No. 15-1204

IN THE
Supreme Court of the United States

DAVID JENNINGS, *et al.*, *Petitioners*,
v.
ALEJANDRO RODRIGUEZ, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF 29 U.S. REPRESENTATIVES: CHAIRMAN ROBERT GOODLATTE, CHAIRMAN MICHAEL MCCAUL, CHAIRMAN LAMAR SMITH, BRIAN BABIN, ANDY BIGGS, DIANE BLACK, MARSHA BLACKBURN, DAVE BRAT, MO BROOKS, SCOTT DESJARLAIS, JEFF DUNCAN, BILL FLORES, TRENT FRANKS, PAUL GOSAR, SAM GRAVES, JODY HICE, LYNN JENKINS, WALTER JONES, STEVE KING, DOUG LAMALFA, DOUG LAMBORN, BLAINE LUETKEMEYER, TOM MCCLINTOCK, ROGER MARSHALL, JOHN RATCLIFFE, MIKE ROGERS, DANA ROHRABACHER, KEVIN YODER, AND TED YOHO; AND 2 U.S. SENATORS: CHAIRMAN CHARLES GRASSLEY AND TED CRUZ; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are 31 Members of Congress and a public-interest law firm.[1] This brief responds to the Court's December 15, 2016 order, which requested supplemental briefing on three questions regarding the due-process rights of aliens subject to detention during the pendency of removal proceedings.

Amici curiae Charles Grassley (Iowa) and Ted Cruz (Tex.) are U.S. Senators. Robert Goodlatte (Va.), Michael McCaul (Tex.), Lamar Smith (Tex.), Brian Babin (Tex.), Andy Biggs (Ariz.), Diane Black (Tenn.), Marsha Blackburn (Tenn.), Dave Brat (Va.), Mo Brooks (Ala.), Scott DesJarlais (Tenn.), Jeff Duncan (S.C.), Bill Flores (Tex.), Trent Franks (Ariz.), Paul Gosar (Ariz.), Sam Graves (Mo.), Jody Hice (Ga.), Lynn Jenkins (Kan.), Walter Jones (N.C.), Steve King (Iowa), Doug LaMalfa (Calif.), Doug Lamborn (Colo.), Blaine Luetkemeyer (Mo.), Tom McClintock (Calif.), Roger Marshall (Kan.), John Ratcliffe (Tex.), Mike Rogers (Ala.), Dana Rohrabacher (Calif.), Kevin Yoder (Kan.), and Ted Yoho (Fla.) are Members of the U.S. House of Representatives. Rep. Goodlatte is Chairman of the House Judiciary Committee. Rep. McCaul is Chairman of the House Homeland Security Committee. Rep. Smith is Chairman of the House Science, Space, and Technology Committee. Sen. Grassley is Chairman of the Senate Judiciary Committee.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the clerk.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support the rule of law in immigration proceedings. *See, e.g., Nken v. Holder*, 556 U.S. 418 (2009).

Amici believe that Congress and the Executive Branch must continue to be afforded broad power to detain, pending completion of removal proceedings, those aliens who have been convicted of serious crimes or who arrive at the nation's borders without authorization to enter. Experience has demonstrated that if those aliens are not detained, a large percentage of them will abscond, and a significant majority of the alien felons will commit new crimes before they can be apprehended and their removal proceedings completed.

Amici believe that Congress acted well within its constitutional authority when, in 1996, it prescribed mandatory detention for these two categories of aliens. Congress reasonably determined that mandatory detention was the only means of maintaining public safety and ensuring that the aliens would appear for removal hearings. It reasonably concluded that individual bond hearings were incapable of accurately predicting which aliens could be safely released.

STATEMENT OF THE CASE

Most aliens who are subject to removal proceedings are permitted to live freely in American society while those proceedings are ongoing. Congress has, however, designated two instances in which such aliens "shall" be detained pending completion of those proceedings. First, the longstanding rule is that aliens

who are intercepted while seeking to enter the country and who are "not clearly and beyond a doubt entitled" to admission, "shall be detained" pending a hearing before an Immigration Judge to determine whether the alien should be removed from the country. 8 U.S.C. § 1225(b)(2)(A).[2] Second, in 1986, Congress enacted 8 U.S.C. § 1226(c) to require the detention, pending completion of removal proceedings, of aliens who have established a presence in the United States but have been convicted of certain serious crimes specified in the statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208.[3]

Respondents are five aliens who were detained by immigration authorities pending completion of removal proceedings. They do not contest the Government's right to detain them for up to six months while proceedings continue. They assert, however, that once six months have elapsed, the Due Process Clause prohibits continued detention unless the Government demonstrates, through clear and convincing evidence, that the detainee is a flight risk or a danger to the community. They assert, *inter alia*, that §§ 1225(b)(2)(A) and 1226(c) violate their substantive

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[2] The Secretary of Homeland Security is authorized to temporarily parole such aliens into the United States for "urgent humanitarian reasons." 8 U.S.C. § 1182(d)(5)(A).

