Nos. 07-55549, 07-56403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND GERALD AUGUSTINO SOEOTH,

Appellee/Cross-Appellant,

v.

MICHAEL B. MUKASEY, Attorney General, et al.,

Appellant/Cross-Appellee.

APPELLEE'S/CROSS APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

STATE CASES

STATUTES

INTRODUCTION

The government incarcerated Raymond Soeoth for two-and-a-half years without holding a hearing to determine if his detention was justified, even though he has never been arrested for, let alone convicted of, any crime. After the district court below ordered a detention hearing, an Immigration Judge considered the evidence and ordered release on a reasonable bond.

The government asks this Court to reject that determination and allow it to re-detain Mr. Soeoth for however long his case takes to finish, even if this means years more of detention. In doing so, the government asks for unfettered discretion, without time limits, to detain all non-citizens in routine immigration cases, regardless of the merits of their claims, simply because they obtained a stay of removal from this Court. Fortunately, Congress has not given the government such expansive authority, and if it did it would be unconstitutional.

In an attempt to mask its striking demand for authority that Congress did not provide, the government resorts to grossly mischaracterizing Petitioner's argument. Mr. Soeoth does *not* argue that every non-citizen who files a petition for review of his removal order has an "absolute entitlement" to release. He argues only that when an individual is detained pending a petition for review, and this Court has issued a stay of removal, the government must hold *a hearing* to

consider whether further detention is warranted, if it has exceeded six months.

The government also argues strenuously that Mr. Soeoth's detention is authorized by statute because it is not "indefinite." But both *Nadarajah* and *Zadvydas* defined indefinite detention as detention where "removal is not significantly likely to occur in the reasonably foreseeable future." Petitioner merely adopts this definition. While neither case involved detention pending completion of judicial review, the government never explains why the statutory rule from those cases should not apply in this context. *See infra* Section III.

More importantly, regardless of what nomenclature the government would use to describe Petitioner's detention, there can be no dispute that it is "prolonged." Prolonged civil detention violates the Due Process Clause unless accompanied by rigorous procedural safeguards. The paltry procedures afforded Mr. Soeothwere grossly insufficient. Because of the serious constitutional problem posed by prolonged civil detention absent rigorous procedures, this Court must construe the statutes at issue here to require a meaningful custody hearing to justify detention beyond six months. *See infra* Section II.

I. This Court Must Consider Petitioner's Constitutional Arguments.

The government's preliminary claim that the Court should rule in its favor on Petitioner's statutory claim while ignoring Petitioner's constitutional arguments

is meritless, and indeed turns the canon of constitutional avoidance on its head. This Court is required to construe the statute in light of potential constitutional problems, so it cannot ignore Petitioner's constitutional claims when deciding how to interpret the statute. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[w]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.").

The government also fails to provide any legal basis for its proposed remand on the constitutional claim. Petitioner presented both statutory and constitutional arguments to the district court below, and, contrary to the government's claim, it is not clear from the record which ground the district court ruled upon. SER 99-100; ER 7.[1] The issue is properly presented to this Court for consideration.

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[1] The government confusingly asserts that Petitioner argued before the district court for a constitutional right to release under *Nadarajah*. See "Cross-Appeal Answering Brief and Reply Brief of Appellants" (hereinafter "RB") at 5. But, as the government itself recognizes, this Court decided *Nadarajah* on statutory grounds, based on the canon of constitutional avoidance. Consistent with that approach, Petitioner's argument is, and always has been, that the statute under which he was detained -- construed so as to avoid the serious constitutional problems posed by prolonged and indefinite detention -- entitled him either to release under reasonable conditions of supervision or to a constitutionally adequate hearing, and that if the statute were not so construed, his detention without a hearing would violate due process. *See, e.g.*, Pet Br. 16-18, 56-57. Although the basis for the district court's preliminary injunction order is not clear, the order on appeal here is the district court's final order denying the petition as moot, and this Court can reverse that ruling on any ground properly preserved for

II. Petitioner's Prolonged Detention Without a Constitutionally-Adequate Hearing Violates the Due Process Clause.

As set forth in Mr. Soeoth's principal brief, his constitutional claim is simple: The Due Process Clause forbids prolonged immigration detention without an individualized hearing before an impartial adjudicator, at which the government bears the burden of proving that continued detention is justified. In violation of these due process requirements, the government detained Mr. Soeoth for two-and-a-half years without ever providing him with such a hearing. Instead, pursuant to the immigration agency's regulations, the government provided three "file reviews" – one during each year of Mr. Soeoth's detention – in which an ICE officer purportedly examined the papers in Mr. Soeoth's file, did not even interview him, and placed the burden on Mr. Soeoth to prove that his detention should end, without even considering the length of his detention as a factor in that calculus.

