No. 03-878

IN THE
Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE CUBAN AMERICAN BAR ASSOCIATION, CUBAN AMERICAN NATIONAL FOUNDATION, HISPANIC NATIONAL BAR ASSOCIATION, AMERICAN IMMIGRATION LAW FOUNDATION, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amicus curiae the Cuban American Bar Association (CABA) was established in Miami in 1974 by a group of approximately 20 Cuban attorneys adapting to a different culture. CABA now has nearly 2000 members, representing all segments of the Cuban American legal community. CABA is actively involved in protecting the human rights and legal interests of Cubans and Cuban Americans.[1]

The Cuban American National Foundation (CANF) is a non-profit organization dedicated to advancing freedom and democracy in Cuba. Established in Florida in 1981, CANF is the largest Cuban organization in exile, with thousands of members across the United States and other countries, representing a cross section of the Cuban exile community as well as friends of Cuban freedom from around the world.

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates.

The American Immigration Law Foundation is a non-profit organization founded in 1987 to increase public understand-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

ing of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association. Founded in 1946, AILA now has more than 8,500 members organized in 35 chapters across the United States and in Canada. AILA's members' clients may be directly affected by the decision in this case.

Amici submit this brief to explain the wholesale inadequacy of the administrative procedures under which Mariel Cubans who have served their criminal sentences may be detained indefinitely—and possibly forever. Even if the Court were to determine that Mariel Cubans are entitled to some lesser degree of due process protection than the former lawful permanent residents in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001)—a position which *amici* reject—the inadequacies of the Mariel Cuban release procedures raise serious questions about whether indefinite detention under such a scheme is constitutionally permissible.

Amici do not address the threshold due process questions here as those issues are thoroughly addressed in other briefs. *See, e.g.*, Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, *Benitez* v. *Mata*, No. 03-7434. Rather, this brief assumes that Mariel Cubans like the respondent are entitled to some degree of due process with respect to their detention, and addresses the government's alternative argument that even if that were the case, existing procedures would satisfy due process. *See* Pet. Br. at 43-49.

As set forth in greater detail below, the "Cuban Review Plan," while perhaps creating the illusion of a meaningful process, falls far short of what the Due Process Clause even minimally requires. These deficiencies have real conse-

quences for the hundreds of Mariel Cubans who languish in immigration imprisonment awaiting a removal that is unlikely ever to be effectuated. Respondent Sergio Suarez Martinez was twice denied release pursuant to the Cuban Review Plan based on criminal convictions for which he had already served his sentence. The experiences of the Mariel Cubans discussed in this brief provide further examples of the unjustified consequences of a process that denies detainees many of the most basic procedural safeguards. Thus, even if this Court's decision in *Zadvydas* did not resolve the statutory question presented here, principles of constitutional avoidance would independently compel this Court to adopt the same construction of the statute that it did in that case.

BACKGROUND

1. Indefinite Detention and *Zadvydas*. In *Zadvydas*, this Court recognized that a "serious constitutional problem" would result from an interpretation of the post-removal-period detention statute that permitted the government to detain former lawful permanent residents indefinitely when their removal was unlikely to be effectuated in the reasonably foreseeable future. 533 U.S. at 690. In reaching this conclusion, the Court stated that the aliens, although subject to removal, retained a significant liberty interest in freedom from imprisonment. *Id.* The Court then noted the "obvious" constitutional problem with construing the statute to authorize indefinite detention given that "the sole procedural protections available to the alien" were administrative review proceedings that would not be adequate "even for property," much less to permit the "indefinite, perhaps permanent, deprivation of human liberty." *Id.* at 692. To avoid these problems, the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682.

Despite the Court's recognition of the significant constitutional problems posed by indefinite detention under the statute, the United States Immigration and Customs En-

forcement (ICE)—the successor agency to the Immigration and Naturalization Service (INS)—has interpreted *Zadvydas* narrowly and continues to assert that it may detain "arriving aliens" indefinitely after the entry of a removal order.[2] *See* Pet. Br. at 32-43. Moreover, the government treats Mariel Cubans as "arriving aliens" even though they were paroled into the country almost 25 years ago. 8 C.F.R. § 241.13(b)(3). In particular, the ICE still holds "[a]pproximately 750" Mariel Cubans in indefinite detention. *See* Pet. Br. at 8.

2. The Cuban Review Plan. The *Zadvydas* Court recognized that the constitutionality of any scheme authorizing indefinite—potentially permanent—detention hinges in large part on the availability of meaningful procedures that assure that detention is appropriately limited. *Zadvydas*, 533 U.S. at 690-692. For Mariel Cubans awaiting removal, the administrative scheme used to decide whether to continue detention indefinitely—the Cuban Review Plan (Plan)—is set out in 8 C.F.R. § 212.12. With some minor exceptions, these procedures are identical to those already determined to be of questionable constitutional sufficiency in *Zadvydas*. Like the procedures there, the Plan grants the ICE's Associate Commissioner for Enforcement (Commissioner) essentially unfettered discretion to decide whether a Mariel Cuban awaiting removal will remain imprisoned or be released on immigration "parole." *See id*. §§ 241.4(b)(2), 212.12(b).[3]

Without limiting the Commissioner's discretion, the Plan establishes an internal ICE administrative process to provide the Commissioner with a purely advisory recommendation. *Id.* § 212.12(c), (d). This recommendation is based first on a

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[2] This brief will use the term "ICE" when referring to both the ICE and the former INS.

[3] Moreover, as they are not required by the statute, nor, in the government's view, by the Constitution, *see* Pet. Br. at 15-24, the Cuban Review Plan procedures could be rescinded at any time.

review of the detainee's file by the Director of the Plan (Director), which, unless the Director recommends release, is followed by a brief interview conducted by two ICE officers (typically deportation officers). *Id.* § 212.12(d)(1), (4)(i)-(ii). The interview may be scheduled at any time after the record review, with no required notice to the detainee.[4] *Id.* This interview is the only time a detainee has any input in the review process.

One other person may accompany the detainee to the interview. *Id.* § 212.12(d)(4)(ii). However, the detainee has no right to appointed counsel, and the regulations do not provide for an attorney's participation at the interview even if one is present. At the interview, a detainee may submit any information supporting release, but the regulations do not guarantee the detainee the opportunity to review or dispute the contents of his file or to review the recommendation of the Director. *Id.* Nor is the detainee entitled to subpoena relevant information or present or examine witnesses. *Id.* No transcript of the interview is produced.

