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 *Amicus Curiae* National Immigrant Justice Center in Support of Respondents

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INTEREST OF *AMICUS CURIAE*

Amicus National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization that provides legal representation and consultation to low-income immigrants, refugees, and asylum seekers across the country. Together with over 1500 pro bono attorneys, NIJC represents thousands of individuals annually, including noncitizens who will be directly affected by the Court's resolution of the question presented in this case. NIJC's extensive experience representing noncitizens in immigration detention and removal proceedings makes it well positioned to assist the Court in understanding how the statutory provision at issue in this case operates in practice and why the Ninth Circuit's interpretation of that provision is consistent with those practical realities.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the proper construction of 8 U.S.C. 1226(c), which provides that the Attorney General must detain certain noncitizens, without opportunity for release on bond, pending resolution of their removal proceedings. See 8 U.S.C. 1226(a), (c). The court of appeals correctly held that Section 1226(c) applies to noncitizens only if the government

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[1] Counsel for the petitioners and counsel for the respondents have consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

detains them promptly upon their release from criminal custody. See Pet. App. 1a-59a; 8 U.S.C. 1226(c)(1) (stating that the Attorney General "shall take into custody" a noncitizen who has committed any of certain offenses "when the alien is released"). Under that ruling, noncitizens who are not promptly detained are subject to Section 1226(a), pursuant to which the government may detain them unless they demonstrate eligibility for release on a bond. 8 U.S.C. 1226(a) (stating that "[e]xcept as provided in subsection (c)" the government "may release the alien on * * * bond").

In challenging the decision of the court of appeals, the government makes certain assumptions and generalizations that are unjustified. The government asserts that the Ninth Circuit's interpretation of the statute would "bestow[] a windfall upon dangerous criminals," Pet. Br. 11-12 (quoting *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013)), and would "re-enabl[e] the very problems of flight and recidivism * * * that Congress enacted Section 1226(c) to prevent," Pet. Br. 24. The government also asserts that if the Ninth Circuit's judgment is affirmed then "criminal aliens would become exempt from mandatory detention based on a factor" that "is irrelevant for all other immigration purposes": a "gap in custody." Pet. Br. 24 (quoting *In re Rojas*, 23 I. & N. Dec. 117, 122 (BIA 2001) (en banc)); see *ibid.* (stating that such a gap "has nothing to do with the alien's criminal history, dangerousness, or flight risk"). Those assertions significantly underpin the government's statutory argument, which relies on the notion that Congress would not have had any

justification for distinguishing in Section 1226(c) between individuals who are taken into immigration custody promptly upon their release from imprisonment for a crime and individuals who are not taken into immigration custody until some later point.

But the government's portrayal of the context in which Section 1226(c) is applied is significantly oversimplified. Understood in proper context, the distinction drawn by Congress in Section 1226(c) between noncitizens who are detained promptly upon release from custody ("when the alien is released," 8 U.S.C. 1226(c)(1)) and those who instead resettle into the community has an obvious rationale and reflects sensible policy judgments.

First, as a practical matter, it is not the case that the construction adopted by the court of appeals would result in the release of large numbers of "dangerous criminals." Pet. Br. 11-12 (quoting *Sylvain*, 714 F.3d at 160-161). Many noncitizens who have convictions described in subsections (A) through (D) of Section 1226(c)(1) are low-level offenders, and many are eligible for various forms of relief from removal that would enable them to remain lawfully and permanently in the United States. In addition, many of those low-level offenders, if given the opportunity for a bond hearing, could demonstrate that they pose neither a flight risk nor a danger to the community. Those who resettle in the community after serving a term of imprisonment and live peacefully for months or years are particularly unlikely to pose a danger. By contrast, aggravated felons and terrorists would be unlikely to be released on bond even if Section

1226(c) did not apply. Section 1226(c) must be interpreted in light of the fact that the opportunity to post bond primarily benefits low-level offenders, not aggravated felons or others who have committed serious criminal offenses.

Second, because the mandatory detention statute includes so many low-level offenses, the distinction between noncitizens who are detained immediately upon release from criminal custody and those who resettle in the community is far from "irrelevant." Pet. Br. 24 (quoting *Rojas*, 23 I. & N. Dec. at 122). To the contrary, living in the community for months or years after being released from criminal custody gives a noncitizen an opportunity to demonstrate *rehabilitation*, which longstanding agency case law treats as a near-requirement for relief from removal after a criminal conviction. Noncitizens who have resettled into the community therefore have a stronger incentive to litigate their removal proceedings than their counterparts who have not had a comparable opportunity, and need not necessarily be detained to ensure that they appear.