The government has not pointed to a single binding precedent in which civil detention of such prolonged length has been permitted without a hearing. Instead, the government relies upon its regulations to counter Mr. Soeoth's due process claim. For persons like Mr. Soeoth who have been detained for a prolonged period of time, however, the regulations do not comport with the Due Process

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its review.

Clause as construed by this Court and the Supreme Court, and they should not be construed to apply here.

A. The Due Process Clause Prohibits *Prolonged*, Not Only Permanent, Detention Without an Adequate Hearing.

The Supreme Court has repeatedly held that prolonged civil detention – that is, incarceration that does not result from a criminal trial with all the attendant procedural protections – violates the Due Process Clause unless the government has a "special justification" that outweighs an individual's liberty interest in being free from restraint. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Moreover, *Zadvydas* held, where the government asserts such a special justification for civil detention, there must be "strong procedural protections" to ensure that the justification is reasonably related to the detention. *Zadvydas*, 533 U.S. at 691 (citing *Hendricks*, 521 U.S. at 368). As set forth in *Zadvydas* and other Supreme Court precedents, those "strong procedural protections" include an individualized hearing before an impartial adjudicator where the government bears the burden of proving its special justification by clear and convincing evidence. *See* Appellee's/Cross-Appellant's Principal and Response Br. (hereinafter "Pet. Br.") at 49-57.

Contrary to the government's assertion, *Zadvydas* does not hold that detention must be "indefinite" (defined by the government as "potentially

permanent") in order to trigger the "strong procedural protections" required by the Due Process Clause. Although the particular facts of *Zadvydas* involved detention that was both indefinite and potentially permanent (because it appeared that no country *at that point in time* would accept the immigrant),[2] the Supreme Court cited other due process cases in which procedural protections were required for detention that was likely to end at some distant point in the future. Indeed, *Zadvydas* makes it clear that stringent procedural protections are required for *any* prolonged detention, while detention of "potentially *indefinite* duration" entails an *additional* due process requirement of "some other special circumstance, such as mental illness," to justify the detention. 533 U.S. at 691 (emphasis in original) (first setting forth procedural requirements to justify civil detention, and then noting that additional special dangerousness requirement applies "[i]n cases in which preventive detention is of potentially *indefinite* duration"). *See also United*

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[2] *Zadvydas*'s analysis did not turn on whether the detention at issue would *actually* be permanent. Indeed, one of the detainees in that case was still making efforts to obtain travel documents that would result in his repatriation, 533 U.S. at 684, and the other detainee was removed to Cambodia only a year after the Supreme Court's decision, when a repatriation agreement was finally negotiated. Jessie Mangaliman, INS Deports 11 Cambodians for Felonies While Refugees, *S.J. Merc. News*, Oct. 19, 2002, at A10. Although this Court was obviously aware of that possibility when it reconsidered the detainee's case upon remand, it nonetheless found his detention unauthorized. *Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001). Thus, by "indefinite detention," the Court in *Zadvydas* clearly meant detention that was not significantly likely to end in the reasonably foreseeable future.

States v. Salerno, 481 U.S. 739, 750-52 (1987) (upholding federal bail statute permitting pretrial detention – which is necessarily of limited duration – based on a finding of danger to the community, on ground that government's interest in preventing crime outweighed the individual's liberty interest *and* because the statute required strict procedural protections to be met for detention, including hearing before judicial officer where government bore burden to prove dangerousness by clear and convincing evidence).

Moreover, this Court has specifically required due process protections for immigration detention that is prolonged, and not just immigration detention that is potentially permanent. In *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) and *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), this Court underscored the due process implications of prolonged immigration detention, even though those cases did not present a barrier to repatriation that would render the detention potentially permanent, as in *Zadvydas*. As in the instant case, the immigrants in *Tijani* and *Nadarajah* were detained while they were litigating their removal claims, either in administrative proceedings or in federal court. Thus, the government's assertion that due process limits apply only when detention is potentially permanent is foreclosed by Ninth Circuit precedent.[3]

[3] As previously discussed, *Demore v. Kim*, 538 U.S. 510 (2003), does not hold otherwise. *See* Pet Br. 25-26. Indeed, this Court cited *Demore* in *Tijani* while holding that a custody hearing before an immigration judge was required to justify prolonged (but not potentially permanent) detention. *Tijani*, 430 F.3d at

B. Due Process Requires the Government to Justify Prolonged Detention at an Individualized Hearing Before an Impartial Adjudicator.