The interviewing officers must recommend detention unless they conclude that the detainee is (i) presently nonviolent, (ii) likely to remain nonviolent, (iii) unlikely to pose a threat to the community following release, and (iv) unlikely to violate the conditions of release. *Id.* § 212.12(d)(2)(i)-(iv). Although the Plan lists several factors to be considered,[5] *id.*

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[4] While the government suggests that the ICE is required to provide notice prior to an interview, *see* Pet. Br. at 6, 45, the two regulations it cites do not support that assertion. *See* 8 C.F.R. § 212.12 (no mention of notice); 8 C.F.R. § 241.4(h)(2) (requiring notice in release procedures for other indefinite detainees that explicitly do *not* apply to Mariel Cubans (*id.* § 241.4(b)(2)). *See also Caballero* v. *United States*, 145 F. Supp.2d 550, 558 (D.N.J. 2001) (finding no right to notice under Cuban Review Plan).

[5] These factors include disciplinary infractions, criminal history, mental health, progress in education programs, ties with the United

§ 212.12(d)(3)(i)-(vii), it specifies no standard of proof, and the burden is placed on the detainee to show that he should be released.[6] Pet. Br. at 45. Even if the detainee satisfies these criteria, the panel is not required to recommend release.

Upon receipt of the interviewers' recommendation, 8 C.F.R. § 212.12(d)(4)(iii), the Commissioner makes the final decision whether to keep the alien in prison or to grant release on "parole." *Id.* §§ 212.12(b)(1), 212.12(g). That decision is left completely to the Commissioner's discretion and is made without the benefit of any record of the interview other than a summary prepared by the officers. *See* Mark Dow, *American Gulag* 297 (2004) ("*American Gulag*"). Detainees have no opportunity to review the officers' recommendation or to rebut it.

If the Commissioner continues detention, the detainee is provided a decision that "briefly set[s] forth the reasons for the continued detention." 8 C.F.R. § 212.12(b)(1). These decisions are typically one-page documents, containing mostly boilerplate language.[7] First, the letter informs the

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States, likelihood of absconding, and other "relevant" information. *Id.* § 212.12(d)(3)(i) (vii).

[6] Decisions denying release indicate that the detainee bears the burden of showing that he is "clearly" entitled to be released. *See, e.g.*, Petitioner's Response to Respondents' Status Report and Objection to the Report & Recommendation, Ex. C, Final Notice of Parole Denial, *Aguilar* v. *Ashcroft*, No. C-01-1328-R (W.D. Wash. Apr. 8, 2002) (Final Notice of Parole Denial) (continuing detention where "it is NOT clearly evident that" detainee entitled to parole).

[7] The "Final Notice of Parole Denial" usually follows a distinct, four-paragraph form, as discussed above. For examples of such notices, *see* Excerpts of Record at 82, 83, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002); Excerpts of Record at 69-72, *Aristica-Rodriguez* v *INS*, No. 01-16398, 45 Fed. Appx. 787 (9th Cir. 2002); Response to Order to Show Cause, Exs. H1-H9, *Benites-Broches* v. *Hedrick*, No. 01-3022-CV-S-1-H (W.D. Mo.

detainee that parole has been denied, citing the applicable regulations. Second, the letter recites that the Commissioner made the decision "[a]fter carefully weighing all of the factors for and against parole." Third, in the sole paragraph personalized to the detainee, the Commissioner proffers some basis for the decision, usually relying on one or more stock phrases relating to criminal history or credibility.[8] Finally, the letter says that the process will begin again within a year.

The Commissioner's detention decision is final and no direct judicial review is available. In fact, even in habeas challenges, the government has argued that detention decisions are either completely immune from review, *see*, *e.g.*, Brief for Appellee at 21-22, *Moreno-Peña* v. *INS*, No. 01-17309, 2002 WL 32112834 (9th Cir. June 27, 2002), or subject to extremely deferential review. *See* Brief for Respondent-Appellee at 11, *Navarro* v. *INS*, No. 01-15111, 2001 WL 34104336 (9th Cir. Aug. 7, 2001) (court "may only determine whether the [ICE] has advanced a 'facially legitimate and bona fide reason' to support its decision").

If the Commissioner decides to authorize release, suitable sponsorship is required before the detainee may be released.

Dec. 5, 2001); Respondent's Answer, Ex. 1 at 11-14, 32, *Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001); *see also* Brief for Appellant at 7, *Bauta-Varona* v. *INS*, No. 011504, 2001 WL 34354609 (9th Cir. Sept. 6, 2001) (notice was "word for word" the same as previous year's notice).

[8] *See*, *e.g.*, Response to Order to Show Cause, Ex. H2, *Benites-Broches* v. *Hedrick*, No. 01-3022-CV-S-1-H (W.D. Mo. Dec. 5, 2001) ("You have demonstrated a propensity to engage in assaultive, violent criminal activities."); Respondent's Answer, Ex. 1 at 12, 29, *Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001) ("In addition, your responses to questions presented for discussion by the Cuban Review Panel were found to be non-credible."); Excerpts of Record at 82, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002) (same).

8 C.F.R. § 212.12(f). And, if sponsorship is unavailable, the detainee remains in jail—sometimes for years—notwithstanding that release has been authorized. *See infra*, n. 29. Moreover, at any time before or after release, the Commissioner may withdraw approval for release, and the alien will remain in or be returned to jail. 8 C.F.R. § 212.12(e).

If the Commissioner denies release, the process begins again within a year of that decision. *Id.* § 212.12(g)(2).

SUMMARY OF ARGUMENT

The only thing currently standing between Mariel Cuban detainees and the possibility of life imprisonment is an administrative scheme that vests virtually unfettered, and largely unreviewable, discretion in the hands of one administrative official. The Cuban Review Plan denies detainees the most basic protections required before the government can infringe on far lesser interests and fails to provide the safeguards against arbitrary detention that are essential before an indefinite detention scheme can pass constitutional muster under any standard. Predictably, the Plan regularly results in arbitrary and sometimes bizarre results for Mariel Cuban detainees who, deprived of counsel and without access to meaningful and impartial review, remain imprisoned for years after completion of their criminal sentences.

ARGUMENT

I. THE CUBAN REVIEW PLAN DEPRIVES DETAINEES OF FUNDAMENTAL DUE PROCESS PROTECTIONS AND GRANTS AN ADMINISTRATIVE OFFICIAL VIRTUALLY UNFETTERED DISCRETION OVER LIBERTY INTERESTS.

