No. 07-56261

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS FELIPE CASAS-CASTRILLON,
Petitioner-Appellee,

v.

BILL LOCKYER, Attorney General, et al.,
Respondent-Appellants.

BRIEF OF AMICI CURIAE

THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE ASIAN LAW CAUCUS, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR GENDER AND REFUGEE STUDIES, THE CORNELL ASYLUM AND CONVENTION AGAINST TORTURE APPELLATE LAW CLINIC, HATE FREE ZONE, HUMAN RIGHTS WATCH, THE INTERNATIONAL DETENTION COALITION, THE NORTHWEST IMMIGRANT RIGHTS PROJECT, MINNESOTA ADVOCATES FOR HUMAN RIGHTS, THE NATIONAL IMMIGRANT JUSTICE CENTER, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, THE NEW YORK STATE DEFENDERS ASSOCIATION IMMIGRANT DEFENSE PROJECT, AND THE U.C. DAVIS IMMIGRATION LAW CLINIC

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Amicus **The Florence Immigrant and Refugee Rights Project (FIRRP)** provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals (BIA), and this Court. On a daily basis, FIRRP staff attempt to ensure that this vulnerable population is afforded due process—a goal that often remains elusive in light of the devastating legal, social, and financial consequences of prolonged detention.

Amici the **American-Arab Anti-Discrimination Committee**, the **American Immigration Lawyers Association**, the **Asian Law Caucus**, the **Center for Constitutional Rights**, the **Center for Gender and Refugee Studies**, the **Cornell Asylum and Convention Against Torture Appellate Law Clinic**, **Hate Free Zone**, **Human Rights Watch**, the **International Detention Coalition**, the **Northwest Immigrant Rights Project**, **Minnesota Advocates for Human Rights**, the **National Immigrant Justice Center**, the **National Immigration Project of the National Lawyers Guild**, the **New York State Defenders Association Immigrant Defense Project**, and the **U.C. Davis**

Immigration Law Clinic are local, national, and international organizations advocating on behalf of non-citizens and immigrant communities in the United States and abroad through a variety of methods, including the provision of direct legal representation to individuals pursuing relief against removal while detained by ICE, litigation, and public education.

INTRODUCTION

The Supreme Court has repeatedly emphasized the weight of the liberty interests at stake in immigration detention and the heavy responsibility the Department of Homeland Security (DHS) bears in structuring its detention system to respect constitutional limits.[1] Nonetheless, *amici* have witnessed a pattern of irresponsible detention practices, as the government regularly subjects our clients—including U.S. citizens, lawful permanent residents (LPRs), and asylum seekers—to protracted and unreasonable periods of detention pending removal proceedings. Despite presenting no danger to the community and no risk of flight, many suffer unnecessary months and years of separation from

[1] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (finding an implicit "reasonableness limitation" of six months for post-removal-order detention); Demore v. Kim, 538 U.S. 510, 526, 529n.12 (2003) (upholding a "narrow detention policy" requiring brief period of mandatory detention for certain non-citizens pending removal proceedings, pursuant to 8 U.S.C. § 1226(c)); Clark v. Martinez, 543 U.S. 371 (2005) (extending Zadvydas to arriving non-citizens).

loved ones and loss of income, homes, and careers. Our clients struggle with the decision of whether to bear such a cost or to abandon the effort and return to a country that is in many cases largely unfamiliar and, for those with persecution-based claims, dangerous. As the stories discussed in this brief illustrate, prolonged detention degrades constitutional due process protections by requiring individuals to surrender their liberty in exchange for judicial review.

In some of the cases in which detainees have been able to take their cases to court, federal judges have intervened to stop prolonged detention.[2] This recourse, however, is unavailable to those lacking the resources to initiate federal litigation. In light of the persistence of unjustified prolonged immigration detention of individuals who are largely challenging their removal and detention on a *pro se* basis,[3] *amici* submit that the agency must be required to implement a system of meaningful custody hearings on the justification of prolonged detention.

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[2] See, e.g., Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006) (resulting in release of individual detained more than four years, repeatedly granted relief by an immigration judge); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (requiring a prompt bail hearing for individual detained more than two years and eight months). See also the cases of Roussel Hyppolite, infra Section I.C.; Alejandro Rodriguez, infra Section III.; and Huyen Thi Nguyen, infra Section IV.

[3] In 2006, 65% of individuals in removal proceedings at the immigration court level were unrepresented, and 29% of individuals on appeal to the BIA were unrepresented. Executive Office for Immigration Review, FY 2006 Statistical Yearbook at G1 and W1 (Feb. 2007).

ARGUMENT

I. The government subjects individuals to unnecessary and prolonged immigration detention while they litigate meritorious claims

In defending the constitutionality of the detention provisions of the Immigration and Nationality Act (INA), the government has argued that the majority of removal cases are completed in an average of 45 days, and that those individuals held significantly longer are likely asserting a claim that is "unlikely to succeed," which the individual may abandon at any time. As such, the government has argued, "[s]uch an alien 'has the keys in his pocket.'"[4] The stories below, however, demonstrate a far different reality. Viable claims against removal often require years of litigation and many levels of appellate review, often culminating in a victory for the detained individual via recognition of citizenship, termination of proceedings, or a grant of relief such as asylum or cancellation of removal. Yet for the months or years required to reach that determination, individuals are punished for their persistence by unreasonably long periods of detention.

