No. 16-4134 & 17-1390

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAFAEL GUERRERO SANCHEZ,
Petitioner-Appellee,

v.

WARDEN YORK COUNTY PRISON
et al.,
Respondents-Appellants

On Appeal From The United States District Court Of The
Middle District Of Pennsylvania
No. 1:15-cv-02423-WWC

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION, AND AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF PETITIONER-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Counsel for *amici curiae* the American Civil Liberties Union Foundation, American Civil Liberties Union of New Jersey Foundation, and American Civil Liberties Union of Pennsylvania authored this brief in full. No person contributed money that was intended to fund preparing or submitting the brief.

INTERESTS OF *AMICI CURIAE*

Amici curiae the American Civil Liberties Union (ACLU) Foundation, American Civil Liberties Union of New Jersey Foundation (ACLU of NJ), and American Civil Liberties Union of Pennsylvania (ACLU of PA) have a longstanding interest in enforcing the constitutional and statutory constraints on the federal government's power to subject noncitizens to civil immigration detention. The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has litigated all of the key cases on immigration detention, including the key cases in this Circuit. *See Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (counsel of record); *Demore v. Kim*, 538 U.S. 510 (2003) (counsel of record); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (amicus); *Clark v. Martinez*, 543 U.S. 371 (2005) (amicus); *Chavez-Alvarez v. Warden of York County Prison*, 783 F.3d 469 (3d Cir. 2015) (briefed and argued as amicus); *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012) (briefed and argued case as amicus for pro se petitioner); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (same); *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011) (counsel of record); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001) (counsel of record). The ACLU also monitors case developments regarding immigration detention

nationwide and provides technical assistance to attorneys representing detained clients.

The ACLU of NJ is the New Jersey state affiliate of the ACLU. The ACLU of PA is the Pennsylvania state affiliate of the ACLU and was co-counsel in the Third Circuit cases listed above.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae the American Civil Liberties Union ("ACLU") Foundation, ACLU of New Jersey Foundation, and ACLU of Pennsylvania submit this brief in support of Petitioner-Appellee Rafael Guerrero Sanchez's argument that both the Due Process Clause and the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(6), require a custody hearing where the government must show that an immigrant's prolonged detention pending withholding-only proceedings is necessary to prevent flight or danger to the community. *See* Appellee's Br. 27-37.

Amici make three points:

First, the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), does not impact this Court's precedents holding that due process requires a hearing over prolonged immigration detention where the government bears the burden of proof. In *Jennings*, the Supreme Court reversed a decision of the Ninth Circuit interpreting certain provisions of the INA to require a custody hearing at six months of detention, and remanded for the Ninth Circuit to

determine whether those hearings were constitutionally required. *Id*. at 836, 842-47, 851. This Court, however, *already* has held that unreasonable periods of prolonged detention without a custody hearing violate due process. Moreover, this Court has instructed that due process requires a custody hearing where the government bears the burden of showing that the individual's continued prolonged imprisonment is necessary. *See Diop v. ICE/Homeland Security*, 656 F.3d 221, 232-33 (3d Cir. 2011) (holding that due process limits mandatory detention under 8 U.S.C. § 1226(c) and requires bond hearing when detention becomes unreasonably prolonged); *Chavez-Alvarez v. Warden, York County Prison*, 783 F.3d 469, 473-75, 478 (3d Cir. 2015) (same and holding that, generally, detention pending removal proceedings in excess of one year is unreasonable). *Jennings*, therefore, does not affect this Court's controlling precedent.

Second, this Court's precedents compel a custody hearing over prolonged detention pending withholding-only proceedings. Cases like Mr. Guerrero's—which involves detention of more than a year and nine months—present the same serious due process concerns that this Court confronted in *Diop*, *Chavez-Alvarez*, and *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012). Like petitioners in those cases, individuals in withholding-only proceedings face months or years of detention while litigating their good faith claims to relief from removal, while never receiving a hearing over whether their detention is justified. As this Court

recognized in *Diop* and *Chavez-Alvarez*, due process requires a custody hearing in these circumstances. Moreover, this is true regardless of what statute governs Mr. Guerrero's detention—i.e., 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a)(6).

