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 OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae served as members of the U.S. Congress during the consideration and passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and its mandatory detention provision, 8 U.S.C. § 1226(c). *Amici* are in a unique position to describe the intended scope of IIRIRA's detention mandate. Several *amici* served on key congressional committees that heard testimony and considered proposals that culminated in the passage of IIRIRA. All *amici* voted on the passage of IIRIRA. As people who have dedicated much of their lives to public service, *amici* share a strong interest in the just enforcement of the nation's immigration laws.

Amici are the following current and former members of Congress, listed in alphabetical order and (for the House) by district at the time of IIRIRA's passage:

1. Fmr. Rep. Howard Berman (Calif., 26th Dist.)
2. Fmr. Rep. Rick Boucher (Va., 9th Dist.)
3. Fmr. Rep. John Bryant (Tex., 5th Dist.)
4. Fmr. Sen. Russell Feingold (Wis.)
5. Fmr. Rep. Barney Frank (Mass., 4th Dist.)
6. Rep. Sheila Jackson Lee (Tex., 18th Dist.)
7. Rep. Zoe Lofgren (Calif., 16th Dist.)

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by a written consent of all parties.

8. Rep. Jerrold Nadler (N.Y., 8th Dist.)
9. Fmr. Rep. Patricia Schroeder (Colo., 1st Dist.)
10. Rep. José E. Serrano (N.Y., 16th Dist.)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief as current and former members of Congress to clarify important aspects of the legislative history behind the mandatory detention provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

Amici agree with Respondents that the text of Section 1226(c) is unambiguous: paragraph (1) provides that, "when the alien is released" from criminal custody, the "Attorney General shall take [the alien] into [immigration] custody," and paragraph (2) applies the detention mandate only to the "alien described in paragraph (1)[.]" 8 U.S.C. § 1226(c)(1)-(2). The plain language of Section 1226(c) applies mandatory detention to only those noncitizens who are apprehended by the Department of Homeland Security (DHS) *when they are released* from criminal custody. For all noncitizens not covered by this narrow carve-out—including many of the Respondent class members who have long ago completed their sentences and now are reintegrated peacefully into society—the agency retains full discretion to make arrest and detention determinations pending removal, subject to the procedures set forth in Section 1226(a).

Amici file this brief to make two points relating to the legislative history of Section 1226(c). Both points

respond to the government's argument that the detention mandate bears no connection to the timing of a noncitizen's release from criminal custody.

First, in enacting mandatory detention, Congress had in mind a specific, narrow objective: to maintain continuous custody over noncitizens convicted of certain crimes who are placed into removal proceedings when they are released from criminal custody. That is why Section 1226(c) requires the immigration agency to take custody of noncitizens convicted of certain enumerated offenses when they are released from criminal custody and then retain custody of these same noncitizens pending resolution of their removal proceedings.

Respondents' case presents a related but different issue: whether and how to detain noncitizens who are *not* taken into immigration custody at the time of their release from criminal custody. Many of the Respondent class members have served their time and become contributing members of society. Their lives present myriad individual circumstances, including caregiving and parenting for U.S. citizen family and ongoing employment and community ties. So Congress did not mandate a "one size fits all" detention policy. Rather, Congress preserved immigration authorities' long-standing discretion to determine whether to detain these noncitizens living peacefully in the community, since their post-release conduct provides a basis for assessing flight risk and dangerousness.

Second, IIRIRA's structure refutes the government's theory that mandatory detention applies to all

noncitizens convicted of the specified offenses, without regard to whether they were taken into immigration custody when released from criminal custody. Each iteration of mandatory detention—through four versions of the statute—followed the same pattern, requiring that the agency (1) take custody of noncitizens with certain convictions when they are released from criminal custody, and then (2) retain custody of those same noncitizens thereafter. This structure accords with Congress's purpose in enacting Section 1226(c): to maintain continuous custody over noncitizens with certain specified convictions—from criminal custody to immigration detention to potential removal.

The Court should reject the government's interpretation of Section 1226(c) and reaffirm the statute's plain textual directive that mandatory detention applies only to noncitizens convicted of predicate offenses who were taken into immigration custody when they were released from criminal custody.