Third, the distinction drawn by Congress avoids serious constitutional concerns. This Court has held that mandatory, preventative detention can be justified based on dangerousness and risk of flight, insofar as necessary to effectuate removal. See *Demore* v. *Kim*, 538 U.S. 510, 518-520 (2003). Those justifications do not hold when applied to noncitizens who have lived freely for substantial periods of time after release from criminal custody and may be fully rehabilitated. Congress crafted the mandatory detention provision in a manner that avoids the constitutional concerns that might arise from

detaining such noncitizens without any possibility of bond.

Finally, the government understates its ability to take noncitizens into immigration custody immediately after their release from criminal custody. Immigration and Customs Enforcement (ICE) has extensive programs for identifying and detaining potentially removable noncitizens in federal, state, and local custody. To the extent it fails to do so, that failure is largely the result of ICE's own policy choices and resource allocation decisions. Localities comply with the vast majority of ICE's requests to notify it in advance of a noncitizen's release or to detain the noncitizen beyond his or her scheduled release date to facilitate ICE taking the noncitizen into custody. Where localities have declined to comply, it is often as a result of legal impediments, some of which are caused by ICE's own policies.

ARGUMENT

I. Mandatory Detention Applies To Individuals Who Have Committed Low-Level Offenses That Pose No Danger To The Public And For Whom Removal Is Not Preordained.

As an initial matter, it is important to interpret Section 1226(c) in light of the fact that the opportunity for a bond hearing most benefits those who have committed relatively low-level offenses, not those who have committed the "dangerous" crimes that the government posits. Many of the offenses described in subsections (A) through (D) of Section 1226(c)(1) are not serious and do not bar

noncitizens convicted of them from obtaining relief from removal. It is noncitizens who have low-level convictions, who have completed their sentences and lived law-abiding lives in the community for months or years, and who may earn the right to remain permanently in the United States who are likely to obtain release on bond, not dangerous criminals or terrorists.

The application of mandatory detention to those classes of noncitizens also provides an essential clue to how to read the statute. If Congress had mandated detention only for noncitizen classes it made generally ineligible for relief from removal, it might make sense to presume that Congress intended to require detention of people it considered generally undesirable, as a prelude to removal. But the fact that Congress adopted the same mandatory detention regime for classes of noncitizens generally eligible for relief from removal suggests that Congress was focused on something else: recency of release.

A. Many Noncitizens With Convictions Covered By Subsections (A) Through (D) Of Section 1226(c)(1) Are Low-Level Offenders.

The offenses that may trigger detention under Section 1226(c)(1) are referenced in subsections (A) through (D) of that provision. Some of those triggering offenses are serious, such as commission of certain aggravated felonies. See, *e.g.*, 8 U.S.C. 1226(c)(1)(B) (incorporating 8 U.S.C. 1227(a)(2)(A)(iii)); *Torres* v. *Lynch*, 136 S. Ct. 1619, 1623 (2016) (explaining that the "21 subparagraphs" of the

aggravated felony definition "enumerate some 80 different crimes").

But many—indeed, most—offenses covered by subsections (A) through (D) of Section 1226(c)(1) do not present the same type of public safety concerns. For instance, those subsections reach any noncitizen who has committed virtually any controlled substance offense, see 8 U.S.C. 1226(c)(1)(A)-(B) (incorporating 8 U.S.C. 1182(a)(2)(A)(i)(II) and 8 U.S.C. 1227(a)(2)(B)),[2] or undertaken certain conduct related to commercialized vice, including having engaged in prostitution in the previous ten years, see 8 U.S.C. 1226(c)(1)(A) (incorporating 8 U.S.C. 1182(a)(2)(D)).

The triggering offenses also include convictions for crimes involving moral turpitude, a term that is not defined in the statute and that the courts have

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[2] Specifically, Section 1226(c)(1)(A) refers to any inadmissibility by reason of having committed any offense covered in Section 1182(a)(2), which in turn makes inadmissible any noncitizen who has been "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of * * * a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. 1182(a)(2), 1226(c)(1)(A); see 8 U.S.C. 1182(a) (discussing grounds of inadmissibility). Section 1226(c)(1)(B) refers to "deportab[ility]" by reason of having committed any offense covered in Section 1227(a)(2)(B), which in turn makes "deportable" any noncitizen who, at any time after admission, has been convicted of any controlled substance violation "other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B); see 8 U.S.C. 1226(c)(1)(B); see also 8 U.S.C. 1227(a) (discussing "classes of deportable aliens").

interpreted broadly. See 8 U.S.C. 1226(c)(1)(A), (C) (incorporating 8 U.S.C. 1182(a)(2)(A)(i)(I) and 8 U.S.C. 1227(a)(2)(A)(i)). Under that broad interpretation, the category includes many low-level offenses.