The government attempts to argue that a yearly "file review" by an immigration officer was sufficient to render Mr. Soeoth's two-and-a-half-year detention constitutional, but the government does not cite a single binding authority for the proposition that its rubber-stamp custody "review" process was adequate under the Due Process Clause. Indeed, the precedents of this Circuit and the Supreme Court make it clear that, at a minimum, when immigration detention becomes prolonged to the point of two-and-a-half years, the government must prove that continued detention is justified at an individualized hearing before an impartial adjudicator. The government's yearly "file reviews" fell far short of this due process standard.

In *Tijani*, this Court construed a "mandatory" immigration detention statute, 8 U.S.C. § 1226(c), to require that a detainee be released unless the government proved that the detention was justified at a hearing before an immigration judge. 430 F.3d at 1242. *Tijani* so construed the detention statute in order to avoid a serious doubt about the constitutionality of a detention that had lasted over two years and four months. *Id.* Thus, in *Tijani*, this Court recognized that due process

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1242, and also cited *Demore* in *Nadarajah* to show that detention beyond six months is presumptively unreasonable. 443 F.3d at 1080, 1081 n.5..

requires the procedural protection of a hearing before an impartial adjudicator before the government can subject a person to prolonged civil commitment.

Contrary to the government's contention, *Tijani* cannot be distinguished either on the ground that Mr. Soeoth has allegedly conceded removability or on the ground that he was detained pending completion of judicial review. *Tijani* rested upon due process requirements that are not limited to the immigration context, much less the particular posture of that case. For example, in placing the burden of proof upon the government, *Tijani* cited *Cooper v. Oklahoma*, 517 U.S. 348 (1996). In *Cooper*, the Supreme Court noted that "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *Id.* at 363 (internal quotation marks omitted) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Addington v. Texas*, 441 U.S. 418, 424 (1979)). Even in contexts that do not involve the loss of physical liberty, the Supreme Court has placed the burden on the government. *See, e.g., Santosky*, 455 U.S. at 769-70 (state must justify termination of parental rights by clear and convincing evidence); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (government bears burden of proof by clear and convincing evidence in deportation and denaturalization cases). *Cf. Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (due process requires "neutral judge and a complete record of the

proceedings" for determination of asylum claims).

In contrast to this large body of authority from a variety of contexts, the government has not pointed to a single binding precedent approving prolonged detention based on the sort of "file reviews" conducted by the government here. Indeed, in other civil detention contexts, the Supreme Court has repeatedly emphasized the need for procedural protections including a hearing before an impartial adjudicator at which the government bears the burden of proof. For example, in *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992), the Supreme Court struck down a civil commitment statute on due process grounds because it did not require the state to prove danger to the community by clear and convincing evidence, and instead put the burden on the detainee to prove that he was not a danger. *Id.* at 81-82. Similarly, in *Jackson v. Indiana*, 406 U.S. 715 (1972), a criminal defendant who had been found incompetent to stand trial challenged his continued commitment to a psychiatric hospital on due process grounds. The Supreme Court held that once the detention became prolonged beyond a "reasonable period" necessary to determine whether the defendant would become competent in the "foreseeable future," then the Due Process Clause required the state either to release the defendant or to pursue civil commitment with all attendant procedural protections. *Id.* at 738. *See also Addington*, 441 U.S. at 424 (holding that state must justify civil commitment by clear and convincing evidence

of mental illness and dangerousness, and rejecting preponderance standard); *Hendricks*, 521 U.S. at 353 (noting that state statute providing for civil detention of "sexually violent predators" required prosecutor to prove beyond a reasonable doubt whether detention was justified during a trial at which the individual had the right to counsel and right to present evidence and cross-examine witnesses); *id.* at 366, 368 (emphasizing procedural protections in upholding constitutionality of commitment statute).

In addition to the cases on civil commitment to psychiatric hospitals, the Supreme Court has required stringent procedural protections in other civil detention contexts, even when such detention is not prolonged to the point of years. *United States v. Salerno*, 481 U.S. 739, 742-43, 751-52 (1987) (emphasizing procedural protections in upholding federal pretrial detention statute). The clear message of the Supreme Court's civil detention cases is that unless the period of detention is brief, due process requires at least that the government justify the continued detention at a hearing before an impartial adjudicator.