Third, should the Court conclude that Mr. Guerrero's detention is governed by Section 1231(a)(6), rather than Section 1226(c), the Court can and should avoid reaching the serious due process concerns presented by Mr. Guerrero's detention by construing Section 1231(a)(6) to require a custody hearing when detention becomes unreasonably prolonged. Section 1231(a)(6) is silent as to the duration of detention it authorizes and the procedures governing release when detention becomes prolonged. Under the principle of constitutional avoidance, this Court must construe a statute to avoid a constitutional problem, as long as such as construction is "'fairly possible.'" *Jennings*, 130 S.Ct. at 842 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Thus, this Court should construe Section 1231(a)(6) to require a bond hearing for Mr. Guerrero and others who are subjected to unreasonably prolonged detention under the statute, and hold that at such bond hearings the government bears the burden of justifying their continued imprisonment. *See Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (construing Section 1231(a)(6) to require custody hearing for individuals subject to prolonged detention under that provision). Indeed, the Supreme Court in *Jennings*

recently reaffirmed that Section 1231(a)(6) may be construed to impose limits on prolonged detention. 138 S.Ct. at 843-44.

ARGUMENT

I. *JENNINGS V. RODRIGUEZ* DOES NOT IMPACT THIS COURT'S PRECEDENTS HOLDING THAT PROLONGED IMMIGRATION DETENTION WITHOUT A CUSTODY HEARING VIOLATES DUE PROCESS.

As an initial matter, the Supreme Court's ruling in *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), that certain provisions of the Immigration and Nationality Act ("INA") authorize prolonged detention without a bond hearing, does not impact this Court's precedents. This Court has held that *constitutional due process*, not just the INA, requires a hearing over prolonged detention where the government bears the burden of showing that the individual's continued detention is necessary to prevent flight or danger to the community. *See Diop v. ICE/Homeland Security*, 656 F.3d 221, 232-33 (3d Cir. 2011).

In *Jennings*, the Supreme Court reversed a ruling by the Ninth Circuit holding that three detention provisions of the INA—8 U.S.C. §§ 1225(b), 1226(a), and 1226(c)—did not authorize prolonged immigration detention without a bond hearing. Applying the canon of constitutional avoidance, the Ninth Circuit had construed these three provisions to require an automatic bond hearing before the immigration judge at six months of detention. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015). The Supreme Court reversed the judgment of the

Ninth Circuit and remanded for further proceedings. The Court rejected the lower court's "implausible constructions" of the three detention statutes, holding that the plain language of Sections 1226(c) and 1225(b) authorized detention without custody hearings until the conclusion of removal proceedings. *Jennings*, 138 S.Ct. at 836, 842-47. Moreover, the Court held that Section 1226(a) could not be read to require periodic custody hearings. *Id*. at 847. The Court remanded for the Ninth Circuit to decide in the first instance whether due process requires a bond hearing with the burden on the government when detention under the three provisions becomes prolonged. *Id*. at 851.

Jennings does not affect this Court's precedents because this Court *already* has held that due process requires a hearing over prolonged detention where the government bears the burden of proof. Specifically, in *Diop v. ICE/Homeland Security*, the Court held that due process prohibits the prolonged mandatory detention, under Section 1226(c), of immigrants charged with removal for a criminal offense. As the Court explained:

> [t]he *constitutionality* of [mandatory detention] is a function of the length of the detention. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) *becomes unconstitutional* unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community . . . . In short, when detention becomes unreasonable, *the Due Process Clause* demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.

656 F.3d at 232-33 (3d Cir. 2011) (emphasis added). In *Chavez-Alvarez v. Warden, York County Prison*, this Court reaffirmed the constitutional limits it imposed on prolonged mandatory detention. 783 F.3d 469, 473-75 (3d Cir. 2015); *see also id*. at 474-75 (holding that "*due process* requires us to recognize that, at a certain point—which may differ case by case—the burden to an alien's liberty outweighs a mere presumption that the alien will flee and/or is dangerous." (emphasis added)).