For example, the Seventh Circuit found that "theft of a recordable sound"—*i.e.*, illegally downloading music—constituted a crime involving moral turpitude. *Hashish* v. *Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006). Other low-level offenses that have been held to involve moral turpitude include petty theft, see *United States* v. *Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999), writing bad checks, see *Ijoma* v. *INS*, 875 F. Supp. 625, 630 (D. Neb. 1995), *aff'd*, 76 F.3d 382 (8th Cir. 1996), misdemeanor burglary of a motor vehicle, see *Pulido-Alatorre* v. *Holder*, 381 F. App'x 355, 358 (5th Cir. 2010), making false statements on a driver's license application, see *Zaitona* v. *INS*, 9 F.3d 432, 438 (6th Cir. 1993), giving false identification information to a police officer, see *Castillo-Torres* v. *Holder*, 394 F. App'x 517, 521 (10th Cir. 2010), manufacturing or selling counterfeit goods, see *Tall* v. *Mukasey*, 517 F.3d 1115, 1119 (9th Cir. 2008), willful failure to file a tax return, see *Carty* v. *Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005), using a false Social Security card to obtain employment, see *Marin-Rodriguez* v. *Holder*, 710 F.3d 734, 739 (7th Cir. 2013), possession of a stolen vehicle, see *De Leon* v. *Lynch*, 808 F.3d 1224, 1232 (10th Cir. 2015), and soliciting prostitution, see *Rohit* v. *Holder*, 670 F.3d 1085, 1091 (9th Cir. 2012).

Thus, it is simply not the case that all offenses listed in subsections (A) through (D) of Section

1226(c) are serious or violent in nature. Indeed, the available data suggest that the majority of immigration charges that could trigger mandatory detention under Section 1226(c) actually involve relatively less serious offenses. From October 1, 2001 to July 26, 2011, the government asserted 430,081 new immigration charges based on statutory provisions covered by subsections (A) through (D) of Section 1226(c)(1).[3] Of those new immigration charges, only 24% were based on aggravated felony convictions. A full 32.5% were based on controlled substance violations, not including controlled substance trafficking.[4] After fiscal year 2011, publicly available data do not reflect the specific statutory provisions on which immigration charges are based, but do classify charges as based on

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[3] Note that the figure set forth above represents the number of charges asserted, not the number of individuals charged. The government may assert multiple charges against a single individual. In addition, the data include 15,578 new immigration charges based on Section 1227(a)(2)(A)(i), which applies to crimes of moral turpitude. A charge based on that provision is covered by subsections (A) to (D) only if the noncitizen was sentenced to a term of imprisonment of at least one year, but the data do not reflect the length of the sentence imposed. Thus, while we include those charges in our analysis, we note that the figure may include some charges that would not come within the scope of subsections (A) through (D) of Section 1226(c)(1).

[4] See Transactional Record Access Clearinghouse (TRAC), *Charges Asserted in Deportation Proceedings in the Immigration Courts*, http://trac.syr.edu/immigration/reports/260/include/detailchg.html (accessed Aug. 1, 2018).

aggravated felonies versus "other criminal."[5] From October 1, 2011 to June 30, 2018, the government asserted more than twice as many immigration charges in the "other criminal" category as it did in the aggravated felony category.[6]

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[5] Because the data do not include the statutory provisions charged, it is impossible to determine how many of the charges come within the scope of subsections (A) through (D) of Section 1226(c)(1). Therefore, these calculation set forth in the text may include some "other criminal" charges that do not trigger detention under Section 1226(c)(1).

[6] See TRAC, *New Deportation Proceedings Filed in Immigration Court*, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (accessed Aug. 1, 2018). The offenses described in subsections (A) through (D) of Section 1226(c)(1) also include commission of certain offenses involving terrorist acts or association with a terrorist organization, see 8 U.S.C. 1226(c)(1)(D) (incorporating 8 U.S.C. 1182(a)(3)(B) and 8 U.S.C. 1227(a)(4)(B)), and commission of certain offenses related to national security, such as espionage, sabotage, treason, or sedition, see 8 U.S.C. 1226(c)(1)(B) (incorporating 8 U.S.C. 1227(a)(2)(D)). But the number of noncitizens charged under those provisions is vanishingly small. From October 1, 2001 to July 26, 2011, the government asserted only 44 immigration charges based on terrorism-related grounds covered by subsections (A) through (D) of Section 1226(c)(1) and only 55 immigration charges based on grounds related to national security covered by those subsections. Transactional Record Access Clearinghouse (TRAC), *Charges Asserted in Deportation Proceedings in the Immigration Courts*, http://trac.syr.edu/immigration/reports/260/include/detailchg.html (accessed Aug. 1, 2018). Similarly, from October 1, 2011 to June 30, 2018, only 0.02% of new immigration charges were terrorism-related and only 0.17% were related to national security. See TRAC, *New Deportation Proceedings Filed in Immigration Court*, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (accessed Aug. 1, 2018).