[3] Congress, in IIRIRA and related legislation, further provided that removal is absolutely mandatory for aliens convicted of particularly serious crimes. IIRIRA eliminated the Secretary's discretion to waive deportation for such aliens. IIRIRA § 304(b) (repealing § 212(c) of the Immigration and Naturalization Act of 1952 (INA)). *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

due process rights if those statutes are construed to mandate detention in the absence of individualized flight-risk or danger findings.

The district court certified Respondents as representatives of a class consisting of all noncitizens within the Central District of California detained for more than six months pursuant to §§ 1225(b), 1226(a), or 1226(c) pending completion of removal proceedings (including judicial review of removal orders) and who have not received a hearing before an immigration judge to determine whether their detention is justified based on individualized factors. Pet. App. 5a-6a. The class is currently divided into three subclasses: (1) the "Criminal Subclass" (those aliens subject to mandatory detention under § 1226(c)); (2) the "Arriving Subclass" (those aliens subject to mandatory detention under § 1225(b)(2)(A)); and (3) the "§ 1226(a) Subclass" (those aliens being detained following an Immigration Judge's determination that they were not entitled to release under 8 U.S.C. § 1226(a)).

The Ninth Circuit affirmed in substantial part the district court's grant of permanent injunctive relief to Respondents. Pet. App. 1a-59a. The injunction requires the Government to provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge; at that hearing, the Government must prove by "clear and convincing evidence" that the detainee is a flight risk or a danger to the community to justify the denial of bond. *Id.* at 4a. The appeals court expanded the scope of the injunction by mandating that: (1) the Immigration Judge's bond decision must consider the length of the class member's past detention because "a

noncitizen detained for one or more years is entitled to greater solicitude than a noncitizen detained for six months," *id.* at 56a; and (2) the Government must provide periodic bond hearings every six months "so that noncitizens may challenge their continued detention as the period of confinement grows." *Id.* at 58a (citation omitted).

Although both § 1225(b)(2)(A) and § 1226(c) prohibit release on bond and do not authorize bond hearings, the Ninth Circuit purported to justify its decision on statutory construction grounds. It concluded that the statutory ban on release applies only during the first six months of detention. It held that the Government's contrary interpretation of the relevant immigration statutes would call into question their constitutionality, and thus "the canon of constitutional avoidance require[d]" rejection of that interpretation. Pet. App. 23a. The initial round of briefing before this Court focused on statutory interpretation issues. The Court's December 15, 2016 order directed the parties to file supplemental briefs focused on whether the Due Process Clause requires that arriving aliens and criminal aliens be afforded individualized bond hearings.

SUMMARY OF ARGUMENT

The temporary detention of a criminal alien by Immigration and Customs Enforcement (ICE) pending completion of removal proceedings does not violate the alien's substantive due process rights. The Court so held in *Demore v. Kim*, 538 U.S. 510 (2003):

> [T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character."

538 U.S. at 523 (quoting *Wing Wong v. United States*, 163 U.S. 228, 235 (1896)).

Respondents insist that criminal aliens are entitled to hearings at which their release should be ordered unless the Government can demonstrate that they pose a flight risk or a danger to the community. But *Demore* rejected an identical substantive due process challenge to § 1226(c). The Ninth Circuit's due process analysis ignores this Court's repeated admonition that "the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). Congress has determined that individualized hearings to determine risk of flight or dangerousness are inappropriate because, it concluded, those risks are substantial among criminal aliens yet cannot be predicted accurately on an individualized basis. *Demore* rejected claims that the Due Process Clause authorizes courts to second-guess that legislative determination in the context of detention during removal proceedings, citing numerous prior Court decisions that have deferred to congressional detention determinations. *Demore*, 538

U.S. at 523-26. Nothing in *Demore* suggests that the constitutional calculus suddenly changes once the detention period exceeds six months.

Aliens who have never been admitted to the United States (and are being detained pending removal under § 1225(b)) have an even weaker substantive due process claim to release. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The reduced constitutional status of arriving aliens in comparison to aliens already within the country makes eminent sense. The latter group has had an opportunity to begin developing ties with our society and assuming rights and responsibilities that resemble those of citizens. In contrast, the Constitution requires nothing more than that an arriving alien be provided an opportunity to return home if he desires to do so. If he persists in requesting admission into the United States, he must abide by the rules established by Congress governing new arrivals. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

Even if the Court concludes that Respondents are entitled to individualized bond hearings, the Due Process Clause provides no support for the procedural rights mandated by the Ninth Circuit. In support of their claim that the government should bear a "clear and convincing" burden of proof, Respondents cite case law imposing a similar burden when the government seeks to impose a "significant deprivation of liberty" on

citizens. Respondents' Opening Brief ("RO Br.") at 49. Those citations are inapposite. As this Court has routinely noted, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

Nor does the Due Process Clause require, as the Ninth Circuit asserted, that courts provide "greater solicitude" to alien detainees' claims as the period of confinement grows. Pet. App. 56a. Detention pending completion of removal proceedings always has an identifiable endpoint. Moreover, the record is uncontested that lengthy detentions of class members are virtually always the product of an alien's decision to contest an Immigration Judge's removal order—first by appealing to the Board of Immigration Appeals (BIA) and then by petitioning to the federal appeals court for review of the final order of removal. Appeals can be very time consuming. Aliens should not be heard to argue that lengthy detention arising directly from their voluntary decisions to appeal strengthens their due process claims, such that the courts may overrule Congress's mandatory-detention determination. Nor does due process require a new hearing every six months, without regard to whether the alien produces evidence of changed circumstances.

