No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS,

v.

ALEJANDRO RODRIGUEZ, ET AL.

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

BRIEF OF PROFESSORS STEPHEN H. LEGOMSKY AND STEPHEN YALE-LOEHR AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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D-J-, *In re*, 23 I. & N. Dec. 572 (B.I.A. 2003) 24

Diop v. *ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) 31, 32

Cases—Continued: Page(s)

Dvorkin v. *Gonzales*, 173 F. App'x 420 (6th Cir. 2006) 31
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Cases—Continued: Page(s)

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Saleem v. *Shanahan*, No. 16-CV-808 (RA), 2016 WL 4435246 (S.D.N.Y. Aug. 22, 2016), appeal filed, No. 16-3587 (2d Cir. Oct. 21, 2016) 30
Singh v. *Holder*, 638 F.3d 1196 (9th Cir. 2011) .. 24, 32
Sopo v. *U.S. Atty. Gen.*, 825 F.3d 1199 (11th Cir. 2016) 20, 31, 32, 33
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Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa L. Rev. (2015) 26
Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) 8

Miscellaneous—Continued: Page

Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (2009), https://www.hrw.org /sites/default/files/ reports/us1209webwcover.pdf 27

Jennifer Lee Koh et al., *Deportation Without Due Process* (2011), https://www. nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf..... 29

Dora Schriro, U.S. Immigration & Customs Enforcement, *Immigration Detention Overview and Recommendations* (Oct. 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf /ice-detention-rpt.pdf..... 27

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U.S. Department of Justice, Executive Office for Immigration Review:

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Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www. dhs.gov /sites/default/files/publications/ 14_1120 _memo_prosecutorial_discretion.pdf..... 29

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Revised Docketing Practices Relating to Certain EOIR Priority Cases (Feb. 3, 2016), https://www.justice.gov/eoir/file/819736 /download 29

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Amici respectfully submit this brief to the Court in support of Respondent.[1]

INTEREST OF AMICI CURIAE

Amici curiae Stephen H. Legomsky and Stephen W. Yale-Loehr are law professors and experienced practitioners in the area of immigration law. Professor Legomsky is the John S. Lehmann University Professor Emeritus, Washington University School of Law.

[1] The parties have filed blanket consent to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Professor Yale-Loehr is a Professor of Immigration Law Practice, Cornell Law School.[2] Additional information about each amicus is set forth in the Appendix.

Between them, amici have decades of experience in this area, in both private practice and senior positions in government, including as Chief Counsel of U.S. Citizenship and Immigration Services and Senior Counselor to the Secretary of Homeland Security, as well as teaching, writing, and practicing immigration law. Amici have a professional interest in ensuring that the court is fully informed of the relevant statutes, regulations, and practical application of the same to various categories of aliens.

Amici submit this brief to explain the statutory framework on which the government and respondents rely, as well as the application of the same. In particular, this brief explains how various aliens are categorized under the statutes and how the Respondent Class members fit into this framework, including when and how they may be detained and the limited avenues currently available for review of detention decisions.

INTRODUCTION AND SUMMARY

The Government has the authority to detain certain categories of aliens pending the start or completion of removal proceedings. In certain circumstances, detention is mandatory; in others, it is discretionary. The present case concerns how long such detention may continue without periodic review of the appropriateness of that detention. This amicus brief focuses specifically on the statutory provisions under which Class

[2] Institutional affiliations are provided for identification purposes only.

Members have been detained: 8 U.S.C. 1225(b), 1226(a), and 1226(c).[3]

As explained below, the statutes provide specific procedural protections with respect to removal. The statutes generally do not, however, explicitly address the permissibility of prolonged detention pending the outcomes of removal proceedings, which in practice are often lengthy. The brief also describes the bond hearing process.

Under the statutes, the variables that govern detention decisions include: (1) whether the alien was detained while trying to enter the United States or while already within the country, (2) whether the alien has been convicted of a qualifying crime, and (3) the basis the alien cites for entering or remaining in the United States. Certain elements, however, are common to all the current detention practices under these provisions.

First, detention is often the effective default condition. This is true even where, for example, an alien has sought asylum and the asylum officer determines in the preliminary interview that the alien possesses a credible fear of persecution. See pp. 6-11, *infra*. Similarly, an alien who claims a right to enter the country, including one who possesses an entry visa duly issued by the appropriate U.S. consulate, but who cannot demon-

[3] The Class as defined by the district court and adopted by the Ninth Circuit consists of noncitizens who "(1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified." Pet. App. 5a-6a. The class excludes detainees who have received final orders of removal.

strate that she is "clearly and beyond a doubt" entitled to enter, shall be detained while the claim is evaluated. 8 U.S.C. 1225(b)(2)(A); see pp. 11-12, *infra*.[4]

Second, these statutory provisions do not specify the permissible length of detention. As a result, aliens are frequently detained for prolonged periods with no review of the need to continue their detention.

Third, there is generally no explicit statutory provision for ongoing review of the appropriateness of the detention.

The framework described below governs whether and under what terms aliens may be, and have been, detained—sometimes for extended periods—while their right to be admitted into or remain in the United States is being adjudicated.

The Court's questions of counsel during the oral argument in this case reflect the complexity of the statutes and the degree to which the questions presented in this case may turn, in part, on the operation of these statutes and the related proceedings. For example, Justice Sotomayor asked about the statutory authority for holding an alien found near the border. Tr. 7. Justice Kennedy asked about the standard of proof for demonstrating public danger and flight risk. *Id.* at 6-7. Justice Breyer asked whether the opportunity for aliens claiming a right to live in the United States to re-

[4] The respondents assert that aliens who present themselves at the border are detained under Section 1225(b) for only the brief period before removal proceedings commence, and thereafter are entitled to the procedures governing detention under Section 1226(a). Resp. Br. 43-47. However, the petitioner disagrees and maintains that such individuals are not entitled to bond hearings during removal proceedings. *Id.* at 5-7.

ceive a bond hearing depends on where they are found. *Id.* at 40-41. These questions are addressed herein.

The limited opportunities for review of detention and the often lengthy or even indefinite duration of detention make it important for this Court to mark out the constitutional limits.

