

No. 25-886

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE NEW YORK
FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, ET AL.,
Petitioners,

v.

KEISY G.M.,
Respondent.

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

**BRIEF FOR AMERICA FIRST LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation (AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States by ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

AFL has a substantial interest in this case. Ensuring compliance with our immigration laws, protecting national sovereignty, and promoting the rule of law are core institutional interests at the heart of the organization's mission. Members of AFL's Board of Directors and its staff have served in various capacities in the federal government, most prominently in the homeland security and immigration policy areas, and know firsthand the issues this case presents.*

* No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

A criminal alien detained under 8 U.S.C. § 1226(c) has the keys in his pocket. He can allow removal proceedings to terminate and return to his native land, ending his detention immediately—and generally he can keep pressing his appeals from there. What he cannot do is decline that choice, stretch the proceedings out, and then ask a federal court to release him into the United States because the proceedings took too long. The Second Circuit held that the Due Process Clause requires exactly that. It was wrong—and it lacked the power to say so in the first place.

Start with jurisdiction. Section 1226(e) bars any court from setting aside an action or decision of the Secretary regarding the detention of an alien. Respondent asks for precisely that. This Court has declined to apply § 1226(e) to challenges it read as attacks on the statutory framework, but Respondent disclaims any such challenge—he says he brings an “as-applied challenge to continued detention.” BIO 2. The statute bars review of such a challenge. In any event, a challenge to a paper framework is no case or controversy at all. Courts adjudge the legal rights of litigants, not the wording of statutes. What injures Respondent, if anything, is the Secretary’s action in continuing to detain him. That is what § 1226(e) places beyond judicial reach. This Court should not extend prior dubious readings of § 1226(e). It should vacate the decision below with instructions to dismiss.

Alternatively, the Court should reverse. The Due Process Clause does not reach § 1226(c) detentions at all. Historical evidence suggests that the Clause does

not apply to laws governing the removal of aliens. More fundamentally, due process of law—especially in the immigration context—safeguards against unlicensed executive action; it does not license courts to second-guess what Congress has authorized. Even if the Clause bound Congress here, it would guarantee only the customary procedures carried over from England. A bond hearing pending removal is not such a procedure.

Respondent's claim also fails on its own terms. He does not attack the procedures for proving removability. Rather, Respondent asserts a right to be released, but that right must be defined with care. Described accurately, the claimed right is a criminal alien's right to escape detention that his own decision to delay removal has prolonged. No deeply rooted tradition supports such a right. Detention under § 1226(c) has a definite termination point, and the alien can decide not to delay that point. His choice to delay earns no constitutional protection.

The consequences of Respondent's theory are not abstract. Congress enacted § 1226(c) because deportable criminal aliens who remained here kept committing crimes. Release also defeats removal; most released aliens are never removed. And court-ordered release rewards delay: an alien who knows that six months of litigation buys him potential release has every reason to stall. Respondent's theory would thus mean more crime against Americans, fewer removals, and an immigration system swamped by dilatory tactics. Congress weighed those risks and chose detention. The Due Process Clause does not forbid that choice.

Even assuming any bond hearing is required, the alien must carry the burden of proof. The default rule is that the party seeking relief bears the burden, and nothing warrants the opposite rule here. Section 1226(c) itself requires an alien seeking release to satisfy the Secretary that he is neither a danger nor a flight risk. And aliens detained under the discretionary provision of § 1226(a) already bear that burden before an immigration judge. The law should not be gentler on terrorists and other criminal aliens than it is on others.

ARGUMENT

I. The courts lack jurisdiction over Respondent's challenge to his detention.

The federal courts lack jurisdiction over this challenge under 8 U.S.C. § 1226(e), which (at the time this challenge was filed) provided that “[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”¹ As Respondent himself characterizes his claim, he argues that his “detention was unreasonably prolonged in violation of the Due Process Clause.” BIO 4–5. That is a challenge to the Secretary’s “action”

¹ In 2025, this language was amended to provide that “[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention of any alien or the revocation or denial of bond or parole.” 8 U.S.C. § 1226(e). The jurisdictional defect here remains the same, as actions “regarding the detention of any alien” are still insulated from review.

