No. 16-1363

IN THE
Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
Petitioners,
v.

MONY PREAP, *et al.*,
Respondents.

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

BRIEF FOR AMICI CURIAE FORMER INS AND DHS GENERAL COUNSELS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are former General Counsels of the Department of Homeland Security ("DHS") and/or the United States Immigration and Naturalization Service ("INS"). As officials who have borne key responsibilities for enforcing the detention statute at issue in this case, managing the agency budget, and making decisions about whether to seek detention of noncitizens subject to removal proceedings, Amici offer a unique perspective to this Court on the practical implications of the parties' arguments.

The signatories of this brief include:

T. Alexander Aleinikoff. Mr. Aleinikoff served as General Counsel of INS from 1994 to 1995; Executive Associate Commissioner for Programs at INS from 1995 to 1996; and United Nations Deputy High Commissioner for Refugees from 2010 to 2015. He is currently the Director of the Zolberg Institute on Migration and Mobility at The New School.

Bo Cooper. Mr. Cooper served as General Counsel of INS from 1999 to 2003. He currently is a partner in the law firm of Fragomen, Del Rey, Bernsen, & Loewy LLP.

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[1] Both Petitioners and Respondents have provided written consent to the filing of this brief. Counsel for Amici state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amici or their counsel made a monetary contribution for its preparation or submission.

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Paul W. Virtue. Mr. Virtue served as acting Executive Associate Commissioner for Programs at INS from 1997 to 1998; as Deputy General Counsel of INS from 1997 to 1998; and as General Counsel of INS from 1998 to 1999. As Deputy General Counsel, he developed government policy on the issue of eligibility for discretionary relief in deportation proceedings. He is currently a partner in the law firm of Mayer Brown.

SUMMARY OF ARGUMENT

Amici's experience supports the Ninth Circuit's holding that Congress intended the mandatory detention provision of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), to apply only to criminal aliens who are taken into custody promptly, or within a reasonable period of time, following their release from criminal custody. *See Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016). If immigration detention does not occur within a reasonable time following release from criminal custody, Congress intended for DHS to use its discretionary detention authority under 8 U.S.C. § 1226(a), subject to an individualized bond hearing by an immigration judge. *See* 831 F.3d at 1199.

The Government contends that Section 1226(c) subjects all criminal aliens listed in the statute to mandatory detention, regardless of when DHS detains them. According to the Government, providing an individualized bond hearing to such individuals, even when they have been living in the community for years following their release from criminal custody, would frustrate Congress's categorical judgment that individuals who have been arrested for certain crimes present both a danger to the community and a flight risk.

Congress did not make any such determination. A categorical judgment regarding the likelihood of recidivism or flight may be appropriate when a noncitizen enters immigration detention contemporaneously with his or her release from criminal custody, because neither DHS nor an immigration judge would have any post-release track record on which to evaluate the individual's likelihood of danger or flight. Moreover, mandatory detention in such circumstances maintains a chain of custody that facilitates a streamlined process for removal. But when there is a significant post-release track record for DHS and an immigration judge to consider, a categorical approach is unnecessarily restrictive and wasteful of the Government's resources. In Amici's experience, many individuals who have spent an extended period of time living in the community following their release from criminal custody develop substantial ties to the community, such as family, friends and jobs, that can give DHS and immigration judges a basis to determine that they pose neither a danger nor a flight risk, and

need not be detained at public expense and significant personal hardship.

Moreover, requiring that such individuals be detained inappropriately constrains DHS's discretion to prioritize who most urgently needs to be detained, given the finite number of detention beds available. It would have been irrational for Congress to have required DHS to detain a person who had been living in the community for years following release, and who had a post-release record showing no danger to the community and strong ties that minimize flight risk, when detaining that person would require the release of an individual who has no criminal history but is specifically believed to be a danger or flight risk. Yet when detention facilities are near or at capacity, the Government's position would require such irrationality. Indeed, Congress has never come close to appropriating sufficient funds to put all criminal aliens in mandatory detention. Instead, Congress wanted to prioritize certain noncitizens for mandatory detention—those placed into immigration detention upon their release from criminal custody.

The Government contends that DHS can face practical difficulties in detaining individuals promptly following their release from criminal custody. Certainly, such practical difficulties do exist. But they are not caused by the Ninth Circuit's interpretation of Section 1226(c). The question this Court must answer is whether Congress intended detention to be mandatory even when DHS—for whatever reason—arrests a noncitizen only after an extended period has elapsed since his or her release from criminal custody.