Finally, there exists an alternative basis for reversal: the federal courts lack jurisdiction to hear large portions of Respondents' class claims. The claims of the Criminal Subclass are barred by 8 U.S.C. § 1226(e), which provides that the Government's detention of criminal aliens under § 1226(c) "shall not

be subject to review" in the courts. While *Demore* held that § 1226(e)'s jurisdiction-stripping language was insufficiently specific to deprive federal courts of jurisdiction to consider an individual *habeas corpus* petition filed by an alien detainee, it did so on the basis of its longstanding rule requiring a "particularly clear statement" of congressional intent to suspend *habeas corpus*. *Demore*, 538 U.S. at 517 (citing *St. Cyr*, 533 U.S. at 308-09). But that "clear statement" rule is of limited applicability to Respondents' complaint, which seeks class-wide relief far beyond the relief normally available in a *habeas corpus* proceeding. When construed in the absence of a "clear statement" rule, § 1226(e) unequivocally deprives federal courts of jurisdiction to hear any claims asserted by members of the Criminal Subclass, other than the individual *habeas corpus* claims of named plaintiffs Alejandro Rodriguez and Jose Farias Cornejo. The Ninth Circuit's jurisdiction to hear Respondents' class-wide claims is also barred by 8 U.S.C. § 1252(f)(1), which states that federal appeals courts lack jurisdiction to "enjoin or restrain" enforcement of §§ 1225 and 1226 "other than with respect to the application of such provisions to *an individual alien* against whom proceedings under such part have been initiated." (Emphasis added.)

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE BOND HEARINGS FOR CRIMINAL ALIENS WHO ARE SUBJECT TO MANDATORY DETENTION UNDER 8 U.S.C. § 1226(c)

A. *Demore* Forecloses the Due Process Claims of the Criminal Subclass

Respondents contend that the Due Process Clause requires criminal aliens who are subject to mandatory detention under § 1226(c)—such as Respondents Rodriguez, Farias Carnejo, and other members of the Criminal Subclass—to be afforded bond hearings, with the possibility of release, if detention exceeds six months. The Court considered and rejected that precise substantive due process claim in *Demore*.

The respondent in *Demore*, Hyong Joon Kim, was a permanent resident alien who filed a *habeas corpus* petition challenging his § 1226(c) detention, pending completion of removal proceedings.[4] The Court rejected Kim's substantive due process challenge to the constitutionality of § 1226(c), which mandates detention of aliens convicted of enumerated serious felonies and permits release in advance of removal "only" in one extremely limited circumstance (not relevant here). 8 U.S.C. § 1226(c)(2). The Court held, "Detention during removal proceedings is a

[4] Kim was subject to removal based on convictions on two charges (burglary and "petty theft with priors") that qualified as "crimes involving moral turpitude." *Demore*, 538 U.S. at 513 & n.1.

constitutionally permissible part of that process." *Demore*, 538 U.S. at 510.

Respondents seek to distinguish *Demore* on two grounds. First, they assert that the average detention time among class members is longer than the detention to which Kim was subjected; accordingly, "the deprivation of liberty at issue here is greater than in *Demore*," and thus "an individualized detention hearing is required to ensure that detention continues to serve its purpose." RO Br. 12-13. Second, they assert that "a large majority of Class members present substantial defenses to removal"—in supposed contrast to Kim, who conceded that his felony convictions rendered him "deportable." RO Br. 13, 19-20 & n.5. Neither assertion meaningfully distinguishes *Demore*.

First, nothing in *Demore* suggests that the Court limited its due process analysis to § 1226(c) detentions lasting less than six months. Indeed, Kim's removal proceedings had already lasted more than four years (thanks in substantial part to Kim's repeated requests for continuances) by the time the Court handed down its detention decision. Immigration authorities detained Kim for 200 days (beginning in February 1999, after his release from California prison) until his release on bond (in August 1999) at the behest of a federal district judge, who held that Kim's mandatory detention under § 1226(c) violated his due process rights. *Demore*, 538 at 515. Thus, Kim's § 1226(c) detention had already lasted more than six months by the time the Court ruled against him, and (as the Court surely recognized) was likely to last even longer following remand. Those facts belie any contention that *Demore* limited its due-process analysis to

detentions lasting less than six months. The Court's due-process analysis was premised on its findings that § 1226(c) detentions have a "definite termination point"—they end as soon as removal proceedings are completed—and serve the Government's interest in "increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id*. at 528-29. Those findings remain true regardless whether (as here and in *Demore*) the detention period exceeds six months.

