No. 15-1204

# In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

*v.*

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS


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## QUESTIONS PRESENTED

Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are:

1. Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether 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, 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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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 804 F.3d 1060. An opinion affirming a preliminary injunction (Pet. App. 60a-100a) is reported at 715 F.3d 1127. An opinion reversing the denial of class certification (Pet. App. 101a-138a) is reported at 591 F.3d 1105. The permanent injunction order of the district court (Pet. App. 139a-148a) is not published in the *Federal Supplement* but is available at 2013 WL 5229795.

### JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 21, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Kenne-

dy further extended the time to March 26, 2016, and the petition was filed on March 25, 2016. The petition for a writ of certiorari was granted on June 20, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

### A. Detention Of Aliens Seeking Admission Into The United States

The Secretary of Homeland Security is responsible for "[s]ecuring the borders," enforcing the immigration laws, and "control[ling] and guard[ing] the boundaries and borders of the United States against the illegal entry of aliens." 6 U.S.C. 202(2) and (3); 8 U.S.C. 1103(a)(5).[1] The longstanding rule is that aliens who arrive at our Nation's doorstep seeking admission, but who are "not clearly and beyond a doubt entitled" to be admitted, "shall be detained" pending the outcome of proceedings before an immigration judge to determine whether the alien should be removed from the country. 8 U.S.C. 1225(b)(2)(A); see Immigration and Nationality Act (INA), ch. 477, Tit. II, § 235(b), 66 Stat. 199 (similar); Immigration Act of 1917 (1917 Act), ch. 29, § 16, 39 Stat. 886 (similar). Immigration judges are administrative judges in the Executive Office for Immigration Review (EOIR) in the Department of Justice. 8 C.F.R. 1001.1(*l*).

Congress has provided one potential avenue for release of an alien detained under Section 1225(b): The Secretary, "in his discretion" and on a "case-by-case basis for urgent humanitarian reasons or significant

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[1] Congress transferred to the Secretary the immigration enforcement functions formerly vested in the Commissioner of Immigration and Naturalization. *E.g.*, 6 U.S.C. 202(3), 557.

public benefit," may parole any alien "into the United States temporarily under such conditions as he may prescribe." 8 U.S.C. 1182(d)(5)(A). "[W]hen parole is not granted, the noncitizen is detained during the pendency of the inquiry" into whether he should be removed. 5 Charles Gordon et al., *Immigration Law and Procedure* § 61.05[2], at 61-28 (2016). Accordingly, an immigration judge "may not" conduct a bond hearing to determine whether an arriving alien should be released into the United States during removal proceedings. 8 C.F.R. 1003.19(h)(2)(i)(B).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III, § 302(a), 110 Stat. 3009-579, Congress amended Section 1225(b) to add "expedited removal" procedures to "streamline[] rules and procedures * * * to make it easier to deny admission to inadmissible aliens," while ensuring that there is "no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 157-158 (1996) (House Report). Section 1225(b) now provides that, if a Department of Homeland Security (DHS) immigration officer determines that an alien "who is arriving in the United States" lacks valid documents or is inadmissible due to fraud, the officer "shall order the alien removed from the United States without further hearing." 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7).[2] If the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture, a DHS

[2] IIRIRA also authorized the Secretary to designate for expedited removal "certain other aliens" who crossed the border two years or less before being detained. 8 U.S.C. 1225(b)(1)(A)(iii). See note 5, *infra*.

asylum officer determines whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 C.F.R. 208.30, 235.3(b)(4). The alien "shall be detained pending a final determination of credible fear of persecution." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If such an alien is found to lack (or never asserts) a credible fear, he "shall be detained" until removed. *Ibid.* If he has a credible fear, he "shall be detained for further consideration of the application for asylum" by an immigration judge. 8 U.S.C. 1225(b)(1)(B)(ii).

As noted, the Secretary has discretion to parole inadmissible aliens into the United States. 8 U.S.C. 1182(d)(5). For aliens detained under Section 1225(b), including those lacking proper documentation who have established a credible fear, regulations provide that DHS may grant parole if the alien is "neither a security risk nor a risk of absconding" and (1) has a serious medical condition; (2) is pregnant; (3) falls within certain categories of juveniles; (4) will be a witness; or (5) if continued detention is otherwise "not in the public interest." 8 C.F.R. 212.5(b); see 8 C.F.R. 235.3(c). Under agency guidance, such aliens who establish a credible fear are automatically considered for parole, and are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger. J.A. 48-49.

**B. Detention During Proceedings To Remove Aliens Already Inside The United States**

1. A different framework exists for the detention and removal of aliens who are already inside the United States. The longstanding general rule is that "an alien may be arrested and detained," on issuance of a warrant, "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a);

see INA § 242(a), 66 Stat. 208; 1917 Act §§ 19-20, 39 Stat. 889-891. "[P]ending such decision," the Secretary "may continue to detain the arrested alien" or "may release" the alien on bond or conditional parole, also known as release on recognizance. 8 U.S.C. 1226(a)(1) and (2); see INA § 242(a), 66 Stat. 208-209 (same); 1917 Act §§ 19-20, 39 Stat. 889-891 (similar).[3] The INA thus "does not grant bail as a matter of right." *Carlson* v. *Landon*, 342 U.S. 524, 540 (1952).

Implementing regulations provide that an immigration officer "may" release an alien detained under Section 1226(a) on bond if "the alien * * * demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8); see 62 Fed. Reg. 10,360 (Mar. 6, 1997). An alien who is denied bond (or who believes it was set too high) may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of the officer's decision. *Reno* v. *Flores*, 507 U.S. 292, 309 (1993); see 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); see *In re Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999); see also *Guerra*, 24 I. & N. Dec. at 40 (identifying factors relevant to bail risk).

The alien may appeal the immigration judge's custody determination to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(3)(i), 1236.1(d)(3)(i). And an alien may, at any time, ask an immigration judge to redetermine bond again if "circumstances have

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[3] For simplicity, this brief uses "bond" to encompass both bond and recognizance.

changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); see *In re Chew*, 18 I. & N. Dec. 262, 263 n.2 (B.I.A. 1982) (similar).

2. In IIRIRA, Congress enacted 8 U.S.C. 1226(c) to prohibit the release of certain criminal aliens during their removal proceedings. Congress enacted that mandate "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. Paragraph (1) directs that the Secretary "shall take into custody any alien" who is inadmissible to or deportable from the United States because he committed a specified crime or engaged in terrorist activities. 8 U.S.C. 1226(c)(1). For an alien who has not been admitted (*i.e.*, who entered illegally or was paroled), paragraph (1) applies if the alien committed a crime involving moral turpitude (unless that is his only conviction and the alien was a minor or the statutory maximum was a year or less and he was sentenced to six months or less); committed a controlled-substance offense; was sentenced to five or more years of imprisonment for multiple criminal convictions; engaged in controlled-substance trafficking; or committed an offense in certain uncommon categories. 8 U.S.C. 1226(c)(1)(A); see 8 U.S.C. 1182(a)(2). For an alien who was admitted, paragraph (1) applies if the alien committed an aggravated felony, a crime involving moral turpitude for which the alien was sentenced to a year or more of imprisonment, two or more crimes involving moral turpitude, a controlled-substance offense other than simple possession of 30 grams or less

of marijuana, a firearms offense, or an offense in certain uncommon categories, see 8 U.S.C. 1226(c)(1)(B) and (C), 1227(a)(2)(A)-(D), or if the alien has engaged in terrorist activities, see 8 U.S.C. 1226(c)(1)(D), 1227(a)(4)(B).

Paragraph (2) expressly prohibits the release of any alien detained under paragraph (1), with one narrow exception. It provides that the Secretary "may release" an alien detained under paragraph (1) "only if" the Secretary decides it is "necessary" for certain witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2).

In *Demore*, this Court held that Section 1226(c) is constitutional on its face and upheld the mandatory detention, without bond, of a lawful permanent resident alien (LPR). 538 U.S. at 531. The respondent, Kim, had already been detained for "six months." *Ibid.* The Court explained that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Ibid.*

**C. Detention Under A Final Order Of Removal**

If an alien is ordered removed from the United States and there is no appeal or the BIA affirms, the order of removal becomes administratively final. 8 U.S.C. 1101(a)(47)(B). Detention authority then shifts to 8 U.S.C. 1231, which provides that DHS "shall remove the alien from the United States" within a "removal period" ordinarily of 90 days, and allows

detention of the alien during that period. 8 U.S.C. 1231(a)(1)(A), (C), and (2).[4]

If DHS does not remove an inadmissible or criminal alien within the removal period, it "may" continue to detain him or may release him on supervision. 8 U.S.C. 1231(a)(6). In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted Section 1231(a)(6) to authorize post-removal-period detention for a "reasonable" time, with six months being "presumptively reasonable" and detention remaining permissible unless "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 700-701.

**D. Procedural History**

In May 2007, respondents initiated this habeas corpus class action on behalf of themselves and all other aliens in removal proceedings who have been detained by DHS in the Central District of California for six months or more. Pet. App. 4a. Respondents contended, among other things, that they are entitled to bond hearings before an immigration judge once they have been detained for six months. The district court declined to certify a class, but the Ninth Circuit reversed. *Ibid.*; see *id.* at 101a-138a.

