No. 01-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION & NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

HYUNG JOON KIM,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, , NATIONAL IMMIGRATION FORUM, ET AL.* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Title 8, Section 1226(c) of the United States Code violates the due process rights of lawful permanent residents and other aliens by requiring their mandatory detention without the benefit of a bond hearing and without a prescribed time limitation pending a hearing to determine whether the individual shall be removed from the country?

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INTEREST OF AMICI CURIAE[1]

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans in this country.

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. The LCCR works in cooperation with other national, regional and local organizations on policy analysis, public education and advocacy activities relating to immigration and other important issues affecting civil rights. The coalition has a particular concern that in striking the necessary balance between concerns of national security and of freedom, and ensuring individual rights to liberty and fair treatment are not unduly trammeled. Accordingly, we have conducted investigations into the detention of immigrants, have supported legislation to ensure fair treatment of immigrants, and filed an *amicus curiae* brief in the *INS v. St. Cyr* case seeking the same objectives. The Leadership Conference believes that in our increasingly diverse nation,

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[1] The parties consented to this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* state that they alone authored this brief, and no other persons or entities have made any monetary contribution to its preparation or submission.

fair and equal treatment is essential to achieving the constitutional goal of domestic tranquility.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of immigrants' rights since the organization's founding. Preserving the constitutional due process rights of immigrants is a primary goal of MALDEF's Immigrants' Rights program.

The American-Arab Anti-Discrimination Committee ("ADC") is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American and Arab immigrant community. ADC is the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent, and is an active member of the Leadership Conference on Civil Rights and the Detention Watch Network national coalitions. With headquarters in Washington, D.C., ADC also has more than 80 membership chapters nationwide. ADC works with other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. ADC is committed to preserving the constitutional guarantees of due process to all and views those guarantees as elemental rights that form the key foundations of our nation. We believe that only by safeguarding due process rights for all individuals subject to the pendency of removal proceedings can the courts affirm the solidly American principles of constitutional democracy championed by our nation for decades.

The Asian American Institute is a pan-Asian, non-profit organization dedicated to the empowerment of the Asian American community through research, education, and coalition-building. Over 76% of the Asian American population in the communities for which we provide is

foreign-born, and a significant number are legal permanent residents. The Constitution guarantees the right to due process for all persons regardless of citizenship status, and mandatory detention during the pendancy of removal proceedings is an unjustifiable denial of this right. The disparate and harmful impact of this law has been felt throughout our community.

Asian Law Alliance ("ALA") was founded 25 years ago by Santa Clara University Law Students to provide legal assistance, education and advocacy to the Asian Pacific Islander Community in Santa Clara County. As the only legal services organization serving the Asian and Pacific Islander population in Santa Clara County, ALA is dedicated to ensuring top-quality multilingual legal assistance to promote dignity, self-reliance and a better quality of life for the people it assists.

Established in 1972, the Asian Law Caucus, Inc. ("ALC") is the country's oldest civil rights and public interest legal organization whose mission is to promote, advance, and represent the civil rights of the Asian American and Pacific Islander community. The ALC represents primarily low-income, monolingual or limited English proficient Asian American and Pacific Islanders in the areas of employment, labor, immigration, housing, community development, and civil rights through the provision of direct services, community education, litigation, and policy advocacy.

The Asian Pacific American Legal Center of Southern California ("APALC") is the largest provider of direct legal services, civil rights advocacy, community education and impact litigation for low-income Asian Pacific Americans in the country. Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including immigration, anti-discrimination, workers' rights, family law, and hate crimes. APALC has worked on cases involving immigrants detained by the INS and also on policy advocacy and individual cases affecting immigrants' rights.

The National Asian Pacific American Bar Association ("NAPABA") is the national professional association of Asian-Pacific American attorneys, judges, law professors, and law students. The goal of NAPABA is to represent and advocate for, on a national level, the interests of Asian-Pacific American attorneys, judges, law professors and law students and their communities. Ensuring fair treatment of Asian Americans and Pacific Islanders within the United States is squarely within the goals of NAPABA, as an organization committed to justice and equality for all people residing in the United States, including lawful permanent residents.

