

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 OF AMICI CURIAE DATA AND POLICY
ANALYSTS IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

Amici are professors, researchers, economists, and policy analysts with a keen focus on immigration law and policy.² They have studied legislative, executive, and judicial developments in immigration law for years, poring over troves of data in the process.

Amici share an interest in ensuring that immigration law and policy—as enacted, enforced, and interpreted by all branches of government—are grounded in objective and accurate facts. They offer this brief to help inform the Court’s empirical understanding of the substantive questions now before it.

INTRODUCTION & SUMMARY OF ARGUMENT

This Court has relied on empirical data in prior immigration-detention rulings, including in *Demore v. Kim*, 538 U.S. 510 (2003), where the Court held that mandatory detention under 8 U.S.C. § 1226(c) did not itself run afoul of due process. In reaching that decision, the Court emphasized that constitutionally tolerable detention meant detention only for the “brief” or “limited period necessary” to facilitate immigration proceedings. *Id.* at 523, 526.

Some of the statistics on which the Court relied in *Demore*, however, were later revealed to be incorrect. Thirteen years after the fact, the Government confessed that “several significant errors” tainted the

¹ Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief.

² The names of all amici are set forth in Appendix A.

data it cited about the length of Section 1226(c) detention, including underreporting the average and median “total time between the filing of charges with the Immigration Court and the BIA’s completion in appealed cases” by many months. Letter from Ian Heath Gershengorn 2–3, Acting Solic. Gen., U.S. Dep’t of Just., to Scott S. Harris, Clerk, Sup. Ct. of the U.S. (Aug. 26, 2016), <https://tinyurl.com/yjpvvv6x>. This Court relied on the Government’s erroneous data to conclude that mandatory detention lasted only “about five months” for “cases in which the alien chooses to appeal,” *Demore*, 538 U.S. at 530, when in reality the average detention period in these cases was over *twice* that length, *see* Gershengorn Letter, *supra*, at 3 (“The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively”).

More than two decades after *Demore*, this Court is now considering new questions about whether due process requires bond hearings for those subject to prolonged detention under Section 1226(c). In reaching its decision, the Court should consider new evidence, which demonstrates that such detainees make up a tiny proportion of all detainees and are particularly likely to appear for and prevail in their immigration court proceedings.

Since *Demore*, assumptions about prolonged mandatory detention and the consequences of bond hearings for those detained under Section 1226(c) in particular have been put to the test. In April 2013, the Court of Appeals for the Ninth Circuit decided *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013), holding that “mandatory detention authority under Section 1226(c) ... [w]as limited to a six-month period, subject to a finding of flight risk or dangerousness.” As a result, individuals in the Ninth Circuit who were otherwise subject to mandatory

detention and lacked a final order of removal received bond hearings after six months of detention. Even though this Court ultimately reversed the Ninth Circuit’s decision, *see Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018), the bond-hearing system in the Ninth Circuit operated for years in nine States. As a result, this Court now has available to it years of real-world data that speak specifically to what actually happens when bond hearings are provided to individuals who experience prolonged detention under Section 1226(c).

These data are inconsistent with the factual premises of the Government’s arguments. The Government’s position appears to rest on the notion that a categorical denial of bond hearings is necessary to prevent crime and ensure that Section 1226(c) detainees appear at their hearings, and is informed by data that predate the statutory provision at issue. U.S. Br. 35. The data available today—which are tailored precisely to the question now before the Court—tell a very different story in at least three critical respects.

First, although any question of open-ended non-criminal detention is undeniably important, the actual, practical reach of this question is numerically limited. The share of individuals detained under Section 1226(c) for more than six months represents one half of one percent of the U.S. Immigration and Customs Enforcement (“ICE”) detention population, and the share of such individuals detained as long as respondent represents only one tenth of one percent of that population.

Second, the data show that noncitizens released from prolonged Section 1226(c) detention on bond not only reliably appear at hearings, but they are also more than three times as likely to prevail in their cases than those who remain detained (under Section 1226(c) or otherwise).

Third, prolonged detention for Section 1226(c) detainees is disproportionately costly, and thus drives up the ever-increasing costs of immigration enforcement.

These real-world data underscore the practical stakes of the Government’s request that the Court endorse prolonged detention without bond hearings for Section 1226(c) detainees. The predominant effect would be to deny release on bond to a small subset of noncitizens who are extremely likely to comply with their appearance obligations and have strong odds of winning their cases, and at high cost. The data thus provide important empirical context for the Court’s consideration of the case at bar.