On remand, the district court certified a class of all aliens within that district who are detained for "longer than six months" during removal proceedings, are not detained pursuant to a special national security detention statute, *e.g.*, 8 U.S.C. 1537, and have not been afforded a bond hearing. Pet. App. 5a-6a. The court divided the class into subclasses, corresponding to the

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[4] Some circuits, including the Ninth Circuit, have held that when an alien files a petition for review and obtains a stay of removal, detention authority reverts to Section 1226. See Pet. App. 50a-51a.

statutes under which class members are detained: Sections 1225(b), 1226(c), and 1226(a). *Ibid.*

The district court entered a preliminary injunction. Pet. App. 147a-148a. It required the government to provide bond hearings to aliens detained for six months under Section 1225(b), as well as criminal aliens detained for six months under Section 1226(c). *Ibid.* The Ninth Circuit affirmed. *Id.* at 6a, 60a-100a.

The district court then granted summary judgment to respondents and entered a permanent injunction. Pet. App. 139a-148a. The permanent injunction requires the government to provide any class member who is detained for six months or more with a bond hearing. *Id.* at 3a-4a, 144a. It further requires "[t]he government [to] prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond." *Id.* at 142a.

The court of appeals affirmed in part and reversed in part. Pet. App. 1a-59a. Applying the canon of constitutional avoidance, the court reasoned that "prolonged" detention under any of the relevant statutes would give rise to serious constitutional doubt, that Congress would have wanted to avoid these doubts by implicitly limiting detention without bond to a "reasonable time," and that detention becomes unreasonable "at the six-month mark." *Id.* at 13a (citations omitted); see *id.* at 32a-38a (discussing Section 1226(c)); *id.* at 39a-45a (Section 1225(b)); *id.* at 46a-48a (Section 1226(a)). The court did not attempt to square that interpretation with the text of the relevant statutes or regulations.

The court of appeals also revised the standards and procedures applicable in bond hearings. The court concluded that, in all bond hearings under the injunc-

tion, the alien is entitled to be released unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger to the community. Pet. App. 49a-50a. The court also held that immigration judges "must consider the length of time for which a noncitizen has already been detained." *Id.* at 56a. And the court held that "the government must provide periodic bond hearings every six months" to all class members, including aliens who already had a bond hearing under Section 1226(a) and had not requested another. *Id.* at 58a.

## SUMMARY OF ARGUMENT

Unsatisfied with the current immigration detention system established by the political Branches, respondents seek a dramatic and wholesale revision of that system through court order. The court of appeals below accepted that invitation, replacing the longstanding legal regime with a radical new one in which aliens newly arriving at our borders or convicted of crimes have a presumptive entitlement to be released into the United States, if custody during removal proceedings lasts six months. The court held that arriving and criminal aliens must be given bond hearings before an immigration judge at that point, despite Congress's directions that they shall be detained, and the court held that such an alien is entitled to be released into the United States unless the *government* can establish through clear and convincing evidence that the alien is a flight risk or danger. The court then imposed a new factor for immigration judges to consider in bond hearings and required automatic bond hearings every six months, even when nothing else has changed since a prior hearing.

Each of these holdings is wrong, and the whole is worse than the sum of its parts. The court of appeals' revised immigration-detention scheme conflicts with the unambiguous text of controlling statutes and regulations. It conflicts with this Court's longstanding rule that the political Branches have plenary control over which aliens may physically enter the United States and under what circumstances. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). It conflicts with this Court's decision in *Demore* v. *Kim*, 538 U.S. 510 (2003), upholding the constitutionality of Section 1226(c)'s mandate that criminal aliens be detained, without bond, during removal proceedings. *Id.* at 531. It causes the very problems of recidivism and flight by criminal aliens that Congress enacted Section 1226(c) to prevent. And it creates an incentive for aliens to contest issues and prolong proceedings in order to be released.

We do not diminish the human consequences of detaining an alien during the proceedings the government has provided if he contests his removability, applies for relief from removal, or seeks appellate review. But the court of appeals seriously erred in using a supersized version of the canon of constitutional avoidance here.

These laws are clear: Congress has long provided that aliens seeking admission who are "not clearly and beyond a doubt entitled to be admitted" "shall" be detained, 8 U.S.C. 1225(b), and parole is the only exception. Longstanding regulations provide that immigration judges "may not" release arriving aliens on bond, 8 C.F.R. 1003.19(h)(2)(i)(B). The Secretary also "shall" take certain criminal aliens into custody, and may release them "only if" a narrow exception for

witness protection is satisfied. 8 U.S.C. 1226(c)(1) and (2). Those mandates are unambiguous, and the avoidance canon has no role to play.

The court of appeals' interpretation would also subvert the fundamental purpose of these statutes, which are clearly constitutional in the vast majority of their applications. The fundamental purpose of Section 1225(b) is to control the border as to aliens on the threshold of entry. The court nonetheless construed it to impose a six-month cap on detention without bond hearings of aliens arriving at our borders for the first time, in order to avoid a constitutional problem it believed could exist if the statute were applied to LPRs returning from abroad. But LPRs returning from abroad are ordinarily exempt from detention under that provision; *Mezei* establishes that an LPR who has not established his admissibility can be detained indefinitely after returning from an extended trip abroad; any such detention under Section 1225(b) has a definite end point, because it ends when removal proceedings end; and parole exists as a safeguard against undue detention. Doubtful applications of Section 1225(b) thus would be vanishingly rare and cannot remotely justify the court's sweeping revision of the statute, which is contrary to Congress's basic aim of controlling the border.

Doubtful applications of Section 1226(c) are also rare and likewise cannot justify invoking the avoidance canon to impose a six-month cap on mandatory detention of criminal aliens. Section 1226(c)'s text is crystal clear. In *Demore*, this Court affirmed the mandatory detention of a convicted criminal alien under Section 1226(c) for more than six months, and explained that constitutionality depends not simply on

the passage of time but on whether detention continues to serve its purpose of preventing flight and recidivism during removal proceedings. 538 U.S. at 529-531. The Court recognized that aliens' choices to seek continuances, relief from removal, or appeals require "difficult judgments," because they come at the cost of more time in detention, but that the difficulty of such choices does not make it unconstitutional for Congress to mandate continued detention during the time they may trigger. *Id.* at 530-531 & n.14. A detention of six months or even considerably longer thus does not itself cause a constitutional problem, as it may simply reflect the legitimate consequences of an alien's choices within a complex adjudicatory system that affords the alien extensive opportunities for relief and review. And releasing criminal aliens on bond would create the very opportunities for recidivism and flight that Congress enacted Section 1226(c) to prevent.

More fundamentally, the Secretary's plenary control of the border, and his detention of convicted criminals for the period necessary to complete their removal proceedings, are vital and intended features of this Nation's immigration law—not problems that Congress would have wanted to avoid. Congress enacted IIRIRA to streamline the Secretary's ability to remove newly arriving aliens and convicted criminals, and to prevent them from fleeing or committing crimes during their removal proceedings. That same Congress did not, sub silentio, hamstring those efforts by creating a presumptive entitlement for such aliens to be released into the United States after six months, nor did that Congress wish to provide an incentive for aliens to extend their proceedings to hit that cap.

To be faithful to the unambiguous judgments of Congress and the Secretary, Sections 1225(b) and 1226(c) must be enforced as written. An alien who believes his circumstances present a rare case in which his detention has become unconstitutional can bring an as-applied challenge to the statute under the Due Process Clause in an individual habeas corpus proceeding. That avenue protects individual constitutional rights without carving enormous loopholes into measures that are vital for effective control of the Nation's borders and enforcement of the immigration laws against criminal aliens.

Some may believe that the Ninth Circuit's vision of immigration detention is wiser or more humane, while others would disagree. But Congress weighed the interests in controlling the border, protecting the public from criminal aliens, affording individual aliens adequate protections and opportunities for relief and review, and minimizing the adverse foreign-relations impact of U.S. immigration law. The canon of constitutional avoidance is not a tool for courts to comprehensively rewrite those laws and strike a different balance.

## ARGUMENT

This Court has "long recognized [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) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 & n.6 (1972) (collecting

cases). This Court has also long recognized that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore* v. *Kim*, 538 U.S. 510, 523 (2003). "[D]eportation proceedings 'would be in vain if those accused could not be held in custody pending the inquiry into their true character.'" *Ibid.* (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)); see *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993).

The court of appeals' revision of the legal framework governing detention during removal proceedings fundamentally disregards these principles. And it is implausible that, to avoid rare constitutional problems that might arise from detaining an alien arriving at our borders or a criminal alien, the Congress that enacted IIRIRA would have preferred to give *all* arriving aliens and criminal aliens a presumptive entitlement to be released into the United States if detention lasts for six months. Rather, to be faithful to Congress's plan, the controlling provisions must be read to mean what they say, leaving any potentially difficult applications of those provisions to be resolved in as-applied constitutional challenges in individual habeas proceedings.