The National Immigration Forum ("Forum"), one of the nation's premier immigration policy organizations, advocates and builds public support for public policies that welcome immigrants and refugees and that are welcoming to newcomers in our country. The mission of the Forum is to embrace and uphold America's tradition as a nation of immigrants. Based in Washington, DC the Forum has distinguished itself as one of the nation's foremost authorities on immigration. By employing an effective combination of advocacy, legal research, media work and public education, the Forum provides accurate, reliable data to our nation's policy-makers, the press, and the public about the need for fair and supportive immigration laws and policies.

The Southeast Asia Resource Action Center is a national advocacy organization that works to advance the interests of Cambodian, Laotian, and Vietnamese Americans, most of whom arrived in this country as refugees, and many of whom continue to lack English proficiency, basic education, and access to affordable legal representation. Because significant numbers of our community are legal permanent residents, the immigration reform laws of 1996 and other policies that take away benefits from immigrants have a devastating impact on our families. Among these individuals are a growing number of lawful permanent residents who

face or will face mandatory detention under the statutory provisions at issue here.

INTRODUCTION

At issue here is the constitutionality of a portion of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which amended the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* The IIRIRA created a new section 236(c) of the INA, 8 U.S.C. § 1226(c), which now requires the Attorney General to detain aliens who are deportable from the United States because they have been convicted of certain enumerated offenses. Under section 1226(c), these individuals must be detained during the pendency of administrative hearings on their removal, without any opportunity for a hearing or individualized determination about whether that disposition is appropriate to their circumstances, and even where they have already discharged the full sentence for any prior offense.[2]

Section 1226(c) does not provide any due process protections whatsoever prior to mandatory detention pending removal proceedings, nor is a maximum length of time for such detention prescribed by the statute. Under the plain language of section 1226(c) and petitioners' interpretation of its terms, the Attorney General is to detain aliens falling under its purview for an indefinite period without providing for a hearing or any opportunity for an individualized determination. Even in cases involving lawful permanent residents such as respondent – the category of aliens who enjoy the broadest constitutional protections – this indefinite period of detention may extend for months or even years.

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[2] The only exceptions to mandatory detention are for government witnesses or those who are assisting in government investigations. *See* 8 U.S.C. § 1226(c)(2). Neither exception is applicable here.

SUMMARY OF ARGUMENT

I. The Due Process Clause of the Fifth Amendment protects individuals from any deprivation of life, liberty, or property without due process of law. This protection is not limited to citizens alone. On the contrary, this Court's jurisprudence has long held that the Due Process Clause serves to protect citizens and non-citizens alike. Particularly in the case of a lawful permanent resident such as respondent, the Due Process Clause stands as a constitutional guarantee to guard against any deprivation of liberty without due process of law.

II.A. Under any standard of review, section 1226(c) violates the due process rights of lawful permanent residents. Whether the Court employs strict scrutiny, the "special justifications" test, or some other approach, its established jurisprudence dictates a finding that the indefinite detention of lawful permanent residents – without any opportunity for an individualized determination and with no possibility of release on bond pending the removal hearing – denies them due process of law. Under the Court's precedents, such a broad and open-ended restriction on personal liberty violates due process whenever the restriction is excessive in light of its purpose.

The Government has asserted two interests that allegedly support the constitutionality of section 1226(c): (1) ensuring that aliens will be available for their removal hearings; and (2) protecting the public from dangerous aliens. Neither of these interests properly supports the constitutionality of this provision as applied to lawful permanent residents. According to the government's own data, the vast majority of aliens released on bond during the pendency of their removal hearings do not flee during that period. Moreover, the statute requires detention for aliens convicted of many nonviolent crimes – such as fraud in obtaining benefits, perjury, forgery, and harboring an undocumented alien – even where they have fully discharged their sentences and

been released back into the community. Mandatory detention of all such individuals on the grounds that they pose a public danger, without any individualized assessment of their circumstances, cannot be justified. At bottom, the mandatory detention ordered by the statute is ill-suited to achieve the Government's stated goals, and it is insufficiently supported by special justifications that would survive any meaningful level of judicial scrutiny.