[4] Pet'r's Br., Demore v. Kim, No. 01-1491, 2002 WL 31016560 at *39-40 (U.S. Aug. 29, 2002) (citing Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999)).

A. Even individuals with substantial citizenship claims are subject to prolonged immigration detention

Millions of U.S. citizens were born abroad and obtained citizenship through acquisition, derivation, or naturalization.[5] When ICE erroneously charges and detains these individuals as non-citizens, it requires them to defend their citizenship through complex and lengthy litigation. Gathering the evidence necessary to establish citizenship is extremely difficult and time consuming, particularly for individuals in detention and proceeding *pro se*. Citizenship claims are often multifaceted, fact intensive matters, hinging on the availability of documents that may have been issued decades earlier and may require translation.[6]

- **Adil Mohammed** endured a year and a half of immigration detention before an immigration judge recognized his U.S. citizenship. A refugee of the Ethiopian civil war, Mr. Mohammed was born in a Sudanese refugee camp and admitted to the U.S. as a refugee in 1982. The key

[5] Approximately 8.5 million individuals who were admitted to the U.S. as LPRs between 1973 and 2003 have since naturalized or derived citizenship. Dep't of Homeland Security, Estimates of the Legal Permanent Resident Population and Population Eligible to Naturalize in 2003 (2005), available at www.dhs.gov.

[6] The American Bar Association recently released a chart designed to assist individuals in citizenship determinations. The complicated document includes a two-page flow chart with 62 boxes and an explanatory manual 63 pages in length. Robert McWhirter, The Citizenship Flowchart (American Bar Association Criminal Justice Section 2007).

issue in his case was whether his parents had naturalized as U.S. citizens before Mr. Mohammed's eighteenth birthday, rendering him a derivative citizen. ICE delayed Mr. Mohammed's initial proceeding for a year while translating his birth certificate, finally producing an incorrect translation that placed his birthday eight months earlier than the actual date due to an erroneous transposition of the month and day. Mr. Mohammed was finally released when an immigration judge recognized ICE's translation error and pronounced him a U.S. citizen.[7]

Individuals attempting to establish citizenship claims from detention are often handicapped in their ability to pursue the necessary documentation and research. Some citizenship claims, for example, rise and fall entirely on the domestic relations laws of foreign nations.[8]

- **Samuel Ankrah** came to the United States from Ghana as a young child and derived citizenship through the naturalization of his mother. In 2005,

[7] Resp't's Mot. to Reopen, Matter of Mohammed, No. 25 304 640 (Immigration Court, Eloy, Ariz. Dec. 6, 2006); Matter of Mohammed, No. 25 304 640 (Immigration Court, Eloy, Ariz. Mar. 8, 2007).

[8] See, e.g., Batista v. Ashcroft, 270 F.3d 8, 15-17 (1st Cir. 2001) (finding a genuine issue of material fact with regard to citizenship largely on the basis of a declaration obtained from a government official of the Dominican Republic attesting that he had in his custody a registered divorce document originally issued in the Dominican Republic in 1988).

however, he was placed in removal proceedings, and the immigration judge denied his claim for citizenship based on an erroneous interpretation of the Ghanaian law of legitimation. In order to vindicate his client's citizenship rights, it was necessary for Mr. Ankrah's attorney to gather letters from a Ghanaian attorney, a report concerning Ghanaian law from the Library of Congress, decisions of the Ghanaian Supreme Court, and a Ghanaian family law treatise. On the basis of this evidence, a district court judge recognized the immigration judge's error and determined Mr. Ankrah to be a United States citizen. Although detained for two years, Mr. Ankrah was never afforded a hearing to determine if his prolonged detention was justified.[9]

A recent national survey revealed that 7% of United States citizens, or approximately thirteen million Americans, do not have ready access to proof of their citizenship—U.S. passports, naturalization papers, or birth certificates.[10] For the foreign-born of these 13 million Americans, even a minor criminal

[9] Ankrah v. Gonzales, No. 3:06CV0554, 2007 WL 2388743 (D. Conn. July 21, 2007); Pet. for Writ of Habeas Corpus, Ankrah v. Gonzales, No. 3:06CV0554 (D. Conn. Apr. 10, 2006).

[10] Brennan Center for Justice, Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification (November 2006).

conviction carries with it the risk of prolonged immigration detention for the period of time necessary to obtain such proof.