## I. ALIENS DETAINED UNDER SECTION 1225(b) CANNOT BE RELEASED ON BOND BY AN IMMIGRATION JUDGE

Aliens seeking admission who are not "clearly and beyond a doubt entitled to be admitted" are statutorily prohibited from physically entering the United States and must be detained during removal proceedings, 8 U.S.C. 1225(b)(2)(A), unless the Secretary exercises his discretion to release them on parole, 8 U.S.C. 1182(d)(5). Congress has never permitted immigra-

tion judges to release such aliens on bond during removal proceedings—much less created a presumptive entitlement for arriving aliens to be released into the United States after six months unless the government can show (by clear and convincing evidence) that the alien is a danger or flight risk. There is no basis for that radical judicial revision of the legal regime that has protected our Nation's borders for a century.

### A. Aliens Detained Under Section 1225(b) Can Only Be Released On Parole And Are Ineligible For A Bond Hearing

The controlling statutory and regulatory text leaves no room for the court of appeals' interpretation that aliens detained under Section 1225(b) may be released on bond by an immigration judge if detention lasts for six months. Congress foreclosed that result by providing that an alien seeking admission into the United States who is "not clearly and beyond a doubt entitled to be admitted * * * *shall be detained* for a proceeding" to determine whether the alien should be removed. 8 U.S.C. 1225(b)(2)(A) (emphasis added). Congress reiterated that directive in IIRIRA for aliens who appear to be inadmissible due to fraud or a lack of valid travel documentation and are subject to expedited removal. Any such alien "*shall*" be ordered removed "without further hearing" unless he claims a credible fear or intends to apply for asylum, in which case he "*shall be detained* pending a final determination of credible fear"; "if found not to have such a fear, until removed"; and if found to have a credible fear, he "*shall be detained* for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(A)(i), (B)(ii), and (iii)(IV) (emphases added).

"Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016); see *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001). And here, the repeated "shall be detained" clearly means what it says, because Congress said "may" when it meant "may." For example, the provision in *Zadvydas* states that the government "may" continue to detain an alien after expiration of the removal period. 8 U.S.C. 1231(a)(6). And Section 1226(a) provides that the Secretary generally "may" take an alien into custody and "may continue to detain the arrested alien" or "may release the alien" on bond. 8 U.S.C. 1226(a)(1) and (2)(A).

Congress crafted only one exception to the rule that, when there is doubt about admissibility, an alien seeking admission "shall" be detained during removal proceedings: In the same provision that defines which aliens are inadmissible, Congress provided that the Secretary "may" parole into the United States "any alien applying for admission," "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5)(B) (standard for refugees). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted).

There is no such contrary evidence here. Indeed, although IIRIRA replaced the term "entry" with the more precise terms "admitted" and "admission," the same fundamental substantive rule has been in place for a century. See INA §§ 212(d)(5), 235(b), 66 Stat.

188, 199; 1917 Act § 16, 39 Stat. 886; *Kaplan* v. *Tod*, 267 U.S. 228, 230-231 (1925) (parole under 1917 Act); *In re R-*, 3 I. & N. Dec. 45, 46 (B.I.A. 1947) (same).

Federal regulations have codified this longstanding rule: An immigration judge "may not" hold a bond hearing for "[a]rriving aliens in removal proceedings." 8 C.F.R. 1003.19(h)(2)(i)(B). The only mechanism for releasing such an alien is via the Secretary's discretionary parole authority. See 8 C.F.R. 235.3(b)(2)(iii) (alien in expedited removal proceedings with credible fear "shall be detained" during removal proceedings, "except that parole of such alien * * * may be permitted"). These regulations are not arbitrary or capricious, warrant full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), and foreclose the court of appeals' statutory interpretation.[5]

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[5] Respondents contend that the government "already provides bond hearings" to some aliens detained under Section 1225(b). Br. in Opp. 14 (citing *In re X-K-*, 23 I. & N. Dec. 731, 734-735 (B.I.A. 2005)). That is inaccurate. *X-K-* establishes that the aliens at issue there ("certain other aliens" who already crossed the border without inspection, were encountered within two weeks and 100 miles of that illegal entry, were subject to expedited removal pursuant to designation by the Secretary, and were found to have a credible fear) were detained under regulations implementing Section 1226(a), not Section 1225(b): Relying on a regulatory lacuna, the BIA ruled that those aliens may obtain bond under "the regulations allow[ing] Immigration Judges to exercise the general custody authority of section [1226]." 23 I. & N. Dec. at 734 (citing 8 C.F.R. 1003.19(h)(2), 1236.1(c)(11) and (d)). By contrast, federal regulations direct that an immigration judge "may not" conduct bond hearings for arriving aliens. 8 C.F.R. 1003.19(h)(2)(i)(B). And *X-K-* stated that "[t]here is no question that Immigration Judges lack jurisdiction over arriving aliens" in removal proceed-

**B. The Statutory Background, Context, And Purpose Confirm That Release On Bond Is Not Permitted**

1. The court of appeals' interpretation also is implausible in light of the statutory background, context, and purpose.

a. As explained above, Section 1225(b) is the most recent iteration of a statutory framework that, for a century, has provided for the exclusion of inadmissible aliens arriving at the Nation's borders. It is also built on a deep foundation of this Court's immigration jurisprudence. "[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (quoting *Mezei*, 345 U.S. at 210). And "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore*, 538 U.S. at 531.

The authority of the political Branches is particularly strong—and countervailing constitutional interests are particularly faint—with respect to control of the Nation's borders as to aliens who stand "on the threshold of initial entry." *Mezei*, 345 U.S. at 212. For such aliens, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Ibid.* (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)); see *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.").

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ings. 23 I. & N. Dec. at 732. Respondents thus press a position *X-K-* itself described as unquestionably wrong.

In *Mezei*, for example, this Court upheld the indefinite detention of an LPR at the border for 21 months, without a hearing, as he sought to return to the United States after a nearly two-year trip abroad. 345 U.S. at 207-209. This Court rejected the proposition that his "continued exclusion deprives him of any statutory or constitutional right," *id.* at 215, and distinguished Mezei's "clear break" in "continuous residence" from an LPR's mere "temporary absence," where some kind of hearing may be required, *id.* at 213-214.

*Mezei* drew spirited dissents, but the Court was unanimous on the point that he could be held, without bond, during the period needed to effectuate his exclusion. See 345 U.S. at 222-223 (Jackson, J., dissenting) ("Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will."). Rather, the dissenting Justices objected only to the government's decision, on national security grounds, not to provide Mezei notice of or opportunity to challenge the basis for his exclusion. See *id.* at 218 (Black, J., dissenting) ("Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court."); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them.").

Consistent with this unbroken legal tradition, Congress provided in IIRIRA that an inadmissible alien arriving in or seeking admission to the United States "shall be detained" during proceedings to remove the alien from the country. 8 U.S.C. 1225(b)(1)(B)(ii),

(iii)(IV), and (b)(2). An immigration judge therefore "may not" release such an alien on bond. 8 C.F.R. 1003.19(h)(2)(i)(B). Congress has instead vested the Secretary with sole authority, as a matter of discretion, to decide whether to release the alien on parole. 8 U.S.C. 1182(d)(5); see 8 C.F.R. 235.3(c). As a result, the Executive retains plenary and firm control over the border and physical entry of aliens into the interior. Unlike the situation that elicited dissents in *Mezei*, aliens detained under Section 1225(b)(2) (and aliens who were in expedited removal under Section 1225(b)(1) but were found to have a credible fear) are entitled to a full hearing before an immigration judge to contest removal. And unlike in *Mezei*, detention under Section 1225(b) has a "definite termination point," *Demore*, 538 U.S. at 529, because it ends when those removal proceedings end.

b. The injunction affirmed below flies in the face of this longstanding legal regime and this Court's precedents. The injunction gives aliens seeking admission who are "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), an entitlement nonetheless to be allowed into the United States, so long as detention lasts six months and *the Secretary* cannot prove, *by clear and convincing evidence*, that they are flight risks or dangers. The Congress that enacted IIRIRA never would have adopted such a regime. Congress enacted IIRIRA to strengthen—not weaken—the Secretary's ability to secure the borders. See House Report 106 ("The first step in asserting our national sovereignty and controlling illegal immigration is to secure our nation's land borders.").

The ruling below would often defeat the very purpose of detaining such aliens: to ensure that the bor-

der actually keeps people out and to ensure physical custody over the alien to effectuate that exclusion. See *Demore*, 538 U.S. at 523; cf. *Mezei*, 345 U.S. at 216 ("Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding."). Under the injunction below, however, those aliens could physically enter the United States—and potentially abscond and thereby thwart efforts to remove them—even when the Secretary concludes that they should be detained rather than paroled.