Rather than address the foregoing due process precedents holding that prolonged civil detention must be accompanied by strong procedural protections including an individualized hearing, the government instead contends that this Court's decision in *Tijani* is distinguishable. But none of the facts identified by

the government actually makes a material difference in the due process analysis. First, the government points to the fact that the detainee in *Tijani* had not conceded removability. But that fact is relevant principally because it meant that the detainee was litigating the merits of his removal case and faced prolonged detention during that process, even though he might ultimately prevail. The instant case is not distinguishable from *Tijani* in that regard, as Mr. Soeoth also continues to litigate the merits of his removal case and faces continued detention during that process even though ultimately he may not be ordered removed. That he has not challenged the ground for removal (overstaying his visa) but rather is litigating grounds for relief from removal, such as asylum, makes no constitutional difference with respect to his detention.[4]

The government also contends that this case is distinguishable from *Tijani* because Mr. Soeoth was not detained until his first round of administrative and judicial review was concluded and he filed a motion to reopen. RB 7. But the only possible relevance of this fact would be if Mr. Soeoth's motion to reopen

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[4] The government suggests that, because asylum relief is "discretionary," Mr. Soeoth's detention is somehow distinguishable from the detention in *Tijani*. RB 19. But the government fails to explain why that should make any difference in the constitutional analysis. In addition, Mr. Soeoth is seeking not only asylum, but also withholding of removal (Pet'r Br. at 33 n.13; Pet'r Br. App'x II at 22-27), which is mandatory. *Ladha v. INS*, 215 F.3d 889, 898 (9th Cir. 2000) (withholding is mandatory).

were frivolous or dilatory. The government has never argued this. Nor could it, given that this Court necessarily determined otherwise when it granted him a stay of removal. *See Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (to obtain stay, non-citizen "must show either (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the [his] favor").

The government also tries to distinguish *Tijani* because Mr. Soeoth has never been detained pending administrative review, only pending judicial review. But the government fails to explain the constitutional relevance of this fact. Regardless of whether a detainee is being detained pending administrative removal proceedings or pending court review of those proceedings, due process requires that when the period of detention has become prolonged, a hearing is required. Indeed, this Court so held in *Tijani*, where the petitioner was detained first during his administrative proceedings, and then during the pendency of his petition for review before this Circuit. 430 F.3d at 1242 (noting that government's brief on merits of removal case had recently been filed in Ninth Circuit).[5]The

[5] The government attempts to argue that when the detainee is litigating an appeal to the federal courts, he holds the keys to his own cell because he can simply agree to return to his home country and continue the litigation while at liberty there. But *Tijani* cannot be distinguished on this basis either, since the petitioner in that case was also being detained pending a stay of removal. In any event, regardless of the general merits of requiring an individual – who may well be pro se in his removal proceeding – to litigate a federal case from a remote country, the argument cannot apply here. Mr. Soeoth's claim against removal is

government finally attempts to evade the holding of *Tijani* by mischaracterizing Mr. Soeoth's claims in this case. Setting up its straw man argument, the government contends that "*Tijani* could not have meant that an alien must be *released* whenever he obtains a stay of removal because every judicial appeal will exceed the terse 'expedited' standard." RB 21 (emphasis added). But Mr. Soeoth does not contend that due process requires release whenever a detainee obtains a stay of removal. Rather, he argues that due process requires a *hearing* whenever immigration detention has become prolonged – whether because of a stay of removal pending judicial review or because administrative proceedings have been lengthy. That is what this Court held in *Tijani*, and such a rule is reasonable and consistent with Supreme Court precedents on civil detention.[6]

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that he will be persecuted because of his religious faith if he is returned to his home country. Under current immigration regulations, Mr. Soeoth's asylum claim would be deemed abandoned if he were to take the physical risk of returning to Indonesia in order to avoid continued detention. Even if that were not the case, the government's argument would result in a perverse system in which an asylum applicant would be required to choose between remaining in prison-like conditions for a prolonged period of time, or taking the great risk of returning to a country where he will be persecuted in order to pursue his claim to stay in the United States.

6 The government raises the specter of frivolous appeals being filed in order to delay removal proceedings and therefore secure release. This argument fails because it ignores the nature of the due process guarantee – a hearing before an impartial adjudicator. During a custody hearing, an immigration judge may consider the strength of the detainee's claim as part of the individualized assessment of flight risk and reasonable foreseeability of removal. Moreover, the government ignores the fact that a stay will not be granted if an appeal is deemed frivolous. *Maharaj*, 295 F.3d at 966.

C. The Government Does Not Cite Any Binding or Even Persuasive Authority Supporting Prolonged Detention Without a Hearing.