ARGUMENT

Parts I and II of this brief address two groups of aliens. Part I explains the statutory grounds for detaining aliens who present themselves at United States ports of entry and are subsequently detained under Section 1225(b). This group includes aliens seeking asylum and those who are not subject to expedited removal because they possess required entry documents and are not suspected of fraud, but whom an immigration officer determines are "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). Part I further describes the limited means by which these aliens may be granted release from detention or have their detention reviewed.

Part II addresses aliens apprehended while present in the United States. This group includes aliens who were never admitted, as well as those who were once admitted but have become subject to removal and are detained under Sections 1225(b) or 1226(a). It also includes aliens who have been convicted of qualifying crimes and are detained under Section 1226(c). Part II further describes the limited availability of bond hearings for some members of these subgroups.

Part III of the brief details the bond hearing process available to certain aliens. This Part also summarizes circuit court rulings that have resulted in aliens in

some jurisdictions receiving bond hearings after prolonged detention.

I. ALIENS ARRIVING IN THE UNITED STATES AT A PORT OF ENTRY

Some of the aliens included in the Section 1225(b) subclass are individuals who arrived at a U.S. port of entry seeking admission to the United States. These individuals have not been admitted but claim that they should be, because they either (i) demonstrate a credible fear of persecution if they were to return to their home countries, or (ii) claim to satisfy the statutory criteria for admission despite being unable to readily demonstrate that right to the satisfaction of the immigration officer.[5]

A. Arriving Asylum Seekers Are Detained Under Color Of Section 1225(b)(1)(B)(ii), Even After An Asylum Officer Has Found A Credible Fear Of Persecution[6]

The Section 1225(b) subclass includes aliens who arrive at a U.S. port of entry, seek asylum, and succeed in demonstrating a credible fear of persecution. The respondent treats such aliens as detained under Section 1225(b)(1)(B)(ii) while awaiting the final asylum determinations during their removal proceedings. They do

[5] An arriving alien who either lacks valid entry documents or is suspected of fraud, and who does not claim asylum and demonstrate credible fear of persecution, is subject to "expedited removal." 8 U.S.C. 1225(b)(1)(A)(i). These individuals are not part of the class in this case.

[6] Detention is also mandatory while the credible fear determination is pending or after a finding of no credible fear, 8 U.S.C. 1225(b)(1)(B)(iii)(IV), but those individuals are not part of the present class.

not receive any review of the likelihood that their claims will succeed or the amounts of time for which they have been detained.

1. Asylum seekers detained under Section 1225(b)(1)(B)(ii) have limited opportunity for review of detention or release

If an alien is present at a U.S. port of entry and is subject to expedited removal because of a lack of entry documents or suspected fraud, and indicates to an asylum officer that she wishes to apply for asylum or that she has a fear of persecution, the immigration officer is required to detain the alien and refer her for an interview by an asylum officer. 8 U.S.C. 1225(b)(1)(A)(ii) and (B)(iii)(IV). Typically, an asylum officer will interview the asylum seeker within a few days of the referral. The interview is a screening mechanism. Its purpose is to determine whether the person has a "credible fear of persecution," 8 U.SC. 1225(b)(1)(B)(iii)(IV), defined as a "significant possibility * * * that the alien could establish eligibility for asylum," 8 U.S.C. 1225(b)(1)(B)(v).

If the asylum officer finds that the alien lacks credible fear, the alien must be detained until removed. 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If, however, as is relevant to the present class members, the asylum officer finds that the alien has a credible fear, the alien remains detained for further consideration of the asylum application under Section 1225(b)(1)(B)(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution * * *, the alien shall

be detained for further consideration of the application for asylum.").[7]

A detained alien seeking asylum may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit." 8 C.F.R. 212.5(b); see J.A. 46.[8] This parole is at the discretion of the Secretary of Homeland Security (though, in practice, decisions are made by Detention and Removal Operations Field Office personnel) and cannot be overturned by an Immigration Judge (IJ) or court. 8 U.S.C. 1225(a)(2)(B)(ii).

A detained alien, including an asylum seeker, may also file a habeas corpus petition in federal court. *Zadvydas* v. *Davis*, 533 U.S. 678, 687, 720-721 (2001) (citing 28 U.S.C. 2241(c)(3)). While a district court does not have jurisdiction to review most of the discretionary actions of the Secretary of Homeland Security,[9] the courts can hear challenges to the constitutionality of an alien's detention. See *Baez* v. *Bureau of Immigration & Customs Enforcement*, 150 F. App'x 311, 312 (5th Cir. 2005); see also *Boumediene* v. *Bush*, 553 U.S. 723, 747 (2008) (reviewing the history of the writ and finding that historically aliens were provided habeas relief)); see generally *Marczak* v. *Greene*, 971 F.2d 510, 518

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[7] After the commencement of removal proceedings detention is governed by Section 1226(a). See 8 C.F.R. 1236.1.

[8] In some instances, parole may not be granted without "compelling reasons in the public interest." See 8 U.S.C. 1182(d)(5)(B).

[9] Under the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, § 1517 (Nov. 25, 2002), statutory references to the Attorney General should be read as if they referred to the Secretary of Homeland Security whenever, as here, the relevant function has been transferred to the Secretary.

(10th Cir. 1992) (collecting cases and finding that the director must articulate "some individualized facially legitimate and bona fide reason for denying parole").

Apart from the relief granted by the Ninth Circuit in this case, subclass members seeking asylum in removal proceedings have no other avenues to challenge their detention pending determination of their application for asylum and ultimate resolution of the removal proceeding. Thus, these individuals are frequently detained indefinitely even after demonstrating a credible fear of persecution.

2. Aliens seeking asylum may be detained for lengthy periods

The Ninth Circuit recognized that "Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each." Pet. App. 40a. That statistic includes aliens seeking asylum, as well as those who were never subject to expedited removal because they possess valid entry documents and raise no suspicion of fraud.