- **Armando Vergara Ceballos** entered the United States legally when he was eight years old and naturalized in 1996. At some point in the subsequent decade, he misplaced his naturalization certificate. Despite his status as a naturalized citizen, Mr. Ceballos is currently in immigration detention while removal proceedings are underway against him on the basis of a robbery conviction. He has repeatedly protested to the immigration judge that he is a U.S. citizen, a fact of which the government should have a clear record. At his third hearing before the immigration judge, the ICE attorney admitted that Mr. Ceballos's "permanent file is lost." He has remained in detention for five months while the government attempts to recover the files it has misplaced.[11]

B. Non-citizens who have meritorious claims for asylum are also subject to prolonged and unnecessary immigration detention

Many asylum seekers flee persecution in their countries of origin only to face immediate detention upon arrival in the U.S. pursuant to the expedited

[11] Pet. for Writ of Habeas Corpus, Ceballos v. Gonzales, No. 3:07-cv-01723 (S.D. Cal. Aug. 30, 2007); Order Denying Pet. for Writ of Habeas Corpus Without Prejudice, Ceballos v. Gonzales, No. 3:07-cv-01723 (S.D. Cal. Sept. 5,

removal provisions of the INA.[12] Those pursuing claims to asylum, withholding of removal, or relief under the Convention Against Torture (CAT) may be detained for years—a steep and unfair price to pay for seeking a safe haven from persecution or torture.[13] Each day in immigration detention can have devastating mental and physical health consequences for individuals who have suffered past persecution.[14]

- **Saluja Thangaraja** fled the brutal beatings and torture that she suffered in a prison camp during the Sri Lankan civil war only to endure more than four years of immigration detention upon her arrival in the U.S. in 2001. In 2004, this Court granted Ms. Thangaraja withholding of removal and found her eligible for asylum, concluding that the immigration judge and the BIA's previous rejection of her claims lacked a "reasonable basis in law and fact." Despite this reprimand, the government continued to

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2007).

[12] INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii).

[13] The average period of detention for persons in ICE custody who were subsequently granted asylum is approximately ten months. U.S. Committee for Refugees and Immigrants, 2006 World Refugee Survey (2006) (surveying rates in 2006 in New York, New Jersey, and Pennsylvania).

[14] Rates of anxiety, depression, and post-traumatic stress disorder are extremely high among asylum seekers in immigration detention, with incidence rates ranging from 50% to 86%, and a 70% rate of reported deterioration of mental health during detention. Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers, pp. 5-10 (June 2003).

doggedly pursue Ms. Thangaraja's detention and removal, appealing the immigration judge's subsequent grant of asylum. Ms. Thangaraja finally gained her freedom in March 2006 after filing a habeas petition. Despite posing no danger to the community and exhibiting an intense commitment to pursuing her asylum claim, Ms. Thangaraja had been administratively denied release twice and never given a custody hearing during the four years she was detained.[15]

The detention of asylum seekers pending adjudication of their claims is often unnecessarily extended by the arbitrary and biased credibility determinations on the part of some immigration judges, a pattern noted in recent years by circuit courts of appeals around the country. See infra Section II.B. When unfounded negative credibility determinations are finally reversed at the circuit level, it is a bittersweet victory for the asylum seeker who has been detained for the intervening months or years.

- **Dominic Moab** endured two years of prolonged immigration detention as an arriving asylum seeker. When Mr. Moab arrived at O'Hare

[15] See Thangaraja v. Gonzales, 428 F.3d 870 (9th Cir. 2005); Thangaraja v. Ashcroft, 107 Fed.App'x. 815 (9th Cir. Aug. 25, 2004); Pet. for Writ of Habeas Corpus, Thangaraja v. Gonzales, No. 05CV1608 (S.D. Cal. Aug. 12, 2005); Stipulated Notice of Dismissal, Thangaraja v. Gonzales, No. 05 CV 1608 (S.D.

International Airport in 2005, he stated that he was seeking asylum from Liberia largely on the basis of a familial land dispute. It was not until he completed his asylum application that Mr. Moab began to reveal the difficult truths of his past—that he had suffered repeated beatings and harassment on account of his homosexuality. The immigration judge denied Mr. Moab's plea for relief, finding him not credible largely on the basis of his failure to discuss his homosexuality at his preliminary airport and credible fear interviews. The Seventh Circuit, in granting Mr. Moab's petition for review, underscored how understandable it was that Mr. Moab might "not have wanted to mention his sexual orientation [in the preliminary interviews] for fear that revealing this information could cause further persecution as it had in his home country of Liberia." Having suffered his entire life because of his sexual identity, Mr. Moab sought refuge in the U.S. only to be met with an adjudicator who could not grasp the complexity and depth of the fears he harbored in connection with that identity.[16]

Cal. June 7, 2006).

[16] Moab v. Gonzales, No. 06-2710, 2007 WL 2669369 (7th Cir. Sept. 13, 2007); Br. and Short App. of Pet'r, Moab v. Gonzales, No. 06-2710, 2006 WL 3098382 (7th Cir. Oct. 20, 2006).