Second, Kim's concession that he was "deportable" (*i.e.*, that he had been convicted of crimes that rendered him subject to removal) does not serve to distinguish his case from the due-process claims raised by members of the Criminal Subclass. As Respondents concede, most members of the subclass do not dispute that their crimes render them subject to removal. Respondents seek to contrast themselves from Kim by asserting that most subclass members have "substantial defenses to removal"—*e.g.*, they are eligible to seek discretionary relief (such as cancellation of removal) based on their "comparatively minor criminal histories and deep ties to the community." RO Br. 19-20. Those assertions do not raise any meaningful factual distinctions. Kim had lived in the United States virtually his entire life, had been granted permanent resident alien status as a child,[5] had a "comparatively minor" criminal history

[5] Kim's status as a permanent resident alien suggests that his substantive due process claims were considerably *stronger* than those of the typical member of the Criminal Subclass, many of whom committed their crimes while living in this country as unauthorized aliens.

(burglary and petty theft), and was eligible for (and was seeking) discretionary relief from removal. *Demore*, 538 U.S. at 522 n.6; *id.* at 541-42 (Souter, J., dissenting). The Court nonetheless did not deem those facts sufficient to entitle Kim to a bond hearing with the possibility of release.

Nor does the Acting Solicitor General's August 26, 2016 letter to the Court—correcting statistical information that the Government had submitted to the Court in connection with *Demore*—call into question the validity of that decision. In urging the Court to reject Kim's substantive due process claim, the Government submitted information regarding the average number of days required to complete removal proceedings in 2001 in cases involving an alien detained under § 1226(c). The Government later recomputed the 2001 data, and the August 2016 letter provided the Court with revised average-number-of-days figures. There is no reason to conclude that the Court's due-process holding would have been affected, had the revised figures been supplied while *Demore* was before the Court in 2002-03. Indeed, the revised figures are not substantially different than those supplied for FY 2001, and in some instances demonstrate that removal proceedings were completed, on average, more quickly than originally reported.[6] Nothing in the revised figures undermines

[6] The August 2016 letter reported that in § 1226(c) cases in FY 2001 in which the alien did not appeal from an adverse decision by the Immigration Judge (roughly 85% of all cases), removal proceedings were completed in a mean time of 34 days and a median time of 15 days. The Government originally had reported somewhat higher averages: 47 and 30 days, respectively.

Demore's conclusions that (in contrast to the indefinite detention questioned by *Zadvydas*), § 1226(c) detention has "a definite termination point" and that "in a majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529.

B. *Demore* Is Consistent with this Court's Immigration Case Law and Ought Not Be Reconsidered

Demore recognized that aliens living in the United States are entitled to considerable constitutional protections, including a due process liberty interest. It concluded, however, that the Due Process Clause does not grant an alien convicted of serious crimes a substantive right to freedom from detention during removal proceedings based solely on evidence that he may not pose either a flight risk or a danger to society. 538 U.S. at 531. The Court held that Congress reasonably concluded that requiring detention of *all* criminal aliens pending completion of removal proceedings would serve the purposes of immigration law. *Id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.").[7]

The letter also reported that the mean and median times for disposition of an appeal to the BIA (141 days and 119 days) was slightly higher than originally reported.

[7] The Court noted that "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of criminal

Respondents urge the Court to overrule *Demore*, asserting that the decision is out of step with the remainder of the Court's due process jurisprudence. To the contrary, the Court's decision to defer to Congress's determination—that *requiring* detention of criminal aliens is necessary to achieve the purposes of immigration law—is consistent with immigration case law throughout our Nation's history, a history that has stressed the limited role of the courts in immigration matters.

"The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo,* 430 U.S. at 792. "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). As the Court has explained:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of

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aliens skipping their hearings and remaining at large in the United States unlawfully," *id.* at 528, and evidence that "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 518.

> government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

The due process rights asserted by Respondents are not sufficiently overpowering to overcome the Court's strong reluctance to interfere with reasonable immigration rules established by Congress. There may be *individual* cases in which relief under the Due Process Clause is warranted; for example, a case in which detention no longer serves any rational purpose because the Government has needlessly delayed removal proceedings for years with no end in sight. But the extraordinary relief requested by Respondents—declaring a federal immigration statute facially unconstitutional and granting *class-wide* relief for all aliens detained more than six months—is wholly inconsistent with the Court's traditional deference to the political branches.

We focus here on several points that make this case a particularly inappropriate vehicle for judicial challenge to congressional immigration policy.

1. Delay in Completing Removal Proceedings Is Almost Entirely Due to Appeals by Aliens from Adverse Decisions by Immigration Judges

All available evidence indicates that the Government proceeds expeditiously with removal proceedings for detained aliens, thereby minimizing the amount of time that criminal aliens are subject to mandatory detention under § 1226(c). Statistics from the Executive Office of Immigration Review (EOIR) indicate that the mean and median completion times for removal proceedings involving aliens detained under § 1226(c)—in which no appeal is taken from the initial decision of the Immigration Judge (about 85% of all cases)—is far less than six months. *See* EOIR, *Certain Criminal Charge Completion Statistics* (Database as of August 2016). In other words, most criminal aliens quickly receive a ruling from a neutral decisionmaker regarding whether they may remain in the country. If the alien chooses to abide by that decision, his detention will end well short of the six-month mark that (according to the Ninth Circuit) begins to raise due-process concerns.