There are examples of still longer detentions. In one habeas case, *Nadarajah* v. *Gonzales*, the plaintiff fled to the United States in October 2001 after enduring repeated torture in Sri Lanka. 443 F.3d 1069, 1072-1073 (9th Cir. 2006). When he arrived, he applied for asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 1073. His first removal proceeding began in November 2001, and, after the government obtained two continuances, culminated with a hearing in April 2003 at which the IJ granted asylum. *Ibid.* The government then moved to re-open the removal proceedings, the IJ denied the motion, and the government appealed to the Board of Im-

migration Appeals (BIA). *Ibid.* The BIA remanded the case, and a second hearing was held in June and August 2004, at which time the IJ reinstated his order granting asylum. *Id.* at 1073-1075. The government again appealed to the BIA. *Id.* at 1075. Still detained, plaintiff sought and was denied discretionary parole under Section 1182(d)(5)(A). *Ibid.* Plaintiff then filed a habeas petition, which the district court denied in late 2005, more than one year after filing. *Ibid.* In January 2006, the BIA affirmed the IJ's decision granting asylum, but the plaintiff still remained detained because the BIA took the unusual step of referring the case to the Attorney General. *Ibid.* Finally, in March 2006, the Ninth Circuit ordered his release. *Id.* at 1084. It said: "[T]he government continues to detain [the plaintiff], who has now been imprisoned for almost five years despite having prevailed at every administrative level of review and who has never been charged with any crime." *Id.* at 1071.

Another alien arrived at a U.S. port of entry seeking asylum, the day after he had witnessed the murder of his twin brother by the Chihuahua State Police and after having been kidnapped and beaten by the same murderers. He was detained for 26 months. *Maldonado* v. *Macias*, 150 F. Supp. 3d 788, 809 (W.D. Tex. 2015). He had requested and been granted several continuances to better prepare his case, but the court found that the continuances had amounted to only a "small fraction of the length of Petitioner's current detention." *Ibid.* Other delays stemmed from an appeal to the BIA and subsequent remand after a finding that the "Immigration Judge did not adequately consider" certain facts, including whether state police could be considered government-sponsored. *Id.* at 792. The district

court granted the writ in part, ordering that petitioner receive a bond hearing. *Id.* at 812 ("[T]his Court finds that a bond hearing before an Immigration Judge is more appropriate than release in this case 'to provide a minimal procedural safeguard.'"). See also *Ahad* v. *Lowe*, No. 16-CV-01864, 2017 WL 66829, at *1-2 (M.D. Pa. Jan. 6, 2017) (granting habeas relief insofar as petitioner, detained 20 months while his asylum claim proceeded, sought an individualized bond hearing).

B. Arriving Aliens Who Are Not Subject To Expedited Removal, But Are Not "Clearly And Beyond A Doubt Entitled To Be Admitted," Are Detained Under Color Of Section 1225(b)(2)(A)

The Section 1225(b) subclass also includes aliens who arrived at a U.S. port of entry and are not subject to expedited removal because they possess valid entry documents and are not suspected of fraud, but have not satisfied the immigration inspector that they are "clearly and beyond a doubt entitled to be admitted." These individuals are detained under Section 1225(b)(2)(A). As is the case for arriving asylum seekers, the statute does not provide an opportunity to challenge the appropriateness of detention, irrespective of the likelihood that their claim will succeed or the length of their detention, although here too habeas is a possibility.[10]

Judicial records of challenges show that detention of this subclass of aliens can be equally prolonged—

[10] These individuals may, in certain circumstances, also be released under discretionary parole by the Secretary of Homeland Security pursuant to Section 1182(d)(5). See J.A. 44.

consistent with the average of 346 days each. Pet. App. 40a. This point applies, with some exceptions,[11] even to lawful permanent residents returning from temporary visits abroad.[12] For example, in *Bautista* v. *Sabol*, a lawful permanent resident returned from a trip to the Dominican Republic and was detained by U.S. Immigration and Customs Enforcement (ICE) based on an old criminal conviction. 862 F. Supp. 2d 375, 377 (M.D. Pa. 2012). Through a habeas petition, he was released after 26 months.

That such detained aliens and other similarly situated may be detained for such lengthy periods reflects the limited avenues available to them. Although the Section 1225(b) subclass includes individuals seeking asylum (including where a preliminary interview finds the alien possesses a credible fear of persecution) and individuals unable to demonstrate their admissibility (including some lawful permanent residents), this subclass is provided with no opportunity for formal review of their detention.

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[11] Under 8 U.S.C. 1101(a)(13)(C), certain returning lawful permanent residents are treated as not seeking admission.

[12] It may even apply when the question in dispute is whether the person is a U.S. citizen. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 608, 628-629 (2011) (stating that "data suggests that in 2010 well over 4,000 U.S. citizens were detained or deported as aliens, raising the total since 2003 to more than 20,000" which results from the fact that "individuals in ICE custody who are U.S. citizens but have not had their claims legally recognized at first inspection are impossible to distinguish from noncitizens making false claims to U.S. citizenship").

II. Aliens Apprehended In The United States

In general, aliens already present in the United States who are apprehended by immigration officers may fall into three categories: (1) those who have not been convicted of specified crimes but whom the immigration inspectors believe to be removable on other grounds; (2) those who have been convicted of specified crimes that are grounds for removal; and (3) those who have final orders of removal that have not been judicially stayed.[13] All three categories are subject to detention, but only for the first group does the statute guarantee a bond hearing and the possibility of a review of the appropriateness of detention while a decision on removal is pending.

A. Aliens Apprehended In The United States But Not Convicted Of A Qualifying Crime May Be Detained And Are Only Sometimes Permitted A Bond Hearing Pending A Removal Decision

An alien apprehended in the United States is generally detained pending a decision whether to initiate removal proceedings. This includes aliens who have been legally admitted but are nonetheless deemed removable, 8 U.S.C. 1226(a), as well as those who have not been admitted but are found within the country (*i.e.*, did not appear at a United States port of entry), 8 U.S.C. 1225(b)(2)(A). A decision on whether an alien is deportable and, if so, whether she is eligible for and deserving of discretionary relief, is ordinarily made in removal proceedings under Section 1229(a). Once those

[13] Only the first two categories are included in the class in this case. See note 3, *supra*.

proceedings commence, detention is governed by Section 1226.[14] See 8 C.F.R. 1236.1(b)(1). Under that provision, the Secretary of Homeland Security has the discretion to detain, release on bond, or release on "conditional parole" (*i.e.*, without bond), unless the person has been convicted of specified crimes, in which case detention is mandatory under Section 1226(c), discussed below.[15]

Unlike other categories of aliens discussed herein, those detained under Section 1226(a) are provided, by statute, an opportunity for a bond hearing. Before being granted release under Section 1226(a), an alien must demonstrate that his release would pose neither a danger to property or persons nor a risk she would not appear for future proceedings. 8 C.F.R. 236.1(c)(8); see *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006) (also stating that the noncitizen must show that he does not present a "threat to the national security").[16] The alien must make this showing to be released on either conditional parole or bond.