Experience also indicates that flight is a serious problem. For example, EOIR reports that, in fiscal year 2015, 11,325 of the 27,443 initial case completions by immigration judges for released aliens—41% of the total—were *in absentia* orders after the alien absconded. EOIR, *FY 2015 Statistics Yearbook*, P3 (Apr. 2016) (*2015 Yearbook*). There is no reason to believe that the aliens released under the court of appeals' rule would be less likely to flee.[6]

2. The court of appeals' interpretation of Section 1225(b) would also undermine the operation of numerous statutory provisions. See *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a 'duty to construe statutes, not isolated provisions.'") (citation omitted). The INA spells out in great detail how aliens can obtain visas or otherwise seek admission to the United States, *e.g.*, 8 U.S.C. 1154, and which aliens

[6] The risk that aliens will abscond is also reflected in private markets for immigration bonds. See House Report 124 ("[B]onding companies are reluctant to underwrite the high risk of aliens failing to appear, and thus, aliens must put up the full amount of the bond.").

are inadmissible, 8 U.S.C. 1182(a). A rule of presumptive release after six months would render those exhaustive rules far less significant.

For example, Congress has defined which criminal offenses—subject to finely-tuned exceptions and waivers—make an alien inadmissible. See 8 U.S.C. 1182(a)(2). But the court of appeals' interpretation would make Congress's precision largely wasted effort in many cases after six months, if the government could not produce clear and convincing evidence of flight risk or danger. That is a particular problem for aliens newly arriving at our borders, about whom the government may know very little. Congress's general prohibition against admitting aliens without a visa or valid passport, 8 U.S.C. 1182(a)(7)(A) and (B), would similarly lose much of its force.

The court of appeals' interpretation also disregards Congress's longstanding interest in protecting American workers. Congress has generally prohibited aliens from being admitted as immigrants to perform skilled or unskilled labor when American workers are available to do the job, see 8 U.S.C. 1182(a)(5), and has prohibited the Secretary from authorizing aliens to lawfully work on the basis that they have been released on bond, 8 U.S.C. 1226(a)(3), 1324a(a). Under the Ninth Circuit's interpretation, however, it may be difficult for the government to establish that an economic migrant is a flight risk or a danger. And releasing such aliens on bond would likely force them to work off the books, rewarding the unscrupulous employers who hire them and distorting labor markets in precisely the ways Congress sought to prevent.

To be sure, the Secretary may release an alien on parole even when the alien is inadmissible under

Section 1182(a). But that is pursuant to express authorization in a latter subsection of the very same statute: 8 U.S.C. 1182(d)(5). That decision is made, as a matter of discretion, by the same official—the Secretary—Congress charged with guarding the borders. *Ibid.* And an alien released on parole may be authorized to work lawfully, 8 C.F.R. 274a.12(c)(11), thereby ameliorating the impact on American workers. Parole is thus properly the sole mechanism for releasing such aliens during removal proceedings, as the Secretary can weigh the full range of competing considerations.

3. The court of appeals' statutory interpretation is even more implausible in light of the incentives it would create for aliens to extend their removal proceedings in order to reach the six-month mark. "[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens." *Demore*, 538 U.S. at 530 n.14 (brackets in original) (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)); see *ibid.* (discussing evidence of aliens released on bond filing frivolous appeals to delay their removal). A Congress intent on "regaining control over our nation's borders," House Report 107, would not have countenanced a rule that would enable aliens to breach the borders so readily.

### C. The Canon Of Constitutional Avoidance Does Not Justify Supplanting The Longstanding Legal Regime Governing Control Of The Border

To support its wholesale revision of Section 1225(b), the court of appeals relied solely on the canon of constitutional avoidance. Pet. App. 39a-45a. For numerous reasons, that canon cannot support the court of appeals' decision.

At the outset, the avoidance canon is "a tool for choosing between competing plausible interpretations of a provision"; "[i]t 'has no application' in the interpretation of an unambiguous statute." *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014)). And it is "a means of giving effect to congressional intent, not of subverting it." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005); see *Salinas* v. *United States,* 522 U.S. 52, 60 (1997). As set forth above, the statutory and regulatory text cannot plausibly be read, particularly in context, to impose a categorical rule requiring arriving aliens to be allowed in the United States on bond if their detention lasts six months and the government is unable to prove that they are a flight risk or danger.

The court of appeals' rule also subverts Congress's purpose of strengthening control of the border and streamlining removal of aliens arriving at our borders. The court acknowledged that Section 1225(b) is clearly constitutional in "likely the vast majority" of its applications. Pet. App. 86a. *Mezei* and *Demore* establish that it is clearly constitutional in virtually of the rest. And an isolated case in which a potential constitutional problem might conceivably arise could be resolved by releasing the alien on parole or through an as-applied constitutional challenge in an individual habeas proceeding. The court's statutory interpretation is thus fundamentally wrong. The Secretary's plenary control over the border is a vital feature of the INA, not a serious constitutional problem that Congress would have wanted to avoid.

1. It is undisputed that "likely the vast majority" of Section 1225(b)'s applications involve the exclusion of aliens on the threshold of initial entry to the United

States. Pet. App. 86a. There is no doubt that Section 1225(b) is constitutional in that setting. See *Mezei*, 345 U.S. at 212. Indeed, Section 1225(b)'s core applications are at the epicenter of the government's inherent power over immigration.

Respondents point (Br. in Opp. 14-15) to the possibility that an LPR returning from abroad could be placed in removal proceedings and detained under Section 1225(b) for more than six months. But the mere fact that an LPR returning from abroad might be detained under Section 1225(b) does not raise constitutional doubts because Mezei himself was an LPR returning from a sufficiently extended trip abroad to be "assimilated to th[e] status" of an alien newly seeking entry, 345 U.S. at 214 (citation omitted), and he was detained indefinitely for 21 months, *id.* at 209. Moreover, the court of appeals identified no example in the record of returning LPRs who had ever been detained under Section 1225(b) for six months. Pet. App. 42a-43a. Respondents assert (Br. in Opp. 16) that there was one, but they do not assess whether the constitutionality of that detention was controlled by *Mezei*.[7] Regardless, the number of plainly valid applications dwarfs any potential for a constitutional problem.

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[7] Following the court of appeals' decision, there has been an uptick in habeas cases pressing a six-month cap on detention of a returning LPR as a matter of avoidance. *E.g.*, *Arias* v. *Aviles*, No. 15-cv-9249, 2016 WL 3906738, at *1 (S.D.N.Y. July 14, 2016) (applying the avoidance canon); *Perez* v. *Aviles*, No. 15-cv-5089, 2016 WL 3017399, at *3 (S.D.N.Y. May 24, 2016) (rejecting such a claim; "the length of Perez's detention has largely been due to his own appeals"); *Chen* v. *Shanahan*, No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016) (dismissed following release on parole). Such cases remain rare.

Most aliens coming to this country are not LPRs, and most LPRs cannot be detained under Section 1225(b). A verified LPR cannot be placed in expedited removal proceedings under Section 1225(b)(1) at all, 8 C.F.R. 235.3(b)(5)(ii), and LPRs are generally exempt from detention under Section 1225(b)(2). That provision applies only to an "applicant for admission," 8 U.S.C. 1225(b)(2)(A), and LPRs generally "shall not be regarded" as applicants for admission, 8 U.S.C. 1101(a)(13)(C). An LPR may be regarded as an applicant for admission only if the government proves, by clear and convincing evidence, that he has been outside the country for more than 180 continuous days; "abandoned or relinquished" his lawful status; "engaged in illegal activity after having departed the United States"; departed the country during removal proceedings; committed a criminal offense that makes him inadmissible under 8 U.S.C. 1182(a)(2); or attempted to enter outside a designated port of entry. 8 U.S.C. 1101(a)(13)(C); see *In re Rivens*, 25 I. & N. Dec. 623, 624-625 (B.I.A. 2011).

Congress enacted those exceptions in light of this Court's jurisprudence, and its judgment that an LPR in these narrow circumstances should be assimilated to the status of a new entrant, *Mezei*, 345 U.S. at 214, warrants great deference and will virtually always be clearly constitutional. There is no constitutional problem with treating an LPR as a new arrival if he has been continuously outside the country for more than 180 days, 8 U.S.C. 1101(a)(13)(C)(ii); see *Mezei*, 345 U.S. at 213-214 (distinguishing between a "temporary absence" and a "clear break" in continuous residence); see also *Plasencia*, 459 U.S. at 32-34 (same). Congress also treats a returning LPR as a new arrival if he has

committed a crime that triggers inadmissibility under Section 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). But such convictions also trigger mandatory detention under Section 1226(c), which this Court upheld in a case involving an LPR detained for more than six months. *Demore*, 538 U.S. at 531.[8] And there is no plausible constitutional problem with treating an LPR as a new arrival if he "abandoned or relinquished" his lawful status, fled during removal proceedings, or attempted to sneak into the United States. 8 U.S.C. 1101(a)(13)(C)(i), (iv), and (vi).

LPRs also have a panoply of protections against the consequences of being treated as new arrivals under Section 1101(a)(13)(C). They have advance notice of that provision and can readily avoid such treatment, including by not leaving the country for more than six months or not committing crimes that trigger inadmissibility under Section 1182(a)(2). See *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1487 (2012). The Secretary may release the alien on parole. 8 U.S.C. 1182(d)(5). Indeed, under U.S. Immigration and Customs Enforcement (ICE) policy, a returning LPR placed in removal proceedings as an applicant for admission is automatically considered for parole and will ordinarily be released unless he has not established his identity or has committed an offense that also warrants mandatory detention under Section 1226(c). See J.A. 48-49. And any LPR detained under Section 1225(b) is in full removal proceedings before

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[8] Treating a returning LPR as a new arrival would be similarly constitutional under *Demore* if the LPR sought to return after committing a similar offense abroad. See 8 U.S.C. 1101(a)(13)(C)(iii).

an immigration judge and thus has the procedural protections the *Mezei* dissenters viewed as sufficient.