B. Congress Made Many Noncitizens Covered By Section 1226(c)(1) Eligible For Relief From Removal.

Congress made many noncitizens covered under subsections (A) through (D) of Section 1226(c)(1) statutorily eligible for relief from removal—that is, for the right to remain permanently in the United States.

Relief from removal for individuals who fall within the scope of subsections (A) through (D) of Section 1226(c)(1) can take various forms. Lawful permanent residents, for example, are eligible for cancellation of removal unless they have been convicted of an aggravated felony. See 8 U.S.C. 1229b(a). Asylum is available to noncitizens, whether lawful permanent residents or otherwise, who meet the relevant statutory requirements and have not been convicted of a "particularly serious crime," which includes aggravated felonies and other offenses designated by the Attorney General. See 8 U.S.C. 1158(b)(2)(B)(i). Noncitizens who are admissible to the United States and eligible to receive an immigrant visa—for example, because they have a spouse, child over age 21, or parent who is a U.S. citizen—may apply for adjustment of status to lawful permanent resident, even if they have a conviction that would otherwise render them removable. See 8 U.S.C. 1255(a); *Matter of Rainford*, 20 I. & N. Dec. 598 (BIA 1992). Finally, the Attorney General may, under certain circumstances, waive specified criminal grounds of inadmissibility: crimes of moral turpitude, a single offense of simple possession of 30 grams or less of marijuana, multiple

criminal convictions for which at least five years' imprisonment was imposed, prostitution or other commercialized vice, and serious criminal activity for which the noncitizen has asserted immunity. See 8 U.S.C. 1182(h). Noncitizens who obtain those forms of relief are not removable on the basis of the charged convictions and may maintain or obtain the right to remain permanently and lawfully in the United States. See, *e.g.*, *Matter of Rainford*, 20 I. & N. Dec. at 602 (noting that a noncitizen who is granted adjustment of status "will no longer be deportable on the basis of this prior conviction").

The government's suggestion that mandatory detention should be regarded as simply a waystation along the road to ultimate removal, see, *e.g.*, Pet. Br. 24, is therefore a significant oversimplification. That cannot be how Congress saw it, given that Congress simultaneously made individuals covered by the majority of the offenses listed in subsections (A) through (D) of Section 1226(c)(1) eligible to obtain discretionary relief that allows them to remain freely in the United States. For that reason, it is more sensible to understand Section 1226(c) as the Ninth Circuit did: as a conclusive presumption that applies only in cases in which a noncitizen went directly from criminal to immigration custody, in which case the likelihood that the individual in question could establish rehabilitation and eligibility for relief from removal is at its nadir. See 8 U.S.C. 1226(a), (c)(1); *infra* Part II.

C. Dangerous Criminals and Terrorists Are Unlikely To Be Released On Bond Regardless Of Whether Section 1226(c) Applies.

Noncitizens who have been convicted of one of the triggering offenses and have served their criminal sentences, but were not taken into custody by the government "when * * * released," 8 U.S.C. 1226(c)(1), and therefore have resettled in the community, may be fully rehabilitated. Those are precisely the types of individuals who may be able to demonstrate the factors justifying release on bond. In a bond proceeding, the noncitizen must convince the adjudicator that she does not pose a danger to persons or property and is likely to appear at future immigration proceedings. See 8 C.F.R. 1236.1(c)(8). Relevant factors include length of residence in the community, strong family ties, stable employment history, passage of many years since any criminal activity, and lack of dangerousness—all factors that someone who has been out of custody for a period of time may be able to establish. See *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (BIA 1987) (describing factors relevant to bond determination); *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006) (same).

In contrast, aggravated felons and other serious offenders would be unlikely to be released on bond even if they are not subject to mandatory detention under Section 1226(c). A noncitizen with a history of violent criminal behavior is highly unlikely to be able to prove that she is not dangerous. See *Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009)

("Dangerous aliens are properly detained without bond."); *Matter of Padilla-Vargas*, No. A43 281 648 - BOST, 2004 WL 2943509, at *2 (DCBABR Nov. 15, 2004) (holding that "even if the respondent were not subject to mandatory detention" he would not merit bond "because he poses a danger to the community due to his recidivist misconduct").