As this Court recognized in *Zadvydas*, freedom from physical restraint is a fundamental liberty interest protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690 (citing *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992)). Nonetheless,

in narrow circumstances, such as where there is an identifiable need to protect the community or where a person presents a dangerous mental illness, the government's interest in detention may outweigh an individual's right to be free. *Id.* at 690; *United States* v. *Salerno*, 481 U.S. 739, 748-752 (1987). *Indefinite* detention, however, involves a heightened intrusion of a person's liberty, and thus is justified only in the rarest of circumstances. *See Zadvydas*, 533 U.S. at 691, 692; *Foucha*, 504 U.S. at 81-83.[9]

This Court has never approved an indefinite detention scheme that applies as broadly as the one at issue here, yet is so lacking in basic procedural safeguards, such as the right to counsel, a neutral decisionmaker, the availability of judicial review, the right to confront adverse evidence, a clear standard of proof, and the placement of the burden of proof on the government. *See Zadvydas*, 533 U.S. at 692. In fact, this Court has found that due process requires much more before much less can be taken.

One such example is parole revocation. *See Id.* at 723 (Kennedy, J., dissenting) (suggesting that release procedures for aliens indefinitely detained pending removal can be informed by parole revocation cases). In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held that parole revocation procedures, at a minimum, must include: (1) written notice of the claimed violation, (2) disclosure to the parolee of the evidence against him, (3) opportunity to be heard and to present witnesses and evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a "neutral and detached" hearing body, and (6) a written statement by the factfinders as to the evidence relied on and reasons for

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[9] *See also Rasul* v. *Bush*, 124 S. Ct. 2686, 2700 (2004) (Kennedy, J., concurring) (noting significance of fact that detention indefinite); *Foucha*, 504 U.S. at 86-87 (O'Connor, J., concurring) (same); *Demore* v. *Kim*, 538 U.S. 510, 528-529 (2003) (emphasizing distinct concerns triggered by indefinite detention).

revoking parole. *Id*. at 489. *See also Gagnon* v. *Scarpelli*, 411 U.S. 778, 782, 786 (1973) (applying same standards to probation revocation proceedings and requiring appointed counsel in some cases); *Vitek* v. *Jones*, 445 U.S. 480, 496 (1980) (requiring similar safeguards to transfer prisoner to mental institution).

Importantly, parole revocation involves a significantly *lesser* interest than that which is at stake here: in parole revocation proceedings a person may be returned to prison to complete a determinate criminal sentence imposed after receiving all of the protections of the criminal justice system. In contrast, Mariel Cubans detained pursuant to the Cuban Review Plan have already completed their criminal sentence and now face added, potentially indefinite, imprisonment imposed solely by an administrative officer. Nonetheless, the parole revocation procedures required by *Morrissey* provide numerous safeguards unavailable to detainees here.

Similarly, the Department of Defense has implemented many of the *Morrissey* safeguards in the plan for reviewing the status of foreign nationals detained as enemy combatants. *See* Deputy Secretary of Defense, Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("DOD Memo."). Prompted by this Court's decision in *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), the Department's plan calls for timely notice to the detainee, adjudication by a neutral tribunal, the creation of a record (including a recording of the proceedings), appointment of a representative with access to the record, the right to call and confront witnesses, the right to testify and introduce evidence, and a written report of the decision.[10] *See* DOD Memo., *supra*. The plan also sets out a clear standard of

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[10] The Department's plan essentially adopts the procedures outlined by the Court in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2648-50 (2004) (plurality opinion) (reviewing legality of process for detaining United States citizens as enemy combatants).

proof and provides that the detainee shall be informed of his right to seek a habeas review. *Id.* Therefore, putative enemy combatants are afforded substantially more procedural safeguards than Mariel Cubans who have lived in this country for almost 25 years and who pose no greater threat than other criminals who have served their sentences and been released back into the community.

The Cuban Review Plan is even less protective than the statute authorizing detention of aliens who are certified as potential terrorists. *See* 8 U.S.C. §§ 1226a(a)(6)-(7), (b). Under that statute, aliens who are ordered removed but whom the government is unlikely to remove in the foreseeable future may be detained "*only if* the release of the alien will threaten national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6) (emphasis added). In contrast, Mariel Cubans who are found to pose *no* threat to the community can continue to be detained indefinitely, in the sole discretion of the Associate Commissioner. 8 C.F.R. § 212.12(b). In addition, the procedural protections are greater for aliens detained as terrorists under § 1226a. The Attorney General must review both the terrorist certification and the detention decision every six months. 8 U.S.C. § 1226a(a)(7). The statute also provides that judicial review of terrorist certification and detention decisions is available through habeas corpus proceedings. *Id.* § 1226a(b).

Even where a person may be deprived of an interest far less significant than physical freedom, this Court has required many of the same safeguards. For example, this Court's decisions recognize the importance of counsel in ensuring that the procedures comport with due process. *See Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1985) (right to counsel in welfare termination hearing); *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976) (same in social security hearing). And where greater liberty interests are present—particularly where a person is deprived of physical liberty—due process

may demand that counsel be provided.[11] Yet Mariel Cuban detainees subject to indefinite detention are not provided counsel, nor are they even guaranteed that retained counsel will be permitted to assist them during interviews.

Also, the Plan places the burden on the detainee to show that he should not be detained indefinitely,[12] and, even then, no judicial officer passes on the propriety of the detention.[13] Instead, the Plan leaves the detention decision to the discretion of an administrative official who hardly qualifies as "neutral and detached." *Morrissey*, 408 U.S. at 489. As the *Hamdi* Court held, "[a]n interrogation by one's captor * * *

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[11] *See Salerno*, 481 U.S. at 751 (appointment of counsel for pre-trial detention); *Vitek*, 445 U.S. at 497 (plurality opinion) (same for transfer of prisoner to mental institution); *Gagnon* v. *Scarpelli*, 411 U.S. at 786-787 (same for probation revocation proceeding); *In re Gault*, 387 U.S. 1, 41 (1967) (same where juvenile detained). Appointed counsel may even be required where non-custodial liberty is at stake. *See Lassiter* v. *Dep't Soc. Servs.*, 452 U.S. 18, 25-28 (1981) (termination of parental rights).

[12] *See Zadvydas*, 533 U.S. at 692; *Foucha*, 504 U.S. at 81-82 (striking civil confinement statute because burden on detainee).