In sum, Section 1225(b) is plainly constitutional as applied to aliens on the threshold of initial entry, which constitutes "likely the vast majority" of its applications; returning LPRs are always exempt from detention under Section 1225(b)(1) and almost always exempt under Section 1225(b)(2); and even when a returning LPR is treated as a new arrival under Section 1101(a)(13)(C), that treatment will often be plainly constitutional under *Mezei* or *Demore*, and will always be accompanied by extensive protections. Section 1225(b) is thus clearly constitutional in virtually all of its applications.

2. Interpreting Section 1225(b) to give *every* arriving alien a bond hearing after six months of detention not only would carve a gaping hole in the legal regime protecting our Nation's borders, but also is completely misdirected for protecting the rights of returning LPRs. Any LPR who is treated as an applicant for admission under Section 1101(a)(13)(C), and thereby detained under Section 1225(b) in circumstances he alleges are unconstitutional, could file a habeas petition raising an as-applied challenge under the Due Process Clause to the application of *Section 1101(a)(13)(C)*, and the district court could take into account all the circumstances of that unusual case. There is no basis to impose a cap on Section 1225(b) itself as a matter of statutory construction, when the overwhelming majority of aliens are clearly properly detained under that provision.[9]

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[9] In the alternative, if the treatment of a particular LPR as an arriving alien under 8 U.S.C. 1101(a)(13)(C) gave rise to a difficult constitutional question, a court could conceivably construe it not to

## II. SECTION 1226(c) DOES NOT PERMIT CRIMINAL ALIENS TO BE RELEASED ON BOND

The court of appeals similarly erred in relying on the canon of constitutional avoidance to interpret Section 1226(c) to give criminal aliens a presumptive entitlement to be released on bond after six months. The text unambiguously forecloses that interpretation. A six-month cap on mandatory detention is also contrary to this Court's decisions in *Demore* and *Zadvydas*, and would cause the very harms Congress enacted Section 1226(c) to prevent.

### A. Section 1226(c) Unambiguously Prohibits Release Of Criminal Aliens On Bond

The statutory text unambiguously prohibits the release of criminal aliens detained under Section 1226(c) on bond. Section 1226(c) provides that the Secretary "shall take into custody" the specified criminal aliens, and "may release" such an alien "*only if*" the Secretary decides it is "necessary" for certain witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear

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mandate such treatment. Congress has provided that an LPR "*shall not be regarded* as seeking an admission" unless an exception applies, *ibid.* (emphasis added), but did not expressly state that all LPRs shall "be regarded" as seeking an admission. A court thus could conceivably interpret that provision to permit DHS to cease "regard[ing]" a returning LPR as seeking admission—and thus to no longer be covered by Section 1225(b)(2). Concededly, that is an unnatural reading of Section 1101(a)(C)(13), and the government does not urge it here. But it is more focused and plausible than the court of appeals' sweeping revision of Section 1225(b), and would do far less violence to the scheme as a whole. Concerns about detaining LPRs also provide no basis for narrowing Section 1225(b)(1), which does not even apply to LPRs.

for any scheduled proceeding." 8 U.S.C. 1226(c) (emphasis added). Congress's direction that such aliens "shall" be taken into custody and may be released "only if" a single express exception is satisfied obviously means that release is prohibited when that exception is not satisfied: It is the "only" exception.

Section 1226(a) reinforces the point. Subsection (a) provides that "[e]xcept as provided in subsection (c)," the Secretary "may release [an] alien" on bond. 8 U.S.C. 1226(a)(2)(A). The Secretary's statutory authority to release an alien on bond thus does not extend to aliens detained under Subsection (c), "[e]xcept" when the witness-protection exception "provided in subsection (c)" is satisfied. *Ibid.* Controlling regulations say the same thing: "[N]o alien described in [Section 1226(c)(1)] may be released from custody during removal proceedings except pursuant to" the witness-protection exception in Section 1226(c)(2). 8 C.F.R. 236.1(c), 1236.1(c). An immigration judge "may not" provide a bond hearing for "[a]liens in removal proceedings subject to [Section 1226(c)(1)]." 8 C.F.R. 1003.19(h)(2)(i)(D).

The canon of constitutional avoidance thus does not apply. "[I]f 'Congress has made its intent' in the statute 'clear, we must give effect to that intent.'" *Zadvydas*, 533 U.S. at 696 (quoting *Miller* v. *French*, 530 U.S. 327, 336 (2000)). In Section 1226(c), Congress has been crystal clear. Indeed, *Zadvydas* itself contrasted the permissive provision at issue there to Section 1226(c), which it emphasized "*require[s]* detention of criminal aliens during removal proceedings." *Id.* at 697. That requirement ends the statutory inquiry. Any doubts about applications of Section 1226(c) accordingly must be resolved in an individual

as-applied constitutional challenge, not a class-action lawsuit.

### B. Releasing Criminal Aliens On Bond Would Cause The Very Harms Congress Enacted Section 1226(c) To Prevent

Section 1226(c)'s context and purpose further weigh against construing it to allow covered criminal aliens to be released on bond at any time, much less after six months.

1. Congress beginning in the late 1980s incrementally amended the INA to constrain the Executive's discretion to release criminal aliens on bond. See *Demore*, 538 U.S. at 520-521. Nonetheless, criminal aliens continued to reoffend and flee at alarming rates, giving rise to a "serious and growing threat to public safety." S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). One study showed 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." *Demore*, 538 U.S. at 518. And after release on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519; see *id.* at 520 (discussing subsequent study finding that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings").

In response to this "wholesale failure by the [Immigration and Naturalization Service (INS)] to deal with increasing rates of criminal activity by aliens," Congress enacted Section 1226(c) in IIRIRA. *Demore*, 538 U.S. at 518. Section 1226(c) embodies Congress's categorical judgment that aliens who have committed the specified offenses pose an undue flight

risk and danger to the community—and that individual DHS agents and immigration judges should no longer be in the business of trying to predict whether they will be a flight risk or danger. See *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) ("[T]he animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens."). In *Demore*, this Court held that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528; see *Flores*, 507 U.S. at 308, 313-314; *Carlson* v. *Landon*, 342 U.S. 524, 541 (1952).

2. The court of appeals' rule would cause the very harms Congress enacted Section 1226(c) to prevent. Criminal aliens would presumptively be entitled to release into society after six months, could reoffend, and could flee and thwart the government's efforts to remove them. And individual DHS agents and immigration judges would be back in the very position from which Congress removed them, making difficult predictions whether an individual criminal alien would be a flight risk or danger—and indeed now requiring them to release the criminal alien unless the government showed by clear and convincing evidence that he poses a risk of flight or danger.

Evidence since *Demore* illustrates that flight and recidivism remain serious concerns. As noted above, EOIR has calculated an *in absentia* rate of 41% for released aliens in fiscal year 2015. *2015 Yearbook* P3. That is far in excess of the *in absentia* rates calculated in a study before Congress when it enacted Section 1226(c), and another study before the Court in *Demore*, which this Court described as "striking." 538

U.S. at 520. Similarly, a recent study calculated a recidivism rate of approximately 30% among 323 criminal aliens released from immigration custody in New England, for any reason, from 2008 to 2012. Maria Sacchetti, *Criminal Aliens Reoffend at Higher Rates than ICE Has Suggested*, Boston Globe, June 4, 2016.

### C. Construing Section 1226(c) To Have A Six-Month Limitation Of The Sort This Court Imposed In *Zadvydas* Also Would Be Inconsistent With *Demore*

1. Even if it were permissible to look beyond Section 1226(c)'s explicit text and clear statutory purpose to bar release, there would be no basis for construing Section 1226(c) to require that mandatory detention of every covered alien cease after six months. In *Demore*, this Court held that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513; see *id.* at 526 ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."). The Court noted that detention under Section 1226(c) "is of a much shorter duration" than the "potentially permanent" detention in *Zadvydas*, and "in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." *Id.* at 528-529 (citation omitted); see *id.* at 529 n.12 ("very limited time").[10] And the Court con-

[10] This Court cited statistics the government had provided calculating that, for aliens in immigration detention under Section 1226(c), "removal proceedings are completed in an average time of

cluded that Kim's detention was constitutional notwithstanding that he had been detained "somewhat longer than the average—spending six months in INS custody" before being released. *Id.* at 530-531.