In addition, a noncitizen's criminal record affects eligibility for relief from removal, which in turn provides an incentive or disincentive to appear for removal hearings. See *Matter of Andrade*, 19 I. & N. Dec. at 490; *infra* Part II. Aggravated felons are generally not eligible for relief from removal and therefore generally pose a greater risk of flight than their counterparts whose convictions are less serious.

Finally, administrative mechanisms ensure that noncitizens are not summarily released from custody. The rules err, if anything, in the opposite direction. If an immigration judge grants bond in a case in which the Department of Homeland Security (DHS) found bond inappropriate, DHS now has the power by regulation to impose a 90-day automatic stay of the bond decision while it appeals to the Board of Immigration Appeals. See 8 C.F.R. 1003.6(c)(5). In such cases, the Board must decide the appeal within that period or decide whether to issue a discretionary stay of release. See *ibid*. And even if the Board upholds the bond decision, release is delayed by another five business days to permit the Attorney General to review the decision. See 8 C.F.R. 1003.6(d).

The government's focus on aggravated felonies thus obscures the main effect of the statutory detention scheme. A host of rules and policies now in place tend to prevent release of noncitizens except those with the most minor of convictions.

II. The Timing Of A Noncitizen's Detention On Immigration Charges Is Highly Relevant Under Section 1226(C) Precisely Because Mandatory Detention Applies To Low-Level Offenders.

The government contends that the timing of the noncitizen's detention on immigration charges is "irrelevant for all other immigration purposes." Pet. Br. 24 (quoting *Rojas*, 23 I. & N. Dec. at 122). If mandatory detention were limited to individuals whom Congress made ineligible for immigration relief, that might have been true. But the statute does not operate as the government suggests. For individuals eligible for relief from removal, longstanding agency case law places great importance on the recency of release from criminal custody. Thus, noncitizens who have lived in the community post-release are not similarly situated to their counterparts who were detained promptly. The structure of the statute, and its breadth of application, therefore provides powerful evidence that applicability of mandatory detention turns on whether a noncitizen is taken into immigration custody "when * * * released." 8 U.S.C. 1226(c)(1).

A noncitizen with a criminal record "will ordinarily be required to present evidence of rehabilitation" before she will be granted discretionary relief such as cancellation of removal.

See *Matter of C-V-T-*, 22 I. & N. Dec. 7, 12 (BIA 1998); *Matter of Edwards*, 20 I. & N. Dec. 191, 196 (BIA 1990) (holding that rehabilitation is "a factor to be considered in the exercise of discretion"). Although not impossible, it is much more difficult for a noncitizen who remains in continuous custody to demonstrate rehabilitation than it is for one who has lived a law-abiding life in the community for a substantial period of time. See *Matter of Marin*, 16 I. & N. Dec. 581, 588 (BIA 1978) ("Dependent upon the nature of the offense and the circumstances of confinement, it may well be that a confined respondent will not be able to demonstrate rehabilitation.").

Accordingly, the distinction drawn by Congress with respect to bond eligibility reflects the increased prospects of success on an important front for noncitizens who have resettled into the community. Congress had every reason to draw a line between individuals who are taken into immigration custody "when * * * released" and those who are not: the logic of mandatory detention is at its apex where an individual's rehabilitation is doubtful and she has a weak case for relief on the merits. Broadening mandatory detention to apply regardless of rehabilitation appears arbitrary and does not necessarily serve the government's interests in identifying noncitizens who may reoffend or flee. See *Demore* v. *Kim*, 538 U.S. 510, 518-519 (2003).

III. The Government's Reading Would Raise Significant Doubts About The Constitutionality Of The Statute.

Conscious that it has prevailed against a facial challenge to the mandatory detention statute, the government advances a view of that statute that treats mandatory detention of noncitizens who have not been taken into immigration custody "when * * * released" as a form of punishment. Interpreting the statute to distinguish between noncitizens who have had a period of release and those who have not thus avoids serious constitutional concerns.

This Court has long recognized that immigration detention may not be used for penal purposes. See *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896) (holding that subjecting noncitizen to imprisonment at hard labor before deportation violated the Due Process Clause and the Sixth Amendment); *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("The [immigration] proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). And when this Court previously considered the constitutionality of Section 1226(c), the Court upheld the provision on the basis of its non-punitive purposes, *i.e.*, ensuring that noncitizens would appear for their removal hearings and protecting the community from dangerous criminals. See *Demore*, 538 U.S. at 518-519. Further, as Justice Kennedy recognized in his concurrence, those justifications are "premised upon the alien's deportability." *Id.* at 531 (Kennedy, J., concurring).