In that situation, there is a reliable basis for an individualized assessment of danger and flight risk. Congress did not intend a categorical detention mandate in those circumstances.

The Government also contends that the Ninth Circuit's reading of the statute would deprive the public of the benefit of mandatory detention. But that benefit stems from avoiding errors that may result from individualized determinations of danger or flight risk in the absence of any individualized post-release track record. Where there is such a track record, mandatory detention is more likely to result in unnecessary detention, which imposes costs to the public that far exceed any benefit from eliminating agency discretion.

ARGUMENT

I. The Ninth Circuit's Ruling Responds to Congress' Primary Motivations for Enacting 8 U.S.C. § 1226(c).

Congress enacted Section 1226(c) in 1996 because it was "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). The evidence before Congress indicated that, at that time, "INS could not even *identify* most deportable aliens" in criminal custody, "much less locate them and remove them from the country." *Id.* at 518 (emphasis in original). This imposed costs on society: in particular, "deportable criminal aliens who remained in the United States often committed more crimes before being

removed." *Id.* Approximately three-quarters were arrested again, and nearly half were arrested multiple times before they were even placed into removal proceedings. *Id.* Moreover, a large fraction—about one in five—"failed to appear for their removal proceedings," *id.* at 519, and about "one out of four criminal aliens released on bond absconded prior to the completion of … removal proceedings." *Id.* at 520.

Accordingly, Congress made a categorical judgment to direct the mandatory detention of certain criminal aliens "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). As the Government explains in its brief, "Section 1226(c) eliminates the need for immigration judges to make inherently difficult predictions about which criminal aliens will flee or reoffend." Petr. Br. 10.

Of course, Congress did not mandate detention of every noncitizen in removal proceedings: it limited mandatory detention to certain categories of noncitizens who had committed specifically enumerated offenses, 8 U.S.C. § 1226(c)(1)(A)-(D), and who would be detained "when … released" from criminal custody. *Id.* § 1226(c); *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009) ("The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply.").

Mandatory detention, after all, carries significant costs: costs to the public, as detention is expensive (at

least $48,000 per bed annually, though this is likely a significant underestimate);[2] and costs to the individuals who are detained for a period of months and potentially years while their immigration cases remain pending. In identifying a subset of individuals to subject to mandatory detention, Congress implicitly weighed the costs and benefits of making a categorical judgment in favor of detention. *See Demore*, 538 U.S. at 518-20.

The question here is whether Congress, in weighing the benefits against the costs, intended to mandate detention even in circumstances where an extended post-release track record would allow DHS and immigration judges to make reliable predictive judgments about whether a particular noncitizen posed a danger or a flight risk.

Neither the text of the statute nor its purposes suggest that Congress intended to mandate detention in such circumstances.

As a matter of text, Section 1226(c) defines with specificity which noncitizens should be subjected to mandatory detention: those who have committed certain crimes are to be taken into immigration custody "when … released" from criminal custody. 8 U.S.C.

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[2] U.S. Government Accountability Office, GAO-18-343, Immigration Detention: Opportunities Exist to Improve Cost Estimates 32 tbl.4 (2018), https://www.gao.gov/assets/700/691330.pdf; Laurence Benenson, National Immigration Forum, The Math of Immigration Detention, 2018 Updated: The Costs Continue to Multiply (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.

§ 1226(c). The term "when … released" places a temporal limitation on the class of individuals covered by Section 1226(c). Noncitizens who are placed into immigration custody contemporaneous with their release from criminal custody are covered by Subsection (c); those who are arrested by immigration officers months or years after their release from criminal custody fall outside of it.

The Government instead reads Section 1226(c) to mean "after release." It argues that in the absence of a specified time limit in the statute for DHS to take criminal aliens into custody, "the natural inference is that Congress did not intend for a delay in custody to be relevant at all." Petr. Br. 21. But the statute does include a specified time limit: it says "when … released." 8 U.S.C. § 1226(c). "Congress chose a word, 'when,' that naturally conveys some degree of immediacy as opposed to a purely conditional word, such as 'if.'" *Castañeda v. Souza*, 810 F.3d 15, 37 (1st Cir. 2015); *see* Resp. Br. 15-29 (discussing the text of Section 1226(c) at length).