ARGUMENT

Years of data collected across millions of ICE detention stays reveal three critical insights about prolonged detention—defined here as detention exceeding six months, *see* Pet. App. 29a–30a—under Section 1226(c). First, because those detained under Section 1226(c) for more than six months account for roughly 0.5% of the ICE detention population, few individuals would receive bond hearings under the rule the Government opposes, and that rule would therefore impose minimal administrative burdens. Second, the even smaller subset of long-term Section 1226(c) detainees actually released as a result of such bond hearings overwhelmingly appear for their removal hearings and tend to have meritorious claims. Third, because most detention is brief, prolonged detention of noncitizens under Section 1226(c) for the sake of eliminating all “false negatives” (U.S. Br. 35) is disproportionately costly.

I. Bond Hearings for Section 1226(c) Detainees Subject to Prolonged Detention Would Affect a Small Number of Noncitizens.

The Government suggests that affirming the judgment below will lead to “substantial numbers” of bond hearings, U.S. Br. 2, when, in reality, this case implicates about 0.5% of immigration detainees, only a fraction of whom are likely to receive bond hearings, let alone obtain an order of release.

To be sure, the total number of individuals detained for immigration purposes is large. Between January 1, 2012, and November 15, 2023, nearly 4 million individuals were detained. David K. Hausman, *The Prospect of Release from Immigration Detention Prevents Self-Deportation* 7–8 (Aug. 22, 2026), <https://perma.cc/8T6H-2BTR>. From March 2025 to March 2026 alone, ICE detained approximately 385,000 persons, who accounted for over 19 million “bed-nights” spent in ICE facilities. Graeme Blair, *Fact Sheet: Detention Length among ICE Civil Immigration Detentions Nationally* 1–2, ACLU (Aug. 28, 2026), <https://perma.cc/SBS5-6P4W>.³

Yet for many—indeed, most—detainees, ICE detention is brief. The median term of detention is 25 days, which means half of the entire ICE detention population is either released or removed in just over three weeks. *Id.* at 1. In contrast, only 6% of detainees face prolonged detention extending beyond six months, and most of those instances are not at issue in this case. *Id.* at 2.

Those detained pursuant to Section 1226(c)—as opposed to other authorities not relevant here—

³ “A bed-night is one detainee held in one bed for one night, and measures detention capacity consumed rather than the number of people held over time.” Blair, *supra*, at 1.

represent a fraction of overall ICE detentions, and those within this group subject to *prolonged* detention (of over six months) represent an even smaller fraction still. Across all 385,414 detentions recorded between March 2025 and March 2026, mandatory detentions under Section 1226(c) represented only 4.4% (i.e., 16,799). *Id.* Of these individuals, only 2,086 were detained for periods surpassing six months—roughly 0.5% of total ICE detainees during this period. *Id.* And, in this same year, fewer than 0.1% of ICE detainees were detained under Section 1226(c) as long as Respondent. *See id.* (listing 156 individuals detained under Section 1226(c) for longer than 21 months, out of 385,414 total detainees).

II. The Few Section 1226(c) Detainees Released on Bond After Prolonged Detention Are Likely to Appear in Court and Win Their Cases.

The suppositions offered by the Government and its amici are inconsistent with the data collected from the Ninth Circuit. Relying on *Demore*, the Government contends that the availability of discretionary release would result in “large numbers” of noncitizens “skipping their hearings and remaining at large in the United States unlawfully.” U.S. Br. 36 (quoting *Demore*, 538 U.S. at 528). The Government’s amici suggest that those released on bond after prolonged Section 1226(c) detention “in nearly all cases should not be here at all.” Am. First Legal Found. Br. 14. And the Government posits that the risk of “false negatives” (i.e., released detainees who then abscond) is so high that bond hearings conducted by immigration judges can “not be trusted.” U.S. Br. 34–35.

The data show the opposite. The few Section 1226(c) detainees who were released after their *Rodriguez*

bond hearings in the Ninth Circuit rarely absconded, and they were much more likely than other Section 1226(c) detainees to win their cases.