[13] *See Kansas* v. *Crane*, 534 U.S. 407, 411 (2002) (jury trial for civil commitment of sex offender); *Salerno*, 481 U.S. at 751 (judicial officer for pre-trial detention). In the immigration context, this Court noted the significance of potential review before a neutral immigration judge in approving pre-hearing detention procedures. *Reno* v. *Flores*, 507 U.S. 292, 308, 309 (1995) (noting that immigration judge is "quasi-judicial officer" independent of enforcement agency).

This Court also has indicated judicial review may be required of an administrative decision implicating fundamental rights. *Zadvydas*, 533 U.S. at 692. *See also Hamdi*, 124 S. Ct. at 2648 (even in wartime, courts have an important role). Such review must be more searching than whether the government's "articulated basis was a legitimate one." *Id*. at 2645.

hardly constitutes adequate factfinding before a neutral decisionmaker." 124 S. Ct. at 2651.

Furthermore, the Court has held that the decision to deprive a person of liberty must be based on clear legal standards and evidence contained in the record. *See Goldberg*, 397 U.S. at 271. "To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on." *Id.* (citations omitted). Such a statement of reasons facilitates judicial review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 573-574 (1975). Boilerplate decisions, like those typically provided to Mariel Cubans, combined with the lack of any record of an interview other than the interviewers' own meager summary, fail to satisfy the dictates of due process.[14]

In all of these important respects, the Cuban Review Plan falls far short of the procedures that this Court has required where similar, or even less significant, interests are at stake. As explained below, these deficiencies have resulted in the arbitrary deprivation of the liberty of the respondent and hundreds of other Mariel Cubans.

II. THE EXPERIENCE OF MARIEL CUBANS IN DETENTION ILLUSTRATES THE INADEQUACIES OF THE CUBAN REVIEW PLAN.

While each of these deficiencies is significant in itself, the combined result is an administrative scheme that fails to provide even minimal due process protections and routinely

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[14] *See Llana-Castellon* v. *INS*, 16 F.3d 1093, 1098 (10th Cir. 1994) (boilerplate decision may violate due process, citing *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 36 (7th Cir. 1992)); *Castillo* v. *INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (boilerplate decisions deny individualized review and impede judicial review); *cf. Khouri* v. *Ashcroft*, 362 F. 3d 461, 466, 467 (8th Cir. 2004) (lack of developed record impedes review); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (lack of reasoned decision impedes review).

produces arbitrary outcomes. As a result, many Mariel Cubans who would otherwise be free from custody remain in immigration imprisonment serving potential life sentences.

Not surprisingly, the inadequacies of the Plan have not gone unnoticed. In 2001, the Inter-American Commission on Human Rights of the Organization of American States ("Human Rights Commission") issued a report in a case brought on behalf of more than 300 Mariel Cubans and several human rights organizations. *Ferrer-Mazorra* v. *United States*, Inter-American Comm'n on Human Rights, Organization of American States, Report No. 51/01, Case No. 9903 (Apr. 4, 2001) ("*Human Rights Report*"). The Commission concluded that the detention of Mariel Cubans under the Cuban Review Plan violated the United States' obligations under the American Declaration of Rights and Duties of Man. *Id.* ¶¶ 1-3, 251. The Commission identified four principal reasons why that was so:

> [The procedures] fail to define with sufficient particularity the grounds upon which the petitioners have been deprived of their liberty; they place the onus upon the detainee to justify his or her release; they are subject to a degree of discretion on the part of officials that exceeds reasonable limits; and they fail to provide for detention reviews at reasonable intervals. [*Id.* ¶ 221.]

The experience of practitioners confirms these and other problems. *See, e.g.*, Letter from Post Conviction Justice Project at Univ. of S. Cal. Law Sch. to Director of INS Policy Directives and Instructions Branch (July 27, 2000) ("*Justice Project Letter*"), *available at* http://lawweb.usc.edu/users/nfrenzen/INS_Letter_7.27.2000. pdf (criticizing limits on access to and participation of counsel, lack of access to records, inadequate notice, unqualified administrative officials, over-reliance on criminal history, and untimely reviews); *see also* Karla Harr, *Mariel Cubans: The Forgotten Lifers*, 4 Bender's Immigr. Bull. 1109, 1111-12 (Dec. 1, 1999) ("*Forgotten Lifers*"). In particular, "almost all of the

Mariels are unrepresented," and lack of access to records and inadequate notice prevent effective representation even for those detainees who do have counsel. *Forgotten Lifers*, *supra*, at 1111-12; *see also Justice Project Letter*, *supra*, at 4-6. The result of these deficiencies is that "[m]any detainees serve much longer in INS detention than they did for the criminal charge which is the basis for removal."[15] Helen Morris, *Detention Reviews for Long-Term Detainees*, 4 Bender's Immigr. Bull. 610, 611 (June 15, 1999) ("*Detention Reviews*").

The examples of how these deficient procedures have affected detainees similarly situated to the respondent represent just the tip of the iceberg, as they are based only on court records of those who managed to mount habeas challenges to their detention. The vast majority of Mariel Cubans in indefinite detention, however, have no representation and no

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[15] *See, e.g.*, Supplemental Brief for Petitioner-Appellant, *Carballo* v. *Luttrell*, No. 99-5698, at 5 (6th Cir. Jan. 16, 2002) (appellant had been "incarcerated by the INS for more than 14 years, more than twice as long as he was required to serve for the crimes that led to his exclusion order"); Brief for Appellant, *Cespedes-Leon* v. *Smith*, No 02-35877, at 5 (9th Cir. Nov. 2002) (appellant sentenced to three to nine years for crimes, but held in ICE custody for 17 years); *Justiz-Cepero* v. *INS*,, No. 3:02-CV-2305-K, 2004 WL 915612, at *1 (N.D. Tex. Apr. 24, 2004) (detained for 13 years); *see also Justice Project Letter*, *supra*, at 2 (noting that of a survey of 67 Mariel Cuban clients, over 60% had served sentences of five years or less for their crimes, but almost 90% had served an additional six or more years in ICE detention); *Forgotten Lifers*, *supra*, at 1111 (noting that, of 66 Mariel Cuban clients, 22 had been in ICE custody for over five years and six had been in detention over 10 years); *American Gulag*, *supra*, at 294, 299 (describing detainee still in detention after completing a two-year marijuana sentence in 1984; detainee held for eight additional years after completing a seven-year sentence; and detainee who has been incarcerated since completing a 14-month marijuana sentence in 1997).

effective means of exposing the problems they experience under the Plan.