The disproportionate reach of the statute can also be seen in the absence of any definite time limitation on the detention of these individuals who are not yet subject to a final order of removal. Although the statute sets an ultimate endpoint – *i.e.*, the issuance or denial of a removal order – the duration of the detention is open-ended, extending for as long as the removal process drags out, whether that be months or years. In substance, section 1226(c) is a temporally unbounded restriction on personal liberty that cannot be justified here as applied to lawful permanent residents such as respondent.

II.B. Under the standards promulgated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a three-part balancing test is applied to determine whether a constitutional violation has occurred. The pertinent factors include: (1) the magnitude of the private interest at stake – *i.e.*, the severity of the deprivation; (2) the risk of an erroneous deprivation and the likelihood that particular procedural safeguards will avoid the error; and (3) the governmental interest in requiring procedures that do not afford these safeguards.

Mandatory detention under section 1226(c) fails this test. *First*, it deprives all such individuals of freedom from incarceration, which the Constitution and the Court recognize as a core liberty interest. *Second*, absent any individualized determination, the risk of wrongful deprivation of that liberty interest is extremely high. Hearings would screen out from detention lawful permanent residents who pose little risk of flight, who were convicted of

non-violent crimes, or whose sentences were completed or suspended in circumstances that posed no continuing risk of danger to the public.

Third, affording the opportunity for an separate and immediate individual hearing where the government bears the burden of proof is a sound alternative to mandatory detention that will reduce the risk of flight, protect the public safety, and guard against unnecessary deprivations of liberty interests. The government states no persuasive countervailing interest in having a process that does not afford the safeguard of a hearing. The costs to the Government of such hearings would be offset by the savings realized if the Government were not required to detain all aliens under section 1226(c). In light of these factors, the broad sweep of this statute clearly violates the due process rights of lawful permanent residents such as respondent.

II.C. The liberty interests violated by mandatory detention are not affected by whether a lawful permanent resident later decides to raise a challenge to his ultimate removal. Petitioners seem to argue that no due process violations occur under the terms of section 1226(c) because, they contend, most of those who are detained under the statute are eventually ordered to be removed. This argument misses the point. Unless and until respondent is removed from the United States, he has not surrendered his constitutional right to due process under the law. Just as a criminal suspect cannot be denied the right to bail simply because the vast majority of suspects may eventually be convicted, a lawful permanent resident cannot be denied his rights simply because statistics may indicate that he is likely, on average, to be removed.

III. Congressional power to enact laws that govern the exclusion or expulsion of aliens is not unfettered. Its implementation is bound by the limits of the Constitution. At issue here is not a question regarding the deportability of respondent, nor even the propriety of an immigration

proceeding; instead, it concerns the constitutional validity of arbitrary incarceration pending removal. In particular, respondent challenges the constitutionality of the statutory requirement that respondent and others similarly situated shall be mandatorily detained, without the possibility of release on bond, during the pendency of the processes for their removal hearings. This case does not bring into question Congress's right to decide whether to remove aliens, grant or deny admission to aliens, or subject aliens to supervision. The only question before the Court is whether a statutory mandate that a general class of aliens must be detained pending a removal hearing can be invoked to deny lawful permanent residents the right to an individualized determination about whether detention is necessary and appropriate in their personal circumstances.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROTECTS THE FUNDAMENTAL LIBERTY INTERESTS OF LAWFUL PERMANENT RESIDENTS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. An alien seeking initial admission to the United States has no constitutional rights regarding an application for admission. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Yet "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Indeed, such persons stand "on an equal footing with citizens" under the Constitution with respect to protection of personal liberty. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586, 587 n.9 (1952).