Consistent with the statutory objectives of immigration detention, bond hearings consist of a thorough inquiry into a detainee’s potential “danger to the community or risk of flight.” *Rodriguez*, 715 F.3d at 1131. If the immigration judge determines either is present, a detainee stays detained. For Section 1226(c) detainees eligible for a bond hearing in *Rodriguez*, release after a bond hearing was relatively rare—rarer than for those held on other grounds. Section 1226(c) detainees who received such bond hearings between early 2013 and early 2015, were granted bond less than 15% of the time, Hausman, *supra*, at 35, tbl. 6 (14.8%), whereas those held on other statutory grounds were released the majority of the time, *see id.* (59.6%).

The small proportion of Section 1226(c) detainees who obtained release overwhelmingly appeared for hearings and posed no greater risk of flight than those detained under other immigration authorities. In fact, the data show they were *less* likely to abscond than their non-Section 1226(c) counterparts. In the Ninth Circuit, some noncitizens released on bond under the *Rodriguez* framework were eventually ordered “removed in absentia,” meaning they failed to appear. *Id.* Notably, the data capturing these in-absentia orders reveal that, while 10.0% of *non*-1226(c) detainees released on bond absconded following release, Section 1226(c) detainees released on bond were ordered removed in absentia roughly half as often (5.2%). *Id.*⁴

⁴ The Government relies on much older findings to suggest that Section 1226(c) detainees might abscond “more than 20%” of the

This same Section 1226(c) sub-group was also more likely to prevail in their immigration cases than those who remained detained. That is, they more frequently established—in immigration court—that they should not be removed at all. Section 1226(c) detainees who were detained throughout their proceedings prevailed in only 11.9% of their cases. *Id.* For Section 1226(c) detainees released on bond, however, the success rate more than tripled: they won their cases and obtained relief from removal over 41% of the time. *See id.* And these success rates may be even higher still: an additional 15% of this particular group (i.e., individuals detained over six months under Section 1226(c) and who were released on bond) still had cases pending. *See id.* at 35, 47–48.⁵

time, with potentially “one out of four” failing to appear. U.S. Br. 35 (quoting *Demore*, 538 U.S. at 519–20). Both figures, however, derive from data not limited to the unusual detainees at issue in this case (subject to *prolonged* detention under Section 1226(c)), or even to noncitizens who actually received bond hearings. *See Demore*, 538 U.S. at 519 n.4 (acknowledging that the “20%” estimate is based on data from those “released on bond *or otherwise not kept in custody*”); *id.* at 520 & n.5 (acknowledging that the “one out of four” estimate is based on data from a private non-profit’s screening for “community supervision”). The Ninth Circuit data, in contrast, tracks outcomes for Section 1226(c) detainees released only after the rigorous, individualized bond hearings conducted by immigration judges that are contemplated in this case.

⁵ The backlog of pending cases before immigration judges has only increased. *Cf.* Exec. Off. for Immigr. Rev., U.S. Dep’t of Just., *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (data generated July 24, 2026) (reporting 3,469,569 pending cases through the third quarter of fiscal year 2026, compared with 826,505 in fiscal year 2016), <https://tinyurl.com/a62w47z5>. Given this backlog—and the time required for cases to reach final resolution—more recent cohorts often lack final outcomes. Examining cases initiated several years

Various factors may explain why Section 1226(c) detainees released on bond “have a better chance of winning their case.” *Id.* at 24. To start, the threshold for Section 1226(c) detainees prevailing at a bond hearing is inherently higher due to their criminal convictions. The select few who are released will necessarily have made a significant showing that they are entitled to release—a showing that may itself include a demonstration of the “likelihood that relief from removal will be granted.” *A-L-S-*, 29 I. & N. Dec. 794, 796 (B.I.A. 2026) (quoting *R-A-V-P-*, 27 I. & N. Dec. 803, 805 (B.I.A. 2020)). That this group overwhelmingly *appears* in court to present their case also contributes to their increased success, because they will not be ordered removed in absentia. And their freedom, as a practical matter, makes it easier to build a successful case. They are more likely to be able to retain lawyers and to seek relief from removal. Hausman, *supra*, at 7. The rare few who obtain release thus have the unique opportunity to present their case effectively, which benefits the truth-seeking function of the immigration court.

The Government’s proposal for blanket detention would lead to abandonment (or inaccurate adjudication) of meritorious cases and thus more erroneous removals. After all, the few detainees who choose to endure prolonged detention may “voluntarily” (U.S. Br. 45) do so precisely *because* they have legitimate claims worth pursuing. Data from the Ninth Circuit indicate that the prospect of release correlates to higher rates of noncitizens with meritorious claims enduring detention, seeing such claims through, and ultimately demonstrating *lawful entitlement* to relief from removal. *See id.* at 12–14.

ago, as this brief does, thus offers a more complete empirical picture of eventual case outcomes.