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[14] As noted above, petitioner views individuals who arrived at the border as detained under Section 1225 even after removal proceedings have commenced.

[15] The subclass at issue in this case does not include aliens who are apprehended having been present in the United States for a period of fewer than 14 days *and* found within 100 air miles of the border. In such cases, "[i]f an immigration officer determines that [the] alien * * * is inadmissible * * * the officer shall order the alien removed from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). These aliens are subject to expedited removal. See 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

[16] A detailed description of the bond hearing process appears in pp. 22-23, *infra*.

Once the enforcement officials have made a bond determination under Section 1226(a), the alien may, at any time during removal proceedings, request a redetermination of his bond from an IJ. See pp. 22-28, *infra*; 8 C.F.R. 236.1(d)(1); 8 C.F.R. 1236.1(d)(1) (same). The alien may appeal the decision of the IJ to the BIA under the procedure described in governing regulations. 8 C.F.R. 236.1(d)(3)(i), 1003.38.

An alien detained pursuant to Section 1226(a) may also request a subsequent redetermination. The request must be made in writing and show "that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e). An alien "is not limited to only one bond reduction request." *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989). Importantly, the length of detention is not considered by the IJ when evaluating whether circumstances have changed materially. Pet. App. 46a-47a; see Arg. Tr. 9.

Section 1226(a) subclass members are aliens detained in the discretion of the Secretary of Homeland Security who were not granted parole, were unsuccessful at the bond hearing stage, and have remained detained for more than six months. Lack of success at this stage can manifest in one of two ways: the alien may have been unable to demonstrate that he will not pose a danger or flight risk, or the alien may have received a bond determination but was unable to pay the amount required for release.[17] See, *e.g.*, *Prieto-Romero*

[17] While inability to pay a bond remains restrictive in, *e.g.*, a typical criminal case, aliens detained under Section 1226(a) are not guaranteed the same expeditious resolution of interim detention status afforded to criminal defendants by the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

v. *Clark*, 534 F.3d 1053, 1068 (9th Cir. 2008) (alien detained under Section 1226(a) for over three years, in part because of inability to pay $15,000 bond).

B. Aliens Apprehended In The United States Who Are Convicted Of A Qualifying Crime Are Subject To Mandatory Detention And Are Not Provided Opportunities For Conditional Release Except In Limited Circumstances

1. Aliens convicted of qualifying crimes are detained under Section 1226(c)

Section 1226(c) requires the government to detain certain aliens deemed either inadmissible or deportable because of specified national security concerns or convictions of certain crimes. This case concerns the latter, the application of Section 1226(c) to both admitted and non-admitted aliens who have committed certain crimes. (Such aliens, if residing in the United States, make up Respondents' "Mandatory Subclass.").[18] Examples include crimes involving moral turpitude and nearly all drug crimes, per Sections 1182(a)(2) and 1227(a)(2). The statute mandates that the Secretary of Homeland Security take into custody aliens rendered deportable under this subsection after they have served their sentences for the underlying crime(s), at which point they are detained by ICE pending removal proceedings.

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[18] Although Section 1226(c) also applies to aliens deemed "inadmissible" under 8 U.S.C. 1182(a)(2) and (3)(B), 8 U.S.C. 1226(c)(1)(A) and (D), Respondents' Mandatory Subclass "consists of individuals *residing in the United States*," Resp. Br. 2 (emphasis added), therefore amici do not provide further detail regarding this subset of aliens.

While certain crimes that would subject an alien to detention under Section 1226(c) likely would qualify as felonies, the commission of a misdemeanor may trigger mandatory detention under the provision. See *Preap* v. *Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016) ("A broad range of crimes is covered under the mandatory detention provision [contained in 8 U.S.C. 1226(c)], from serious felonies to misdemeanor offenses involving moral turpitude and simple possession of a controlled substance."); *Munoz* v. *Tay-Taylor*, No. 12-3764 (PGS), 2012 WL 3229153, at *1 (D.N.J. Aug. 6, 2012) (observing that the alien in that case was "arrested and detained by [ICE] pursuant to 8 U.S.C. 1226(c) because of his status as a criminal alien under 8 U.S.C. 1227(a)(2)(A)(ii)" following his completed sentence of one year of probation after having pled guilty to the misdemeanor of criminal possession of a controlled substance in the seventh degree); *Monestime* v. *Reilly*, 704 F. Supp. 2d 453, 455 (S.D.N.Y. 2010) (following an arrest for disorderly conduct, alien detained by ICE, which instituted removal proceedings because alien's misdemeanors involved "attempted menacing in the second degree" and "criminal possession of stolen property in the fifth degree").

2. Aliens detained under Section 1226(c) are released from detention in only narrow circumstances

For aliens detained under Section 1226(c), there is only one circumstance in which the Secretary of Homeland Security may authorize release: when "necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major

criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." 8 U.S.C. 1226(c)(2). Moreover, even then the government must be satisfied "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." *Ibid.* These circumstances are much narrower than the general discretion afforded to the Secretary of Homeland Security for aliens detained under Section 1226(a). See pp. 13-16, *supra*. The Secretary's general discretionary authority to grant parole under Section 1182(d)(5)(A) also does not apply to an alien detained under this Section. See 8 C.F.R. 212.5(b), 235.3(b)(2)(iii), (b)(4) and (c); see also J.A. 44.

Relatedly, aliens detained pursuant to Section 1226(c) are not automatically afforded bond hearings to determine the necessity of their continued detention.[19] The only type of hearing that an alien held under Section 1226(c) is entitled to pursue is one challenging the basis of her detention under that statute. This is the *Joseph* hearing, named for the case from which it derives, *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

In a *Joseph* hearing, a detainee may avoid mandatory detention by demonstrating one or more of three facts: (1) that she is not an alien, (2) that she was not convicted of the predicate crime, or (3) that DHS is substantially unlikely to establish that she is in fact

[19] Aliens subject to Section 1226(c) may be entitled to bond hearings in certain circumstances once the duration of detention is deemed prolonged, although circuits have not arrived at a consensus on when such a point is reached. See pp. 22-23, *infra*.

subject to mandatory detention. See 22 I. & N. at 805-806; 8 C.F.R. 1003.19(h)(2)(ii).