The court of appeals took this Court's references to "brief" and "very limited" time, coupled with the cited statistics, to imply that Section 1226(c) is constitutionally doubtful whenever detention becomes "prolonged." Pet. App. 13a. And it extended *Zadvydas*'s constitutional-avoidance rationale to conclude that detention is per se "prolonged"—and therefore no longer authorized—at six months. *Ibid.*

Again, even putting aside Section 1226(c)'s clear text, a six-month cap cannot be squared with *Demore*. At the outset, *Demore* held that it is constitutional to detain a criminal LPR under Section 1226(c), without a bond hearing, where his detention had already last-

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47 days and a median of 30 days," and that an appeal takes "an average of four months, with a median that is slightly shorter." *Demore*, 538 U.S. at 529. This Court also stated that the total time for appealed cases was "about five months." *Id.* at 530. EOIR has informed this Office that its prior calculations were erroneous. See Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court 1 (Aug. 26, 2016), in *Demore*, *supra* (No. 01-1491). EOIR calculates that the average and median duration in cases without an appeal should have been 34 and 15 days, respectively, and the average and median for an appeal itself should have been 141 and 119 days, respectively. *Id.* at 2. And for reasons the letter explains, the overall time in cases where there was an appeal to the BIA was also considerably longer than five months, according to EOIR's statistics at the time (233 and 221 days, respectively) and its corrected calculations (382 and 272 days, respectively). *Id.* at 2-3. EOIR has published updated figures at *Statistics and Publications*, https://www.justice.gov/eoir/statistics-and-publications (last visited Aug. 26, 2016).

ed more than six months. 538 U.S. at 531.[11] And the Court's reversal of the lower court's rulings ordering Kim's release, *ibid.*, presumably contemplated that he could be restored to custody until his removal proceedings were complete. That "implicitly foreclos[es]" a bright-line six-month cap, *Reid*, 819 F.3d at 497, and belies the premise that detention becomes constitutionally dubious on or around the 181st day.

*Demore* also declined to adopt a *Zadvydas*-type limit as a matter of avoidance. This Court granted certiorari in *Demore* to resolve a circuit split, where two judges on a panel in one of those circuit cases had relied on *Zadvydas* to hold that detention under Section 1226(c) should be limited to a reasonable period, with six months being presumptively reasonable. See *Demore*, 538 U.S. at 516; *Welch* v. *Ashcroft*, 293 F.3d 213, 228 (4th Cir. 2002) (Widener, J., concurring); *id.* at 234-235 & n.7 (Williams, J., concurring in the judgment). The government argued that "that approach lack[ed] a specific foundation in the text or history of Section 1226(c)," *Demore* Pet. Br. 48, and Kim pressed a narrowing construction focusing on the phrase "is deportable." *Demore* Resp. Br. 40-50. This Court adopted neither view. And the principal dissent in *Demore* emphasized that "[d]etention under § 1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year." 538 U.S. at 558 (Souter, J., concurring in part and dissenting in part); see *id.* at 567 ("often extend[s] beyond the time suggested

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[11] Kim had already been detained at least 197 days: He was taken into custody on February 2, 1999, and granted bond on August 18, 1999. See *Demore* Pet. Br. 4; *Demore* J.A. 11.

by the Court"). Only one Justice would have adopted a narrowing construction: Justice Breyer advocated a *Zadvydas*-type limit when the alien concedes removability, and otherwise construing "is deportable" to allow bond. *Id.* at 576-578 (Breyer, J., concurring in part and dissenting in part). *Demore* accordingly implicitly declined similar efforts to impose a *Zadvydas*-type rule under Section 1226(c).

Moreover, *Demore* expressly rejected the underlying analogy to *Zadvydas* and explained why the two cases were "materially different." *Demore*, 538 U.S. at 527. First, the detention in *Zadvydas* no longer "serve[d] its purported immigration purpose": Aliens are detained after they are ordered removed in order to actually effectuate their removal, but in *Zadvydas* removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Other countries had refused to accept the aliens, so there was no country to which to return them. See *Zadvydas*, 533 U.S. at 684, 702. By contrast, this Court emphasized in *Demore* that detention of criminal aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-528; see *id.* at 528 (discussing evidence that "large numbers of deportable criminal aliens skipp[ed] their hearings and remain[ed] at large in the United States unlawfully."). Those purposes do not lapse after six months.

Second, *Zadvydas* involved "indefinite" and "potentially permanent" detention because it "ha[d] no obvious termination point." *Demore*, 538 U.S. at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). By con-

trast, this Court emphasized in *Demore*, "*detention pending a determination of removability*" has a "definite termination point": entry of a final order of removal. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697). The duration of removal proceedings varies and will be unknown in any particular case until it is completed. But detention under Section 1226(c) is still "limited," not indefinite or potentially permanent, because it ends when removal proceedings end, as they always do. The court of appeals' reliance on *Zadvydas* to limit detention under Section 1226(c) is thus fundamentally contrary to *Demore*.

2. A bright-line cap at six months or any other time suffers from further flaws. First, *Zadvydas* itself did not apply a bright-line cap. It instead held that detention could continue past six months "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Second, Section 1226(c) "does not come ready-made with a time cutoff the way" the statute at issue in *Zadvydas* does. *Sopo* v. *U.S. Attorney Gen.*, No. 14-11421, 2016 WL 3344236, at *14 (11th Cir. June 15, 2016). The removal period in Section 1231(a) is presumptively 90 days, "to which [*Zadvydas*] appended another 90 days" to reach six months. *Ibid.* By contrast, Section 1226(c) "contains no time limitation at all on which to base a firm cutoff." *Ibid.*

Third, "the complex course of events during removal proceedings" makes a fixed cap inappropriate both as a statutory and constitutional matter. *Sopo*, 2016 WL 3344236, at *14; see *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (discussing the "inevitable elasticity" of removal proceedings). "[R]emoval proceedings involve many * * * exigencies and the con-

duct of the criminal alien can equally affect the duration of that alien's removal proceedings." *Sopo*, 2016 WL 3344236, at *14. Some aliens may concede they are removable, pursue no relief, and be removed very swiftly. Others may seek discretionary relief from removal to remain in the United States, notwithstanding that they are removable. "Some [aliens] ask for multiple continuances"; "some choose to file frivolous appeals"; others file reasonable appeals; others do not appeal at all; "and each [immigration judge] has a docket with different demands." *Ibid.* A one-size-fits-all approach is simply not appropriate for a large, complex, and multi-tiered system of administrative adjudication of widely varying cases.

*Demore* reinforces this point. Although this Court noted that mandatory detention under Section 1226(c) typically lasted less than 90 days, 538 U.S. at 529, it recognized that an alien's own litigation choices can extend detention beyond that range, and that this feature of the adjudicatory process does not undermine the constitutionality of continued detention. Kim's "removal hearing was scheduled to occur" after five months, "but [he] requested and received a continuance to obtain documents relevant to his withholding application." *Id.* at 531 n.15. The Court gave no hint that the five-month schedule was problematic, or that it became problematic when the hearing was postponed because Kim sought more time to strengthen his request for relief from removal.

The Court further noted that, when the alien decides to appeal to the BIA, that step takes yet more time. See *Demore*, 538 U.S. at 529. But again, the Court viewed detention during that time as a valid consequence of the alien's choices within the adjudica-

tory system. "As we have explained before," the Court reasoned, "'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." *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)); see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Justice Kennedy's concurrence in *Demore* reflects a similar understanding. Justice Kennedy joined the majority opinion and further explained that, in his view, an LPR "could be entitled" to a bond hearing, presumably as a matter of due process, "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. But he viewed the constitutionality of continuing detention as depending on the reasons: If there were an "unreasonable delay *by the INS* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, *but to incarcerate for other reasons*." *Id.* at 532-533 (emphases added). Justice Kennedy could not draw such an inference, however, "from the circumstances of" *Demore* itself. *Id.* at 533. The implication is that the extension of removal proceedings caused by an alien's litigation choices within the ordinary operation of an adjudicatory system does not cast doubt on the constitutionality of detention, because it continues to be justified by the interests in "protect[ing] against risk of flight or dangerousness." *Id.* at 532.

Criminal aliens who are removable but seek discretionary relief from removal, such as cancellation of

removal, 8 U.S.C. 1229b, also have a particularly weak claim to be released into the United States pending a decision on their request. Such an alien's crime makes him removable, eliminating any entitlement to be present in the United States. And the question whether to grant cancellation of removal to allow the alien nonetheless to remain is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)); see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (it is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). But under the court of appeals' ruling, the key question—whether the alien can live in the United States—would be made in the first instance not when deciding the request for relief, but in a bond hearing.

It is thus true, as the court of appeals noted, that "[n]on-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability." Pet. App. 19a. But that is a natural consequence of Congress's commendable decision to establish a robust system of administrative adjudication that affords even convicted criminal aliens opportunities to challenge their removability, apply for relief, and seek appellate review. The fact that criminal aliens who take advantage of the process afforded to them are detained while the system adjudicates their claims is not a sign of a *lack* of due process; it is a sign that extensive process has been provided. Once invoked, completing any process takes time.

Section 1226(c) puts aliens on clear notice that the immigration consequences of committing a specified

offense include not only that they will become removable, but also that they will be detained throughout removal proceedings. And *Demore* reinforces that criminal aliens whose removal proceedings (and resulting detention) last longer because they seek relief from removal or otherwise make litigation choices that prolong their proceedings do not thereby gain the possibility of release: "[T]here is no constitutional prohibition against requiring parties to make such choices." *Demore*, 538 U.S. at 530 n.14.