C. Longtime residents of the United States who have meritorious claims that they are eligible for relief from removal, or that they are not even removable, also remain detained for unreasonable periods of time while litigating these claims

Individuals who have lived in the U.S. for many years, fostering careers and nurturing family and community ties with U.S. citizens and LPRs, are often eligible for forms of relief from deportation such as cancellation of removal.[17] Many pursue their meritorious claims from detention, far from their homes and families, and without any hearing to determine if their prolonged detention is justified notwithstanding their entrenched community ties and low flight risks.

- **Roussel Hyppolite**, originally from Haiti, has been a lawful permanent resident of the U.S. since 1994. His parents and sister are LPRs, and his young daughter is a U.S. citizen. The family has served its new country of residence well—Mr. Hyppolite has a strong employment history and his sister recently served in Iraq with the U.S. Army National Guard. Mr. Hyppolite was placed into removal proceedings and detained in early 2006 on the basis of one conviction for possession of narcotics, his only criminal conviction, for which he served less than four months in prison. ICE detained Mr. Hyppolite for a total of sixteen months, six months of which came after the government's concession that the Supreme Court

[17] See INA § 240A, 8 U.S.C. § 1229b.

decision in Lopez v. Gonzales (see infra) rendered him eligible for cancellation of removal. Despite his more than ten years of residence in the U.S. and the fact that he clearly posed no danger to the community, Mr. Hyppolite's requests for an opportunity to argue for his release before an immigration judge were twice denied. He was finally released on the habeas order of a federal judge.[18]

In addition, many longtime residents have meritorious challenges to removability itself. Yet, successfully contesting a removability charge may require years of litigation. This is so for a variety of reasons, including the complexity of the INA's removability provisions, the voluminous case law interpreting them, and the difficulties of litigating *pro se*.[19] Indeed, claims hinging on the minutiae of state penal codes are often litigated as far as the circuit courts and even the Supreme Court, with favorable results for the non-citizen. See, e.g., Leocal v. Ashcroft, 543 U.S. 1 (2004) (unanimous court holding that conviction for driving under the influence of alcohol is not a "crime

[18] Hyppolite v. Enzer, No. 3:07-cv-00729 (D. Conn. June 19, 2007); Pet. for Writ of Habeas Corpus and Declaratory and Injunctive Relief, Hyppolite v. Enzer, No. 3:07-cv-00729 (D. Conn. May 8, 2007); Mem. of Law in Support of Pet. for Habeas Corpus, Hyppolite v. Enzer, No. 3:07-cv-00729 (D. Conn. May 8, 2007).

[19] See supra note 3.

of violence" and therefore not an "aggravated felony" warranting mandatory removal); Lopez v. Gonzales, 127 S.Ct. 625 (2006) (eight-justice majority holding that simple drug possession offenses categorized as misdemeanors under federal law but felonies under state law are not "aggravated felonies" requiring removal). Many linger in detention for months or years pending the final outcome of these appeals.[20]

- **Aurora Carlos-Blaza**, a citizen of the Philippines, lawfully entered the U.S. years ago as a teenager. Ms. Blaza has always been deeply committed to her family, working in California fruit orchards during school vacations to help her parents finance a house and attending a local community college so as to be able to serve as a caregiver for members of her extended family. However, after her husband conceived a child in an extramarital affair, divorced her, and left her deeply in debt and ashamed of asking her family for assistance, Ms. Blaza was convicted on charges arising out of loans she took out for herself in her aunt and cousin's names. For eighteen months, ICE has kept Ms. Blaza in detention while

[20] For example, dozens of cases were held in abeyance pending the outcome of the issue at stake in Lopez v. Gonzales. See, e.g., Pet. for Writ of Cert., Salazar-Regino v. Moore, No. 05-830, 2005 WL 3606452 at *14 (U.S. Dec. 22, 2005) (presenting the same issue as Lopez, petitioner noted, "Nor is the number of individuals affected by the issue trivial. In the Fifth Circuit alone, the cases of at least thirty similarly situated LPRs are trailing the one at bar.").

she pursues her claim that the statute under which she was convicted does not make her deportable under the law. Her case is currently pending before this Court with a high likelihood of success on the basis of a recent Third Circuit decision interpreting the same statute under which Ms. Blaza was convicted in favor of the non-citizen petitioner. Despite an outpouring of support from her family and her U.S. citizen fiancé and her strong equities as a committed worker and caregiver, Ms. Blaza remains in a detention facility in Hawaii, far from her home and family in Fresno, California.[21]

II. Protracted removal proceedings are further extended by the agency's dilatory appeals and administrative error

Removal proceedings frequently stretch on for months or years due to the procedural and legal complexities of immigration law and the challenges that accompany *pro se* litigation, resulting in prolonged detention. In the experience of *amici*, this already protracted litigation is often exacerbated by administrative errors and ICE's pursuit of dilatory appeals of questionable merit. During such appeals, ICE continues to detain non-citizens regardless of flight risk and

[21] Parole Request for Aurora Carlos-Blaza, A 40 317 082 (Addressed to Detention and Removal, DHS, Aug. 9, 2007); Pet. for Review, Matter of Carlos-Blaza, No. 40 317 082 (Immigration Court, San Francisco, Cal. July 10, 2006).

danger, without a system of custody hearings to determine if prolonged detention is warranted.