The Court in *Diop* also construed Section 1226(c) to include an implicit "reasonable" time limit on the period for which detention without a bond hearing was statutorily authorized. *Diop*, 656 F.3d at 235. Although that statutory holding has been abrogated by *Jennings*, 138 S.Ct. at 846-47, *Diop*'s holding that unreasonable periods of mandatory detention violate due process remains good law.

In sum, *Jennings* does not impact this Court's precedents holding that due process requires a hearing over prolonged immigration detention where the government bears the burden of proof.

II. PROLONGED DETENTION PENDING WITHHOLDING ONLY PROCEEDINGS RAISES THE SAME DUE PROCESS CONCERNS THIS COURT RECOGNIZED IN *DIOP*, *LESLIE*, AND *CHAVEZ-ALVAREZ*.

Regardless of what statute governs Mr. Guerrero's detention—Section 1226(c) or Section 1231(a)(6)— this Court's precedents compel a custody hearing over Mr. Guerrero's prolonged detention pending withholding-only proceedings. *See* Appellee's Br. 27-37.

Because Mr. Guerrero raises a good faith challenge to his removal, his prolonged detention—for a year and nine months—raises the same concerns this Court addressed in *Diop*, *Leslie*, and *Chavez-Alvarez.* The fact that Mr. Guerrero is seeking relief from a reinstated order of removal does not change the due process analysis. "Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention." *Diouf v. Napolitano*, 634 F.3d at 1087; *see also id*. at 1086, 1091-92 (construing Section 1231(a)(6) to require bond hearing for individual detained more than six months while seeking review of denial of a motion to reopen, and holding that mere fact the petitioner was subject to a removal order he was seeking to reopen did not alter the due process concerns triggered by his prolonged detention).

Ultimately, there is no meaningful difference between the liberty interests of persons pursuing relief from a reinstated order of removal and the liberty interests that this Court has recognized for persons, like Diop, who are detained under

Section 1226(c). Although the government claims that individuals like Mr. Guerrero have a lesser liberty interest by virtue of his prior removal order, *see* Appellants' Reply 17-18, his status is not appreciably different from that of Diop, who had a final removal order at the time the Court decided his case and was subjected to prolonged detention while pursuing the *same forms of relief* that Mr. Guerrero pursues here: withholding of removal and relief under the Convention Against Torture ("CAT"). *See Diop*, 656 F.3d at 224-26. [1]

Morover, the same concerns about prolonged detention arise irrespective of the type of removal proceeding at issue: in both circumstances, individuals who are pursuing good faith challenges to removal may be subjected to detention for years until their proceedings are resolved. As this Court made clear in *Leslie*, individuals should not be "effectively punish[ed] . . . for pursuing applicable legal remedies." *Leslie*, 678 F.3d at 271 (internal quotation marks and citation omitted).[2]

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[1] The government seeks to distinguish *Diouf* on the grounds that the petitioner in that case raised a collateral challenge to his removal order. Appellants' Reply 17. That is irrelevant. Mr. Guerrero has a substantial claim to *mandatory* relief from deportation. *See Zubeda v. Ashcroft*, 333 F.3d 463, 469, 472 (3d Cir. 2003) (explaining that by law the government cannot remove someone to a country where they would face persecution or torture). Although the government can remove someone who has been granted withholding of removal or CAT relief to a third country, the government has never identified a third country that would accept Mr. Guerrero, nor has it complied with the procedures for designating such a third country for removal. *See* Appellee's Br. 16-18.

[2] As this Court emphasized in *Chavez-Alvarez*, this deprivation of liberty is especially serious given that immigration detainees are typically held in conditions of confinement that are identical to those imposed on convicted criminals. 783

Nor does the government have any greater interest in subjecting people like Mr. Guerrero to prolonged detention without a bond hearing. The primary purposes of immigration detention under Sections 1231(a)(6), and 1226(c) are the same: to ensure the person's availability for removal, and to protect the public from danger. *See Zadvydas v. Davis*, 533 U.S. 689, 690 (2001). The government has the same interest in "ensuring that aliens are available for removal if their legal challenges do not succeed" and protecting public against danger, regardless of what statute applies. *See Diouf*, 634 F.3d at 1088. Moreover, regardless of the applicable statute, "the government's interest in [those individuals'] prompt removal . . . is served by the bond hearing process itself. If the alien poses a flight risk, detention is permitted." *Id*. Likewise, detention is permitted if the individual poses a danger. *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). The bond hearing process is especially effective where an individual is subjected to prolonged detention, since the government has "sufficient time to examine information about him to assess whether he truly posed a flight risk or presented any danger to the community." *Chavez-Alvarez*, 783 F.3d at 477. [3]