Those foundations grow shaky when applied to noncitizens who have lived lawfully in the community for a period of months or years. Because of the increased probability that they may ultimately obtain relief from removal, noncitizens who can demonstrate rehabilitation by showing a period of post-release law-abiding conduct have every incentive to appear for their removal hearings and litigate their claims for relief. Cf. *Zadvydas*, 533 U.S. at 690 (stating that the "justification" of "preventing flight" is "weak or non-existent where removal seems a remote possibility at best"). Further, even if Congress had good reasons to be concerned that noncitizens who are subject to criminal grounds of removability would reoffend before their immigration proceedings concluded, see *Demore*, 538 U.S. at 518, those reasons do not apply to noncitizens who have been living freely for months or years and have not, in fact, reoffended. See *Zadvydas*, 533 U.S. at 690-691 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."). Finally, noncitizens who have had a gap in custody are more likely to receive relief from removal; their ultimate likelihood of success is therefore much higher than it is for their counterparts who have been held in continuous custody.

Under those circumstances, imposing mandatory detention appears to have little purpose but to punish an individual on the basis of a crime for which she has already served her criminal sentence—an outcome that would be difficult or impossible to reconcile with the commands of the

Constitution. Congress may not attaint people, even noncitizens, and may not require the imposition of punishment without trial by jury and other constitutional protections. This Court should not adopt an interpretation that would throw Section 1226(c) into such constitutional doubt.

IV. The Government Understates Its Ability To Take Noncitizens Into Immigration Custody Promptly After Their Release From Criminal Custody.

The government contends that gaps in custody are "often caused by reasons outside [DHS's] control," and in particular by the refusal of state and local jurisdictions to assist immigration enforcement efforts. See Pet. Br. 26. In fact, the government has extraordinary resources to identify and detain potentially removable noncitizens held by federal, state, and local law enforcement agencies. To the extent that it fails to do so, that failure is largely attributable to the government's own actions.

1. a. ICE's Criminal Alien Program screens virtually all individuals booked into federal and state prisons and local jails to identify and prioritize potentially removable noncitizens. See generally Congressional Research Serv., *Interior Immigration Enforcement: Criminal Alien Programs* (Sept. 8, 2016) (*Interior Immigration Enforcement*), *available at* https://fas.org/sgp/crs/homesec/R44627.pdf. That screening takes place through several different mechanisms.

First, Criminal Alien Program officers use biometric information to identify potentially

removable noncitizens. *Interior Immigration Enforcement* at 10. When a law enforcement agency takes custody of an individual in relation to a criminal offense, the agency submits the arrestee's fingerprints to the FBI for a criminal background check. *Id.* at 11. Under an initiative known as Secure Communities, those fingerprints are automatically checked against DHS databases, which, as of June 10, 2015, included over 186 million unique records. *Id.* at 11 n.47.[7] Secure Communities has been in place in all 3,181 jurisdictions within the fifty states, the District of Columbia, and five U.S. territories since January 2013, thus ensuring that DHS is automatically notified whenever an individual is booked into criminal custody and automatically notified of any sentence meted out in ensuing criminal proceedings. See U.S. Immigration and Customs Enforcement, *Secure Communities*, https://www.ice.gov/secure-communities (accessed July 31, 2018).

Second, Criminal Alien Program officers interview arrestees and prisoners in person to

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[7] Under the Obama administration, Secure Communities was replaced by a program known as the Priority Enforcement Program, which used the same automatic biometric database checks but limited the use of detainers, among other reforms. *See* U.S. Immigration and Customs Enforcement, *Priority Enforcement Program*, https://www.ice.gov/pep (accessed July 31, 2018). In January 2017, the current administration terminated the Priority Enforcement Program and restored Secure Communities. *See* Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

identify potentially removable noncitizens who do not have existing biometric records in DHS's databases. *Interior Immigration Enforcement* 10. As of April 2016, there were approximately 1300 Criminal Alien Program officers monitoring 100% of federal and state prisons. *Ibid.*

When Criminal Alien Program officers identify a potentially removable noncitizen in law enforcement custody, they may issue a detainer, which is a checkbox form asking the law enforcement agency to notify DHS at least 48 hours before the noncitizen is released and to maintain custody of the noncitizen for up to 48 hours after when he or she would otherwise be released. See U.S. Immigration and Customs Enforcement, *Detainer Policy*, https://www.ice.gov/detainer-policy (accessed July 31, 2018). The number of detainers increased dramatically over recent decades—from 5,246 in fiscal year 2003 to a peak of 309,697 in fiscal year 2011.[8] Those numbers declined under reforms implemented under the Obama administration's Priority Enforcement Program, with fewer than 100,000 detainers issuing in each of fiscal years 2015 and 2016. *Id.* The current administration rescinded those reforms, however, and ICE's use of detainers has again increased.[9]

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[8] TRAC, *Latest Data: Immigration and Customs Enforcement Detainers*, *available at* http://trac.syr.edu/phptools/immigration/detain/ (accessed Aug. 2, 2018).