ARGUMENT

I. CONGRESS ENACTED SECTION 1226(c) TO ENSURE THAT CERTAIN NONCITIZENS ARE TRANSFERRED DIRECTLY FROM CRIMINAL CUSTODY TO IMMIGRATION CUSTODY

Congress enacted mandatory detention for the first time in 1988. Congress sought to address concerns about certain noncitizens being allowed back into the community when they were released from criminal custody. Congress's solution to this specific and narrow problem was to mandate that immigration authorities take custody of noncitizens convicted

of aggravated felonies at the time of their release from criminal custody and then retain custody of them pending removal. Congress thus ensured a continuous chain of custody from criminal custody to immigration detention through to the completion of removal proceedings. This remained Congress's goal for mandatory detention from 1988 through IIRIRA's passage in 1996.

For all other individuals not covered by mandatory detention—including those like Respondent class members who were already released from criminal custody and reintegrated into the community—Congress provided federal immigration officials discretion to decide whether to release them on bond. *See* 8 U.S.C. § 1252(a)(1) (1989); 8 U.S.C. § 1252(a)(1) (1991); 8 U.S.C. § 1252(a)(1) (1996); 8 U.S.C. § 1226(a) (1996). Eligibility for release on bond has long been the default in the immigration detention system. Prior to 1988, all detained noncitizens were eligible for release on bond. *See* 8 U.S.C. § 1252(a) (1952); *Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) (noncitizens were "not [to] be detained" unless found to be a danger or a flight risk).

A. Legislative History Demonstrates That Congress Intended Mandatory Detention to Ensure Continuous Custody of Certain Noncitizens from Their Release from Criminal Custody to Potential Removal

From the initial enactment of mandatory detention in 1988 through IIRIRA's passage in 1996, Congress consistently focused on the narrow category of

noncitizens transferred directly from criminal custody to immigration custody. Contrary to the government's submission, there is nothing in the legislative history indicating that Congress sought to address through mandatory detention the separate and distinct issue of detaining noncitizens who were released from criminal custody and reintegrated into society.

1. When Congress first enacted mandatory detention through the Anti-Drug Abuse Act of 1988,[2] it focused on only noncitizens convicted of "aggravated felonies"[3] and transferred directly from criminal custody to immigration detention. 8 U.S.C. § 1252(a)(2) (1989) ("[T]he Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion* of the alien's sentence for such conviction . . . [and] the Attorney General shall not release *such felon* from custody.") (emphasis added). The 1988 Act preserved federal immigration officials' long-standing discretionary authority to release all other noncitizens in removal proceedings. *See* 8 U.S.C. § 1252(a)(1) (1989).

Legislative history makes plain the problem that Congress sought to address through mandatory detention. Prior to the enactment of the 1988 Act, Congress received General Accounting Office (GAO) reports and heard testimony that some noncitizens with

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[2] *See* Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181, 4470.

[3] The Act defined "aggravated felony" to include only noncitizens with very serious convictions—namely, murder and drug and firearms trafficking. *See* Anti-Drug Abuse Act of 1988, § 7342, Pub. L. No. 100-690, 102 Stat. at 4469-70 (codified at 8 U.S.C. § 1101(a)(43)).

criminal convictions committed additional crimes or fled after being identified as removable because they were not taken into custody upon release from criminal custody. *See, e.g.*, *Criminal Aliens, Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 53-54, 67, Serial No. 44 (1989) (statement of GAO Directors Lowell Dodge and James Blume regarding 1986 and 1987 GAO reports submitted to Congress); *see also Demore v. Kim*, 538 U.S. 510, 518 (2003) (citing to the 1986 report and the 1989 hearing on H.R. 3333).

Congress imposed mandatory detention on noncitizens who were in criminal custody to solve that specific problem. As stated by Senator Alphonse D'Amato, upon concurrence of the Senate in the bill that was subsequently enacted into law as the Anti-Drug Abuse Act of 1988, the mandatory detention provision "requires the Federal Government to put aggravated alien felons in detention *immediately* after they serve their criminal sentence." 134 Cong. Rec. 32649 (1988) (statement of Sen. Alphonse D'Amato); *see also* Cong. Research Serv., Library of Congress, RS52, *Anti-Drug Abuse Act of 1988 (P.L. 100-690): Summary of Major Provisions* (1989) (report for Congress stating that the mandatory detention provision contained in the 1988 Act required "State and local authorities to transfer custody of such aliens [convicted of aggravated felonies] *promptly* to the Attorney General.") (emphasis added). Senator Bob Graham reiterated the purpose of the mandatory detention provision when later explaining that, "[i]n 1988, Congress . . . wrote specific guidelines for the [Immigration and Naturalization