A. The Decision to Continue Indefinite Detention Is Made by Immigration Officials, Rather Than Impartial Decisionmakers, and Is Not Subject to Meaningful Oversight or Judicial Review.

For all of the pomp and circumstance in the Cuban Review Plan concerning annual interviews and various levels of review, the only decision that matters—whether to release a Mariel Cuban detainee or continue detention indefinitely—rests in the virtually unfettered discretion of one administrative official, the Commissioner. The Commissioner, who is charged with the duty of removing aliens from this country, is hardly an "impartial" decisionmaker.[16] He is free to accept or reject panel recommendations as he sees fit, without explaining departures from those recommendations and without creating any other meaningful record concerning the reasons for continuing detention. And, as we have explained, the government has argued that the Commissioner's decision is either completely unreviewable or is subject to extremely deferential review by a habeas court.[17] *See supra*, at 7. In

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[16] *See, e.g.*, *Phan* v. *Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) (*en banc*) (" 'Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences.' ") (citation omitted); *Duong* v. *INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000) (finding a due process violation because potentially biased ICE officers made the final parole decision rather than an "impartial party such as a judge or jury"); *Ekekhor* v. *Aljets*, 979 F. Supp. 640, 644 (N.D. Ill. 1997), *appeal dismissed as moot*, 172 F.3d 53 (7th Cir. 1998) (finding ICE officials to be potentially biased and requiring an impartial Immigration Judge to make parole determinations).

[17] The Human Rights Commission said that it could not "overemphasize the significance of ensuring effective supervisory

any event, meaningful review of the Commissioner's decision, to the extent available at all, is frustrated by the nearly complete lack of a record or explanation of his decision.

This wholly inadequate scheme results in arbitrary decisions that force Mariel Cubans to sit in jail for years longer than necessary. For example, Eduardo Dominguez, who came to the United States during the Mariel boatlift, was detained in a federal prison for six years despite repeated recommendations of release. *See Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001).

The ICE detained Mr. Dominguez in November 1994 after he completed his two-year sentence for a false imprisonment conviction stemming from a domestic dispute with his ex-girlfriend. *Id*. In 1995, the Commissioner refused release, citing the false imprisonment conviction. Respondent's Answer, Ex. 1 at 11, *id*. In 1996, although the panel recommended Mr. Dominguez' release, the Commissioner refused release, citing the now three-year-old false imprisonment conviction and a nine-year-old juvenile conviction. Oddly, the ICE officials who interviewed Mr. Dominguez found his answers credible, but the Commissioner—who had never met him—reached the opposite conclusion.[18] *Id*. at 12, 29-31.

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control over detention as an effective safeguard, as it provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority." *Human Rights Report*, *supra*, at ¶ 232. The Commission found that the "limited nature and scope of judicial control" available by habeas courts was insufficient. *Id.* at ¶ 233.

[18] Credibility determinations are frequently cited by the Commissioner in denying parole. Such credibility determinations are extremely difficult for detainees to overcome. For example, in several reviews, Mr. Reynero Arteaga Carballo was denied parole because of his purported failure to accept responsibility for his crimes. *See* Supplemental Brief for Petitioner-Appellant at 22-23, *Carballo* v. *Luttrell*, No. 99-5698 (6th Cir. 1999). In 1997, however, when Mr. Carballo expressed remorse during an inter-

Again in 1997, the panel recommended release, and again the Commissioner rejected that recommendation. *Id*. at 32; Petitioner's Traverse and Memorandum of Law in Support, Ex. G, *Dominguez* , No. CV 00-1040-PA (D. Or. Jan. 19, 2001).

In 1998, the panel's release recommendation (its *third*) became even more emphatic, suggesting that Mr. Dominguez be released "as soon as possible" and lauding his academic and vocational achievements while detained. *Id*. Ex. H. However, the Commissioner, without mention of Mr. Dominguez' achievements, again refused release citing the now five- and 11-year-old convictions. Respondent's Answer, Ex. 1 at 14, *Dominguez*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001). And in 1999, the panel highly recommended that Mr. Dominguez be released with only a modicum of supervision, concluding that he was "totally rehabilitated," so academically ambitious that he had exhausted all of the classes available, and so non-violent that he refused to defend himself when assaulted by another prisoner. *Id*. at 35-37. The Commissioner again refused release on the grounds that Mr. Dominguez was still a violent threat due to his prior convictions.[19] *Id*. at 13.

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view, the panel found him non-credible, calling his remorse a "new tactic" and an attempt to play "the age angle." *Id.* at 22. The panel made this determination despite numerous psychological evaluations that determined Mr. Carballo was ready to be released. *See id.* at 7. As the Post Conviction Justice Project noted, the Plan places detainees in a precarious position by considering credibility and remorsefulness alongside dangerousness. If a detainee seeks to explain his crimes in the most positive light, he risks adverse determinations concerning credibility and remorsefulness. If he does not, however, continued detention based on criminal history is likely. *See Justice Project Letter*, *supra*, at 7.

[19] The Commissioner further justified the decision by reference to a disciplinary citation—the only one in five years of detention—for refusing to obey an order. *Id.* The panel who interviewed Mr.

Each year, despite increasingly glowing recommendations from the Cuban Review Panel, the Commissioner refused release because of Mr. Dominguez' criminal record. *See id*. at 11-14, 32. The only notification provided to Mr. Dominguez each year was the Commissioner's "Final Notice of Parole Denial"—a document that did not inform Mr. Dominguez of the favorable recommendations by the panels, but instead denied release using boilerplate language. *See id*. at 13-14, 32. When Mr. Dominguez finally received a fair hearing by an impartial decisionmaker through his habeas action, the assessment of his case was strikingly different. The court immediately released Mr. Dominguez, finding that the Commissioner had abused his discretion and acted arbitrarily by denying parole.[20] *See Dominguez*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001). By then Mr. Dominguez had already been imprisoned for an additional six years after serving a two-year sentence.

Enrique Acosta Delgado's case further demonstrates the capriciousness of the officials who administer the Plan. The Commissioner first denied parole to Mr. Delgado in 2000, citing petty institutional infractions such as "refusing to turn over a comb" and "refusing to get into the chow line."[21]

Dominguez mentioned this citation in passing and found it irrelevant. *Id*. at 36.