[9] TRAC, *Use of ICE Detainers: Obama v. Trump*, *available at* http://trac.syr.edu/immigration/reports/479/ (accessed Aug. 2, 2017).

b. An additional mechanism available to the government to ensure chain of custody is the Institutional Hearing Program. That program, which is effect in all state prison systems, allows removal proceedings to be conducted before an immigration judge at hearing sites within federal, state, and local correctional facilities. When a removable noncitizen completes his sentence, he is released into DHS custody for immediate removal, thus "eliminating the need for ICE to detain the alien[] prior to removal."[10]

2. Despite the extensive resources available to the government to enable it to take noncitizens into custody promptly, the government nonetheless contends that its failure to do so is due to States' and localities' alleged noncompliance with detainer requests. See Pet. Br. 26-27; Pet. 13. That contention is not borne out by the data.

As an initial matter, the percentage of federal requests for notification or detainer that are refused by state and local law enforcement agencies is low. Based on ICE's own records, from fiscal year 2014 through the first two months of fiscal year 2016, only

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[10] U.S. Immigration and Customs Enforcement, *Institutional Removal Program National Workload Study*, at I (Sept. 2004), *available at* https://cis.org/sites/cis.org/files/articles/2009/fentress-report.pdf; see U.S. Department of Justice Office of the Inspector General, *Audit Report: Immigration and Naturalization Service Institutional Removal Program*, at i (Sept. 2002), *available at* https://oig.justice.gov/reports/INS/a0241/final.pdf; see also *Demore*, 538 U.S. at 530 n.14.

6.1% of detainer requests were refused.[11] Nonetheless, in a full 55.5% of instances in which it issued a detainer request during the same period, ICE failed to take custody of the noncitizen. *Id.* Thus, gaps in custody more often result from the government's own unexplained failure to detain noncitizens promptly than from state and local jurisdictions' refusal to cooperate. And despite well publicized disagreements between federal and some state or local authorities regarding immigration enforcement in recent years, the percentage of detainer requests that are refused has remained at a consistently low level. From February 2017 through April 2018, ICE recorded only 5.6% of detainer requests as being refused.[12]

Further, the ICE statistics on which the government relies overstate state and local refusals to cooperate. See Pet. Br. 26. Those statistics do not distinguish between requests to notify ICE in advance of a noncitizen's release and requests to detain the noncitizen for 48 hours after the local sentence is complete. Many jurisdictions that decline to detain noncitizens beyond their release

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[11] See TRAC, *Has Cooperation by State and Local Law Enforcement Agencies Improved ICE's Apprehension Numbers?*, tbl. 1, *available at* http://trac.syr.edu/immigration/reports/433/ (accessed July 31, 2018). TRAC notes that these numbers are based on field data, and therefore may suffer from inaccuracies in ICE's recording of refusals. Nonetheless, they represent the best data available.

[12] TRAC, *Latest Data: Immigration and Customs Enforcement Detainers*, *available at* http://trac.syr.edu/phptools/immigration/detain/ (accessed Aug. 3, 2018).

date nonetheless continue to notify ICE 48 hours in advance of the noncitizen's release from custody. For example, under California's SB 54, which came into effect in January 2018, certain California law enforcement agencies may no longer detain individuals on the basis of an immigration detainer request, but may continue to notify ICE of release dates and may facilitate transfers of certain classes of individuals who have been arrested for or convicted of specified offenses including serious, violent, and state prison felonies. See Immigrant Legal Resource Center, *Practice Advisory: SB 54 and the California Values Act*, at 3 (Feb. 2018), *available at* https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf; Cal. Gov't Code § 7285.5 (a)(1)-(3).[13]

Finally, when state and local jurisdictions refuse to honor detainer requests, it is often because they are concerned about liability arising from procedural shortcuts that the federal government has elected to take in issuing such requests. From 1997 through 2012, ICE's standard detainer form, I-247, permitted ICE agents to request that local jurisdictions detain noncitizens after local detention authority lapsed based solely on ICE's assertion that "[i]nvestigation has been initiated to determine whether this person