As for statutory purpose, Congress deliberately chose the phrase "when … released" to identify the particular circumstances that warrant mandatory detention procedures—those soon after release from criminal custody, when the actual flight or danger risk posed by a criminal alien is unknown. Congress knew that criminal aliens were highly likely to reoffend, and thus were likely to pose a danger to the community; but that generalization does not apply to individuals who have resided in the community for prolonged periods of time since their release from criminal custody and now

have a track record of law-abiding conduct. As the First Circuit has explained:

> It is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks. The affected aliens are individuals who committed an offense, and were released from custody for that offense, more than a decade ago. They have continued to live in the United States. By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.

Saysana, 590 F.3d at 17-18.

Amici's experience reflects that same intuition. Non-citizens who have resided in the community for prolonged periods of time since release often develop significant ties to the community, such as families and employment, that can reduce the likelihood of danger and flight. Their post-release track record allows for an individualized assessment of such risks. Accordingly, the Ninth Circuit's ruling, which calls for the individualized assessment of flight risk and dangerousness in such circumstances, correctly interpreted Section 1226(c) in light of congressional intent.

II. The Ninth Circuit's Interpretation Enhances, Rather Than Hampers, DHS's Authority to Detain Criminal Aliens.

The Government argues that the Ninth Circuit's interpretation of Section 1226(c) undermines DHS's

authority to detain criminal aliens and rewards criminal aliens with the possibility of release for DHS's failure to immediately arrest them. *See* Petr. Br. 8-9. The opposite is true. The Ninth Circuit's interpretation enhances governmental authority by giving DHS discretion and flexibility to shape its detention decision to the circumstances, including the authority to deny release or set a high bond when individualized review finds flight risk or danger. An expansive interpretation of the mandatory detention provision, by contrast, takes away that discretion and, under some circumstances, can force DHS to take measures contrary to congressional objectives, the public interest, and its own enforcement imperatives.

A. The Ninth Circuit's Interpretation Does Not Reduce DHS's Authority or Meaningfully Increase Its Burden to Detain.

Mandatory detention under Section 1226(c) does not provide the Government with any more authority than discretionary detention under Section 1226(a). In either case, DHS may detain persons who qualify as criminal aliens under the statute, through their removal proceedings. Nor is detention under Section 1226(a) meaningfully more burdensome for the Government. In Amici's experience, custody determinations and bond hearings do not take up disproportionate amounts of time or impose unworkable administrative costs on immigration officials. To the contrary, bond proceedings are generally very short. Each side states its position; there is usually no testimony when the individual is

represented by counsel, and a hearing may last fewer than ten minutes. Certainly, bond proceedings are generally no more burdensome for enforcement authorities than *Joseph* hearings, which noncitizens subject to mandatory detention are entitled to request. *See Demore*, 538 U.S. at 514 n.3.[3] Indeed, *Joseph* hearings can be quite complex—essentially a minitrial on whether the noncitizen is removable for an offense enumerated under Section 1226(c).

The main case on which the government relies, *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), underscores why the Government's position in this case is misguided. *Montalvo-Murillo* involved a claim that the Government's failure to hold a prompt bond hearing prevented the Government from detaining an arrestee altogether. The Court held that Congress did not clearly intend such a drastic outcome simply by specifying that a suspect be given a bail hearing "immediately upon the person's first appearance." *Id.* at 714 (quoting 18 U.S.C. § 3142(f) (1988)).

Here, by contrast, the Ninth Circuit's interpretation of Section 1226(c) does not cause the Government to lose any authority to detain, nor does it deprive the public of the benefit of detention. Unlike *Montalvo-*

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[3] A *Joseph* hearing is a special appearance before an immigration judge, during which a noncitizen may challenge a mandatory detention determination by showing that the government is "substantially unlikely to succeed" in establishing that his or her criminal conviction falls within the categories subject to mandatory detention under the statute. *See Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999).

Murillo, the statute at issue here authorizes the government to detain in two ways—in its discretion upon a showing of danger and flight risk, 8 U.S.C. § 1226(a), and mandatorily, *id.* § 1226(c). The question thus is *not* whether Congress intended to strip DHS of its power to detain merely because a criminal alien was not detained when released from criminal custody—certainly, it did not. Rather, the question is whether Congress intended its categorical judgment in favor of detention to apply even in circumstances where DHS has a post-release track record on which it can base an individualized detention decision. *Montalvo-Murillo* is beside the point.