[20] Mr. Dominguez represents one of the rare cases in which a district court has found itself able to explore in a meaningful way the facts and circumstances of a Mariel Cuban's detention. In most cases, like that of Manuel Navarro discussed below, habeas courts hardly progress past the extremely deferential standard of review urged by the government.

[21] Disciplinary citations are another frequent and virtually unassailable basis used by immigration officials to justify continued detention. *See, e.g.*, *Sierra* v. *INS*, 258 F.3d 1213, 1216 (10th Cir. 2001) (indicating Commissioner withdrew approval for parole because detainee was disciplined for fighting while awaiting release, even though the citation was being administratively

Excerpts of Record at 82, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002). The following year, Mr. Delgado was scheduled for an interview before the Director himself, who was training other officials in the interview process. *See id*. at 78. After some questions about his family situation, criminal history, and the events surrounding his custody, the Director said: "I have two words: 'mierda' and 'porqueria.' Bullshit and shit." *Id*. at 78-79 (declaration of attorney present at interview). The Director then berated Mr. Delgado for his past conduct and informed him that, "If you don't have any family, you belong to us." *Id*. at 79. When Mr. Delgado received his parole decision, signed by the same Director, it denied release.[22] *Id*. at 83.

Even when a detainee's case is reviewed by an impartial decisionmaker through a habeas corpus petition, the inadequacies of the Cuban Review Plan are often not subjected to meaningful review, both because of the highly deferential standard of review and the lack of a reviewable record. For example, Manuel Navarro was detained by the ICE from

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appealed on grounds of self-defense); *see also Forgotten Lifers*, *supra*, at 1114 (noting problems with reliance on incident reports). Similarly, although chastised by some courts and commentators, ICE officials often cite to arrests, as opposed to convictions, in support of continued detention. *See Chavez-Rivas* v. *Olsen*, 207 F. Supp.2d 326, 340 (D. N.J. 2002) (continued detention based on arrest without conviction violates due process); *Justice Project Letter*, *supra*, at 7 ("some panel members hold an arrest or a dismissed charge at the same level as a criminal conviction").

[22] Under the regulations, the parole decision is made by the Commissioner or his designee. 8 C.F.R. § 212.12(b)(1)-(2). Since 1987, the Director has had the "privilege of making the parole decisions," thereby vesting most of the review process in one person. *See* Supplement to the Record, Deposition of John Castro at 14, *Suarez-Tejeda* v. *United States*, No. CIV-01-96-F (W.D. Okla. May 24, 2002). As a result, every stage of Mr. Delgado's review was performed by a single person—the Director.

1997 to 2002 and was interviewed only once—and then only at the prompting of counsel who had been appointed after he filed his habeas petition. *Navarro* v. *INS*, No. CV 99-01025-WBS(DAD), slip op. at 2-3 (E.D. Cal. Dec. 8, 2000); Joint Statement Regarding Agreed Upon Facts at 3, *id.*[23] After his single interview, the Commissioner denied parole, citing only Mr. Navarro's criminal convictions—the most recent of which was 11 years old. Excerpts of Record at C, *Navarro* v. *INS*, No. 01-15111, 39 Fed. Appx. 513 (9th Cir. Apr. 8, 2002); Joint Statement Regarding Agreed Upon Facts at 3-4, *Navarro*, No. CV 99-01025-WBS(DAD) (E.D. Cal. Dec. 8, 2000).

On habeas review—the only court review available—the ICE argued that "[i]n reviewing a denial of immigration parole, this Court may not substitute its judgment for the [ICE's] and may only determine whether the [ICE] has advanced a 'facially legitimate and bona fide reason' to support its decision to deny immigration parole to Mr. Navarro." Brief for Respondent-Appellee at 11, *Navarro* v. *INS*, No. 01-15111 (9th Cir. Apr. 8, 2002). The court accordingly took judicial notice of the Commissioner's decision to deny parole, and—although there was no meaningful record to review—simply assumed that the Commissioner considered factors other than the prior convictions. Excerpts of Record at C, *Navarro*, No. 01-15111 (9th Cir. Apr. 8, 2002). The court did this even though the only reference to other factors in the parole denial decision was a statement that the Commissioner had "carefully weigh[ed] all of the factors for and against parole." *Id.* This language is part of the form letter that appears to be used for every parole denial in the United States. Unable to secure meaningful administrative

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[23] The following year, despite his counsel's urging and his pending habeas case, Mr. Navarro was unable to secure an interview. Letter from Daniel J. Broderick, Chief Assistant Federal Defender, to John Castro, Cuban Review Plan 1 (Sept. 25, 2001) (on file with counsel of record).

review, Mr. Navarro's attempts to receive impartial consideration from a court were ultimately thwarted by the lack of a record and a standard of review so deferential that it relied upon boilerplate language from a form letter.

* * *

Mariel Cubans find themselves playing against a stacked deck in trying to convince the ICE—or more particularly the Commissioner or his designee the Director—that they should not be held indefinitely. Given the limited oversight and review by judicial or other impartial authorities, arbitrary parole decisions are common.

B. The Cuban Review Plan Places the Burden on the Detainee to Satisfy Vague Standards to Avoid Indefinite Detention, but Denies the Detainee Any Meaningful Opportunity to Satisfy that Burden.

The Cuban Review Plan strays still further from the mandates of due process by placing the burden on the detainee to show that he should not be detained indefinitely, and then depriving him of any reasonable way to satisfy that burden. A detainee bears the burden of clearly demonstrating that he is "presently a nonviolent person," is "likely to remain a nonviolent person," is "not likely to pose a threat to the community following his release," and is "not likely to violate the conditions of his [release]." *See* 8 C.F.R. § 212.12(d)(2)(i)-(iii). "[R]eviews are conducted based upon a presumption of detention, which the detainee must rebut based on evidence of a bona fide change in his or her circumstances." *Human Rights Report*, *supra*, at ¶ 228. Yet, "the Regulations do not prescribe specific factors defining when a detainee may be considered 'violent' or a 'threat to the community,' much less how future conduct in this regard is to be predicted." *Id.* ¶ 223. Such standards—"on their face vague, speculative and open to various interpretations"—create an "unacceptable risk of inconsistency in decision-

making" and fail to provide "sufficient notice of the case [detainee] must meet in order to justify [his] release." *Id.*

On top of all that, the Plan ties the hands of the detainee in a manner that makes the satisfaction of these ill-defined standards even more difficult. Mariel Cubans are not guaranteed access to their records and are not provided with other means to obtain relevant information, such as through subpoena or discovery mechanisms. Nor are Mariel Cubans provided the assistance of counsel in navigating the Plan.[24]

The case of Jorge Suarez-Sanchez shows the difficulties a detainee faces in proving that he should not be detained indefinitely. After arriving in the United States in June 1980, Mr. Sanchez was paroled into the country and eventually settled in California, where he worked as a migrant farmer. *See* Petitioner's Exhibit in Support of Petitioner's Traverse and Memorandum of Law, Ex. B at MC 2095-97, *Suarez-Sanchez* v. *Smith*, CV No. 01-377-PA (D. Or. Apr. 22, 2003). After becoming blind in one eye and becoming severely myopic in the other, Mr. Sanchez stopped working and began receiving disability. *See id.* at MC 2096.