[13] Notably, the limited restrictions in SB 54 do not apply to the state prison system. See Cal. Gov't Code § 7284.4 (defining "California law enforcement agency," to which the Act's restrictions apply, not to include "the Department of Corrections and Rehabilitation").

is subject to removal from the United States."[14] Several courts held that issuing a detention request based solely on the initiation of an investigation, without a determination of probable cause, exceeded ICE's authority under the INA, see *Moreno* v. *Napolitano*, 213 F. Supp. 3d 999, 1008 (N.D. Ill. 2016), and that the receiving jurisdiction's execution of such a request violated the Fourth Amendment, see *Morales* v. *Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014), *aff'd*, 793 F.3d 208 (1st Cir. 2015); *Miranda-Olivares* v. *Clackamas Cty*., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014). Local law enforcement authorities thus face liability for complying with those legally flawed detainer requests. See, *e.g.*, *Miranda-Olivares*, 2014 WL 1414305, at *12.

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[14] A version of Form I-247 containing this language was issued on April 1, 1997. See National Immigration Project of the National Lawyers Guild, *Understanding Immigration Detainers: An Overview for State Defense Counsel* at Appendix B (Mar. 2011), *available at* https://nationalimmigrationproject.org/pdfs/practitioners/practice_advisories/crim/2011_may_understand-detainers.pdf. DHS revised Form I-247 in August 2010 and December 2011, but the revised forms retained essentially the same language. *See id.*; Mem. of Law in Support of Plaintiffs/Petitioners' Amended Motion for Class Certification or Representative Habeas Action, Ex. B, *Jimenez Moreno* v. *Napolitano*, No. 11-cv-05452 (N.D. Ill. June 21, 2013), ECF No. 95-3. DHS revised Form I-247 yet again in December 2012, this time allowing ICE to issue a detainer based on its "[d]etermin[ation] that there is reason to believe the individual is an alien subject to removal from the United States." U.S. Immigration and Customs Enforcement, *Immigration Detainer—Notice of Action* (Rev. 12/12), *available at* https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

Versions of I-247 that have been in effect since May 2015 require ICE itself to determine that "[p]robable cause exists that the subject is a removable alien." DHS Form I-247D (Rev. 5/15), *available at* https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF. In March 2017, DHS issued a new policy directing that detainer requests be accompanied by an administrative warrant issued by an authorized immigration officer. See U.S. Immigration and Customs Enforcement, *Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers* § 2.4 (Mar. 24, 2017), *available at* https://www.ice.gov/sites/default/files/ documents/Document/2017/10074-2.pdf.[15] Even with that reform in place, state and local jurisdictions detaining individuals on the basis of immigration detainers may continue to face liability in suits brought under Section 1983 alleging that complying with the federal government's requests violates the Fourth Amendment. For example, in November 2017, an Indiana county entered a Stipulated Judgment providing that its compliance with ICE

[15] ICE previously engaged in a practice of issuing detainers based solely on an individual's foreign birth and the absence of records relating to that individual in an immigration database. A court recently held that those facts fail to establish probable cause to detain the individual. See *Roy* v. *County of Los Angeles*, No. CV 12-09012, 2018 WL 914773, at *20 (C.D. Cal. Feb. 7, 2018), *reconsideration denied*, No. CV-12-09012, 2018 WL 3439168 (C.D. Cal. July 11, 2018). The court further held that ICE's practice of issuing warrantless detainer requests without making an individualized determination of flight risk exceeded its authority under the INA. *Id.* at *20-21.

detainers without probable cause sufficient under the criminal law constituted a Fourth Amendment violation. See *Lopez-Aguilar* v. *Marion Cty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 963 (S.D. Ind. 2017). Similarly, a district court in California has held that the Fourth Amendment does not permit local authorities to hold individuals beyond their release dates on the basis of civil immigration detainers. See Order Granting Plaintiffs' Motion to Modify Class Definition, *Roy* v. *County of Los Angeles*, No. CV 12-09012, Slip Op. at 6, ECF No. 396 (C.D. Cal. July 11, 2018).

In sum, the government's incorrect interpretation of Section 1226(c) cannot be justified on the ground that the government is simply unable to take individuals into custody, as a practical matter, "when" those individuals are "released" from imprisonment for criminal offenses. 8 U.S.C. 1226(c)(1). The government has tremendous resources for identifying, tracking, and apprehending potentially removable noncitizens, and it cannot lay the blame for its failure to do so at the feet of States and localities.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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