The court of appeals' holding, by contrast, would confer the windfall of a presumptive entitlement to release on aliens whose litigation choices lead to longer proceedings. Indeed, it would create a powerful incentive for aliens to extend litigation. The First, Third, Sixth, and Eleventh Circuits have rejected a rigid six-month cap in part because of this concern. See *Sopo*, 2016 WL 3344236, at *14 ("[W]ere we to impose a strict cutoff, a criminal alien could deliberately cause months of delays in the removal proceedings to obtain a bond hearing and then abscond and avoid removal altogether."); *Reid*, 819 F.3d at 501 (differentiating delays due to "dilatory tactics"); *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("[A]liens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing they would not otherwise get."); *Ly*, 351 F.3d at 272 (cautioning against rewarding aliens who "raise frivolous objections and string out the proceedings"). In the speedy trial context, this Court has similarly rejected "rigid" time requirements and instead required balancing of factors, including the reasons for delay and whether it is "attributable to the de-

fendant." *Barker* v. *Wingo*, 407 U.S. 514, 527, 529 (1972); see *id*. at 522-531.

3. Under *Demore*, Section 1226(c) will almost always be constitutional even in cases involving more than six months of detention: Detention will continue to serve its immigration purposes, and much of the time taken will be due to an alien's litigation decisions.

Aliens may seek one or more continuances, including to hire counsel and prepare their case. Continuances are granted "for good cause shown." 8 C.F.R. 1003.29. That standard is often liberally applied. *E.g.*, *Montes-Lopez* v. *Holder*, 694 F.3d 1085, 1087 (9th Cir. 2012) (reversing denial of third continuance, even though immigration judge "warned" that the second "would be [the] last"); *Ahmed* v. *Holder*, 569 F.3d 1009, 1012-1013 (9th Cir. 2009) (collecting cases and reversing denial of second six-month continuance). And aliens often obtain continuances. For example, based on a sample of studied members of the class in this case—which is limited to aliens detained for more than six months—the government's expert testified that 86.9% had requested a continuance; that "over half" requested three or more; that alien-requested continuances within the first six months of detention alone were typically responsible for more than half of that period (consuming a median of 101 days); and that in 18.6% of cases the alien-sought delay in the first six months was 151 days or more. J.A. 136-137, 153.

An alien may seek relief from removal, which necessitates time to determine whether the individual is eligible for and warrants such relief. For example, respondents' expert found that a request for relief, on

average, added 61 days to studied class members' detention. J.A. 80.

An alien may appeal to the BIA, which necessitates time to prepare briefs and decide the appeal. Respondents' expert found that, among studied class members, cases that are appealed to the BIA last 118 days longer on average. J.A. 76; see *Demore*, 538 U.S. at 529. Seeking relief from removal *plus* appealing adds more time: Respondents' expert calculated that seeking relief and appealing added 192 days to the average (from 281 to 473). J.A. 81. And an alien may file a petition for review and seek a stay, which in the Ninth Circuit will add yet more time: Under circuit precedent, time during a stay of removal counts towards the six-month clock, see Pet. App. 51a; note 4, *supra*; and any alien who requests a stay of removal automatically receives one "until the court rules on the stay motion," *De Leon* v. *INS*, 115 F.3d 643, 644 (9th Cir. 1997). Respondents' expert found that detention of class members lasts, on average, 219 days longer when a case is appealed to the Ninth Circuit rather than ending at the BIA. J.A. 76.[12]

The district court did not make factual findings regarding the competing experts' calculations, which were contested. But on any view, aliens who seek multiple continuances or appeal to the BIA will frequently be in removal proceedings for well more than six months. Aliens who seek relief from removal also will frequently be in removal proceedings longer. And by definition, many cases take longer than the average or median, consistent with the reasonable administra-

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[12] The expert's average for class members who seek relief, appeal to the BIA, and appeal to the Ninth Circuit was 400 days longer than those who take none of those steps. J.A. 81.

tion of the robust adjudicatory system Congress provided, while still remaining within the normal range for comparable cases.

In the end, moreover, criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed. That is true even within the class in this case, which is limited to aliens detained for more than six months and therefore disproportionately consists of aliens who are litigating vigorously. The fact of removability ordinarily will be established, beyond dispute, by the alien's conviction. Respondents' expert calculated that only 5% of completed cases (20 of 409) for studied Section 1226(c) subclass members were "terminated," meaning that the alien defeated the charge that he was removable. J.A. 96. And although class members are disproportionately likely to seek relief from removal, respondents' expert calculated that most of those requests were denied: of the 409 completed cases, 324 sought relief and 130 were granted. J.A. 95-96. Virtually all of those were requests for discretionary relief, as a matter of grace, for criminal aliens lacking any legal right to be present in the United States. J.A. 94 (97% of requests were for discretionary relief).[13]

Respondents have emphasized their expert's testimony (Br. in Opp. 7 & n.3) that the average duration of detention for studied class members was 404 days. But that figure is not representative of the far larger category of *all* aliens detained under Section 1226(c), which is the proper focus of a broad-based challenge, because the class definition ensures that "[a]liens

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[13] In the remaining completed cases studied (259 of 409), the alien was removed, ordered removed, or ordered to voluntarily depart. J.A. 96.

detained for shorter periods are not included in the data at all." J.A. 171. The class members' experience instead largely illustrates the unremarkable proposition that resolving claims by people who contest issues, request relief, or seek extra time to prepare will take longer than for those who do not.

Furthermore, even if the 404-day figure were fairly representative, it would not itself indicate that the resulting detention is constitutionally doubtful. As explained above, the constitutionality of mandatory detention under Section 1226(c) depends on whether it continues to serve its purposes of preventing flight and recidivism. *Demore*, 538 U.S. at 527-529; see *id.* at 531-532 (Kennedy, J., concurring). Detention continues to serve those purposes even when the affected aliens sometime face difficult choices between litigating while in detention, or forgoing some or all claims and being removed—and thus released—faster. *Id.* at 530 n.14. The 404-day average lumps together all time in detention, no matter the cause, including delays due to alien-requested continuances, alien-initiated requests for discretionary relief from removal, and alien-initiated appeals to the BIA and the Ninth Circuit. That figure thus obscures the considerations *Demore* identified as relevant, and accordingly does not indicate a constitutional problem.

### D. Any Relief From Detention Must Be Sought In An Individual Habeas Proceeding Raising An As-Applied Constitutional Challenge

As explained above, the avoidance canon cannot be applied to override Congress's unambiguous mandate that release is allowed "only if" the narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). The proper avenue for presenting a claim that deten-

tion under Section 1226(c) has become impermissibly prolonged is therefore through an as-applied constitutional challenge in an individual habeas corpus proceeding.

*Demore* provides guideposts for evaluating such a challenge: Mandatory detention of a criminal alien during removal proceedings remains "constitutionally permissible" so long as it serves its "purported immigration purpose" of facilitating removal and preventing fight and recidivism. *Demore*, 538 U.S. at 527, 531; see *id.* at 532-533 (Kennedy, J., concurring). Conversely, mandatory detention may cease to be constitutionally permissible if it no longer furthers these purposes, and instead is for some "other reasons." *Id.* at 533 (Kennedy, J., concurring). The constitutionality of prolonged mandatory detention thus depends on the reasons why it is continuing. And because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely, see *Zadvydas*, 533 U.S. at 690, 701.

The government's interest in preventing recidivism by a criminal alien is ordinarily constant throughout any Section 1226(c) case, and weighs heavily in favor of constitutionality. Congress has made a considered judgment, backed by evidence and experience, that it is not acceptable for an alien who has committed one of the specified crimes to remain free in our society, where he could flee or reoffend while removal proceedings are ongoing. See *Demore*, 538 U.S. at 528. The government's interest in preventing flight will also ordinarily continue (and indeed strengthen) over time. Both the government's interest in effectuating removal and the alien's incentive to flee become par-

ticularly strong when entry of a final order of removal approaches. And *Demore* establishes that the government's interests do not weaken simply because an alien's good-faith litigation choices require that additional time be spent in removal proceedings. See *id.* at 530-531 & n.14. Accordingly, unlike in *Zadvydas*, detention during a removal proceeding under Section 1226(c) is entitled to a strong presumption of constitutionality for its duration.

A criminal alien detained markedly beyond the range of time taken to resolve most similar cases in this adjudicatory system could overcome that presumption of validity, however, by showing that the length of the proceeding is substantially attributable to unwarranted delays caused by the government. If there is "an unreasonable delay *by [DHS and EOIR]* in pursuing and completing deportation proceedings," that may indicate that continued detention is actually for an impermissible collateral purpose (or no purpose at all). *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (emphasis added). To show that the government is unreasonably delaying a proceeding, a criminal alien must first identify who is responsible for different periods of time. A criminal defendant must make a similar showing in the speedy trial context, see 18 U.S.C. 3161; *Barker*, 407 U.S. at 522-531, and a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," *Barker*, 407 U.S. at 532.