“regarding the detention of any alien”—specifically, the action of detaining him without a bond hearing.

Despite this clear statutory language, the Court concluded in *Demore v. Kim* that § 1226(e) did not preclude jurisdiction over a habeas claim alleging that initial bond hearings are required under § 1226(c). According to the Court, “respondent does not challenge a ‘discretionary judgment’ by the Attorney General or a ‘decision’ that the Attorney General has made regarding his detention or release.” 538 U.S. 510, 516–17 (2003). “Rather, respondent challenges the statutory framework that permits his detention without bail.” *Id.* at 517. The Court would later invoke the same rationale in adjudicating other § 1226 cases—reasoning that the challenges were to “the statutory framework as a whole.” *Nielsen v. Preap*, 586 U.S. 392, 401 (2019) (citation modified) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)).

That reasoning does not apply here and is dubious anyway.

First, the Court in *Demore* appeared to treat the issue as one of a facial “constitutional challenge to the legislation authorizing . . . detention without bail.” 538 U.S. at 517; *see id.* at 532 (Kennedy, J., concurring) (suggesting the continued availability of as-applied challenges); *see also Black v. Decker*, 103 F.4th 133, 143–44 (2d Cir. 2024) (stating that “in *Demore*,” “the Court upheld the facial constitutionality of detention under section 1226(c) without a bond hearing”).

Here, by contrast, Respondent says that his challenge is “as-applied.” BIO 7. So he is not attacking

“the statutory framework” writ large. *Demore*, 538 U.S. at 517.

Second and relatedly, “[c]ourts have no authority to strike down statutory text.” *Borden v. United States*, 593 U.S. 420, 447 (2021) (Thomas, J., concurring in judgment) (citation modified). “A court may only ‘adjudge the legal rights of litigants in actual controversies.’” *Id.* (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)). What Respondent is attacking—and what gives him an Article III injury, if he has one—is his continued detention (or its likelihood). That is an “action” by the Secretary. 8 U.S.C. § 1226(e). Likewise, to the extent any injury is redressable, it is by forcing some *other* action by the Secretary—namely, releasing him absent a bond hearing, as one of the district courts below ordered. *See Black v. Decker*, 2020 WL 4260994, at *9 (S.D.N.Y. July 23, 2020). “[I]t is impossible for a court to ‘redress’ an injury that is inflicted entirely by words appearing in a statute.” Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1005 (2018). Thus, Respondent is challenging the Secretary’s “action” in continuing to detain him absent a bond hearing; he does not and could not challenge a paper “framework.” *Demore*, 538 U.S. at 517.

Third and in all events, *Demore*’s jurisdictional holding was wrong from the outset. “There is simply no reasonable way to read” the language in § 1226(e)’s second sentence “other than as precluding all review, including habeas review, of the [Secretary’s] actions or decisions to detain criminal aliens pursuant to § 1226(c).” *Demore*, 538 U.S. at 534 (O’Connor, J.,

concurring in part and concurring in judgment, joined by Scalia and Thomas, JJ.); *see Preap*, 586 U.S. at 424 (Thomas, J., concurring in part and concurring in judgment, joined by Gorsuch, J.).² And “any argument that § 1226(e) violates the Suspension Clause is likely unavailing,” *Demore*, 538 U.S. at 537 (O’Connor, J., concurring in part and concurring in judgment); *see id.* at 537–39, and Respondent has made no such argument.

So whether this Court declines to “extend” *Demore* to this “new context” or recognizes that it was egregiously wrong from the start, it should not apply that decision. *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). Rather, it should vacate the decision below for lack of jurisdiction.³

II. Detention under § 1226(c) cannot—and does not—violate due process.

Even if the courts had jurisdiction, Respondent’s due process theory fails at every step. The Clause does not reach detention incident to removal; it creates no right to escape delay of the alien’s own making; and reading it otherwise would endanger Americans and undermine removal.