F.3d at 478 (noting that "merely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures."); *see also Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("It is . . . unrealistic to believe that . . . INS detainees are not actually being 'punished' in some sense for their past conduct."). (internal citations omitted)).

[3] Furthermore, this Court already has recognized that the administrative custody reviews Mr. Guerrero received are inadequate. *See Leslie*, 678 F.3d at 267 n.2

The governments asserts, without analysis, that to the extent Section 1231(a)(6) governs Mr. Guerrero's detention, his detention is subject only to the specific statutory and constitutional limits on detention imposed by the Supreme Court in *Zadvydas*, 533 U.S. 689 (2001)—namely the prohibition on indefinite detention of individuals whose removal cannot be effectuated. *See* Appellants' Br. 36-37 (arguing that because Mr. Guerrero's removal to Mexico could be effectuated if he loses his claims to relief, his continued detention raised no due process concerns)

But the government's analysis completely misreads *Zadvydas* and the due process principles for which it stands. *Zadvydas* specifically addressed indefinite detention after entry of a removal order, prohibiting such detention where there is no "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. However, *Zadvydas* made clear that this rule is not the *only* constraint on detention imposed by the Due Process Clause. Even where detention is not indefinite, detention still must "bear a reasonable relation" to the government's interests in preventing flight and danger to the community and

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(custody review "at which neither Leslie nor counsel representing Leslie was present" was not a "bond hearing"); *see also Diouf*, 634 F.3d at 1091 (post-order custody regulations for Section 1231 detainees "do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge.").

accompanied by adequate procedures to determine if detention is necessary. *Id*. at 690 (internal quotation marks and citation omitted).[4]

Zadvydas had no occasion to address the due process concerns posed by prolonged detention of someone in Mr. Guerrero's situation who is still seeking relief from removal. Rather, *Zadvydas* addressed only the detention of noncitizens who—unlike Mr. Guerrero—have exhausted all administrative and judicial challenges to removal, including applications for relief from removal, and are simply waiting for their removal to be effectuated. Thus, *Zadvydas*' focus on the foreseeability of removal—and its limiting construction of Section 1231(a)(6) as authorizing detention only when removal is reasonably foreseeable—does not address or settle the serious due process concerns raised by the prolonged detention of someone like Mr. Guerrero, who is still fighting his case.

In sum, Mr. Guerrero and the petitioners in *Diop*, *Leslie*, and *Chavez-Alvarez* are similarly situated. Individuals like Mr. Guerrero, who are seeking relief from reinstated removal orders, and individuals like Diop, Leslie and Chavez-Alvarez, who are challenging their removal while subject to mandatory detention,

[4] *See also Zadvydas*, 533 U.S. at 700 ("[I]f removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period."); *accord* 8 C.F.R. §§ 241.4(e)-(f), 241.13(b)(1) (regulations providing that even if removal is reasonably foreseeable, the Department of Homeland Security must conduct a post-order custody review to consider release of those who pose no danger or flight risk).

may both be detained for prolonged periods; both may succeed in obtaining relief from removal; and both may be detained without bond when necessary to ensure their availability for removal or to protect the public from danger. The constitutional problems raised by Mr. Guerrero's prolonged detention without a bond hearing are thus no different than those this Court has already recognized.

III. SECTION 1231(a)(6) CAN AND SHOULD BE CONSTRUED TO REQUIRE A CONSTITUTIONALLY-ADEQUATE CUSTODY HEARING.

Prolonged detention without a bond hearing raises the same constitutional problems that this Court recognized in *Diop*, *Leslie*, and *Chavez-Alvarez*. However, should the Court conclude that Section 1231(a)(6) governs Mr. Guerrero's detention, it can and should avoid deciding the constitutional question by construing Section 1231(a)(6) to require a bond hearing where the government bears the burden of justifying his continued imprisonment.