A *Joseph* hearing does not guarantee release from detention, even if the alien prevails. "A determination in favor of an alien * * * does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of" Section 1226(a). *Joseph*, 22 I. & N. Dec. at 806. The hearing also does not consider other factors, such as whether the alien poses a danger to persons or property or whether the alien presents a flight risk. *Id.* at 809. A *Joseph* hearing attacks the evidence as to whether the alien properly falls under this section of the statute, not the appropriateness of detention.

3. Aliens held under Section 1226(c) generally are detained for longer periods of time than are other aliens

Because Section 1226(c) makes detention mandatory, the affected aliens are often held for longer periods of time than their Section 1226(a) or 1225(b) counterparts. See Pet. App. 34a ("The longest-detained class member [a member of the Section 1226(c) subclass] was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days."). This is true despite the fact that the length of the aliens' sentences served for the underlying crimes is sometimes less than the amount of time spent in immigration detention afterward, and the fact that these aliens' detentions bear no relation to their

success rate in obtaining relief from removal, which can be higher than that of other detained aliens. *Ibid.*[20]

Cases from the courts of appeals offer examples of some of the more extreme lengths of time spent in detention under Section 1226(c) without the benefit of a bond hearing. In another Ninth Circuit case, *Casas–Castrillon* v. *DHS*, a lawful permanent resident was detained pursuant to Section 1226(c) for nearly seven years before winning a right to a bond hearing via a habeas petition. 535 F.3d 942, 945 (2008).

Others have experienced similarly lengthy detentions under the same statute. See, *e.g.*, *Tijani* v. *Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (lawful permanent resident detained for more than two and a half years); *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1220-1221 (11th Cir. 2016) (alien held pursuant to Section 1226(c) for at least three and a half years—exceeding the prison time he served for bank fraud—in part because (i) alien refused to file new asylum application form in 2012, insisted on retrieval of his 2004 form, and requested continuances; (ii) government took months to respond to FOIA request; and (iii) case moved between IJ and BIA three times on account of reversals); *Reid* v. *Done-*

[20] Other cases addressing this subclass of aliens evidence the same pattern. See, *e.g.*, *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (alien served less than three years subject to indefinite detention under the statute, and was held for three and half years as of release on bond); *Walker* v. *Lowe*, No. 4:15cv0887, 2016 WL 6082289, at *1 (M.D. Pa. Oct. 17, 2016) (alien held for approximately three years, "far in excess of his original * * * criminal sentence," for which alien was given time served); *Monestime* v. *Reilly*, 704 F. Supp. 2d 453, 459 (S.D.N.Y. 2010) (alien arrested based on two misdemeanor convictions subject to indefinite detention under the statute).

lan, 819 F.3d 486, 501 (1st Cir. 2016) (lawful permanent resident alien detained under Section 1226(c) held for 14 months following issuance of removal order while he appealed).

C. Aliens Ordered Removed Are Generally Detained Until The Removal Order Is Executed

Under Section 1231(a), aliens with administratively final orders of removal must be detained until they are removed (unless a court of appeals has granted a stay of removal and judicial review is still pending).[21] In most cases, the alien is subject to a 90-day removal period that begins at the latest of when the removal order becomes final, a reviewing court issues its final order after having stayed removal pending judicial review, or the alien is released from detention. 8 U.S.C. 1231(a)(1)(B). The Secretary of Homeland Security has discretion to detain certain aliens beyond the 90-day removal period, such as where the alien fails to adequately arrange for departure, is considered an inadmissible or criminal alien under the statute or the Secretary determines the alien is "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).[22] This Court addressed Section 1231(a)(6) in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

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[21] While respondents originally included a Section 1231(a) subclass, the court below found this subclass to be nonexistent, as none of the aliens in the present class were subject to final removal orders. See Pet. App. 51a.

[22] If, in the alternative, the removal is stayed, the court will typically hold that detention authority reverts to pre-removal status. See, *e.g.*, *Prieto-Romero* v. *Clark*, 534 F.3d 1053, 1062 (9th Cir. 2008) (finding detention authority reverts to Section 1226).

* * *

The statutory provisions applicable to aliens present in the United States provide bond hearings to only a subset of detained aliens. Subject to the case law in certain Circuit Courts of Appeals, as explained below, the result is that these individuals are frequently detained for significant periods without the possibility of a review of the appropriateness of detention.

III. The Bond Hearing Process Provides Limited Procedural Rights, Which Vary Across The Circuits

As described *supra*, the detention statutes at issue in this case provide limited opportunities for review of an alien's detention during a removal proceeding, with only Section 1226(a)(2) expressly providing for bond hearings. A majority of the courts of appeals have found that the statutes nevertheless should be read to include a bond hearing to assess the need for continued detention. This Part describes the bond hearing procedures set out in Section 1226(a), the right to a bond hearing as recognized by the courts, and the bond hearing procedures that currently apply in various circuits.

A. Aliens Detained Under Section 1226(a) Are Entitled To Bond Hearings In Certain Circumstances

For aliens detained pursuant to Section 1226(a), see discussion pp. 6-11, 13-16, *supra*, the statute provides that an alien may be released on "bond of at least $1,500" approved by the Secretary of Homeland Security or "conditional parole." 8 U.S.C. 1226(a)(2). The statute expressly provides two modes of review and release, each to be based on an assessment of whether detention is appropriate for the specific individual at

issue. Furthermore, an alien may request a redetermination as to bond or conditional release under Section 1226(a), in accordance with specific procedures.

As an initial matter, "conditional parole" under Section 1226(a) is distinct from discretionary parole available to arriving aliens under Section 1182(d)(5). See *In re Castillo-Padilla*, 25 I. & N. 257, 258 (B.I.A. 2010). While Section 1182(d)(5)(A) contemplates that the Secretary of Homeland Security may temporarily release 1225(b) subclass members "for urgent humanitarian reasons or significant public benefit," that release is in the Secretary's sole discretion and is not reviewable.

For an alien detained under Section 1226(a), seeking conditional parole or bond thereunder provides a basic form of review of detention. To be granted release on bond or conditional parole, the alien must "demonstrate to the satisfaction of the officer" that she does not present a "danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8). This determination is normally made shortly after the alien is detained. See, *e.g.*, 8 C.F.R. 287.3(d). As a practical matter, the timing may create an added hurdle for a detained alien, who not only bears the burden of proof, but may also have had minimal or no opportunity to identify evidence and develop an argument.