² The contrary conclusion in *Demore* relied in part on *INS v. St. Cyr*, 533 U.S. 289 (2001), which was likewise egregiously wrong and later abrogated by Congress. *See id.* at 326–48 (Scalia, J., dissenting); *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020).

³ The courts also lack jurisdiction under 8 U.S.C. § 1252(b)(9). *See Preap*, 586 U.S. at 423–24 (Thomas, J., concurring in part and concurring in judgment); *Jennings*, 583 U.S. at 315–23 (Thomas, J., concurring in part and concurring in judgment).

A. Respondent’s detention does not implicate the Due Process Clause.

The Due Process Clause cannot invalidate detention under § 1226(c), for at least three independent reasons.

First, “there is considerable historical evidence that the Due Process Clause does not apply to laws governing the removal of aliens.” *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 585 (2022) (Thomas, J., concurring) (citation modified) (quoting *Sessions v. Dimaya*, 584 U.S. 148, 210 (2018) (Thomas, J., dissenting)); *contra Trump v. J.G.G.*, 604 U.S. 670, 673 (2025). Significant historical evidence suggests a public understanding that “[r]emoving a resident alien from the country did not affect ‘life, liberty, or property’ . . . until the alien became a naturalized citizen.” *Dimaya*, 584 U.S. at 214 (Thomas, J., dissenting). This Court has long “agreed that civil deportation statutes do not implicate ‘life, liberty, or property,’” *id.*: “[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law.” *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904).

Second and more fundamentally, “considerable historical evidence supports the position that ‘due process of law’ was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law.” *United States v. Vaello Madero*, 596 U.S. 159, 168 (2022) (Thomas, J., concurring); *see Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 33 (2025) (Thomas, J., concurring in judgment).

The Court has repeatedly applied this understanding in the immigration context. “Over no conceivable subject is the legislative power of Congress more complete.” *Reno v. Flores*, 507 U.S. 292, 305 (1993) (brackets omitted). “[T]he power to admit or exclude aliens is a sovereign prerogative,” and “the Constitution gives the political department of the government plenary authority to decide which aliens to admit.” *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (citation modified). This Court’s “cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Dep’t of State v. Muñoz*, 602 U.S. 899, 911 (2024) (citation modified) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). Thus, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Thuraissigiam*, 591 U.S. at 138.

The same rule should apply to removal. “[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Demore*, 538 U.S. at 522. That criminal aliens like Respondent “were made deportable after entry is immaterial”: “[t]hey are deported for what they are now, not for what they were.” *Carlson v. Landon*, 342 U.S. 524, 536 (1952). So long “as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within

our borders.” *Id.* at 534. Thus, if removal proceeds as Congress’s statutes require, the alien has received all the process he is due.

Third, even “to the extent that the Due Process Clause restrains the authority of Congress” in this context, at most it would “prohibit Congress from authorizing the deprivation of a person’s life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England.” *Vaello Madero*, 596 U.S. at 168–69 (Thomas, J., concurring) (citation modified). A bond hearing pending removal proceedings is not such a customary procedure. As this Court has explained, “prior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings.” *Demore*, 538 U.S. at 523 n.7. That forecloses Respondent’s claim here.

B. The Due Process Clause does not require release based on an alien’s voluntary decision to delay removal.

Respondent’s theory suffers a fourth flaw. Respondent does not challenge the *procedures* for proving any element “relevant to the inquiry” of his removability under § 1226(c). *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). Rather, he claims a substantive right to freedom from detention pending removal. Thus, his claimed right sounds in substantive due process. But substantive due process rights may not be defined “at a high level of generality.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257 (2022). Properly defined, Respondent’s asserted right is for an alien subject to removal to be presumptively free from prolonged

detention caused by his own decision to delay (and appeal) removal. No deeply rooted historical tradition supports that right.