A. Agency pursuit of dilatory appeals and overbroad interpretation of removal statutes extends already prolonged periods of detention

Some individuals suffering prolonged detention have already been granted relief by an immigration judge but are kept in detention while the agency appeals. The intervening periods of prolonged detention contradict the government's purported interests in detention, as the likelihood of removal is low (see infra note 34).

- **Sam Kambo** continues to be detained despite an immigration judge's determination that he should be released and his status adjusted to lawful permanent residency. Mr. Kambo, an accomplished government employee and engineer, has been detained for eleven months, causing outrage and an outpouring of support from his community in Austin, Texas. Mr. Kambo was detained at his green card interview last year, twelve years after he had legally entered the U.S., because ICE suspected that he had taken part in politically-motivated executions in his native Sierra Leone. In June 2007, the immigration judge found that there was "no credible evidence to tie [Mr. Kambo]" to the crimes in Sierra Leone

> and ordered him released; ICE immediately appealed this determination. On two separate occasions, ICE has appealed the immigration judge's determination that Mr. Kambo should be released on bond. Mr. Kambo's friends and co-workers have rallied around him, organizing a plate lunch every month to raise money for groceries for his wife and U.S. citizen children. The federal district court judge presiding over Mr. Kambo's habeas petition pointedly rebuked ICE last month, saying, "I am confused by what the government is doing here. You have an order in June '07 that is adverse to you . . . You have an individual who has been in this country . . . at least since 1994 . . . What is the problem with allowing him to go on bond?"[22]

See also, **Adil Mohammed**, supra Section I.A. (detained for six weeks *after* an immigration judge determined he was a U.S. citizen, because ICE reserved appeal).

In addition, the government aggressively litigates removal cases based on severe interpretations of the immigration statute that are eventually overturned

[22] Pl.'s Original and Verified Application for Writ of Habeas Corpus, Kambo v. Moore, No. 5:2007cv00724 (W.D.Tex. Sept. 5, 2007); Steven Kreytak, Judge Skeptical in Kambo Case, Austin American-Statesman, Sept. 20, 2007; John Kelso, It's Time the Government Let Sam Kambo Out of Jail, Austin American-

by appellate courts.[23] Pending the pursuit of this litigation, individuals posing no flight risk or danger are often detained for prolonged periods of time without a meaningful hearing on whether or not such prolonged detention is justified.

- **Diego Miguel-Miguel** has been detained for more than eight years despite this Court's adjudication of his claim in his favor in August of this year. Mr. Miguel was granted asylum in 1988 based on the persecution he suffered during the Guatemalan civil war, including six months held in captivity by a guerilla group. In 1999, he was placed in removal proceedings on the basis of a conviction for selling $20 worth of cocaine to an undercover agent. When Mr. Miguel's case finally reached this Court in 2007, the government argued that an Attorney General-issued opinion should be retroactively applied to render him ineligible for withholding of removal. This Court rejected the government's position as impermissible and granted Mr. Miguel's petition for review. He nonetheless remains detained while his case is remanded to the BIA. Mr.

Statesman, Sept. 18, 2007.

[23] On a single day this September, for example, four different circuit court panels resolved questions of law in favor of non-citizen petitioners. Dulal-Whiteway v. U.S. Dept. of Homeland Security, No. 05-3098, 2007 WL 2712941 (2d Cir. Sept. 19, 2007); Shardar v. Attorney General, No. 06-1238, 2007 WL 2713029 (3rd Cir. Sept. 19, 2007); Navarro-Lopez v. Gonzales, No. 04-70345, 2007 WL 2713211 (9th Cir. Sept. 19, 2007); Jean-Pierre v. Attorney General, No. 06-13359, 2007 WL 2712108 (11th Cir. Sept. 19, 2007).

> Miguel has been a model detainee, has re-connected on a deep level with family members, and has arranged for admission into a drug recovery program upon release. Despite his efforts, he has been administratively denied release twice and has never been provided with any custody hearing in which he can challenge the exceedingly prolonged nature of his detention.[24]

B. Negligent administration and adjudication at the agency and immigration court level further unnecessarily prolongs detention

In the experience of *amici*, already lengthy periods of detention are also extended by the agency's negligent administration of the detention and removal scheme, including detention and prosecution on the basis of mistaken identities. This negligence exacerbates the already protracted nature of removal proceedings, particularly for those pursuing relief from removal without the assistance of counsel. Without access to a meaningful hearing on the issue of prolonged detention, many remain in detention while patiently appealing clerical errors introduced by the government's hasty prosecutorial tactics.

[24] See Miguel v. Gonzales, No. 0515900, 2007 WL 2429377 (9th Cir. Aug. 29, 2007); Pet. for Writ of Habeas Corpus, Miguel v. Kane, No. 2:07-cv-018145 (D. Ariz. Sept. 21, 2007).