III. Prolonged Detention for Section 1226(c) Detainees Imposes Disproportionate Costs on the American Taxpayer.

While prolonged detention pursuant to Section 1226(c) is relatively rare, such detention represents an outsized drain on the public fisc. A zero-tolerance system that closes off release opportunities even for those who are statistically more likely to appear for hearings, respect the law, and ultimately prevail before an immigration judge will only exacerbate those burdens.

Immigration detention is expensive, and that cost is only rising. On July 1, 2025, Congress agreed to a 265% increase in the ICE detention budget. As a result, the ICE detention budget is now 62% larger than that of the entire federal prison system. Am. Immigr. Council, *Senate Approves Unprecedented Spending for Mass Deportation, Ignoring What's Broken in our Immigration System* (July 1, 2025), <https://tinyurl.com/bdfrwxwe>. For each ICE detention bed, every additional day of detention costs the Government roughly \$152. *See* U.S. Immigr. & Customs Enft, *Alternatives to Detention* (May 18, 2026) (“[T]he cost of detention ... is around \$152 per day.”), available at <https://www.ice.gov/features/atd>. At scale, these costs add up quickly.

Prolonged detention under Section 1226(c), in particular, is disproportionately costly. While this group accounts for 0.5% of the total ICE population, they represent more than 3.6%—i.e., a more than six-fold overrepresentation—of all bed-nights. *Id.* And while only 12% of Section 1226(c) detainees are detained for longer than six months, that 12% accounts for nearly half of all bed-nights for Section 1226(c) detainees. *Id.* In concrete terms, that is an annual 708,338 bed-nights, and roughly \$108

million in Government expenses, attributable to the same class of detainees who the Government says must not even be *considered* for potential release.

The Government insists that our immigration system must accept the cost of keeping all Section 1226(c) detainees locked up because the system cannot tolerate the inherent “rate of error ... in any system of bond hearings.” U.S. Br. 35. As explained above, the data drawn from the Ninth Circuit’s experience of providing bond hearings to 1226(c) detainees do not support that premise. And the fiscal and operational data described here underscore that a zero-tolerance detention system carries its own, significant costs as a matter not only of basic liberty but of basic economics.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to consider these real-world data in resolving this case.

Respectfully submitted,

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Michael Clemens is a Professor of Economics and Founding Faculty member at the School of Government & Policy at Johns Hopkins University, a Non-Resident Senior Fellow at the Peterson Institute for International Economics, and a Distinguished Non-Resident Fellow at the Center for Global Development.

David Hausman is an Assistant Professor of Law at the University of California Berkeley School of Law and, with Graeme Blair, a co-director of the Deportation Data Project.⁶

⁶ Professor Hausman was an attorney at the ACLU Immigrants’ Rights Project from 2016 to 2019, and has worked

Simon Johnson is the Ronald A. Kurtz (1954) Professor of Entrepreneurship at the MIT Sloan School of Management. He served as Chief Economist of the International Monetary Fund from 2007 to 2008. He received the Nobel Prize in Economics in 2024.

Philip Luck is the Director of the Economics Program and Scholl Chair in International Business at the Center for Strategic and International Studies (“CSIS”). He served as Deputy Chief Economist at the Department of State from 2022 to 2025.

Philip Magness is a Senior Fellow at the Independent Institute and the David J. Theroux Chair in Political Economy.

Kyle Pomerleau is a Senior Fellow in Economic Policy Studies at the American Enterprise Institute.

Stan Veuger is a Senior Fellow in Economic Policy Studies at the American Enterprise Institute.

Alan Viard is a Senior Fellow Emeritus at the American Enterprise Institute. He served as a Visiting Scholar at the U.S. Department of the Treasury’s Office of Tax Analysis in 2005, and as Senior Economist at the White House’s Council of Economic Advisers from 2003 to 2004.

Tara Watson is the Director of the Center for Economic Security and Opportunity, the John C. and Nancy D. Whitehead Chair, and a Senior Fellow at the Brookings Institution. She served as Deputy Assistant Secretary of the Treasury for Microeconomic Analysis from 2015 to 2016.

more recently for the Project as a consultant and volunteer attorney. He has not worked on this case.