Service (INS)]" stating that, once noncitizens convicted of aggravated felonies complete their sentences, "they must be taken into *immediate* custody by the INS." 136 Cong. Rec. 35621 (1990) (statement of Sen. Bob Graham) (emphasis added); *see also* H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554 (characterizing then-"current law"—the detention mandate set forth in the 1988 statute—as "requir[ing] [the government] to incarcerate alien aggravated felons without bond *immediately upon completion of the alien's criminal 'sentence*'") (emphasis added).[4]

2. Congress next refined the mandatory detention provision through the Immigration Act of 1990. Its focus was on ensuring that all noncitizens with certain convictions were taken into immigration custody at the time of their release from criminal custody, even if their release did not coincide with the conclusion of their criminal sentences. Congress revised the Immigration and Nationality Act (INA) to require that a noncitizen convicted of an aggravated felony be taken into immigration custody "upon release" from

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[4] Congress's focus on taking custody of noncitizens convicted of aggravated felonies "upon completion" of their underlying sentences is further underscored by Section 1252(a)(3), which provides, among other things, that the Attorney General shall devise a system "to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and *release* of any alien charged with an aggravated felony." 8 U.S.C. § 1252(a)(3)(A)(ii) (1989) (emphasis added). This language was retained in all subsequent iterations of the mandatory detention statute. *See* 8 U.S.C. § 1252(a)(3)(A)(ii) (1991); 8 U.S.C. § 1252(a)(3)(A)(ii) (1996); 8 U.S.C. § 1226(d)(1)(B) (1996).

criminal custody, "regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (codified at 8 U.S.C. § 1252(a)(2) (1991)).

When approving this "clarification," a House report to the 1990 amendments explained that "[a]t least one immigration judge has ruled that an aggravated felon who has been paroled by the sentencing court continues to serve his 'sentence' while out on parole," thereby preventing INS from placing the noncitizen in immigration custody "until his period of parole has ended." H.R. Rep. No. 101-681(I), § 1503, at 34, 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554; *see Matter of Eden*, 20 I. & N. Dec. 209, 210 (BIA 1990). Congress amended the law to specifically "requir[e] INS to incarcerate aggravated felons *upon release from confinement*." H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554 (emphasis added). As Representative Romano Mazzoli explained, "[t]he Immigration Act of 1990 required the Immigration Service to detain all aliens convicted of aggravated felonies during the time periods between their release from prison and their deportation." *Criminal Aliens, Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary*, 103rd Cong. 1, Serial No. 37 (1994) (opening statement of Romano Mazzoli).

The government concedes that Congress's "upon release" clause in the 1990 Immigration Act directed

federal immigration officials to detain noncitizens immediately upon release from criminal custody. *See* Pet. Br. at 35 (citing to *Webster's* Dictionary for the proposition that "upon" means "immediately" or "very soon after"). Nonetheless, the government argues that the 1990 amendments applied to all noncitizens with the requisite criminal history, regardless of whether they were released from criminal custody several years prior and had since lived peacefully in society. *Id.* at 32. It is true that the Immigration Act of 1990 briefly restored discretion to "release from custody" any "lawfully admitted" noncitizen on bond, so long as the noncitizen could demonstrate that he or she did not pose a flight risk or danger to the community. *See* Immigration Act of 1990, § 504, 104 Stat. at 5049. But the provision permitting discretionary release of lawfully admitted noncitizens was an exception to the mandatory detention provision, which *did* refer to the timing of release from criminal custody. *See* 8 U.S.C. § 1252(a)(2)(A) (1991).