- When **A.F.** applied to replace his permanent resident card, he was detained for seven months on the basis of mistaken identity. His detention was based on the criminal record of a man with the same name, even though the man in the conviction documents had a different alien registration number, different facial features and fingerprints, was five inches taller, and was incarcerated during a period when Mr. F was employed elsewhere. In its motion to dismiss removal proceedings, ICE conceded that "the NTA was improvidently issued."[25]

See also the case of **Armando Vergara Ceballos**, supra Section I.A. (naturalized U.S. citizen detained because ICE lost his permanent alien file).

Prolonged periods of detention are also compounded by careless and inaccurate rulings of both fact and law at the immigration court level. See, e.g., Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) ("adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice"); Recinos de Leon v. Gonzales, 400 F.3d 1185, 1191 (9th Cir. 2005) (noting the "indecipherable nature" of the immigration judge's entire decision, including a key sentence that "defies parsing under ordinary rules of English grammar"); Wang v. Attorney General, 423 F.3d 260, 269 (3d Cir.

[25] *Amicus* FIRRP represented Mr. F.

2005) (comparing the "tone, the tenor, the disparagement, and the sarcasm of the IJ" to that of a court television show).[26] The cost of these clumsy decisions for those detained is often months or years of unnecessary detention, as individuals presenting no danger or flight risk remain in detention while appellate courts undo the mistakes of the immigration courts below.

- As a ten year old girl in her native Sierra Leone, **Badiatu Tunis** was forced to endure female genital mutilation, a procedure in which a girl's clitoris and all or part of her labia are removed, and her vaginal opening is stitched to the size of a matchstick. Because Ms. Tunis's procedure was partially botched, she was taunted as a "half-woman" by villagers who claimed they had to complete what they started. Ms. Tunis was admitted to the United States as a refugee in 1999. She was convicted of two charges of selling a small amount of cocaine in 2004 and was taken into ICE custody upon her release. In May 2006, Judge Posner, writing for a Seventh Circuit panel reviewing her CAT claim, sharply reprimanded the immigration judge for his mistakes of law, bungling of medical terms, misreading of a medical exam, and errors in refusing to credit Ms. Tunis's testimony. Ms. Tunis was granted CAT relief and finally released after 32

[26] See also Adam Liptak, Courts Criticize Judges' Mishandling of Asylum Cases, New York Times, Dec. 26, 2005, at A1.

months in immigration detention—an incarceration more than four times as long as her prison term—a year of which came *after* the Seventh Circuit's decision.[27]

See also the cases of **Saluja Thangaraja**, supra Section I.B. (Sri Lankan asylum seeker enduring four years of detention despite this Court's finding that immigration judge and BIA determinations lacked a "reasonable basis in law and fact"); and **Samuel Ankrah**, supra Section I.A. (U.S. citizen detained based on immigration judge's misinterpretation of Ghanaian law).

III. Individuals with strong community ties who pose no danger or flight risk languish needlessly in detention, serving no governmental interest

As illustrated by the case of **Mr. Kambo** (see supra Section II.A.), ICE often detains individuals who pose no danger to the community and no risk of flight for months and years at a time, flying in the face of the government's asserted justifications for its immigration detention scheme—preventing flight and danger to the community.[28] Such individuals are summarily denied bond under the mandatory detention provisions of INA § 236(c), 8 U.S.C. § 1226(c) or are provided often inadequate custody review procedures pursuant to the

[27] Tunis v. Gonzales, 447 F.3d 547, 549-52 (7th Cir. 2006); Pet. for Writ of Habeas Corpus, Tunis v. Preston, No. 07-cv-00506 (E.D. Wis. May 31, 2007).

bond and parole authority provided by INA § 236(a), 8 U.S.C. § 1226(a) and INA § 212(d)(5)(A), 8 USC § 1182(d)(5)(A). In the experience of *amici*, those lucky individuals with the ability to pursue federal litigation challenging their continued detention are often released—with no explanation from the agency—shortly after filing a petition for a writ of habeas corpus with a federal district court. This pattern lays bare the arbitrary nature of the agency's detention scheme.

- **Alejandro Rodriguez**, a Mexican national who has been in the U.S. since he was a baby, was detained for more than three years without a meaningful hearing on the propriety of his prolonged detention in light of the non-violent nature of his convictions and his strong community ties. Prior to his detention, Mr. Rodriguez lived near his extended family in Los Angeles, working as a dental assistant to support his two U.S. citizen children. His claim against removal hinged on whether he could be deported for two non-violent convictions—joyriding when he was nineteen, and a misdemeanor drug possession when he was twenty-four. Mr. Rodriguez was denied release by ICE on the basis of "File Custody Reviews" in which the agency rejected his requests for release based entirely on a written questionnaire, without even interviewing him. After

[28] Zadvydas, 533 U.S. at 690-91.