In the face of this Court's controlling decision in *Tijani* and the long-settled due process cases requiring a hearing to justify prolonged civil detention, the government merely argues that agency regulations provide only for the "file reviews" that Mr. Soeoth received once a year. To the extent that those regulations are applied to persons in prolonged detention, they simply do not comport with the Due Process Clause. The government baldly asserts that the agency promulgated the file review regulations for the very purpose of implementing *Zadvydas* and therefore the regulations are constitutional. But the government does not make a regulation constitutional by saying so, when the procedures implemented by those regulations are contrary to Supreme Court and Ninth Circuit precedents. *Cf. Thai v. Ashcroft*, 366 F.3d 790, 798-99 (9th Cir. 2004).

The government also relies on several district court decisions and one unpublished Ninth Circuit decision in an effort to evade the due process cases cited above. RB 12-13 (citing *Beqir Krasniqi v. Clark*, 2007 U.S. App. LEXIS 1822, 220 Fed. Appx. 469 (9th Cir. 2006); *Singh v. Clark*, 2007 U.S. Dist. LEXIS 50237, C 06-1387 MJP-MJB (W.D. Wash. Feb. 13, 2007); *Mboussi-Ona v.*

Crawford, 2007 U.S. Dist. LEXIS 77681, CV 06-02897 PHX-NVW (BPV) (D. Az. Sept. 27, 2007); *Rosario v. Gonzales*, 2007 WL 1232207 (W.D. La. Apr. 25, 2007)). Those decisions are neither binding nor persuasive. The only Ninth Circuit case cited– *Krasniqi*– is an extremely short unpublished memorandum that dismissed a petition filed by a pro se litigant. The case does not even cite, let alone analyze, either *Nadarajah* or *Tijani*. To the extent that *Krasniqi* can be read to hold that prolonged detention pending administrative and judicial review is permissible simply because it has a definite termination point, 220 Fed. Appx. at 471, it is inconsistent with both *Nadarajah* and *Tijani*, as both petitioners in those published cases were detained pending completion of administrative or judicial proceedings.

The government's citations to *Singh*, *Mboussi-Ona* and *Rosario* are equally unhelpful. *Singh* cites neither *Nadarajah* nor *Tijani*. *Mboussi-Ona* also makes no mention of *Nadarajah*, and simply refuses to follow *Tijani*, claiming that the portion of the opinion that rejects prolonged detention pending completion of judicial review is "not a holding binding on lower courts." In so doing, the court erroneously believed that any other interpretation would result in the release of all petitioners seeking judicial review. Id. at *12, *13. *Rosario* does not mention this Court's precedents in *Tijani* or *Nadarajah*. And indeed, *Rosario* supports Mr. Soeoth's due process claim, as the district court actually provided a hearing on the

merits of the detainee's claim for release pursuant to *Zadvydas*.

D. None of the Government's Contentions about the Merits of Mr. Soeoth's Case Address the Due Process Requirement of a Hearing.

In the absence of any authority supporting prolonged detention without a hearing, the government resorts to a number of factual assertions in an effort to explain why Mr. Soeoth's detention was justified. None of those arguments addresses the fundamental issue in this case – whether due process requires an individualized hearing when detention has become prolonged. Indeed, each of the factual assertions the government raises here could have been raised – and indeed were raised – before the immigration judge during the individualized hearing that the district court ordered. Such arguments about the merits of continued detention are irrelevant to the constitutional issues on appeal.

In any event, the government's factual assertions are incorrect, as the immigration judge found. First, the government suggests that Mr. Soeoth has weak claims on the merits of his removal case that have already been rejected. That assertion is simply incorrect. As explained in Mr. Soeoth's principal brief, his claim for asylum and withholding based on his status as a Christian minister has never been considered on the merits either in administrative proceedings or by this Court. *See* Pet Br. 5, 5 n.2.

Second, the government argues at great length that Mr. Soeoth is a flight

risk because he breached his bond by failing to leave the United States pursuant to a voluntary departure deadline. The government's argument is absurd. Two of the custody review decisions ordering his detention never even mentioned this alleged bond breach, and the third faults him for failing to depart in 2001, when he unquestionably was not required to do so. ER 55, 75, 87. The government's argument is also legally wrong – Mr. Soeoth cannot be deemed a flight risk for failing to depart based upon a change in the law after he received his voluntary departure order. Rather, as the BIA has held in unpublished decisions at the time, non-citizens who received voluntary departure orders under the old rule were entitled to rely upon that rule. *See, e.g., Matter of Park*, 2006 WL 1558841 (BIA 2006) (unpublished) (holding that a non-citizen granted voluntary departure prior to *Zazueta-Carillo* reasonably relied upon the law in effect at the time he sought relief). In any event, even if this error showed that Mr. Soeoth was a slightly greater flight risk, it surely did not justify his being detained for two-and-a-half years, as the Immigration Judge correctly found.