A substantive due process claimant must first provide “a careful description of the asserted fundamental liberty interest.” *Muñoz*, 602 U.S. at 910 (citation modified). But Respondent invokes a “core liberty interest in [his] bodily freedom from detention.” BIO 19. That framing is far too “broad[],” *Dobbs*, 597 U.S. at 255, as it would suggest that every law authorizing detention is subject to strict scrutiny.

Described precisely, Respondent claims a right against continued detention that a criminal alien’s own choice to delay removal has caused. That choice, not the statute, is what prolongs the detention. Any prolonged detention—which is the focus of Respondent’s alleged right—is attributable to the alien’s voluntary choice to delay or appeal a removability finding. *See* Pet. 7, 9 (reflecting that Respondent was found removable two months after being detained).

Having identified the claimed right, the second inquiry under substantive due process is whether the right is, “objectively, deeply rooted in this Nation’s history and tradition.” *Muñoz*, 602 U.S. at 910. But no deeply rooted right protects a criminal alien from detention he has prolonged. As noted, no such right to bond exists at all. And Respondent certainly cannot show a deeply rooted right to obtain bond where any delay was caused by the criminal alien himself.

Criminal aliens subject to detention under § 1226(c) “can avoid enduring an unconscionably long

delay by submitting to what the [laws of this country] have deemed [them] to deserve”: removal. *Reynolds v. Fla.*, 586 U.S. 1004, 1010 (2018) (Thomas, J., concurring in denial of certiorari) (citation modified). “It makes a mockery of our system of justice for a convicted [alien], who, through his own interminable efforts of delay has secured the almost-indefinite postponement of his [removal], to then claim that the almost-indefinite postponement renders his [continued detention] unconstitutional.” *Id.* (citation modified).

Indeed, “prolonged detention” has little meaning in this context. Respondent does not dispute that any detained criminal alien can readily and quickly obtain “a fair opportunity to be heard” on removability. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 (1953); see Pet. 7, 9; accord BIO 21. The alien can be heard practically “immediately” on any statutory reason to avoid mandatory detention. *Demore*, 538 U.S. at 514 n.3; *Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). Removability can also be resolved speedily.⁴ And aliens who wish to appeal decisions by the IJ and BIA can permit execution of the removal order and continue to appeal from their home countries. See 8 U.S.C. § 1252(b)(3)(B); *Nken v. Holder*, 556 U.S. 418, 435 (2009); ICE Directive No. 11061.1, *Facilitating the*

⁴ See U.S. Gov’t Accountability Off., GAO-25-106867, *Immigration Courts: Actions Needed to Track and Report Noncitizens’ Hearing Appearances* 40–41 fig. 12 & n.70 (2024) (reporting that, for detained removal cases generally, the median period from the start of the case to the initial master-calendar hearing was 16 days, with another 93 days until the first merits hearing).

Return to the United States of Certain Lawfully Removed Aliens ¶ 2 (Feb. 24, 2012).

So “the detention[] here ha[s] been prolonged not because of the government’s inability to effectuate the removal[] but because of the [Respondent’s] own litigation conduct.” *Black v. Almodovar*, 156 F.4th 171, 184 (2d Cir. 2025) (Menashi, J., dissenting from denial of rehearing en banc); *see id.* at 184–86.

Given these facts, at no point could a criminal alien’s detention become “unreasonably prolonged,” such that due process could require a bond hearing—the alien is always free to consent to removal and end his detention. “[D]etention under § 1226(c) has a definite termination point: the conclusion of removal proceedings.” *Jennings*, 583 U.S. at 304 (citation modified). That “marks the end of the Government’s detention authority under § 1226(c).” *Id.* So a detained criminal alien “has the keys in his pocket.” *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (Easterbrook, J.). He “can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately.” *Id.* He can even continue appealing removal in the courts from there. An “insist[ence] on postponing the inevitable” does not create a “constitutional right to remain at large during the ensuing delay.” *Id.*; *see Banyee v. Garland*, 115 F.4th 928, 933 (8th Cir. 2024).