B. The Government's Interpretation In Fact Limits, Rather Than Maximizes, DHS's Authority.

The experience of Amici is that interpreting Section 1226(c) to apply even to noncitizens who have resided in the community for prolonged periods of time since their release from criminal custody would result in the detention of many individuals who pose no danger to the community and are not flight risks, and whom Congress had no interest in detaining.

Preserving the government's capacity to make individualized decisions unless specifically forbidden by Congress is important to the effective administration of the immigration laws. Noncitizens with criminal convictions frequently go on to live law-abiding lives and develop significant community ties following their release from criminal custody. They may marry and have children, obtain stable employment or further education, complete drug treatment programs, and

serve as caregivers for ill or disabled family members. Some become ill and disabled themselves. Moreover, for some, their offense of conviction reflects mistakes of youth rather than the beginning of a criminal career. That is particularly so, for example, for minor drug possession convictions that nevertheless can qualify an individual for mandatory detention. Many individuals, once released into the community for a prolonged period, will never reoffend. Where these circumstances exist, these are precisely the kinds of circumstances that must be taken into account in the effective management of detention resources.

Certainly, many criminal aliens *do* pose a threat to the community or a risk of flight, and Congress reasonably provided immigration officials with the authority to detain such persons. But Congress did not compel the government to ignore the equities of individual cases when a post-release track record allows the Government to make a reliable, individualized assessment of danger and flight risk.

Indeed, the Government's overbroad interpretation of Section 1226(c) risks frustrating immigration enforcement efforts, contrary to Congress' intent. Not only would DHS be required to detain many individuals whom it has no immigration-enforcement interest in detaining, but DHS would also be hamstrung from making rational detention decisions when operating detention facilities at capacity. In such circumstances, the Government's interpretation could require DHS to release an individual who is a danger to the public or a flight risk, but is not subject to mandatory detention, in order to make room for an individual who poses no

danger or flight risk in light of a prolonged post-release presence in the community, but who nevertheless has a conviction that qualifies for mandatory detention. For example, DHS could be forced to release a recent undocumented arrival who has no fixed address and thus is likely to abscond upon release; or a known gang member who has not been charged with any criminal conduct, and thus is not subject to mandatory detention; or even another criminal alien whose offenses fall outside the categories set forth in Section 1226(c)(1), but who nevertheless poses a danger if released. Congress did not intend to force DHS or other immigration officials to abandon high priority detentions in order to make room for individuals whose dangerousness or flight risk could be reasonably ascertained based on a track record following release from criminal custody.

In the recent past, DHS has in fact bumped up against capacity constraints and has been forced to release detainees who, presumably, had previously been found at bond hearings to warrant detention. In February 2013, eleven Immigration and Customs Enforcement ("ICE") Field Offices had detention populations in excess of their budget targets.[4] Initially, ICE responded by "transferring funding from other programs"—an unsustainable strategy that "leaves

[4] These included Atlanta, Chicago, Houston, Miami, New Orleans, Newark, Philadelphia, Phoenix, San Antonio, San Diego, and San Francisco. U.S. Dep't of Homeland Security, Office of Inspector General, *ICE's Release of Immigration Detainees* 32 (Aug. 2014), http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

ICE with inadequate resources" for other enforcement activities.[5] Eventually, ICE began releasing detainees it previously had determined should be detained. Between February 9, 2013, and March 1, 2013, ICE released 2,226 such immigration detainees.[6]

This situation may recur on a regular basis when, on any given day, ICE is forced to make a determination to release someone who is subject to discretionary detention under Section 1226(a), but whom ICE believes presents a flight risk or danger, because ICE needs to create space for individuals who fall under the Government's expansive interpretation of Section 1226(c). And this situation may yet repeat itself on a wide scale, as well, if ICE runs out of detention beds in the event of a surge in the number of undocumented persons crossing illegally into the United States.

Accordingly, even if the text of Section 1226(c) were ambiguous when read in isolation, the Court should not interpret the provision in a way that, when applied in reality, would force DHS to take steps directly contrary to Congress's overriding objective of preventing noncitizens from committing crimes or absconding while their removal proceedings were pending. Congress did not intend to make a categorical judgment requiring the detention of noncitizens who have a demonstrated post-release track record of law-abiding conduct and significant community ties.

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[5] *Id.* at 1.

[6] *Id.*

CONCLUSION

The Court should affirm the decision of the Ninth Circuit.

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Respectfully submitted,

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