III. No Statute Authorizes Petitioner's Prolonged and Indefinite Detention Without a Detention Hearing.

Apart from the constitutional problem posed by prolonged detention without adequate procedures, the government's interpretation of the provisions at issue here cannot be reconciled with the statutory holdings of this Court and the Supreme Court as applied to the language of the relevant provisions.

A. Petitioner Faces Prolonged and Indefinite Detention under *Zadvydas*, *Nadarajah*, and *Tijani*.

Contrary to the government's assertions, Petitioner faces prolonged and "indefinite" detention within the meaning of *Zadvydas*, *Nadarajah*, and *Tijani*. *Zadvydas* held that the general detention statute governing detention pending actual physical removal does not authorize detention beyond a presumptively reasonable six month period of non-citizens who have finished litigating their cases, but for whom "there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. *Nadarajah* extended *Zadvydas* to non-citizens whose cases remain pending, holding that non-citizens who have been detained for more than six months and for whom "there is no significant likelihood of removal in the reasonably foreseeable future" face prolonged and indefinite detention even though their immigration cases are not over, and therefore that no general detention statute can authorize their detention. 443 F.3d at 1078.

Prior to *Nadarajah*, this Court in *Tijani* applied similar reasoning to the case of a non-citizen who had obtained a stay of removal pending judicial review. Noting that he had already been detained for 28 months pending administrative and judicial review and that "the foreseeable process" of judicial review would be at least a year, this Court found that his continued detention was not authorized by statute, and ordered his release unless the government was able to demonstrate in a

hearing before an immigration judge that his continued detention was justified. *Tijani,* 430 F.3d at 1242. Here, Mr. Soeoth makes the same argument advanced in these other cases, namely that lengthy detention of non-citizens who have been granted stays of removal, and whose cases are unlikely to be decided "in the reasonably foreseeable future," is similarly prolonged and indefinite and thus is not statutorily authorized, at least in the absence of a constitutionally adequate custody hearing.

The government cannot dispute the clear statutory holdings of these cases, namely that prolonged detention is not authorized when "there is no significant likelihood of removal in the reasonably foreseeable future" in the absence of a meaningful custody hearing or express authorization. Instead, the government seeks to limit the import of these rulings by adopting a cramped view of the circumstances under which removal can be deemed "not significantly likely to occur in the reasonably foreseeable future," and thus impermissibly indefinite. Resp. Br. 11-13. Thus, the government suggests that *Zadvydas* must be limited to situations where non-citizens have repatriation problems that render their detention "potentially permanent" or "no longer practically attainable." Resp. Br. 11. But this ignores the *Zadvydas* Court's concern not only with detention that may have no ultimate end point, but also with detention that is unreasonably prolonged. *See, e.g., Zadvydas,* at 701 ("for detention to remain reasonable, as the

period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."). Indeed, under the government's view the mere fact that a repatriation agreement has been negotiated, even if it is not due to take effect for another ten years, would be sufficient to render a non-citizen's removal "reasonably foreseeable" and detention therefore authorized.

The government's attempt to limit *Nadarajah* is equally weak. RB 14-18. As a threshold matter, the government attempts to limit the case to the particular statute at issue there, accusing Petitioner of "inventing" the term "general immigration detention statutes," RB 14. But this Court in *Nadarajah* used or referred to that phrase (or the phrase "general detention statutes") nine times, 443 F.3d at 1076, 1078, 1079, 1084), and relied on cases interpreting other detention statutes in support of its interpretation of the one at issue in that case. *See id.* at 1080 (relying on *Demore*, which interpreted Section 1226(c), *Zadvydas*, which interpreted Section 1231(a)(6), and *Clark*, which interpreted, *inter alia*, Section 1182(d)(5)(A)). In any event, Petitioner is not arguing that all the general immigration detention statutes must be treated the same for *all* purposes, but rather that they must be read as not authorizing prolonged and indefinite detention in the absence of a meaningful custody hearing.

The government next seeks to distinguish *Nadarajah* by claiming that the

non-citizen in that case "had been granted relief from removal; hence, he was *not* going to be removed." RB 15. But this is false -- and indeed would come as a surprise to Mr. Nadarajah, who has yet to receive a final grant of any form of relief. Although he was granted asylum by the immigration judge and the BIA, the government has sought certification of the BIA's decision to the Attorney General. Thus, his case remains pending before the Attorney General to this day – as it was when this Court decided it. *See Nadarajah,* 443 F.3d at 1075 (stating that case was referred to the Attorney General for review); *see also Gelman v. Ashcroft,* 298 F.3d 150, 156, n.4 (2d Cir. 2002) (Sotomayer, J., dissenting on other grounds) ("While the BIA exercises its independent judgment in a quasi-judicial capacity, its decisions are subject to plenary review and overruling by the Attorney General. *See* 8 C.F.R. § [1003.1(h)].").[7]