The government also asserts that Congress ratified an interpretation of mandatory detention that was supposedly adopted by the Executive Branch, *see* Pet. Br. at 31-33, but that is an incomplete retelling of the story. Nothing in the legislative history indicates that the regulations cited by the government—which were promulgated less than six months prior to the 1990 Act—were ever "called to the attention of Congress" and "accompanied by any congressional discussion which throws light on its intended scope." *United States v. Calamaro*, 354 U.S. 351, 359 (1957); *see also Isaacs v. Bowen*, 865 F.2d 468, 473 (2d Cir. 1989) ("to construe an agency's interpretation as Con-

gress' will we must find a manifestation of congressional approval").[5] And the broader legislative history clearly shows that it only applied to noncitizens immediately "upon release" from criminal custody, so there is no need to "look to the [agency's] interpretation" to determine the Act's meaning. *Goldings v. Winn,* 383 F.3d 17, 21 (1st Cir. 2004) (citation omitted).

3. When Congress next amended the mandatory detention provision as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it continued to refine its approach to the specific problem of ensuring that noncitizens convicted of certain offenses were transferred directly from criminal to immigration custody. Congress expanded the category of noncitizens subject to mandatory detention and instructed the Attorney General to take noncitizens into custody "upon release . . . from incarceration." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277.

During discussions leading to AEDPA's passage, Congress consistently continued to identify the problem it sought to solve: preventing certain noncitizens from being released into local communities at the end

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[5] The government's reliance on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-20 (2015), and *Forest Grove School District v. T. A.*, 557 U.S. 230, 244 n.11 (2009), to support its argument is misplaced. *See* Pet. Br. at 33. These cases involved Congress acting in the face of known court precedent, rather than Congress acting against the backdrop of agency regulations that Congress never discussed and which conflict with the plain language and legislative history of the statute.

of criminal custody. *See, e.g.*, H.R. Rep. No. 104-22, at 6 (1995), 1995 WL 56411 (describing the "need for the legislation" for a companion bill that would eventually be incorporated into AEDPA as addressing the issue of noncitizens with criminal histories who were "released into American society after they were released from incarceration"); *see generally* 137 Cong. Rec. 17,550 (1991) (statement of Sen. Seymour) ("[O]ur first priority must be to deport alien felons the very minute they're released from prison.").

4. With the enactment of IIRIRA in the fall of 1996, Congress once again expanded the group of individuals subject to mandatory detention. As before, for these and the other individuals covered by mandatory detention, the amendments focused on ensuring that the agency maintain a continuous chain of custody from criminal custody to immigration detention. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-546, 3009-585. Much like the predecessor statutes, IIRIRA's detention mandate—embodied in Section 1226(c)—directs the Attorney General to take into custody certain noncitizens "when [they are] released" from criminal custody. 8 U.S.C. § 1226(c)(1).

Legislative history demonstrates that, in revising the text of Section 1226(c) from "upon release" to "when . . . released," Congress did not intend to make a substantive change to the statute; the mandate continued to be triggered by the timing of release from criminal custody. *Compare* 8 U.S.C. § 1252(a)(1) (1996), *with* 8 U.S.C. § 1226(c)(1). As Senator Simpson, a leading sponsor of IIRIRA, explained just prior to conference, the bill "will ensure that aliens who

commit serious crimes are detained *upon their release from prison* until they can be deported." 142 Cong. Rec. S10572–01 (daily ed. Sept. 16, 1996), 1996 WL 522794 (statement of Sen. Simpson) (emphasis added). A House Report on the bill explained that the new measure was intended to "restate[]" AEDPA's mandatory detention provision, which required noncitizens to be taken into custody "upon release . . . from incarceration." *See* H.R. Rep. 104–469(I) (1996), 1996 WL 168955, at *230; 8 U.S.C. § 1252(a)(1) (1996); *see also* 142 Cong. Rec. 27216 (1996) (colloquy between Sens. Abraham and Hatch) (explaining that IIRIRA "would add to the Immigration and Nationality Act a new section providing for mandatory detention of criminal aliens . . . which was already required under the Anti-terrorism and Effective Death Penalty Act signed into law earlier this year").[6]

Over four iterations of the mandatory detention provisions, Congress's focus was on ensuring that certain noncitizens be transferred to immigration custody when they were released from criminal custody. The provisions do not address individuals like Respondent class members, many of whom have lived peacefully in their communities for years after serving their time for a criminal conviction.

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[6] Nothing in the legislative history suggests that Congress intended the "when . . . released" clause in Section 1226(c) to mean "while" or "during the time that" a noncitizen was released from criminal custody, as the government contends. *See* Pet. Br. at 35. Had Congress intended such a sea change in the agency's obligations, Congress would have used much clearer language to signal the change, as it did with other provisions in IIRIRA. *See, e.g.*, 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order at *any time after* the reentry.") (emphasis added).