Accordingly, the Court has held that a lawful permanent resident who has been "continuously present" in the United States has a right to due process of the law in any

proceedings to remove that alien from the country, including the right to be free of arbitrary confinement pending deportation proceedings. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guarant[e]ed by [the Fifth and Sixth] [A]mendments"). As a lawful permanent resident, respondent is thus entitled to the full guarantees provided by the Due Process Clause.

II. SECTION 1226(c) DENIES RESPONDENT HIS RIGHT TO DUE PROCESS OF LAW.

Section 1226(c) instructs the Attorney General to detain aliens who are deportable by virtue of their prior convictions for certain offenses, even after they have completed their lawful sentences and been released into the community. Under this statute, detained aliens are confined pending the outcome of administrative hearings conducted on the question of their removal. Until such time, however, section 1226(c) requires these persons to be detained without possibility of bonded release and with no procedural safeguards to ensure that detention is appropriate and its duration is not unduly extended. It is these requirements to detain aliens indefinitely and deprive them of the benefit of an individualized hearing into their personal circumstances that renders the statute unconstitutional. The application of section 1226(c) necessarily violates the due process rights of lawful permanent resident aliens who are affected by its terms.

A. Under Any Level of Scrutiny of Respondent's Liberty Interest, Section 1226(c) Violates Due Process.

When analyzing whether a statute violates due process rights, this Court must first determine what level of scrutiny to apply, and then determine whether the statute in question survives the applicable standard of review. Whether the Court employs a more traditional strict scrutiny standard or

the "special justifications" test articulated in *Zadvydas v. Davis*, 533 U.S. 678 (2001), section 1226(c) cannot pass muster. Should this Court find that respondent has a fundamental liberty interest in freedom from physical restraint, as most lower courts have done, then strict scrutiny applies and section 1226(c) will be invalidated absent a compelling state interest.[3] At any level of scrutiny, however, the result should be the same. At the very least, the Court's precedents require section 1226(c) to be supported by "special justifications" that outweigh the "individual's constitutionally protected interest in avoiding physical restraint" in order to withstand due process review. *Zadvydas*, 533 U.S. at 690 (citations and quotations omitted); *see also Reno v. Flores*, 507 U.S. at 315-16 (O'Connor, J., concurring) (core liberty interest implicated by confinement requires "heightened" scrutiny). It is the utter absence of any such justifications that renders section 1226(c) invalid under the Due Process Clause.

For due process concerns relating to regulatory confinement, this Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), is particularly instructive. Under the two-part test articulated in *Salerno*, a direct restriction on personal liberty violates due process when: (1) the restriction constitutes impermissible punishment; or (2) absent express intent to impose punitive restrictions, the restriction is excessive in relation to its purpose. *See id.* at

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[3] *See, e.g., Hoang v. Comfort*, 282 F.3d 1247, 1257-59 (10th Cir. 2002) (finding fundamental liberty interest and employing strict scrutiny); *Patel v. Zemski*, 275 F.3d 299, 308-13 (3d Cir. 2001) (finding fundamental liberty interest and employing heightened scrutiny); *Danh v. Demore*, 59 F. Supp. 2d 994, 1001 (N.D. Cal. 1999) (same); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) (strict scrutiny); *Martinez v. Greene*, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998) (same). *Cf. Welch v. Ashcroft*, 293 F.3d 213, 218-228 (4th Cir. 2002) (declining to apply strict scrutiny but finding due process violation).

747. Judged under this framework, section 1226(c) violates due process.

The Government has two stated interests that are allegedly served by mandatory detention of individuals in accordance with the terms of 1226(c): (1) ensuring that the individual will not flee prior to the removal hearing; and (2) protecting the public from potentially dangerous individuals. *See* Pet. Br. at 11-22. Measured in light of these justifications, the statute is simply too excessive to pass muster as applied to lawful permanent residents.