To avoid government-created delay, ICE policy is for attorneys to seek continuances in cases involving detained aliens only when "absolutely necessary," and to seek to expedite the resolution of applications for relief. Office of the Principal Legal Advisor, ICE,

*Continuances and Briefing Extensions Before EOIR* (July 1, 2014); ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* 1-3 (Aug. 20, 2010). Immigration judges and the BIA similarly prioritize cases involving detained aliens. See Dep't of Justice, *Administrative Review and Appeals: FY 2017 Performance Budget, Congressional Budget Submission* 19.[14] If, notwithstanding these efforts, the government is responsible for an unusually long proceeding, the alien may have a potential due process claim. Conversely, when proceedings are appropriately extended because of an alien's own good-faith litigation choices, that does not undermine the purpose of detention. And any delay due to an alien's bad-faith tactics is surely constitutional.

There is no occasion here, however, for the Court to decide when an as-applied constitutional challenge would be viable, because that is a case-specific question that is not properly resolved in the abstract in class action litigation. This Court therefore should reverse the judgment below allowing criminal aliens detained under Section 1226(c) to be released on bond after six months or any other fixed time limit. The statutory text forecloses it, the Constitution does not require it, and such a rule would undermine important governmental interests recognized by this Court in

[14] This Court may wish to urge circuit courts to expedite consideration of petitions for review when the alien is detained. But a detained alien should ordinarily be expected to seek expedition rather than accepting delay and then challenging the resulting length of his detention.

*Demore*.[15] The question in any individual habeas case in the future must be whether removal proceedings and resulting detention of exceptional duration continues to serve their valid immigration purpose.

## III. THE COURT OF APPEALS ERRED IN REWRITING THE PROCEDURES THAT GOVERN BOND HEARINGS

The court of appeals further erred in refashioning bond hearings by (1) shifting the burden of proof to the government and demanding clear and convincing evidence that the alien is a flight risk or danger; (2) requiring bond hearings for all class members automatically every six months, even when the alien has not shown that circumstances have materially changed; and (3) requiring immigration judges to consider as a factor the length of time the alien has been detained.

### A. The Court Of Appeals Erred In Shifting And Heightening The Burden Of Proof

1. There is no basis for shifting the burden to the government to justify detention during removal proceedings—much less to require the government to bear that burden by clear and convincing evidence.

a. Section 1226(c) unambiguously forecloses a rule that the government must bear the burden of proving that a criminal alien covered by that provision is a danger or a flight risk, even in the narrow circumstance where release is allowed. Congress provided that, in the "only" situation when such a criminal alien

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[15] Section 1226(c)'s text likewise forecloses a more generalized standard of reasonableness, which some courts have adopted as a matter of avoidance. See *Sopo*, 2016 WL 3344236, at *12-*14 (adopting this approach and collecting cases).

may be released during removal proceedings—for witness protection—"*the alien*" must demonstrate that he "will *not* pose a danger" or flight risk. 8 U.S.C. 1226(c)(2) (emphases added). Indeed, Congress placed the burden on LPRs convicted of aggravated felonies even before it enacted Section 1226(c) to make detention mandatory. See Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, Tit. III, § 306(a)(4), 105 Stat. 1751 (prohibiting release "unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear"); cf. 18 U.S.C. 3143(b)(1)(A) (similar for bail pending appeal).

b. Imposing the burden of proof on the government would also be fundamentally inconsistent with Section 1225(b). The longstanding rule is that an alien seeking admission must be detained unless he is "clearly and beyond a doubt entitled" to be admitted, 8 U.S.C. 1225(b)(2)(A), and "the alien has the burden" in that context, 8 U.S.C. 1229a(c)(2). See 8 U.S.C. 1361. It would be manifestly inconsistent with those provisions to require that an arriving alien who is *not* clearly entitled to be admitted nonetheless is entitled to be released into the United States unless the *government* can prove, by clear and convincing evidence, that he is a flight risk or danger.

Such a rule would also reward the party with the best access to information regarding flight risk and danger—the alien—for not sharing it, allowing an inadmissible alien to physically enter the United States due to an information asymmetry, because DHS may know little about a newly arriving alien. DHS also may have concluded that the alien should not be released

on parole. In short, the Ninth Circuit's unprecedented rule would substantially undermine the Secretary's ability to control the border and protect the security of the Nation.

c. Regulations and BIA decisions also unambiguously foreclose the Ninth Circuit's ruling that the government must bear the burden of proof (and by clear and convincing evidence) in bond hearings under Section 1226(a): Those regulations provide that "*the alien* must demonstrate" that he is *not* a flight risk or danger to persons or property. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added); see *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) ("The burden is on the alien."). That rule is unambiguous and reasonable, and warrants full *Chevron* deference.

Before IIRIRA, the government applied a presumption that non-criminal aliens detained under Section 1226(a) would be released on bond, unless the government could show by a preponderance that he was a flight risk or danger. See 62 Fed. Reg. at 10,323. In response to IIRIRA, INS promulgated regulations placing the burden on the alien. *Ibid.* Some objected, but INS concluded that this change was "consistent with the intent of Congress" in IIRIRA. *Ibid.* INS explained that it had been "strongly criticized for its failure to remove aliens who are not detained." *Ibid.* It also explained that Congress's mandate, "as evidenced by budget enhancements and other legislation," including for increased bed space to hold aliens, "is increased detention to ensure removal." *Ibid.* That reflects a reasonable implementation of IIRIRA, and it has been in place for nearly 20 years. And since the dawn of federal immigration law, the government has never borne the burden to prove by clear and

convincing evidence that an alien should be detained during removal proceedings.

2. Contrary to the court of appeals' reasoning (Pet. App. 52a-53a), the constitutional standard for involuntary commitment of the mentally ill is inapposite. See *Singh* v. *Holder*, 638 F.3d 1196, 1203-1204 (9th Cir. 2011) (citing *Addington* v. *Texas*, 441 U.S. 418, 425-427 (1979)). Unlike involuntary commitment, the government has plenary authority over immigration and the exclusion or expulsion of aliens. See *Flores*, 507 U.S. at 305 ("Over no conceivable subject is the legislative power of Congress more complete.") (quoting *Fiallo*, 430 U.S. at 792). And "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 (1976).

This Court has long recognized that detention during removal proceedings is an integral aspect of removal itself, and it has repeatedly upheld detention of aliens during removal proceedings under standards that did not require the government to provide clear and convincing evidence. See *Demore*, 538 U.S. at 531; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538; *Wong Wing*, 163 U.S. at 235. Indeed, in *Zadvydas*, this Court placed the burden on "the alien" who is subject to potentially indefinite detention following entry of a final order of removal to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. And in *Demore*, counsel for the alien told this Court that there was "no problem" with placing the burden of proof on the alien. *Demore* Oral Arg. Tr. 48.

### B. New Bond Hearings Are Not Required Automatically Every Six Months

When an alien is detained under Section 1226(a), the Secretary "may" continue to detain the alien or "may" release him on bond. 8 U.S.C. 1226(a)(1) and (2). The Secretary thus has discretion whether to release an alien detained under Section 1226(a) on bond. See *Carlson*, 342 U.S. at 540. Federal regulations have long provided that aliens detained under Section 1226(a) are automatically assessed for bond eligibility at the outset and, if denied bond by DHS, informed of their opportunity to ask an immigration judge for a redetermination. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1); see J.A. 43 (notice given to detained aliens). An alien can appeal to the BIA. 8 C.F.R. 236.1(d)(3). And, if the alien is denied or fails to post bond, the alien can later obtain another hearing by showing that "circumstances have changed materially." 8 C.F.R. 1003.19(e).

These procedures have been in place for decades, see *In re Chew*, 18 I. & N. Dec. 262, 263 n.2 (B.I.A. 1982), and warrant *Chevron* deference. There is no basis for invalidating them on their face. The court of appeals asserted that due process "requires" automatic hearings because "longer detention requires more robust procedural protections." Pet. App. 56a; see *id.* at 58a. But due process is satisfied in this context when there is a "facially legitimate and bona fide reason" for the rule. *Fiallo,* 430 U.S. at 794-795 (citation omitted). And even outside immigration, due process is satisfied by "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted). The existing procedures readily satisfy both standards, because an alien

who has not been released on bond can obtain later review. Cf. 18 U.S.C. 3142(f) (allowing a new bail hearing "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on" the defendant's bail risk).

### C. Bond Hearings Need Not Consider Factors Beyond Bail Risk

Section 1226(c)(2) and federal regulations also foreclose the court of appeals' revision of the factors that immigration judges must consider in determining whether to grant bond. Those provisions unambiguously provide that release during removal proceedings, when it is allowed, depends on whether the alien will "pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2); see 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (similar for aliens detained under Section 1226(a)). And it is well-settled outside the immigration context that bail determinations are properly made on that basis—not the period of time that has elapsed or that might elapse if bail is denied. See 18 U.S.C. 3142(f)(2), 3143(b)(1)(A).

The court of appeals nonetheless held that immigration judges must also consider the length of detention as a factor, because "longer detention requires more robust procedural protections." Pet. App. 56a. Even if that were true in this context, it would impermissibly double count the length of detention, which (under the court's predicate rulings) would already trigger the "more robust" procedures of a bond hearing under Sections 1225(b) and 1226(c) in the first place. Forcing immigration judges to consider the passage of time in bond hearings would put a substan-

tive thumb on the scales, and create a further reward for aliens to pursue time-consuming litigation.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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