> Mr. Rodriguez filed a habeas petition in district court—but before the petition was adjudicated—ICE released him on his own recognizance, revealing that the agency had never considered him a flight risk or danger to the community.[29]

See also the case of **Paul Macalma**, detained for three years and seven months while litigating his derivative citizenship claim, released only after a federal judge intervened twice, first to order a bond hearing before an immigration judge, and subsequently to reverse the immigration judge's order of $7,000 bond, which Mr. Macalma could not pay.[30]

For arriving asylum seekers, pressing humanitarian concerns often exacerbate the physical and psychological costs of prolonged detention (see supra Section I.B.). Nonetheless, detained asylum seekers with strong community ties and sponsors are often denied release pursuant to the agency's erratically implemented parole authority.[31]

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[29] Pet. for Writ of Habeas Corpus, Garcia, et al. v. Hayes, No. CV07-3239 (C.D. Cal. May 16, 2007).

[30] Macalma v. Chertoff, No. 06-CV-2623, 2007 WL 2070350 (S.D. Cal. May 22, 2007); Macalma v. Chertoff, No. 06-CV-2623, 2007 WL 2070350 (S.D. Cal. Sept. 26, 2007).

[31] ICE exercises its parole authority for detained asylum seekers in an "arbitrary and wildly variant" manner, with rates of release in 2004 ranging from 4% in Newark, New Jersey to 94% in San Antonio, Texas. World Refugee Survey, supra note 13. See also United States Commission on International Religious Freedom, Expedited Removal Study Report Card: Two Years Later, pp. 5-6

- **Lobsang Norbu**, a Buddhist monk from Tibet, fled China after he had been arrested, incarcerated, and tortured twice on the basis of his religious beliefs and political expressions in support of Tibetan independence. He arrived in New York and was immediately placed into immigration detention pending the adjudication of his asylum claim. Mr. Norbu's attorney filed a parole application that included an affidavit from a member of the American Tibetan community who pledged to provide Mr. Norbu lodging and ensure his appearance at any hearings. During Mr. Norbu's ten-month detention, the government provided *no response* to this parole request, and Mr. Norbu was never given the opportunity to argue for his release before a judge. In August 2007, the BIA reversed the immigration judge's denial of Mr. Norbu's asylum claim, stating that there was "clear error in the Immigration Judge's determination that the respondent was not credible."[32]

IV. People for whom there is no foreseeable possibility of removal are nonetheless subject to prolonged detention

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(Feb. 2007).

[32] In re: Lobsang Norbu, No. 97 529 993 (BIA Aug. 23, 2007); Mem. of Law in Support of Lobsang Norbu's Application for Asylum, In re: Lobsang Norbu, No. 97 529 993 (Immigration Court, Elizabeth, N.J., March 2007).

Because the U.S. lacks repatriation agreements with some countries, such as Laos and Vietnam, ICE cannot actually carry out removal orders against citizens of those countries. Nonetheless, if detainees from those countries seek relief from removal, the government detains them, sometimes for protracted periods. This creates a perverse Catch-22 situation, where detainees must choose between enduring continued detention for as long as is necessary to contest the government's attempts to deport them, and securing release from detention at the cost of accepting an order of removal.[33] Detainees who choose the former often suffer prolonged detention despite no reasonable foreseeability of removal, a result at odds with the Supreme Court's reasoning in Zadvydas and Kim.[34] See, e.g., Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); Nguyen v. Alcantar, No. C-04-3280 (N.D. Cal. Jan. 19, 2005).

- **Huyen Thi Nguyen**, a Vietnamese refugee who was incarcerated in her native country for four years as a political prisoner, endured sixteen months of immigration detention at the age of 63 in a facility thousands of

[33] Joren Lyons, Mandatory Detention During Removal Proceedings: Challenging the Applicability of Demore v. Kim to Vietnamese and Laotian Detainees, 12 Asian L.J. 231, 231 (2005).

[34] Zadvydas, 533 U.S. at 699-700 ("If removal is not reasonably foreseeable, the court should hold continued detention unreasonable" in line with "the statute's basic purpose, namely, assuring the alien's presence at the moment of removal"); Kim, 538 U.S. at 528 (pre-removal-order detention statutes serve the purpose of "increasing the chance that, if ordered removed, the aliens will be

miles away from her 72 year-old U.S. citizen husband. On three occasions the immigration judge ruled in favor of Ms. Nguyen, and each time ICE appealed: first when the judge terminated removal proceedings, then when the judge determined that she was neither a flight risk nor a danger to the community and should be released on bond, and finally when the judge granted Ms. Nguyen withholding of removal. Even though there was no country to which Ms. Nguyen could be removed, and her non-violent convictions arose out of her unauthorized use of food stamps, the agency detained her for another year after the immigration judge determined she was not a flight risk or a danger. Ms. Nguyen was finally released when a district court judge granted her habeas petition.[35]

V. The occurrence of prolonged detention is so frequent and widespread that many individuals abandon claims with high likelihoods of success

A. Aware of the likelihood of prolonged detention, many individuals choose to abandon viable claims and self-deport

Prolonged pre-removal-order detention has become so common in *amicus* FIRRP's experience that staff attorneys feel an ethical obligation to advise detained clients that pursuing anything but the most straightforward legal claim

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successfully removed").