B. Congress's Prospective Application of Section 1226(c) and Modest Appropriations for Detention Bed Space Are Consistent with its Narrow Goal of Ensuring Continuous Custody of Certain Noncitizens

Congress's intent to limit the application of 1226(c) to a narrow group of noncitizens when they are released from criminal custody is further supported by the context of IIRIRA's enactment.

1. Congress declined to make the detention mandate retroactive: Section 1226(c) did not apply to those who were living peacefully in the community after having been released from criminal custody. *See* Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. at 3009-586 ("The amendment . . . [to Section 1226] shall become effective on the Title III-A effective date); *see generally INS v. St. Cyr*, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result.").

If Congress had made Section 1226(c) retroactive, mandatory detention would have applied to individuals who had previously been released from criminal custody, but who were newly subject to removal under IIRIRA's expanded grounds of removability. This is because in AEDPA and IIRIRA, Congress dramatically expanded the list of convictions that subjected noncitizens to mandatory detention. For instance, Congress substantially widened the definition of "aggravated felony" to include simple battery, theft, filing a false tax return, and failing to appear in court. *See* AEDPA, Pub. L. No. 104-132, § 440(e), 110 Stat.

at 1277-78; IIRIRA, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. at 3009-628, codified at 8 U.S.C. § 1101(a)(43); *see* 8 U.S.C. § 1101(a)(43)(F), (G), (M), (Q), & (T). Then, in IIRIRA, Congress made the aggravated felony definition expressly retroactive. *See* IIRIRA, Pub. L. No. 104-208, Div. C, § 321(b), 110 Stat. at 3009-628 (making IIRIRA's amended aggravated felony definition apply "regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph."). But by making the mandatory detention provision only prospective, Congress ensured that individuals long ago released from custody for convictions now deemed aggravated felonies would not be subject to that provision.

2. Congress's implementation of the Transition Period Custody Rules (TPCR) further demonstrates that Congress intended for mandatory detention to apply to only those individuals with certain convictions who were taken into immigration custody when released from criminal custody. Under the TPCR, Congress permitted the Attorney General to delay implementation of IIRIRA's mandatory detention provision for up to two years. IIRIRA, Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. at 3009-586. The TPCR provided that "the provisions of [] section 236(c) shall apply to individuals released after such periods." *Id*. This meant that the detention mandate would apply only to individuals released from criminal custody *after* the expiration of the TPCR period. The INS adopted this reading of the statute in its own bond adjudications. *In re Adeniji*, 22 I. & N. Dec. 1102, 1111 (BIA 1999). Because the agency availed itself of the full two-year delay, noncitizens released from criminal custody after October 8, 1998, were subject to

mandatory detention, whereas those released on or before October 7, 1998, were not.

This history reveals a fundamental flaw in the government's interpretation of the statute. If mandatory detention applied to all noncitizens with predicate offense convictions, as the government contends, then the agency could have subjected noncitizens with predicate offense convictions to mandatory detention at any point in time, regardless of when they were released from criminal custody. In that case, there would have been no need for the October 8, 1998 enforcement date, and there would have been no need to tether the imposition of mandatory detention to the timing of a noncitizen's release from criminal custody.

3. The appropriations to implement IIRIRA's mandatory detention provision fell far short of what was needed to keep pace with IIRIRA's expanded list of triggering convictions, let alone the levels needed to locate and detain noncitizens who had previously been released from criminal custody.

The INS General Counsel testified that, as of 1996, INS had fewer than 10,000 beds and did not have the resources to implement AEDPA's mandatory detention provision. *See Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 15-16, 34-35, 50, Serial No. 103 (1996) (prepared statement and testimony of David A. Martin, General Counsel, INS). Given funding and bed space limitations, INS stated that it was focusing its limited resources on the problem Congress sought to solve: ensuring that noncitizens with convictions for predicate offenses be taken into immigration custody when

released from criminal custody, not finding and detaining without bond those who had served their sentences and were living in the community. In March 1995, the General Counsel of INS testified that, "[b]ecause of [INS's] scarce resources," INS "targeted [its] resources in the State prisons and the Federal prisons . . . to make sure that we remove those people[.]" *Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 29, Serial No. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS). The INS General Counsel testified in 1996 that apprehending individuals with criminal convictions in the community required far greater investigative resources, reliable availability of detention space, and additional attorneys than the agency had at its disposal. *Removal of Criminal and Illegal Aliens, Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 50, Serial No. 103 (1996) (testimony of David A. Martin, General Counsel, INS).