Immigration proceedings (and thus § 1226(c) detention) will continue only if the Immigration Judge rules against an alien and the alien chooses to appeal that decision. Accordingly, delays beyond six months in § 1226(c) cases virtually always arise because the alien has not accepted the decision of the first neutral decisionmaker and has chosen to appeal. That choice may result in continued detention, but the Constitution has never been understood to protect individuals from having to make such choices. As *Demore* explained:

> Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. ... As we have explained before, however, "the legal system ... is replete with situations requiring the making of difficult judgments as to which course to follow," and even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices.

538 U.S. at 530 n.14 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).[8]

2. Respondents Hold the Keys to Unlock Their Jail Cells

In a very significant sense, aliens detained under § 1226(c) hold the keys to unlock their own jail cells. ICE has no desire to retain custody of removable aliens; its only purposes in taking custody are to promote public safety within this country and to ensure a means of effecting removal. A criminal alien can regain his liberty instantly by agreeing to return to his native country. *See, e.g., Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (detained alien "has the keys in his pocket"); *Doherty v. Thornburgh*, 943 F.2d 204,

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[8] *Demore* also noted Congress's finding that, before adoption of § 1226(c) in 1996, many deportable criminal aliens "filed frivolous appeals in order to delay their deportation. ... '[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens.'" *Ibid* (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)).

212 (2d Cir. 1991) (detained alien "possessed, in effect, the key that unlocks his prison cell"). The quasi-voluntary nature of Respondents' detention significantly weakens their due process claims.

Moreover, in many instances, an alien can leave the country yet continue to litigate his immigration claim from abroad—and then return to the United States if he ultimately prevails in court. Before Congress adopted IIRIRA in 1996, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States. *See* 8 U.S.C. § 1105a(c) (1994). As explained in *Nken v. Holder*, 556 U.S. at 424, IIRIRA lifted the ban on post-departure adjudication of a petition for review. IIRIRA § 306(b).

The Government generally does not permit an alien who has departed the country to continue to adjudicate claims before an Immigration Judge and the BIA. But if the BIA rejects an alien's claims and a final removal order is entered, the alien need not remain in the country in order to pursue a petition for review in a federal appeals court. Following entry of a final removal order, an alien in detention under § 1226(c) faces a choice: he can seek (and perhaps obtain) a stay of the removal order from the appeals court (but remain in detention); or he can decline to seek a stay (at which point he will be removed forthwith and thereby obtain his liberty) and continue to litigate from abroad. In other words, criminal aliens need not abandon their hope of living in the United States as the price of regaining their liberty.

Individual instances of long-delayed removal proceedings almost always arise due to protracted proceedings in federal court—*i.e.*, during a period when a § 1226(c) detainee could have obtained his freedom by returning to his home country and litigating from abroad. The case of Respondent Alejandro Rodriguez is a good illustration. Following his convictions for car theft and drug possession, ICE took him into custody in April 2004. His hearing before an Immigration Judge and his appeal to the BIA were completed within eight months, and a final removal order was issued in December 2004. Rodriguez filed a petition for review with the Ninth Circuit that same month. Rather than obtaining his liberty by returning to Mexico and pursuing his petition from abroad, Rodriguez sought (and obtained) a stay of removal—thereby ensuring his continued detention. Rodriguez ultimately spent 39 months in detention, but he could have avoided all but eight months of that detention had he opted to pursue his petition from Mexico.

3. ICE Provides Detainees with Individualized Hearings at which They May Assert They Are Not Subject to § 1226(c) Detention

Importantly, § 1226(c) does *not* deny a criminal alien access to an expedited hearing before an impartial decisionmaker. Rather, § 1226(c) merely prohibits a hearing on the issue Respondents wish to contest: whether there is individualized evidence demonstrating that the alien will flee or commit new crimes if released. Congress concluded that detaining *all* criminal aliens is the only way to prevent large numbers of them from fleeing or committing new

crime. Thus it deemed individualized predictive evidence irrelevant.

The Government nonetheless provides an expedited hearing to any § 1226(c) detainee who contends that he is not subject to § 1226(c). As *Demore* explained, at such "*Joseph* hearings":

> [T]he detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention. *See* 8 U.S.C. § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999).

Demore, 538 U.S. at 514 n.3. Due process concerns are at a minimum when, as here, the Government affords expedited review before an impartial decisionmaker of every factual issue relevant to a § 1226(c) detention decision.[9] Regardless whether detention of citizens under similar circumstances could pass constitutional

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[9] Respondents argue that expedited *Joseph* hearings are constitutionally inadequate because they do not allow consideration of all issues that Respondents would like to assert, RO Br. 21 n.6. But the only issues they cite (individualized evidence of danger or flight risk, and whether the Government might ultimately exercise its discretion to waive a deportable offense) are not ones that Congress deemed relevant to its determination regarding whether detention will "increas[e] the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528.

muster, "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id.* at 522.

II. THE CONSTITUTION DOES NOT REQUIRE BOND HEARINGS FOR ALIENS SEEKING ADMISSION WHO ARE SUBJECT TO MANDATORY DETENTION UNDER 8 U.S.C. § 1225(b)

The Arriving Subclass consists of aliens who have not yet entered the United States and are subject to mandatory detention under 8 U.S.C. § 1225(b), which states that aliens who are intercepted while seeking to enter the country and who are not "clearly and beyond a doubt entitled" to admission "shall be detained" pending a hearing before an Immigration Judge to determine whether they should be removed from the country. 8 U.S.C. § 1225(b)(2)(A). Mandatory detention of such aliens is not a new policy; it has been in place for well more than a century.