[35] See Lyons, supra note 33.

will likely mean a lengthy period of detention. Staff attorneys at *amicus* FIRRP often meet with individuals who, when faced with years in detention—away from family, friends and the ability to pursue a career—choose to abandon their claim of relief and return to their country of origin, where they will at least have their freedom. An Iranian man detained in Arizona, for example, recently informed *amicus* FIRRP that he will not pursue his compelling claim for political asylum from Iran, largely based on his understanding that the government will likely appeal his case and subject him to prolonged detention even if he is successful at the immigration court level (see supra Section II.A.). Many individuals who would have ultimately achieved relief had they remained in the U.S. abandon their claims because of prolonged detention.

- **Mahad Omar** had been detained for more than four years when he decided to give up his fight against removal and return to Somalia, leaving his family and community behind. Mr. Omar fled Somalia in 1990 because of the civil war, and settled in Minnesota with his wife and U.S. citizen child. Despite a district court judge's determination that the government could not remove Mr. Omar to Somalia because it lacked a functioning government, and despite Mr. Omar's more than ten years of residence in the U.S., ICE subjected him to prolonged detention until he abandoned his claim in 2004. Less than a year after he departed, the

Supreme Court ruled in Leocal v. Ashcroft that the crime with which Mr. Omar had been convicted is not a removable offense. 543 U.S. at 1. In 2005, the Eighth Circuit explicitly noted that its decision to deny Mr. Omar's claim against removal had been overruled by Leocal. Had Mr. Omar remained in the U.S., he might have successfully reopened his case and been allowed to remain lawfully in the U.S. with his family. The cost, however, would have been additional years spent in detention.[36]

B. Litigating appellate claims from abroad is not a viable option

Amici have encountered government arguments that non-citizens can avoid prolonged detention by agreeing to removal and later filing and pursuing petitions for review from abroad. The government, in fact, has gone so far as to argue that detention pending judicial review at the federal appellate level is "voluntary," as the individual could prosecute the case from his home country.[37] In practice, however, this proposition is often impossible. Those seeking relief on the basis of past or future persecution simply do not have the option to return to the country of that persecution. Other individuals litigating from outside of

[36] Omar v. INS, 298 F.3d 710 (8th Cir. 2002); Lopez v. Gonzales, 417 F.3d 934, 936 (8th Cir. 2005) (citing Omar v. INS as overruled by Leocal); Omar v. INS, No. 02-1387, 2003 WL 23741855 (D. Minn. June 18, 2003).
[37] Government's Opp'n to Amicus Curiae Br., Macalma v. Chertoff, No. 06-cv-

the country face significant barriers to securing and effectively communicating with counsel, and must endure long separations from their families and communities. Furthermore, an individual litigating from abroad has no guarantee that he will be granted the necessary documents to secure admission back to the U.S. to pursue his claim if the circuit court remands to the BIA or, in the case of a citizenship claim, to the district court.[38]

- **Lucas Martinez Calderon** decided after two and a half years in immigration detention that he could bear it no longer. In his mid-60s with a skin disorder that requires constant care, Mr. Calderon decided to return to Mexico and continue to litigate his claim *pro se* from abroad rather than remain in detention for a third year. His claim against removal, which hinges on the wording of the controlled substances statute pursuant to which he was convicted, was pending before this Court when he left. After his arrival in Mexico, Mr. Calderon received notice that the BIA had granted a motion filed by ICE to re-open his case. He repeatedly tried to get in touch with his deportation officer to ensure his presence at the ensuing immigration court hearing, but the officer did not return his calls.

2623 (S.D. Cal. Apr. 18, 2007), .

[38] See *Amicus Curiae* American Civil Liberties Union Reply to Government's Opp'n Br., Macalma v. Chertoff, No. 06-cv-2623 (S.D.Cal. May 11, 2007), (rejecting the assertion that detention pending appellate review is "voluntary").

Mr. Calderon never received notice of the date of his remanded hearing. When the hearing was subsequently held in his absence, the immigration judge ordered the case administratively closed. Again, Mr. Calderon received no notice of this decision. Mr. Calderon remains in Mexico, aware that despite his diligence and best efforts, his decision to attempt litigation from abroad deeply prejudiced his case.[39]

CONCLUSION

Amici have witnessed the devastating impact that prolonged immigration detention has on those who suffer it and their loved ones. The judiciary serves a vital role as a check against excess in all areas of our government's administration, including the DHS's detention authority. As the agency flagrantly violates the constitutional limits on detention that have been imposed and upheld by the Supreme Court, our clients continue to lose years of their lives to a detention system that robs them of hope that is rightfully theirs.

Dated: Florence, Arizona
October 16, 2007

Respectfully submitted,

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[39] *Amicus* FIRRP consulted with Mr. Calderon while he was in detention and has been in touch with him since his departure to Mexico.

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