Congressional appropriations and bed space allocations around IIRIRA's enactment did not allow the agency to keep pace with the statute's expanded list of predicate offenses. IIRIRA itself only required "the Attorney General . . . [to] provide for an increase in the detention facilities of the Immigration and Naturalization Service to at least 9,000 beds before the end of fiscal year 1997," "*subject to the availability of appropriations*." IIRIRA, Pub. L. No. 104-208, Div. C, § 386, 110 Stat. at 3009-653 (codified at 8 U.S.C. § 1368) (emphasis added). The INS increased its bed space to 12,050 beds in 1997 and 13,491 beds in 1998. *Dep'ts of Commerce, Justice, and State, the Judiciary,*

and Related Agencies Appropriations for Fiscal Year 1999, Hearings Before a Subcomm. of the S. Comm. on Appropriations, 105th Cong. 172 (1998) (statement of Doris Meissner, INS Commissioner).

* * *

If Congress had intended to mandatorily detain *all* noncitizens with predicate offense convictions, it would have made the detention mandate retroactive and then dramatically expanded appropriations to address agency resource and bed space shortfalls. Instead, it applied the mandate only prospectively and allocated funds and bed space in a manner consistent with the agency's stated focus on noncitizens apprehended by the agency when released from criminal custody.

C. After IIRIRA, Congress Considered and Rejected Numerous Proposed Amendments That Would Have Dramatically Expanded the Scope of Section 1226(c) to Apply to All Noncitizens Convicted of a Predicate Offense

Since Congress enacted IIRIRA in 1996, it has rejected numerous proposed amendments that would have dramatically expanded the scope of Section 1226(c) to apply to all noncitizens convicted of an enumerated offense, any time after they are released from criminal custody. Congress's repeated refusal to enact this broader version of mandatory detention further supports Respondents' and the lower court's interpretation of Section 1226(c) as applying to only noncitizens when released directly from criminal custody to immigration custody.

Congress has considered and rejected the language that the government now seeks to read into Section 1226(c) at least five times. *See* H.R. 1901, 113th Cong. (2013); H.R. 2278, 113th Cong. (2013); S. 2463, 113th Cong. (2014); S. 291, 114th Cong. (2015); S. 1640, 114th Cong. (2015). For example, the Keep Our Communities Safe Act of 2011 (which Congress did not pass) sought to amend Section 1226(c)(1)(D) to allow for mandatory detention:

> *any time after the alien is released*, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense.

H.R. Rep. 112–255, at 5 (2011) (emphasis added). In considering the Keep Our Communities Safe Act, Congress underscored that the proposed amendment would "greatly expand[] the number of people subject to mandatory detention by eliminating the requirement that the release from criminal custody be tied to the offense triggering mandatory detention." *Id.* at 52 (Dissenting Views). This major shift in policy would mean that "mandatory detention would apply to individuals who have long since been released from criminal custody for any offense listed in the statute and who are now leading productive lives in the community." *Id.*; *see also Keep Our Communities Safe Act, Hearing on H.R. 1932 Before the Subcomm. on Immi-*

gration Policy and Enf't of the Comm. on the Judiciary, 112th Cong. 24 (2011) (statement of Congressman Conyers) ("Under the bill, thousands of immigration detainees *would become* subject to mandatory detention….") (emphasis added).

Indeed, members of Congress who opposed the bill objected that it would "expand[] the scope of mandatory detention to include persons who have been at liberty for years and leading productive lives on the basis of old criminal offenses, rather than applying mandatory detention to non-citizens at the time of their release from sentences for designated crimes." H.R. Rep. 112–255, at 47 (2011) (Dissenting Views).