Members of the Arriving Subclass have an even weaker constitutional claim than do members of the Criminal Subclass. The subclass consists almost entirely of arriving aliens who seek entry on the basis of an asylum claim.[10] While the United States is justly

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[10] Arriving aliens who are deemed inadmissible and are determined (following interview by an asylum officer) to lack even a credible fear of persecution in their home country are subject to IIRIRA's "expedited removal" proceedings. Such aliens are "removed from the United States without further hearing," 8 U.S.C. § 1225(b)(1)(A)(i), and thus are never subject to extended detention under § 1225(b)(2)(A). Respondents raise a theoretical claim that some long-term resident aliens might be subjected to

proud of its long humanitarian tradition of providing refuge to those who can demonstrate that they face persecution elsewhere, the Court has never suggested that nonresident aliens possess a constitutional right to asylum. If the federal courts tell Congress that it lacks the power to detain asylum seekers at the border for the period necessary to ascertain the validity of the asylum claim, then Congress may conclude that it should cut back or eliminate asylum admissions.

Because members of the Arriving Subclass have not been admitted to the United States, their Due Process Clause protections are minimal. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas*, 533 U.S. at 693.[11] An arriving alien may, of course, avoid detention by returning home. But if he persists in requesting admission into the United States, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). An alien seeking admission "requests a privilege and has no constitutional rights regarding his application, for the

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mandatory detention under § 1225(b)(2)(A) upon returning to the United States after a brief trip abroad, but Respondents identify no such individuals—and no member of the Arriving Subclass meets that description. By Respondents' own estimate, 97% of those subject to extended detention under § 1225(b)(2)(A) are asylum seekers.

[11] Arriving aliens denied admission and being detained pending removal are deemed never to have entered the country. *Ibid*; 8 U.S.C. § 1225(a)(1).

power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 31 (1982).

The reduced constitutional status of arriving aliens in comparison to aliens already within the country makes eminent sense—the latter group has had an opportunity to begin developing ties with our society and assuming rights and responsibilities that resemble those of citizens. An alien is accorded "an ascending scale of rights as he increases his identity with society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). The Constitution has extended the "privilege of litigation" to aliens living within the United States "only because permitting their presence in the country implied protection." *Id.* at 777-78. Arriving aliens who have not previously been permitted to live in the United States thus have no basis for claiming a right to enter our society while their removal proceedings are pending.

In asserting a due-process right to be released during removal proceedings in the absence of individualized evidence that they pose a flight risk or a danger to society, Respondents Farah and Abdikadir (the representatives of the Arriving Subclass) urge the Court to overturn *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), which denied virtually all due-process protection to arriving aliens.[12] Respondents

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[12] *Mezei* involved an alien denied admission by immigration authorities and being held indefinitely at Ellis Island. He had lived in the United States as a resident alien for 25 years before traveling to Europe in 1948. His wife and family remained in Buffalo, and he attempted to return less than two years later.

assert that *Mezei* is out of step with modern due-process case law. RO Br. 29-30. But the Court need not re-affirm *Mezei* in full in order to reject Respondent's due-process claims.

Criticism of *Mezei* has focused largely on its failure to recognize Mr. Mezei's *procedural* due-process claims: the Government excluded him because it claimed that he posed a national security threat, yet it failed to disclose any of its evidence and denied him an opportunity to contest the claim. Respondents make no similar procedural claim here. They were all provided a full and fair hearing at which to demonstrate that they were entitled to asylum. Instead, they assert a substantive due process claim: that the Due Process Clause prohibits their detention during removal proceedings when, as here, the Government does not claim to possess individualized evidence demonstrating flight risk or danger to society.

Four justices dissented in *Mezei*. But the sole basis for their dissents was that the Government had denied Mezei procedural due process. *Mezei*, 345 U.S. at 218 (Black, J., dissenting); *id.* at 227 (Jackson, J., dissenting). Indeed, Justice Jackson explicitly rejected Mezei's claim that his confinement violated substantive due process. He explained:

The practical effect of Mezei's exclusion was detention with no discernable endpoint because he was stateless, and no other country was willing to accept him. *Mezei*, 345 U.S. at 216. The Government told Mezei that he was denied admission as a national security risk, but it denied him a hearing at which he could contest that determination.

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. ... Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. ... Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. ... I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.

Id. at 222-24. Members of the Arriving Subclass are not being detained based on a finding that they, individually, pose a risk of flight or a danger to society. Rather, they are being detained at the border because they refuse to return home and have not yet demonstrated that they have a right to enter the United States. They are being provided an opportunity to make that showing before an impartial decisionmaker. The Due Process Clause requires nothing more.