More significantly, however, the Court in *Nadarajah* did not limit its construction of the statute to non-citizens who had won even preliminary grants of relief from removal. Rather, in seeking to avoid the serious constitutional problem that would be presented were the statute read to authorize prolonged and indefinite detention, the Court construed the statute to authorize only a "brief and

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[7] Counsel undersigned represented Mr. Nadarajah before this Court and continues to represent him in his pending removal case. Mr. Nadarajah remains on supervised release with an electronic monitor pending final resolution of his case.

reasonable" period of detention, presumptively six months. Because Mr. Soeoth's detention was not brief, having extended four times longer than the presumptively reasonable six month period identified by this Court, it was not statutorily authorized -- at least absent a custody hearing to determine whether detention of this length was justified, taking into account not only danger and flight risk, but also the likelihood of his removal occurring in the reasonably foreseeable future.

The government's attempt to distinguish *Tijani* is similarly unpersuasive. First, the government argues that *Tijani*'s holding is limited to non-citizens who do not concede removability. RB 19. But even if Mr. Soeoth were deemed to have conceded removability – which he disputes (*see supra* at 12, 12 n.4) -- the government offers no explanation for how the same statutory language can be read to authorize prolonged and indefinite detention for one class of non-citizens and not for another. *See, e.g., Clark v. Martinez,* 543 U.S. at 377-78, 386 (holding that Section 1231(a)(6) could not be construed differently for different classes of non-citizens because "the same statutory text" cannot be given "different meanings in different cases"). Because the governing detention statute, Section 1226, contains no language that distinguishes between detention of non-citizens who are challenging a threshold finding of removability and those who are seeking relief from removal, the government's asserted distinction is irrelevant.[8]

[8] Although *Tijani* involved detention under 1226(c), and Soeoth is detained under 1226(a), the language in 1226(a) is no more express than the language in

Finally, the government attempts to limit the reach of *Tijani* and *Nadarajah* by arguing that they only apply to detention pending completion of administrative proceedings, not to detention pending judicial proceedings. But neither *Tijani* nor *Nadarajah* can be distinguished on this basis. Indeed, as noted above, this argument is particularly puzzling as applied to *Tijani*, because *Tijani* concerned delay during *both* administrative and judicial proceedings, as the government itself recognizes. RB 21.

Moreover, the same general detention statute – Section 1226 – governs detention both during administrative proceedings and during judicial proceedings where a stay is in effect. *See* Pet. Br. 36-44. Thus, even if detention pending judicial review did not raise the same constitutional concerns as detention pending administrative review – a position with which Petitioner vigorously disagrees (*see supra* at 14) – the government can point to no language in the statute that permits construing it differently for detention pending judicial proceedings than for detention pending administrative proceedings. *See* 1226(a).

With respect to *Nadarajah*, the government is correct that it involved

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1226(c) in terms of providing authority for prolonged and indefinite detention. Nor does it distinguish between non-citizens who are challenging a charge of removability and those who concede removability and are applying for relief from removal. For this same reason, the government's claim that Mr. Soeoth's detention is authorized because he is seeking to reopen his case (RB 8) must fail, because nothing in the detention statute provides a basis for such a distinction.

detention pending administrative rather than judicial proceedings. But, nothing in the decision's rationale supports treating one different from the other. As a statutory matter, in both situations Congress has not specifically authorized the detention at issue to go on for longer than six months, as it has in the narrow national security-related detention statutes. *See* Pet Br. 23-24. And as a constitutional matter, in both cases prolonged and indefinite detention without rigorous procedural protections raises serious constitutional problems. *See supra* Section II.

* * *

For these reasons, it is clear that Petitioner faces prolonged and indefinite detention within the meaning of *Zadvydas*, *Nadarajah*, *Tijani*, and other cases involving prolonged immigration detention. As such, Congress could only authorize his detention with a clear statement, as it did in certain statutes involving national security. As explained below, neither of the potentially-applicable statutes in this case Speaks with the Requisite Clarity to Authorize Such Detention.

B. Petitioner Is Detained under Section 1226(a), but in Any Event Neither Section 1226(a) Nor Section 1231(a)(1)(C) Authorize His Detention Without a Hearing.