A criminal alien’s choice to delay a removability determination or appeal is his own—it receives no constitutional protection. “The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, and certainly does not establish any right to” appeal an immigration judge’s removability

finding. *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) (citation omitted). “[T]he legal system is replete with situations requiring the making of difficult judgments as to which course to follow, and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices.” *Demore*, 538 U.S. at 530 n.14.

Respondent thus invokes no right the Due Process Clause recognizes. That forecloses his claim.

C. Respondent’s theory would endanger citizens and undermine removal.

As this Court has recognized, “detention of deportable criminal aliens pending their removal proceedings” “necessarily serves” several important purposes. *Demore*, 538 U.S. at 527–28 (citation modified). Each of these purposes would be undermined by Respondent’s effort to free criminal aliens pending removal.

First, § 1226(c) was enacted in the face of evidence that “deportable criminal aliens who remained in the United States often committed more crimes before being removed.” *Demore*, 538 U.S. at 518. Given the “high rates of recidivism for released criminal aliens,” *id.* at 519, Respondent’s rule would expose citizens to crimes by aliens who, in nearly all cases, should not be here at all. Recently, ICE reported that 81,312 arrested aliens with criminal histories had a

combined total of 516,050 charges or convictions, averaging 6.3 each.⁵

Second, § 1226(c) serves “the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” *Demore*, 538 U.S. at 528. In 1997, “the Department of Justice Inspector General found . . . that ‘when aliens are released from custody, nearly 90 percent abscond and are not removed from the United States.’” *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 508 (5th Cir. 2026). That figure has remained largely unchanged. Of the 219,568 aliens DHS encountered between 2014 and 2018 who were free when their removal orders issued, 179,757—81.9%—remained in the country at the end of 2018.⁶ Only 3.2% of those detained had not been removed.⁷ Criminal aliens who remain here harm citizens directly—through crime and much else. *See Arizona v. United States*, 567 U.S. 387, 398 (2012) (“The problems posed . . . by illegal immigration must not be underestimated.”).

Third, “[c]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens.” *Demore*, 538 U.S. at 530 n.14 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J.,

⁵ ICE, *Fiscal Year 2024 Annual Report* 8 (2024), <https://perma.cc/YTU9-NR5K>.

⁶ *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44,392, 44,407 tbl. 4 (Aug. 23, 2019).

⁷ *Id.*

dissenting)). If Respondent were right that criminal aliens can be released after six months, these aliens would have a strong incentive to delay their proceedings, seek bond, and abscond. So Respondent's theory would mean more crime, fewer removals, and an immigration system swamped by delay.

Fourth, Congress revisited § 1226 in 2025 and made an institutional judgment directly relevant to the balance the Second Circuit struck. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). The amended statute requires a detainer for a new category of covered aliens who are inadmissible and commit certain crimes. 8 U.S.C. § 1226(c)(3). It also authorizes a State attorney general or other authorized State officer to seek expedited injunctive relief when a federal decision to release an alien or grant bond or parole harms the State or its residents. *Id.* § 1226(f). Congress specified that financial harm exceeding \$100 is sufficient. *Id.* This recent congressional action refutes the panel's premise that a court-created bond hearing would "do nothing to undercut" governmental interests. *Black*, 103 F.4th at 153. Congress has identified erroneous release as a source of concrete public, fiscal, and sovereign injury, and the panel's clear-and-convincing rule (discussed more next) necessarily increases the risk of that error.

In sum, the Court should not read the Due Process Clause to extend a substantive right to a criminal alien to escape detention that Congress mandated and that continues only because of his own choices.

III. Aliens should bear the burden of proof at any bond hearing.

Even if the courts had jurisdiction over Respondent's claim, and due process required a bond hearing, the Second Circuit erred in assigning the government a "clear and convincing evidence" burden of proof at such a hearing.