III. THE CONSTITUTION DOES NOT REQUIRE THE PROCEDURAL PROTECTIONS MANDATED BY THE NINTH CIRCUIT

Even if the Court concludes that Respondents are entitled to individualized bond hearings, the Due Process Clause provides no support for the procedural rights mandated by the Ninth Circuit. The Constitution does not require, in bond hearings for an alien who has been detained for six months pending completion of removal proceedings, that the alien be released unless the Government demonstrates by "clear and convincing evidence" that the alien is a flight risk or a danger to the community, that the length of the alien's detention be weighed in favor of release, or that new bond hearings be afforded automatically every six months.

The Ninth Circuit held that, at a bond hearing for any alien being held pending completion of removal proceedings, the Government—if it wishes to continue to detain the alien—bears the burden of proving that the alien is a flight risk or a danger to the community, and must meet a "clear and convincing evidence" standard of proof. Pet. App. 52a. It stated, "[T]he Supreme Court has repeatedly reaffirmed the principle 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.'" *Ibid* (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)). It concluded that "a clear and convincing standard of proof provides the appropriate level of procedural protection in light of the substantial

liberty interest at stake" in this case. *Id.* at 53a (citation omitted). The Ninth Circuit's case citations are inapposite. *Cooper* and all but one of the cases relied on by the Ninth Circuit involved the due process rights of American citizens.[13] As noted above, the Due Process Clause provides significantly fewer protections for resident aliens than for citizens and even fewer for arriving aliens and for aliens (including many of those in the Criminal Subclass) whose presence in the United States is unauthorized.

Imposing the burden of proof on the Government (as well as a heightened standard of proof) makes little sense in the context of bond hearings for detained aliens. Personal details about the alien's life (*e.g.*, strong contacts with family in the United States) are relevant in determining whether he is likely to flee if released from detention. The alien is far more likely to know those details than is the Government. Accordingly, it makes much more sense to require the alien to demonstrate that he will not flee than to require the Government to prove that he is likely to flee. That is particularly true in the case of arriving aliens. Immigration officials are likely to know

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[13] The one exception, *Woodby v. INS*, 385 U.S. 276 (1966), involved the standard of proof imposed on the Government when it seeks to deport an alien already present in the United States. In that case, the Government conceded that immigration statutes imposed on it the burden of proving deportability; the Court's conclusion that the Government was required to meet that burden with "clear and convincing evidence" made no mention of the Due Process Clause. More importantly, unlike the Supreme Court cases involving citizens cited by the Ninth Circuit, *Woodby* had nothing to say about government detention decisions. Nor did *Woodby* address exclusion of arriving aliens.

virtually nothing about a removable alien who arrives at the Nation's borders; if they must bear the burden of demonstrating by clear and convincing evidence that this particular alien is likely to flee if released, then they will be unlikely to prevent release of *any* of the thousands of Arriving Subclass members who appear at the borders each year. Protecting the borders will become all but impossible once unauthorized aliens learn that "asylum" is a magic word that will set you free in the United States.

The Ninth Circuit also held that longer detention "requires more robust procedural protections" and thus that "a noncitizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months." Pet. App. 56a. That holding finds no support in this Court's case law. *Demore* makes clear that the Government has a strong interest in ensuring that aliens in removal proceedings do not flee, thereby ensuring that, "if ordered removed, the alien will be successfully removed." 538 U.S. at 528. So long as removal proceedings have a foreseeable endpoint, that interest does not diminish with the passage of time. Indeed, human nature suggests that the likelihood that an alien will abscond increases over time; the urge to flee will increase as the date of a final removal order approaches. Moreover, the point of a bond hearing is to weigh the benefits to the government against the burdens imposed on the alien by continued detention. The burdens of *continued* detention do not vary based on how long the alien has already been detained. Finally, by ordering the placement of more thumbs on the alien's side of the scale as the length of the detention grows, the Ninth Circuit has created a strong incentive to aliens to delay

their removal proceedings as long as possible—with the hope that they eventually can outwait the Government and win their freedom.

The Ninth Circuit also held that the Government "must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention 'as the period of confinement grows.'" Pet. App. 58a (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011)). Its rationale was similar to its rationale for requiring "greater solicitude" for aliens detained for more than one year. That is, because (according to the appeals court) every passage of an additional six-month increment of time calls further into question the constitutionality of continued detention, periodic bond hearings are a constitutional necessity. *Ibid.* But, as explained above, the passage of time does *not* reduce the Government's interest in maintaining detention (at least as long as removal proceedings are moving forward), and thus this periodic-hearing requirement is not constitutionally mandated.

Amici do not mean to suggest that a second bond hearing is never justified. Indeed, immigration law authorizes aliens who have been ordered detained by an Immigration Judge under § 1226(a) to obtain a second detention hearing by showing that "circumstances have changed materially." 8 C.F.R. § 1003.19(e). That regulation is comparable to bail rights afforded to defendants incarcerated pending trial and more than satisfies whatever due process hearing rights an alien may possess to challenge his continued detention pending removal.

IV. THE FEDERAL COURTS LACK JURISDICTION TO HEAR LARGE PORTIONS OF RESPONDENTS' CLASS CLAIMS

Congress has significantly restricted the jurisdiction of federal courts over immigration matters. In awarding injunctive relief on a class-wide basis against federal immigration officials, the lower courts far exceeded their jurisdiction. That jurisdictional issue provides an alternative basis for reversing the Ninth Circuit.