Notably, petitioners do not contend that *every* lawful permanent resident alien detained pursuant to section 1226(c) is a flight risk or presents a public danger. Rather, petitioners seek to justify the provisions of the statute by noting that approximately 20% of criminal aliens released on bond or otherwise not detained during the pendency of a removal hearing fail to appear. *See* Pet. Br. at 19. To justify *mandatory* detention of 80% of lawful permanent residents who would otherwise not abscond by pointing to a "failure to appear" rate of 20% among *all* aliens released on bond or otherwise not detained is plainly excessive. Thus the Government's own statistics demonstrate that the vast majority of aliens who are released on bond do not abscond and do not present an actual flight risk.[4]

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[4] Petitioners cite other statistics to bolster their claim that mandatory detention is necessary to ensure that aliens will attend their removal hearings. *See* Pet. Br. at 19-20 & n.7. However, the relevant rate is that only about 20% of criminal aliens *released on bond during the pendency of a removal hearing* fail to appear for their removal proceedings. The other statistics cited by the Government pertain to aliens who were never taken into custody and aliens who were the subject of final orders for removal. *See id.* at 19-20. Those numbers are thus irrelevant to the inquiry here and to the task of justifying the mandatory detention provisions of section 1226(c).

Indeed, it is virtually undeniable that the "failure to appear" rate will be considerably lower among lawful permanent residents, like respondent, than among other aliens. These individuals have the closest ties to the United States of any category of aliens. About two-thirds of them are admitted because of family members who are already in the United States, who themselves are often citizens. *See* 8 U.S.C. § 1153(a). They have the right, without limitation, to reside and work in this country, and retain their rights until a final administrative order of removal is entered against them. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Many lawful permanent residents are highly educated or skilled professionals whose entry is encouraged because they make important contributions to our society and to the American economy. *See* 8 U.S.C. § 1153(b). The risk of flight is thus reduced even further for such individuals.

The Government's other justification – protecting the public against potentially dangerous individuals – is also not reflective of the broad sweep of section 1226(c). The terms of the statute serve to detain many individuals who have been convicted of crimes that are not traditionally considered to be "dangerous," such as fraud in obtaining benefits, *see, e.g., Danh v. Demore*, 59 F. Supp. 2d 994 (N.D. Cal. 1999), or harboring an undocumented alien, *see, e.g., Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). Moreover, most of these persons have completed the terms of the sentence imposed for their prior offenses and have frequently been released into the community, all of which indicates that an individualized judgment has already been made, pursuant to the applicable processes of the criminal law, that they pose no serious or continuing danger to the public.

Perhaps most important, section 1226(c) is excessive because it provides for unfettered and virtually unlimited mandatory detention. By its own terms, section 1226(c) requires these individuals to be confined without any possibility of bonded release for an indefinite period during the pendency of their removal proceedings. Although there

is a clearly identifiable event that marks the completion of their detention period (*i.e.*, issuance of a final order), there is no clearly identifiable deadline by which that event must take place. As the lower court cases illustrate, the terms of section 1226(c) permit individuals to be detained without possibility of release, and with no individualized determination, for months or even years while waiting for their removal proceedings to be completed.[5]

Petitioners miss the point when they note that removal proceedings are completed in an average time of 47 days and a median time of 30 days.[6] Pet. Br. at 39-40 (citing *Zadvydas*, 533 U.S. at 701). Regardless of what the "average" practice may be, the statute clearly permits mandatory detention that is unlimited in time, since the date of a final order in the removal proceeding simply cannot be forecast.

B. Section 1226(c) Violates Due Process Because It Lacks Appropriate Procedural Safeguards.

"A fundamental requirement of due process is 'the opportunity to be heard' . . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Any interference with personal liberty must be

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[5] For example, respondent in the case at bar spent more than three months in INS custody before he began *habeas corpus* proceedings. *Kim v. Ziglar*,, 276 F.3d 523, 526 (9th Cir.), *cert. granted*, 122 S. Ct. 2696 (2002); *see also* Pet. Br. at 4. Detaining an alien for a period of months does not appear to be outside the norm. *See e.g.*, *Hoang*, 282 F.3d at 1252-53 (detailing detention of three aliens for as many as three months before *habeas* petitions were filed).