Aliens denied bond or release at this initial determination, and who may remain in detention indefinitely, may request a redetermination hearing in front of an IJ. See 8 C.F.R. 236.1(d)(1), 1003.19(b), 1236.1(d)(1). A redetermination hearing is the clearest avenue for a detainee to secure release from custody pending a final

determination, particularly as it is subject to certain procedural protections. A redetermination hearing usually occurs within the first few months of detention. See *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); but see 8 C.F.R. 236.1(d)(1) (a Section 1226(a) detainee may apply for a redetermination of custody at any point between the initial custody determination and the order of deportation).

The burden of proof at the redetermination hearing remains unchanged, and the IJ has broad discretion in deciding what factors to consider and whether to release the detainee. *In re D-J-*, 23 I. & N. Dec. 572, 581 (B.I.A. 2003) (the IJ "may (but is not required to) grant release under [§ 236.1]" if the alien meets his or her burden of proof). IJs often consider factors such as whether the alien has a fixed address in the United States, the length of residence in the United States, family ties in the United States, employment history, immigration record, attempts to escape authority, failures to appear for scheduled court proceedings and whether the individual has a criminal record.[23] See *Guerra*, 24 I. & N. Dec. at 40. Criminal history does not necessarily justify a denial of bond or parole on the basis of dangerousness. See *Singh* v. *Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011); cf. *Ngo* v. *INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("[P]resenting danger to the community at one point by committing [a] crime does not place them forever beyond redemption."). See also *Guerrero Sanchez* v. *Sabol*, No. 1:15-CV-2423, 2016 WL 7426129, at *5 (M.D. Pa. Dec. 23, 2016) ("Importantly, the bond

[23] U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Introductory Guide: Bond* (2016), https://www.justice.gov/eoir/file/830231/download.

hearing a section 1226 detainee receives must be 'individualized.' Mechanistic reliance on factors that are common to all section 1226 detainees will not suffice." (internal citations omitted)).

Aliens who remain detained following an initial redetermination hearing may seek a subsequent redetermination or appeal the decision to the BIA.[24] 8 C.F.R. 236.1(d)(3)(i), 1003.19(e)-(f). However, a request for a subsequent hearing "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989). Additional time spent in detention is not, in the government's view, a "changed circumstance," no matter how long the detention. Pet. App. 46a-47a; see Arg. Tr. 9. Accordingly, in many cases, subsequent redetermination hearings are unlikely to serve as a significant check on lengthy detention.

The structure of these hearings, including hearing procedures, the presence of counsel, the information available to the parties, and an alien's ability to exercise his or her rights under the statute, may significantly influence the outcome. In many instances, these factors result in continued detention.

Hearing Procedures. Hearings entail "informal procedures." *In re Chirinos*, 16 I. & N. Dec. 276, 277

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[24] An appeal of the IJ's bond redetermination must be made within 30 days of the decision date. 8 C.F.R. 236.1(d)(3), 1003.38(b). An IJ may grant a bond redetermination request for a new hearing even if a previous bond redetermination has been appealed to the BIA. *In re Valles-Perez*, 21 I. & N. Dec. 769, 772 (B.I.A. 1997). If a bond redetermination is granted while a bond appeal is pending, the appeal is rendered moot. *Id.* at 733.

(B.I.A. 1977). Detainees may appear in person or by video. *Ibid*; 8 C.F.R. 1003.25(c) (stating that an IJ may "conduct [immigration] hearings through video conference to the same extent as he or she may conduct hearings in person"). If the detainee is represented by counsel, the attorney will typically be in the courtroom while the detainee appears by video. As one indication of the informal nature of the proceedings, the detainee has no right to a transcript. *Chirinos*, 16 I. & N. Dec. at 277.

Representation by and Presence of Counsel. During the hearing, the government is represented by an ICE attorney. Detainees may be represented by counsel but are not guaranteed or provided counsel. 8 U.S.C. 1362. In practice, the vast majority of detained aliens proceed pro se.[25] Even where the alien may have been able to procure counsel, the realities of lengthy detention, the remote locations of detention facilities, and possible short-notice transfers across various facilities may effectively limit a detainee's access to coun-

[25] See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa L. Rev. 1, 40, 75 (2015) (providing data showing that 86 percent of detainees were unrepresented in hearings).

sel.[26]

Information Available to the Parties. During the bond hearing, each side has the opportunity to present evidence and witnesses. Formal rules of evidence do not apply. *Baliza* v. *INS*, 709 F.2d 1231, 1233 (9th Cir. 1983). The government frequently has a wide range of information at its disposal. For example, the government can readily access criminal records using fingerprints or biometrics. The government also has the alien's "A file," containing information about prior immigration filings and proceedings, as well as any filings in the instant case, such as the alien's I-213 form, a record created by the immigration official taking the alien into custody, which includes personal information and immigration history. At least one circuit has held that administrative documents such as the I-213 are "presumptively reliable administrative document[s]," *Gutierrez-Berdin* v. *Holder*, 618 F.3d 647, 653 (7th Cir. 2010), although the information therein may not have

[26] See Dora Schriro, U.S. Immigration & Customs Enforcement, *Immigration Detention Overview and Recommendations*, 24 (Oct. 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (recommending that detainees represented by counsel not be transferred outside the area unless there are health or safety concerns); see also Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* 43 (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf (indicating that detainee transfer can seriously impact detainees' access to counsel).

been subject to verification.[27] The government also has access to background checks and certain information elicited in prior proceedings (*e.g.*, during the credible fear screening).

Facts Concerning Detention. In addition, the government may point to, and the IJ may rely on, information concerning the alien's detention, including specifics of the detainee's behavior in detention.

Unless the detainee is transferred, she will likely appear before the same immigration judge, who will be familiar with the case. See Amicus Br. of Nine Retired Immigration Judges 22 (asserting that, after six months, the judge will have background information on the alien's claims and will be able to assess the alien's credibility).