8 U.S.C. § 1226 governs the "Apprehension and detention of aliens." Section 1226(a) states the general rule: aliens arrested pending a decision on whether they are to be removed from the United States "may" continue to be detained following their arrest or "may" be released on "bond of at least $1,500." Section 1226(c) governs detention of aliens convicted of certain serious crimes; it states that the Government "shall" take such criminal aliens into custody and may release them pending removal only in extremely limited circumstances not relevant here. Section 1226(e), entitled "Judicial review," states in full:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Demore held that § 1226(e)'s jurisdiction-

stripping language was insufficiently specific to deprive federal courts of jurisdiction to consider an individual *habeas corpus* petition filed by an alien criminal for the purpose of challenging his § 1226(c) detention. 538 U.S. at 516-17.[14] The Court presumed that Congress does not ordinarily intend to bar *habeas corpus* claims of individuals detained by the federal government and applied a "clear statement" rule of construction to § 1226(e): "Where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent. *See INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001)." *Id.* at 517. The Court held that the federal courts possessed jurisdiction to hear *habeas* petitions filed by § 1226(c) detainees because "Section 1226(e) contains no explicit provision barring habeas review." *Ibid.*

But this lawsuit is not limited to *habeas corpus* claims asserted by individual detainees seeking relief from federal detention under the *habeas* statute, 28 U.S.C. § 2241. Respondents' Third Amended Complaint (TAC) also seeks declaratory relief, 28 U.S.C. § 2201-02, and relief under the All Writs Act, 28 U.S.C. § 1651. TAC ¶ 3. It seeks relief on a class-wide basis, including detailed declaratory and injunctive relief that would have the effect of substantially revising the Government's detention procedures. TAC at 31-32. Because such relief is far afield from the typical *habeas* claim, the "clear statement" rule

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[14] Three justices disagreed and would have held that the federal courts lacked jurisdiction to hear the *habeas* petition. 538 U.S. at 533-540 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

articulated in *Demore* and *St. Cyr* is inapplicable.

If § 1226(e) is construed in accordance with the plain meaning of its language and without reference to the "clear statement" rule, the claims of the Criminal Subclass and the § 1226(a) Subclass are jurisdictionally barred—except for the individual *habeas corpus* claims of Respondents Rodriguez, Farias Cornejo, and Ruelas. Section 1226(e) states that the Government's discretionary application of § 1226 "shall not be subject to review," and that "[n]o court may set aside any action or decision ... regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The injunction imposing detailed requirements regarding future bond hearings surely qualifies as a decision "regarding ... the grant, revocation, or denial of bond." The only plausible interpretation of that statute is that the federal courts lack jurisdiction to hear Respondents' claims for declaratory relief and class-wide relief and their claims arising under the All Writs Act. If the federal courts determine that the Government's detention of the individual Respondents violates their constitutional rights, they may so rule pursuant to 28 U.S.C. § 2241. But they lack jurisdiction to grant injunctive and declaratory relief that goes beyond ordering the Government to cease detaining the individual Respondents.

The class-wide relief ordered by the Ninth Circuit is also barred by 8 U.S.C. § 1252(f)(1), entitled "Limits on Injunctive Relief," which states:

> Regardless of the nature of the action or claim or of the identity of the party or

> parties bringing the action, no Court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of [8 U.S.C. § 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

The last clause of § 1252(f)(1) prohibited the Ninth Circuit from issuing class-wide injunctive relief with respect to detentions under §§ 1225 and 1226. Instead, the Ninth Circuit was limited to issuing an injunction with respect to the detention of "an individual alien against whom proceedings under such part have been initiated." Section 1252(f) thus barred the class-wide relief granted by the lower courts.

In its decision granting class certification, the Ninth Circuit sought to explain why § 1252(f) did not apply. Pet. App. 120a-126a. It noted that Respondents asserted that their prolonged detention violated § 1226(a) and that the mandatory detention provisions of §§ 1225(b) and 1226(c) did not apply to detentions lasting more than six months. The court held that while § 1252(f) might bar an injunction against enforcement of §§ 1225 and1226 (if, *e.g.*, those statutes were deemed unconstitutional), it did not bar courts from enjoining, on a class-wide basis, conduct "not authorized by the statutes." *Id.* at 124a.

That holding squarely conflicts with the plain language of § 1252(f). The only injunctive relief permitted by § 1252(f) is an injunction "with respect to

the application of [§§ 1225 or 1226] to an individual alien." In other words, an injunction "with respect to the application" of those statutes to a class of aliens *is* barred, regardless whether the aliens assert that the Government is applying the statutes in violation of the terms of the statutes, or assert that the statutes themselves are unconstitutional.

Demore ensures that individual aliens will have a federal forum within which to assert that their continued detention violates their constitutional rights. But the Court should take this opportunity to remind the lower federal courts that their jurisdiction extends no further than the jurisdiction granted to them by Congress and that class-wide relief is inappropriate in immigration cases. As this Court has noted repeatedly, immigration policy is "entrusted to the political branches of government" and is "largely immune from judicial inquiry or interference." *Mathews v. Diaz,* 426 U.S. at 81 n.17.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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