Under the canon of constitutional avoidance, courts must construe statutes to avoid constitutional problems where "'fairly possible.'" *Jennings*, 130 S.Ct. at 842 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). In *Zadvydas*, the Supreme Court found Section 1231(a)(6) ambiguous as to the length of detention it authorized. Thus, in light of the serious constitutional problems that would be posed if the statute were read to authorize indefinite detention, the Court clarified that the statute authorized detention only for the period of time reasonably

necessary to effectuate removal. *Zadvydas*, 533 U.S. at 701. Section 1231(a)(6) is likewise silent as to the procedures governing release when an individual, like Mr. Guerrero, who is pursuing a good faith challenge to removal, is subjected to prolonged detention under the statute. Section 1231(a)(6) merely provides that a noncitizen "*may be detained* beyond the removal period." *Id*. (emphasis added). Thus, there is no evidence that Congress clearly intended to authorize the long-term detention of such noncitizens without providing them access to a constitutionally adequate bond hearing. Moreover, the government itself has construed Section 1231(a)(6) to authorize release on bond. *See* 8 C.F.R. § 241.5(b) (authorizing release on bond to individuals who can demonstrate lack of danger and flight risk, albeit by providing an administrative custody review rather than a bond hearing); *accord Diouf*, 634 F.3d at 1089 (citing regulation to hold that release on bond is authorized under Section 1231(a)(6)).

Jennings reaffirms that Section 1231(a)(6) is amenable to *amici*'s limiting construction. The Supreme Court underlined that, in contrast to the detention provisions at issue there—Sections 1225 and 1226(c)—Section 1231(a)(6) may be construed to limit prolonged detention. As the Court explained, the statutory phrase "may be detained" is ambiguous: "'[M]ay' . . . 'suggests discretion' but not necessarily 'unlimited discretion. In that respect the word 'may' is ambiguous.'" *Jennings*, 138 S.Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 697). Moreover, unlike

Sections 1225 and 1226(c), 1231(a)(6) contains no language expressly limiting release from detention to a certain procedure. *See id.* at 844 (emphasizing that release from detention under Section 1225 is statutorily limited to parole under 8 U.S.C. § 1182(d)(5); *see also id*. at 846 (holding that release from detention under Section 1226(c) is limited to the witness protection program).[5]

Thus, where detention exceeds a reasonable period, this Court should construe Section 1231(a)(6) to require that the government justify the individual's continued detention at a hearing where it bears the burden of proof. *See Diouf*, 634 F.3d at 1092.

CONCLUSION

For the foregoing reasons, Mr. Guerrero was entitled to a custody hearing where the government bore the burden of justifying his prolonged detention pending withholding-only proceedings.

Dated: March 26, 2018

Respectfully submitted,
/s/Michael Tan

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[5] *See also Ramos v. Sessions*, No. 18-cv-00413-JST, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018) (*Jennings* concluded that the text of Section 1231(a)(6) "left space for constitutional avoidance" and "left untouched the Ninth Circuit's requirement [in *Diouf*] of such hearings for immigrants detained under section 1231(a)(6)."); *accord Borjas-Calix v. Sessions*, No. CV-16-00685-TUC-DCB, 2018 WL 1428154 at *6 (D. Ariz. Mar. 22, 2018) (holding, after *Jennings*, that "*Diouf* remains good law").

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COMBINED CERTIFICATIONS

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,505 words from the Introduction and Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

4. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic Brief for *Amici Curiae* American Civil Liberties Union Foundation Immigrants' Rights Project, American Civil Liberties Union of New Jersey Foundation, and the American Civil Liberties Union of Pennsylvania has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.

5. Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this Brief for *Amici Curiae* American

Civil Liberties Union Foundation Immigrants' Rights Project, American Civil Liberties Union of New Jersey Foundation, and American Civil Liberties Union of Pennsylvania, and that no virus was detected. The virus detection program utilized was Symantac Endpoint Protection.

Dated: March 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 23 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: March 26, 2018

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