To begin, the Second Circuit used the procedural due process factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), "as our guide" for who had the burden of proof. *Black*, 103 F.4th at 155. But "the burden of proof is a substantive aspect of a claim" and "cannot be considered a mere incident of a form of procedure." *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 199 (2014) (citation modified). That the Second Circuit needed to fashion its own substantive rule underscores that Respondent's claim is one of substantive due process.

Next, "[t]he ordinary default rule" is that the burden of proof falls "upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005). "Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding—as [the Second Circuit did] here—are extremely rare." *Id.* at 57. The statute does not support that "extremely rare" step here.

Section 1226(c)(4) provides circumstances in which the Secretary "may release an alien" otherwise subject to mandatory detention. That subsection requires the alien to "satisf[y]" the Secretary "that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled

proceeding.” 8 U.S.C. § 1226(c)(4). Congress would not have flipped that burden onto the Secretary for court-devised hearings under § 1226(c).

BIA precedents are in accord. Those precedents involve 8 U.S.C. § 1226(a), which gives the Secretary discretionary authority to detain an alien pending removal or release him on bond with “conditions prescribed by” the Secretary. Even these aliens—subject to mere discretionary detention—have the burden “to show to the satisfaction of the Immigration Judge that he or she merits release on bond.” *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). The IJ generally “consider[s] whether an alien who seeks a change in custody status is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.” *Id.* The BIA has refused to make the government show the propriety of continued detention “by clear and convincing evidence.” *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 (B.I.A. 2020).

The same burden that applies under § 1226(a) should apply to any bond hearing under § 1226(c). The critical difference between subsections (a) and (c) of § 1226 is that subsection (a) “sets out the default rule” of discretionary detention, while subsection (c) “carves out a statutory category of aliens who may *not* be released.” *Jennings*, 583 U.S. at 288–89. Section 1226(c) “sprang from a concern that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.” *Preap*, 586 U.S. at 398 (citation modified). “To address this problem, Congress mandated that aliens who were thought to

pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.” *Id.* The “heightened risk” Congress had in mind was that “upon their release, [these criminal aliens] would pose a danger to the community or risk of flight.” *Id.* at 421 (Kavanaugh, J., concurring).

“[S]ubsection (a)—which generally authorizes the Secretary to release an alien pending removal proceedings—features an exception ‘as provided in subsection (c).’” *Id.* at 410 (majority opinion) (citation modified). And “Congress enacted mandatory detention precisely out of concern that” “individualized hearings could not be trusted to reveal which deportable criminal aliens who are not detained might continue to engage in crime or fail to appear for their removal hearings.” *Id.* at 412 (plurality opinion) (citation modified).

Given this statutory context, an alien should have to prove that he qualifies for an exemption from Congress’s presumption that criminal aliens are too dangerous to be released pending removal. It would make little sense to put the burden on the alien under § 1226(a), where the Secretary’s detention authority is merely discretionary, but on the government under § 1226(c). Under subsection (c), the default is that dangerous criminal aliens stay detained. The law itself sets out the presumption, grounded in reality, that “‘a criminal record accumulated by an admitted alien’ is a good indicator of future danger.” *Demore*, 538 U.S. at 525 n.9 (quoting *Zadvydas*, 533 U.S. at 714 (Kennedy, J., dissenting)); see *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) (noting “statistical

studies showing high recidivism rates for released aliens”).

An alien who wishes to defeat this statutory presumption should have the burden. And any bond hearing should not “be gentler on terrorists” and other criminals subject to § 1226(c) “than it is on” non-criminal aliens. *Preap*, 586 U.S. at 416. The law “does not require such an odd result.” *Id.* at 421 (Kavanaugh, J., concurring).

Thus, the criminal alien seeking an extra-statutory right to release must bear the burden of proof.

CONCLUSION

For these reasons, the Court should vacate the decision below with instructions to dismiss or, in the alternative, reverse.

Respectfully submitted,

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