[6] This estimation by petitioners fails to account for the time aliens will spend detained pending adjudication of appeals, which can take up to 180 days. *See* 8 C.F.R. 3.1(e). This time frame does not include 21 days for submitting briefs (which can be extended), and 30 days for filing the notice of appeal. Additionally, briefing is frequently delayed by months or even years while transcripts of the immigration judge proceedings are prepared.

implemented fairly and must provide for adequate procedural safeguards against wrongful deprivations. *See Salerno*, 481 U.S. at 746; *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It is the IIRIRA's elimination of vital procedural safeguards that renders section 1226(c) violative of due process requirements. The statute's provisions for mandatory detention without the benefit of a hearing or any possibility for release on bond disavows the very mechanism that aliens previously invoked to show they are neither flight risks nor dangerous to the public. And indeed, this mechanism is endemic to the American legal and constituitonal system. *See* U.S. CONST. amend. VIII.

For this reason, as discussed below, section 1226(c) cannot pass constitutional muster. To judge conformity with procedural due process, the Court employs a balancing test to weigh the following factors: (1) the magnitude of the private interest at stake – *i.e.*, the severity of the deprivation; (2) the risk of an erroneous deprivation and the likelihood that particular procedural safeguards will avoid the error; and (3) the governmental interest in requiring procedures that do not afford these safeguards. *See Mathews*, 424 U.S. at 335; *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

1. The liberty interest at stake here is severely infringed by section 1226(c).

The private interest to be free from arbitrary detention is considerable. As explained more fully in briefs submitted by other *amici curiae*, mandatory detention severely harms respondent and all others who are similarly situated. *See generally* Amicus Br. of Citizens § IV. As noted, the private interest at issue here is the individual's fundamental interest in "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – [that] lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690, *quoting Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

The right to freedom from arbitrary or unjustified government detention is fundamental to any democratic society. As the Court has emphasized time and again: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80. And Justice O'Connor has spelled out more comprehensively what is at stake here: "'Freedom from bodily restraint' means more than freedom from handcuffs, straitjackets, or detention cells. A person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal." *Flores*, 507 U.S. at 315 (O'Connor, J., concurring). The gravity of the private interest at stake here cannot be overstated, and any statute designed to interfere with this interest must provide appropriate procedural safeguards to ensure against wrongful deprivations.

2. Mandatory detention with no individualized determination creates an extreme risk of erroneous deprivation of liberty.

The second factor in the *Mathews* analysis is the risk of erroneous deprivation of liberty and whether the implementation of procedural safeguards would avoid the error. *See Mathews*, 424 U.S. at 335. Where there is no individualized hearing to determine the propriety of continued detention, the risk of erroneous detention is great. In fact, unless *all* of the individuals detained under section 1226(c) are flight risks or present a danger to the public, there is a guarantee that erroneous detention *will* occur, because the statute does not provide for *any* procedure by which to determine if an individual's particular circumstances warrant release on bond.

As discussed in Part II.A, *supra*, petitioners cannot rightly contend that *every* alien detained pursuant to section 1226(c) is a flight risk or presents a public danger; in fact, many individuals clearly fall into neither category. Petitioner's

claim that a person may be deprived of liberty without a hearing whenever there is a basis for detaining *most* people in her situation would be a recipe for mass detentions without cause.

The Government's allegations about preventing danger to the public fare no better here. Absent an individualized determination of dangerousness, it cannot simply be assumed that all or even most persons who have at one time been convicted of the crimes encompassed by section 1226(c) pose a continuing or present danger to the public. As discussed in Part II.A, *supra*, the argument that section 1226(c) exists to protect the public from dangerous criminals is specious because it applies equally to lawful permanent residents who have never been convicted of any crime that is traditionally considered to be "dangerous." Some crimes that are not traditionally labeled "dangerous," yet can still subject aliens to mandatory detention under section 1226(c), include fraud in obtaining benefits, harboring an undocumented alien, or (as in this case) petty theft with priors. Moreover, these persons have usually completed any sentence imposed for their prior offenses and have been released back into the community. In this respect, an individualized judgment has already been made by the courts that they pose no serious or continuing danger to the public. To treat all such aliens – including lawful permanent residents – the same without the benefit of any individualized determination of dangerousness violates procedural due process.