B. Federal Courts Have Held That Aliens Detained Under Sections 1225(b), 1226(a), And 1226(c) Are Entitled To Bond Hearings When Detention Becomes Prolonged

Six United States Courts of Appeals provide de-

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[27] "[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress," the document is relied upon even without verification. *In re Gomez-Gomez*, 23 I. & N. Dec. 522, 524 (B.I.A. 2002). See, *e.g.*, *In re Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (the BIA found that the I-213 was properly admitted although immigration officer relied upon information provided by a noncitizen, who was suspected of being untruthful and could not provide verifying documents); *In re Aracely Del Carmen Mendoza-Robles*, No. A095 724 672, 2015 WL 5180619, at *2 (B.I.A. Aug. 11, 2015) (The BIA held that an I-213 was reliable even though it contained hearsay, the secretary who obtained the information for the "Background Information Form" was later fired for theft, and DHS relied upon counsel's admissions on behalf of noncitizen in filling out the form.).

tained aliens bond hearings if and when their detention becomes "prolonged." Hearings for prolonged detention are available, in different circumstances, to aliens detained under Sections 1225(b), 1226(a) and 1226(c). With the limited exception of bond redetermination hearings available to aliens detained under Section 1226(a), the bond hearings described in this section represent the only opportunity for many class members to challenge prolonged detention.[28]

[28] Although an alien held in detention may request an expedited case review, such review is unlikely to change the processing time. Under current ICE policy, cases of detained aliens are already prioritized. U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Revised Docketing Practices Relating to Certain EOIR Priority Cases* (Feb. 3, 2016), https://www.justice.gov/eoir/file/819736/download; see also U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (prioritizing aliens subject to detention, including those convicted of a felony or apprehended while trying to enter the United States, and directing enforcement resources towards prioritized aliens). Despite this policy, there is a growing backlog and these detentions may stretch on for years. See Pet. App. 40a. The detainee's other option is to concede removability and agree to deportation. Given the current backlog, aliens can and do opt to waive their rights to minimize their time in detention, losing the chance to adjudicate their immigration case. See Jennifer Lee Koh et al., *Deportation Without Due Process*, 6-8 (2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf (detailing that the majority of individuals who accept stipulated removal are behind bars).

1. The Ninth and Second Circuits provide for bond hearings for aliens detained over six months

The Ninth Circuit, in the case below, held that aliens detained under Sections 1225(b), 1226(a) and 1226(c) are entitled to bond hearings after six months of detention. See Pet. App. 61a-100a; *id.* at 2a-59a. The opinion below followed earlier Ninth Circuit cases, including *Casas-Castrillon* v. *DHS*, 535 F.3d. 942 (2008). In that case, the same court reasoned that Section 1226(c) was intended to govern aliens only during "'brief' detention," not lengthy detention (in that case, nearly seven years), without some form of procedural protections for the detained. *Id.* at 950. The court found that once the BIA affirms the removal order, the government's authority to hold the alien is based in Section 1226(a), which requires a bond hearing. *Id.* at 951; Pet. App. 71a-72a. Furthermore, prolonged detention under either Section raises "serious constitutional concerns." Pet. App. 83a.

The Second Circuit adopted the Ninth Circuit's interpretation for Section 1226(c) detainees, holding that "mandatory detention [of Section 1226(c) detainees] for longer than six months without a bond hearing affronts due process." *Lora* v. *Shanahan*, 804 F.3d 601, 606 (9th Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016). The same interpretation has been adopted by district courts in detentions under Section 1226(a) and in detentions under Section 1225(b), although these issues remain unresolved in the Second Circuit. See *Aria* v. *Aviles*, No. 15-CV-9249 (RA), 2016 WL 3906738, at *4 (S.D.N.Y. July 14, 2016), appeal filed, No. 16-3186 (2d Cir. Sept. 12, 2016); *Saleem* v. *Shanahan*, No. 16-CV-808 (RA), 2016 WL 4435246, at *3 (S.D.N.Y. Aug. 22,

2016), appeal filed, No. 16-3587 (2d Cir. Oct. 21, 2016); see also *William* v. *Aviles*, No. 15-CV-4009, 2015 WL 7181444, at *3 (S.D.N.Y. Oct. 30, 2015), appeal filed, No. 15-4166 (2d Cir. Dec. 30, 2015); but see *Perez* v. *Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016) (holding that *Lora* does not apply to aliens detained under Section 1225(b)); *Cardona* v. *Nalls-Castillo*, 177 F. Supp. 3d 815, 816 (S.D.N.Y. 2016) (same).

2. The First, Third, Sixth and Eleventh Circuits provide for bond hearings on a case-by-case basis

The First, Third, and Eleventh Circuits have held that Section 1226(c), requiring the Secretary of Homeland Security to take into custody certain aliens, "implicitly authorizes detention for a reasonable amount of time," after which an individualized review of detention is necessary. *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011); *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1214 (11th Cir. 2016); see *Reid* v. *Donelan*, 819 F.3d 486, 498-499 (1st Cir. 2016) (holding that, in determining whether continued detention is unreasonable, "the district court must evaluate whether the alien's continued detention sufficiently serves the categorical purpose of the statute"). Similarly, the Sixth Circuit has held that when an alien's removal is not foreseeable, the alien may not be held in detention for an unreasonable period without a "government showing of a 'strong special justification,' constituting more than a threat to the community, that overbalances the alien's liberty interest." *Ly* v. *Hansen*, 351 F.3d 263, 273 (2003) (citing *Zadvydas*, 533 U.S. 678, 690 (2001)); see *Dvorkin* v. *Gonzales*, 173 F. App'x 420, 424 (2006) (acknowledging *Ly*'s holding that "detention pursuant to § 1226 must be reasonable").

Unlike the Second and Ninth Circuits, these circuits have declined to adopt a bright-line test for determining the point at which detention is considered prolonged. See, *e.g.*, *Sopo*, 825 F. 3d at 1215. The First, Third, Sixth and Eleventh Circuits have also limited their holdings to individuals held under 1226(c).

3. Bond hearings based on prolonged detention are procedurally similar to Section 1226(a) bond hearings

Circuits that provide bond hearings for aliens subject to prolonged detention have largely adopted the procedures of Section 1226(a), with a few significant exceptions.

First, in this case the Ninth Circuit required that the Immigration Judge consider the length of detention in bond hearings after prolonged detention. Pet. App. 56a.[29]

Second, the Ninth, Second, and Third Circuits have shifted the burden of proof in prolonged detention hearings from the alien to the government. *Lora*, 804 F.3d at 616; *Singh*, 638 F.3d at 1203; *Diop,* 656 F. 3d at 233. In the Ninth and Second Circuits the government must carry this burden by establishing by "clear and convincing evidence" that the alien "poses a risk of flight or a risk of danger to the community." *Lora*, 804 F.3d at 616; *Singh*, 638 F.3d at 1203.