In May 1999, Mr. Sanchez was released from state custody after completing a two-year sentence for failing to register as

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[24] Most Mariel detainees lack resources to retain counsel. *See Forgotten Lifers*, *supra*, at 1112 (identifying "lack of financial resources, limited availability of pro bono attorneys, [and] geographical location of the detention facility" as common obstacles to obtaining legal representation). The problem of access to counsel is exacerbated by the fact that ICE only allows detainees to bring one person with them to their panel interviews, *see* 8 C.F.R. § 212.12(d)(4)(ii), thereby forcing detainees to choose between bringing a legal representative or a witness. *See*, *e.g.*, Excerpts of Record at 78, *Delgado*, No. 02-16526 (9th Cir. filed Aug. 6, 2002) (declaration from detainee's attorney noting that his client, like other Mariels, was allowed to have only one person accompany him to interview).

a sex offender based on two convictions for indecent exposure while urinating in public.[25] Nonetheless, he remained imprisoned by the ICE for an additional four years, winning his release under conditions of supervision only when a district court found that his continued indefinite detention violated this Court's decision in *Zadvydas*. *See Suarez-Sanchez* v. *Smith*, No. CV 01-377-PA (D. Or. Apr. 22, 2003) (relying on *Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002)).

At the time he filed his habeas corpus petition, Mr. Sanchez had received only one "annual" interview by the ICE in three years of custody.[26] The immigration officers who interviewed Mr. Sanchez at that time recommended against his release because they were "unable to conclude" that he was "not likely to pose a threat to the community" and "not likely to violate conditions of his parole."[27] *See* Excerpt of Record at MC 2097, *id*. In support of their recommendation, the officers cited four reasons: first, that Mr. Sanchez was "not credible" because of alleged discrepancies between his claims about his criminal history in Cuba and the information

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[25] Mr. Sanchez was convicted of a number of criminal offenses, most involving petty theft and/or drugs, and the majority of which resulted in probation. *See id.* at MC 2095. Mr. Sanchez' only violent crime resulted in probation. *See id.* In 1987, Mr. Sanchez was convicted of two drug-related felonies. *See id.*

[26] Mr. Sanchez is not alone in having received reviews less frequently than required. *See* Allison Davenport & Laurie Joyce, *Indefinite Detainees: In Definite Need of Legal Representation*, 9 Bender's Immigration Bulletin 188, 190 n.6 (Feb. 15, 2004) (noting that "reviews are often severely delayed," and that a district court had certified a class in a case challenging the "practice of delaying custody reviews" (citation omitted)).

[27] These vague standards create the possibility that a Mariel Cuban could be detained indefinitely just because the interviewers believe that he is likely to commit petty crimes if released. Therefore, a nonviolent, recidivist shoplifter could potentially be subjected to life imprisonment by the ICE.

in his file; second, that he "ha[d] an extensive history of arrests and convictions" for crimes of "violence, sex and drugs"; third, that he had failed to work for an extensive period of time or to learn a trade or improve his English skills; and finally, that his failure to comply with California's sex offender registration requirements—imposed as a consequence of his convictions for urinating in public—indicated that "he would fail to fulfill the requirements of [p]arole with the INS." *See id.*

Notably, the panel did not suggest that Mr. Sanchez was either currently violent or likely to be violent in the future. *Id*. Rather, its recommendation was based on the interviewers' reluctance to conclude that Mr. Sanchez was "not likely to pose a threat to the community" and "not likely to violate conditions of his parole." *See id.*

One month later, the Commissioner denied release, concluding that Mr. Sanchez had "demonstrated a propensity to engage in recidivist criminal behavior as reflected by [his] criminal record." *Id.* at MC 2090, from Petitioner's Exhibit in Support of Petitioner's Traverse and Memorandum of Law, *Suarez-Sanchez* v. *Smith*, CV No. 01-377 (D. Or. 2001). The Commissioner's decision also cited the panel's credibility finding. *See id.*

Mr. Sanchez' case demonstrates the heavy, often insurmountable, burden faced by Mariel Cuban detainees seeking release. First, although the panel's credibility finding was based on alleged discrepancies between Mr. Sanchez' recollection of his criminal history and what appeared in his file, it is not clear whether there truly was any conflict,[28] or

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[28] Although Mr. Sanchez reported convictions in Cuba for vagrancy and *peligrosidad* ("dangerous person") in his asylum application, the panel said that he disclaimed these convictions in his interview. *See Id.* at MC 2095. The panel relied on this alleged discrepancy to determine that he was not credible. *See id.* at MC 2097. In that same application, however, Mr. Sanchez also

what the nature of any such discrepancy was. Panel members often quiz detainees about past crimes and past statements during interviews without providing detainees access to their records to refresh their recollection. And because no transcript is made of interviews, it is impossible to know whether alleged discrepancies were the result of confusion on the part of the detainee or a deliberate intent to deceive the panel. With additional access to his records or opportunity to discover and present evidence concerning his criminal record, it is possible that Mr. Sanchez could have shown that there was no discrepancy and that he was telling the truth.

The panel also exaggerated the circumstances of Mr. Sanchez' convictions to support its recommendation, stating that they were for crimes of "violence, sex and drugs." *Id.* at MC 2097. In so doing, the panel failed to acknowledge that only one of his convictions was for a crime of violence (which resulted in probation), that most of the convictions resulted in probation, and that the so-called "sex crime" was for urinating in public.[29] *Id.* at MC 2096. Similarly, the panel's criticism of Mr. Sanchez for failing to work or participate in educational programming was not well-founded. The panel ignored that Mr. Sanchez was unable to work because of his health condition, and that his failure to complete an English course resulted from his release from custody before the class ended.[30] *Id*. at MC 2096-97; Brief of Appellant, 2002 WL 32298225, at *31.