3. The government's duty to provide individual hearings prior to detention imposes only a minimal burden.

The burdens that would be imposed on the Government to conduct an individualized hearing to evaluate flight risk and dangerousness are minimal here. Any additional burden or cost placed on the Government by requiring it to provide for an separate and immediate hearing to determine the propriety of detention would be more than offset by the savings it

would enjoy by not having to detain *all* aliens who fall under section 1226(c).

Moreover, mandatory detention is an extreme solution, in particular, to concerns about the risk of flight. As discussed by other *amici curiae*, there are numerous alternatives to mandatory detention – including posting of bond or the imposition of specific conditions – that would reduce the risk of flight without impermissibly infringing on the core liberty interest to be free from incarceration. *See generally* Amicus Br. of American Bar Ass'n § II.A. From the standpoint of procedural due process, any one or more of these alternatives would be preferable to mandatory detention, as they would not result in deprivation of a fundamental liberty interest.

Section 1226(c) also is constitutionally suspect for its assumption that every individual who falls under its auspices presents a danger to the public. Such a blanket determination is akin to Congress substituting a single categorical judgment in place of those entities, including the courts, that have made individualized determinations about danger in the process of suspending sentences or granting parole. Putting aside the risk of flight, the only way that section 1226(c) can pass constitutional muster is if Congress has made a permissible assumption that *all* aliens who fall within the terms of the statute present a serious and continuing threat to the public safety, which is untenable given the broad sweep of the statute.

Finally, it cannot be maintained that aliens detained pursuant to section 1226(c) have already had an opportunity for a hearing in the form of the criminal proceeding that led to the conviction or plea that triggered their mandatory detention under this statute. The focus of a due process hearing for these purposes would be markedly different from the proceedings in any criminal trial, and would more closely resemble a bail hearing. Moreover, the factors relevant to flight risk and public danger are fluid and may change over the course of time. After the terms of a criminal sentence

have been fully served, and those obligations have been discharged, the question of subsequent detention pending a removal hearing involves a different set of facts relating to flight risk and public danger. These facts must be evaluated in an individualized hearing at that time in order to comport with constitutional due process.

C. These Fundamental Liberty Interests Are Not Extinguished Unless or Until a Final Order Is Entered on Removal.

It is worthy of emphasis that respondent does not assert an absolute right to be released during the pendency of a removal hearing, but only the narrow right to an individualized hearing to determine whether release on bond would be appropriate. Even then, as the Court stated in *Zadvydas*: "The choice . . . is not between imprisonment and the alien 'living at large.' . . . It is between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696 (citation omitted).

Moreover, the validity of an alien's challenge to removal has no bearing on whether this statute violates her due process rights. A lawful permanent resident such as respondent has the statutory right to reside in the United States until such time as a final removal order is issued against him. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Unless or until that happens, regardless of the stages of those proceeding, such persons have not lost their legal right to remain in the country. Indeed, even the statute that governs the detention of aliens *after* they have had a final removal order entered against them includes a time limit, which makes them eligible to be considered for release from custody after ninety days have elapsed from entry of the final removal order. *See* 8 U.S.C. § 1231(a). It is irrational to impose *more rigid* restrictions in the circumstances here, where the individual is not yet subject to a removal order.