In rejecting the Keep Our Communities Safe Act and the other proposed amendments that would have dramatically expanded the scope of mandatory detention under IIRIRA, Congress repudiated the very interpretation of the statute that the government proffers in this case.[7]

II. THE STRUCTURE OF SECTION 1226(c) AND ITS PREDECESSOR STATUTES CONFIRMS CONGRESS'S NARROW GOAL FOR MANDATORY DETENTION

The structure of Section 1226(c) also contradicts the government's theory that mandatory detention applies broadly to all noncitizens convicted of a predicate offense, regardless of whether they were taken

[7] Congress considered other post-IIRIRA amendments that would have refocused mandatory detention on a narrower category of predicate offenses; these are irrelevant to the precise issue before the Court.

into immigration custody when released from criminal custody. *See* Pet. Br. at 13-17. Each mandatory detention provision—through four iterations of the statute—followed the same pattern of requiring that the agency (1) *take custody* of certain noncitizens at the point of their release from criminal custody, and then (2) *retain custody* of those same noncitizens thereafter. This structure confirms Congress's narrow purpose for mandatory detention: to maintain continuous custody over noncitizens with certain specified convictions—from criminal custody to immigration detention to potential removal.

In each version of the INA's detention mandate that predated IIRIRA, Congress required first that the Attorney General "shall take into [immigration] custody any alien convicted" of an enumerated felony offense "upon completion" of the criminal sentence (1988 mandate) or "upon release" from criminal custody (later mandates). *See* 8 U.S.C. § 1252(a)(2) (1989); 8 U.S.C. § 1252(a)(2) (1991); 8 U.S.C. § 1252(a)(2) (1996). And, in each prior version, Congress then required that the Attorney General "shall not release *such felon* from [immigration] custody." *Id.* (emphasis added). The text expressly limited the detention mandate, in each iteration, to the same "such felon" whom the Attorney General took into custody "upon completion" of a criminal sentence or "upon release" from criminal custody.

The BIA and district courts interpreted IIRIRA's predecessor statutes in just this way—reading the detention mandate to be limited to those noncitizens who were first taken into immigration custody at the moment when they were released from criminal custody. *See, e.g.*, *Matter of Eden*, 20 I. & N. Dec. at 211

(interpreting the 1988 Act); *DeMelo v. Cobb*, 936 F. Supp. 30, 36 (D. Mass. 1996) (interpreting AEDPA), *vacated as moot after IIRIRA's passage*, 108 F.3d 328 (1st Cir. 1997) (per curiam) (unpublished); *Villagomez v. Smith*, No. 96-1141, 1996 WL 622451, at *2 (W.D. Wash. July 31, 1996) (unpublished) (interpreting AEDPA).

Against the backdrop of this prevailing interpretation of the statute, Congress drafted IIRIRA's detention mandate to follow the same structure as all of its precursors. *First*, in paragraph (1) of Section 1226(c), Congress required that, "when the alien is released" from criminal custody, the Attorney General "shall take [the noncitizen] into custody[.]" 8 U.S.C. § 1226(c)(1). *Second*, in the subsequent paragraph, it provided that the "Attorney General may release an alien described in paragraph (1)" only under extremely limited circumstances that are not applicable here. *Id*. § 1226(c)(2).[8]

IIRIRA's specific instructions to the agency regarding custody and release operate in tandem, just as they did in all prior versions of mandatory detention. The mandate under Section 1226(c) applies explicitly to the noncitizens described in Section 1226(c)(1) *as a whole—i.e.*, noncitizens who were both convicted of a predicate offense and taken into immigration custody when they were released from criminal custody.

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[8] Congress broadened the cross-reference from AEDPA to read "described in paragraph (1)," instead of "such felon," to account for the fact that not all noncitizens subject to IIRIRA's expanded list of predicate offenses qualify as "felons."

Had Congress intended Section 1226(c) to conform to the government's interpretation, it would have expressly decoupled the detention mandate from the timing of a noncitizen's release by either providing that the agency could take custody of these noncitizens *at any time* after their release from criminal custody, or specifying that the detention mandate applies to the "alien described *in subparagraphs (A)-(D)* in paragraph (1)," or both. But Congress did neither of these things. Instead, it chose to retain the clear structure and meaning of IIRIRA's precursors. H.R. Rep. 104–469(I) (1996), 1996 WL 168955, at *230 (stating that Section 1226(c) was intended to "restate[]" the provisions of the detention mandate under AEDPA).

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

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