The government says very little about Petitioner's argument that he is detained under Section 1226(a) rather than Section 1231(a)(1)(C). *See* Pet. Br. 36-

44 (arguing that plain language and structure of statute show that Section 1226(a) governs). Most important, the government fails to explain how its interpretation can be reconciled with Section 1231(a)(1)(B)(ii) – the provision that specifically addresses stays of removal. *Compare* Pet. Br. at 39 (arguing that that section controls) *with* RB 27-30 (failing even to cite it).

Although the government says nothing about the provision that specifically addresses stays of removal, it repeats again its argument that Section 1252(b)(8)(A) – a provision that nowhere mentions stays of removal – requires a contrary result. RB 28. However, as explained earlier, that provision merely clarifies that non-citizens who have administratively final orders of removal can in general be detained under Section 1231. It does not speak to the specific subset of cases where the non-citizen obtains a stay of removal. That situation is addressed instead by the more specific provision at 1231(a)(1)(B)(ii).

The government next argues that Petitioner's reading renders Section 1252(b)(3) superfluous. This is nonsensical; Section 1252(b)(3) merely states, *inter alia*, that the act of seeking judicial review does not automatically stay the removal order. This is entirely consistent with Petitioner's reading of the statute – if no stay issues, then the non-citizen is detained under Section 1231 and can be removed at any time. If a stay issues, detention is under Section 1226, and remains so until the reviewing Court's final order.

The government also focuses on two cases that do *not* involve non-citizens who obtained stays of removal – *Pelich* and *Lema* – and argues that they somehow show that Mr. Soeoth is detained under Section 1231. However, the petitioners in those cases had lost their appeals and no longer had stays of removal. Thus, unlike Mr. Soeoth, they were properly detained under Section 1231.

Pelich and *Lema* also provide no support for the government's assertion that a non-citizen who obtains a stay of removal is thereby acting to prevent his removal within the meaning of Section 1231(a)(1)(C). *Pelich* remained in detention only because he refused to apply for travel documents, while *Lema* had both refused to furnish documents for his application and lied to prevent confirmation of his identity. *Pelich v. INS*, 329 F.3d 1057, 1059 (9th Cir. 2003); *Lema v. INS*, 341 F.3d 853, 856-57 (9th Cir. 2003). They provide no support for the government's claim that it can indefinitely detain non-citizens who obtain stays of removal while legitimately pursuing the judicial review made available to them by law. *See also Arevalo v. Ashcroft*, 260 F. Supp. 2d 347, 350 (D. Mass 2003), *vacated as moot*, 386 F.3d 19 (1st Cir. 2004), (rejecting such an interpretation as "not only incongruent with the statutory language, but [ ] also illogical and fundamentally unfair." Indeed, if the government were correct that seeking a stay of removal constitutes an "act" to "prevent" removal, then it would also trigger a civil penalty under 8 U.S.C. 1324d (providing penalty of up to $500 per day for

non-citizen who "takes any action designed to prevent or hamper" removal).

The government also suggests that *Pelich* and *Lema* would have had to receive detention hearings under the argument Petitioner advances here. This is correct, but it in no way contradicts this Court's decisions in those cases. Neither *Pelich* nor *Lema* argued that they were entitled to a hearing to determine whether their detention was justified. Instead, both argued that they were entitled to release notwithstanding the fact that they had failed to cooperate with attempts to remove them. Moreover, this Court was careful to note in both cases that if there had been evidence that they were cooperating, or a dispute as to that point, then the cases might have been decided differently. *See Pelich*, 329 F.3d at 1061 n.3 (if there were such dispute, "we would have a different case."); *Lema*, 341 F.3d at 857 n.9 (noting that it might reach a different result were there evidence in the record showing that petitioner remained detained even though he was cooperating with attempts to remove him). Thus, both cases are entirely consistent with Petitioner's argument that even if he is detained under Section 1231(a)(1)(C), it is not sufficiently clear to authorize his prolonged and indefinite detention without a hearing to determine if his detention is justified under that Section. *See* Pet. Br. 44-46 (arguing that Section 1231(a)(1)(C) is no clearer than the statute construed in *Zadvydas*).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court hold that no statute authorizes his detention beyond a presumptively-reasonable six month period absent a constitutionally adequate detention hearing, and reverse the district court's order dismissing this case as moot.

Respectfully Submitted,

ACLU OF SOUTHERN CALIFORNIA

Dated: December 12, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App., P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,971 words.

ACLU OF SOUTHERN CALIFORNIA

Dated: December 12, 2007

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CERTIFICATE OF SERVICE

I am employed in the office of a member of the bar of this Court, at whose direction the following service was made. I am over the age of eighteen years and am not a party to this action.

On December 12, 2007, I served two copies of the foregoing **Appellee's/Cross Appellant's Reply Brief** by U.S. mail, postage prepaid, addressed as follows:

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