[29] In addition, in the Ninth Circuit, a detainee in prolonged detention bonds hearings may receive a transcript or audio recording of the hearing to aid in appeal. See *Singh*, 638 F.3d at 1208 (citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

Both the Eleventh and First Circuits have kept the burden on the alien. The Eleventh Circuit has held that an alien detained under Section 1226(c) "carries the burden of proof and must show that he is not a flight risk or danger to others." *Sopo*, 825 F. 3d at 1220. The First Circuit has affirmed district court holdings that "aliens detained under § 1226(a) [bear] the burden of proof at their bond hearings, and 'individuals who commit[] a § 1226(c) predicate offense should not receive *more* protections than § 1226(a) detainees.'" *Reid*, 819 F.3d at 492. No other circuit has ruled on this issue.

In short, while the statutes at issue provide limited opportunities for review of an alien's detention, these courts of appeals have read these statutes to include a bond hearing, although the applicable procedures vary.

CONCLUSION

As described above, the government may detain aliens, and in certain circumstances must do so, under several interrelated statutory authorities. While the specific provisions vary, driven largely by the circumstances of the alien's apprehension and any claimed grounds for remaining in the United States, they possess certain shared elements. The statutory provisions are generally silent on the length of detention, parole or review of detention is discretionary and infrequent, and for many detainees there is no explicit provision for a bond or equivalent hearing. Even in the limited circumstances where bond hearings are available, those hearing are conducted under procedures that may put the detained alien at a disadvantage. The result is frequently extensive and prolonged detention for large numbers of aliens while they await the outcomes of

their removal proceedings, with few opportunities for review of the continued necessity of that detention, as the class members' lengthy detentions attest.

Respectfully submitted,

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APPENDIX

Dr. Stephen H. Legomsky is the John S. Lehmann University Professor Emeritus at the Washington University School of Law in St. Louis. Professor Legomsky took a leave of absence from 2011 to 2013 to serve as Chief Counsel of U.S. Citizenship and Immigration Services, the immigration services agency in the Department of Homeland Security. After retiring in July 2015, he returned to Washington to serve as Senior Counselor to the Secretary of Homeland Security. He has testified before Congress many times while in the private sector, most recently in 2015 before both the House and the Senate Judiciary Committees on the legality of President Obama's immigration executive actions. He has served as a consultant to the transition teams of Presidents Clinton and Obama, the first President Bush's Commissioner of Immigration, the U.N. High Commissioner for Refugees, and several foreign governments, on immigration and refugee policies. His latest book, Immigration and Refugee Law and Policy (co-authored starting with the fifth edition, and now in its sixth edition), has been the required text at 185 law schools since its inception. His other books, published by the Oxford University Press, include Immigration and the Judiciary—Law and Politics in Britain and America, and Specialized Justice. Professor Legomsky is the founding director of the law school's Whitney R. Harris World Law Institute. A former actuary, he graduated first in his class at the University of San Diego School of Law (Day Division) before earning the degree of Doctor of Philosophy from Oxford University. He clerked for the U.S. Court of Appeals for the Ninth Circuit and headed a division of the Ninth Circuit central legal staff. He has won several awards, includ-

ing the American Immigration Lawyers Association's annual award, given to one immigration law professor in the United States, and Washington University's Arthur Holly Compton Award, given annually to one university faculty member for career accomplishments. An elected member of the American Law Institute, he founded and chaired the Immigration Law Section of the Association of American Law Schools and has chaired the American Immigration Lawyers Association's Law Professor's Committee and the Refugee Committee of the American Branch of the International Law Association. Professor Legomsky has been appointed to visiting positions at Oxford University, Cambridge University, and other universities in the United States, Mexico, New Zealand, Switzerland, Germany, Italy, Austria, Australia, Suriname, Singapore, Israel, and Portugal. In the past three years he has appeared several times on the PBS News Hour, NPR, Al Jazeera, foreign national news broadcasts, and several local NPR and other stations, and has been quoted in the NY Times, the Wall Street Journal, the Washington Post, CNN, USA Today, US News & World Report, Voice of America, Huffington Post, Politico, ABC News, NBC news, the Los Angeles Times, Associated Press, Reuters, Bloomberg News, the National Law Journal, and other major news outlets.

Stephen Yale-Loehr has practiced immigration law for 35 years. He is co-author of Immigration Law and Procedure, the leading 21-volume treatise on U.S. immigration law. U.S. federal courts have cited the treatise more than 500 times. He also teaches immigration and asylum law at Cornell Law School as Professor of Immigration Practice and is of counsel at Miller Mayer in Ithaca, New York.

Mr. Yale-Loehr received his B.A. degree from Cornell University in 1977 and his J.D. cum laude from Cornell Law School in 1981. He was editor-in-chief of the Cornell International Law Journal. After graduation, Mr. Yale-Loehr clerked for the Chief Judge of the Northern District of New York.

From 1982 to 1986 Mr. Yale-Loehr practiced international trade and immigration law at a large law firm in Washington, D.C. From 1986 to 1994 he was managing editor of Interpreter Releases and executive editor of Immigration Briefings, two leading immigration law publications.

Mr. Yale-Loehr is the coauthor or editor of many books, including Green Card Stories; America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11; Balancing Interests: Rethinking the Selection of Skilled Immigrants; Global Business Immigration Practice Guide; J Visa Guidebook; Understanding the Immigration Act of 1990; Understanding the 1986 Immigration Law, and numerous law review articles.

Mr. Yale-Loehr is a member of the New York bar and the U.S. Supreme Court. He is a non-resident Fellow at the Migration Policy Institute in Washington, DC. He chairs the asylum committee of the American Immigration Lawyers Association (AILA).

Mr. Yale-Loehr is annually listed in Chambers Global, Chambers USA, and An International Who's Who of Corporate Immigration Lawyers as one of the best immigration lawyers in the world. He is listed in Who's Who in America. He is frequently quoted in the press on immigration issues and has often testified before Congress. He is the 2001 recipient of AILA's Elmer

Fried Award for excellence in teaching and the 2004 recipient of AILA's Edith Lowenstein Award for excellence in advancing the practice of immigration law.