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stated that he was convicted of these offenses because of his political opinion. *See Id.* at 241.

[29] The panel referenced the public urination in its summary of the interview, but in the section justifying its recommendation, it described the indecent exposure convictions as "crimes of * * * sex" and referred to Mr. Sanchez as a sex offender.

[30] An additional problem is the lack of availability of programming for Mariel Cubans. "While the detainee can avail himself of the various educational, vocational, and self-help programs at the

As Mr. Sanchez' experience shows, detainees with a past criminal record—and particularly detainees with a history of even petty recidivism—face an extremely heavy burden in persuading the ICE that they are "unlikely to pose a threat to the community" and "unlikely to violate their conditions of release"—especially since the regulations provide little guidance concerning the meaning of those standards. And as evidenced by this case and many others, a detainee's criminal history—which the detainee is powerless to alter—time and again becomes a justification for detention.

Angel Sanabria Casares likewise discovered how hard it was to overcome his criminal history and convince a faceless administrative officer that release is appropriate. In 1983, Mr. Casares shot a man in a drunken altercation; later pled guilty to voluntary manslaughter; and was sentenced to eight years in prison. In April 1988, Mr. Casares was released into the custody of the ICE after serving four years of his sentence. For the next seven years, he was detained by the ICE in various high security prisons. *See* Brief of Appellant at *3-*4, *Sanabria-Casares* v. *United States*, No. 95-35469 (9th Cir. Dec. 29, 1995).

In March 1993, an interview panel concluded that Mr. Casares should be released, stating that he "would be safer outside rather than inside" and had "sustained injuries while detained which have now caused him numerous medical problems." Reply Brief of Appellant at *3, *id*. The recommendation stated:

> Other than those caused by his homosexuality while detained, and his case involving murder/manslaughter, he

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facility if they exist, the majority of INS detainees are kept in county jails where no such programs are offered." *Forgotten Lifers*, *supra*, at 1113. Detainees "are repeatedly penalized for insufficient programming," even though "programming is virtually impossible" because of unavailability and frequent transfers. *Justice Project Letter*, *supra*, at 5-6.

> has no record of violence. He has shown tremendous self-development and is highly motivated, as well as being intelligent and well-spoken. He would probably do well in a halfway house. [*Id.*]

The Commissioner nevertheless denied release based on Mr. Casares' manslaughter conviction—for which he served four years in prison followed by seven years in immigration custody—and incidents while imprisoned in which Mr. Casares defended himself from attack. Brief of Appellant at *4-*5, *id*. Despite the interviewers' finding that Mr. Casares was not violent, the Commissioner concluded that Mr. Casares had "demonstrated a tendency to engage in assaultive behavior as reflected by [his] criminal record" and that "it is not clearly evident that [he was] likely to remain nonviolent and/or unlikely to pose a threat to the community." *Id.* at *5 n.4. Mr. Casares, therefore, faced an insurmountable burden in persuading the Commissioner, whom he never met, that he should be spared indefinite detention.

Mario Moreno Peña also learned first hand the difficulty of showing that detention is not warranted, particularly when access to relevant information is unavailable. Mr. Peña's parole status was revoked in May 1999 as a result of drug and robbery convictions. Order and Findings and Recommendation at 2, *Moreno-Peña* v. *INS*, No. CIV-S-99-1721-DFL (E.D. Cal. Mar. 28, 2001).

After spending nearly three years in detention pending removal, Mr. Peña was paroled in February 2002 to a halfway house for a drug treatment program.[31] Petitioner-

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[31] While Mr. Peña found a placement relatively quickly, many Mariel Cuban detainees are not as fortunate. "INS does not contract with enough such programs * * * lead[ing] to the continued detention of those approved for release until bed space becomes available." *Forgotten Lifers*, *supra*, at 1115; *see also Justice Project Letter*, *supra*, at 8-9 (noting that placement is difficult because of restrictions on placement and referring to this

Appellant's Opening Brief at 8, *Moreno-Peña* v. *INS*, No. 01-17309 (9th Cir. Oct. 19, 2002). A few months later, however, the Commissioner revoked Mr. Peña's parole due to allegations of his use of aggressive language in group therapy and alleged involvement in a fight. *Id.* Mr. Peña later learned—only through a separate information request he made to the Bureau of Prisons—that the employees of the halfway house thought he was "innocent of the charges." Excerpts of Record, Tab 9, *id*. Nevertheless, the Plan provided Mr. Peña with no opportunity to challenge the allegations that ultimately led to his parole revocation. *Id.* at 3.

Mr. Peña's case illustrates the problem of conferring unreviewable discretion over release and revocation of release decisions to an administrative official. It also illustrates the problems detainees face in gaining access to information and a complete record. In fact, many ICE district offices only release files in response to Freedom of Information Act requests, and then often take more than six months to do so. Petitioner's Brief in Support of Petition for Writ of Habeas Corpus and in Support of Motion for Release; Ex. 6, Declaration of Helen Morris, *Moreno-Peña* v. *INS*, No. CIV-S-99-1721-DFL (June 9, 2000) ("Morris Decl."); *see also id.*, Ex. 7, Declaration of D'Ann Johnson, ("Johnson Decl."). This lack of access to relevant information, especially when combined with the short notice (if any) given before interviews, makes it extremely difficult for a detainee or his representative to obtain—much less thoroughly review—the detainee's record prior to the interview. *See* Morris Decl., *supra*; Johnson Decl., *supra*.

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as "[o]ne of the most crippling hurdles" posed by the Cuban Review Plan); *Detention Reviews*, *supra*, at 611 (noting that lack of sponsorships and halfway houses is one of the "most appalling problems" of the Plan). *Human Rights Report*, *supra*, at ¶ 227 (discussing detainee held for 10 years awaiting placement after determined entitled to parole).

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The Cuban Review Plan forces Mariel Cuban detainees to overcome an ill-defined and onerous burden in order to avoid indefinite detention, all without adequate access to relevant information or the assistance of counsel. Although *amici* suggest that this scheme does not comport with the Due Process Clause, this Court need not decide that difficult constitutional question and should adopt the same construction of the post-removal-period detention statute that it did in *Zadvydas*. Such a construction will prevent the arbitrary and indefinite detention of Mariel Cubans at the virtually unfettered discretion of an administrative official.

CONCLUSION

For the foregoing reasons and those set forth in the respondent's brief, this Court should affirm the judgment below.

Respectfully submitted,

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