Much of petitioners' argument elides these points, simply assuming that an eventual removal order is a foregone

conclusion. Petitioners assert that "removability ordinarily will be established, *beyond dispute*, by the alien's judgment of conviction." Pet. Br. at 26 (emphasis added). Yet removal is not at all automatic, since there are initial legal issues about whether an individual's prior offenses necessarily bring her within the meaning of section 1226(c). And even aliens who have a final removal order entered against them following an appropriate hearing are not necessarily removed from the country. As petitioners themselves note, withholding of removal was granted in 3,450 cases involving criminal and non-criminal aliens in the last year alone. *See* Pet. Br. at 30. Thus the Court has correctly noted that there is "a clear difference . . . between facing *possible* deportation and facing *certain* deportation." *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (emphasis added).

At bottom, the issue here is not whether an individual will ultimately be subject to removal. Rather, it is whether that individual's right to due process of law has been conceded or extinguished. That is not the case for respondent here, nor has it occurred in any of the many similar situations around the country involving the due process rights of lawful permanent residents.

III. CONGRESS'S PLENARY POWER OVER IMMIGRATION MATTERS IS CONFINED BY CONSTITUTIONAL LIMITS.

Petitioners seek to muddy the waters by framing the issues here to invoke the doctrine that Congress has plenary powers over immigration matters. *See, e.g.*, Pet. Br. at 23. Although the Court has recognized that Congress does exercise broad control over the admission and removal of aliens, it has also taken pains to point out that this legislative authority remains subject to the limits imposed by the Constitution. *See, e.g., Galvan v. Press*, 347 U.S. 522, 531 (1954); *Carlson v. Landon*, 342 U.S. 524, 533 (1952).

Petitioners' argument also fails to give due weight to the Court's recent holding in *Zadvydas*, which expressly held

that Congress's supposed plenary power "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. Indeed, the challenge here is *not* to Congress's decisions about whether to admit and deport aliens. Rather, respondent's due process claim questions the *manner* in which this authority is to be implemented. As this Court stated this in *Zadvydas*, the courts can take appropriate account of Congress's authority "without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id*. at 700.

In urging the Court to validate section 1226(c), petitioners obscure the fact that the statute does not merely deal with immigration issues. The statute does not seek to exclude particular groups of aliens from entry to the Untied States, nor does it seek removal of particular groups of aliens. Instead, the statute sets the terms for detention of individuals who are already present in the United States. Section 1226(c), particularly as it relates to lawful permanent residents, is less invocative of plenary power than it is of the police power. The mere fact that the individuals affected are aliens does not, by itself, give Congress free rein to order those individuals to be confined without bond and with no opportunity to show why detention is unjustified in their circumstances.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Court similarly rejected an improper assertion of Congress's plenary powers to justify otherwise unconstitutional legislation:

> The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing that power*. As we [have] made clear[]: "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, . . . so long as

> the exercise of that authority does not offend some other constitutional restriction."

Chadha, 462 U.S. at 940-41 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); other citation omitted). The Court has long recognized a difference between substantive policies regarding matters relating to immigration and the procedural mechanisms by which those policies are implemented. *See Galvan*, 347 U.S. at 530-32 ("In the enforcement of these policies [pertaining to the entry of aliens and their right to remain here] the Executive Branch of the Government must respect the procedural safeguards of due process."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (same).

The Court strongly reinforced this point in *Zadvydas*:

> . . . we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions. . . . The question before us is not one of "'confer[ring] on those admitted the right to remain against the national will'" or "'sufferance of aliens'" who should be removed. . . . Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

533 U.S. at 695 (citations omitted; brackets original).

The only tangible distinction between this case and *Zadvydas* is that here the individual aliens are subject to a subsequent hearing on removal and hence, though the Government is "unable to remove" them as yet, *id.*, it may be able to remove them eventually. Pending any final order of removal, however, the strictures of the Due Process Clause apply with full force, *see, e.g.*, *Mathews v. Diaz*, 426 U.S.

67, 77 (1976), especially with respect to the fundamental right to freedom from imprisonment, which "has always been at the core of the liberty protected by the Due Process Clause," *Foucha*, 504 U.S. at 80. That fundamental right is infringed here.

CONCLUSION

For these reasons, section 1226(c) should be held unconstitutional as applied to lawful permanent residents and the decision below should be affirmed.

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