No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
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 THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the mandatory detention of lawful permanent residents under 8 U.S.C.1226(c), without an individualized determination of flight risk or dangerousness, violates the Due Process Clause of the Fifth Amendment.

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INTEREST OF THE AMERICAN BAR ASSOCIATION

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") respectfully submits this brief urging this Court to hold that Section 1226(c) of Title 8 of the United States Code violates the Due Process Clause of the Fifth Amendment of the Constitution.[1]

STATEMENT OF INTEREST

The American Bar Association ("ABA") respectfully submits this brief as amicus curiae pursuant to Rule 37.3 of the Rules of this Court. The ABA is a voluntary, national membership organization of the legal profession. Its more than 410,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of non-lawyer associates in allied fields.

The ABA is deeply committed to ensuring that foreign nationals in the United States receive fair treatment under the nation's immigration laws to the full extent provided in the Constitution. Among the ABA's greatest concerns in this regard is to ensure that all persons within the United States receive traditional due process safeguards in the context of immigration detention and deportation proceedings. Since 1990, the ABA has maintained that the Immigration and Naturalization Service ("INS") should detain noncitizens only in the least restrictive environment consistent with the public safety and should develop prehearing release programs. The ABA subsequently adopted policy urging that the Government (1) promptly charge detainees, or release detainees when charges are not brought or removal orders are not effectuated within a constitutionally permissible time period; and (2) provide prompt custody hearings before immigration judges with meaningful administrative review and judicial oversight. The ABA has long held that prompt custody hearings with procedural safeguards are required in the criminal justice context. This view was recently reaffirmed when the ABA House of Delegates promulgated the latest edition of its Criminal Justice Standards on Pretrial Release (3d ed. 2002) (hereinafter "Pretrial Release Standards"). The Pretrial Release Standards represent a consensus of the legal community and contain a comprehensive set of guidelines and recommendations intended to help criminal justice planners design a system and procedures for the legislatures, courts and practitioners to operate and keep it viable – all targeted toward

[1] This brief is filed with the consent of both petitioners and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, the ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

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achieving a criminal justice system that is fair, balanced, and constitutionally responsible. The first edition of the Standards was described by former Chief Justice Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251 (1974). The Standards are guided by the recognition that deprivation of liberty while awaiting a final determination of an individual's fate is "harsh and oppressive, subjects [individuals] to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." Pretrial Release Standards, 10-1.1. Accordingly, the ABA has worked with federal and state Governments to ensure that, consistent with the Constitution, such individuals are entitled to seek release pending a final adjudication of their rights. While the Standards are addressed principally to criminal detention, the ABA believes that the procedural safeguards are no less critical where, as here, lawful permanent residents are awaiting a civil proceeding – often housed in criminal detention facilities[2] – to determine whether or not they may be removed permanently from this country.

In keeping with these principles, the ABA has conducted or participated in numerous delegations to INS-operated and contract detention facilities and created pro bono programs to assist immigration detainees. The ABA has also worked closely with the Department of Justice to establish minimum standards for allowing immigrants access to legal representation in immigration proceedings and has helped to distribute informational and legal materials to detained persons. In addition, the ABA recommended to Congress and the Department of Justice that the INS develop alternative means of ensuring appearances at court proceedings, and the ABA has welcomed Congress' approval and funding of these efforts. The ABA has determined that such alternatives, which have been proven effective, are best suited to fulfill the ABA's commitment to promoting due process and the rule of law, while ensuring the highest level of efficiency and fairness in our judicial system.

The ABA appears as amicus curiae in this proceeding because the question presented herein has serious implications for the administration of justice and, in particular, for the constitutional right of lawful permanent residents to a forum in which their challenge to the need for detention may be heard.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the brief of Respondent in its entirety. Amicus notes the following points that warrant special attention.

First, this case presents the narrow question whether a lawful permanent resident may be held for an indeterminate period, without possibility of release, and without any individualized determination of the reasons for his detention, while the Government determines

[2] The INS uses hundreds of facilities for immigration detention, the majority of which are state and local jails and correctional institutions where the INS contracts for bed space. This creates the anomaly of civil administrative detainees being incarcerated alongside criminal defendants and inmates serving criminal sentences but without any of the procedural safeguards that are the norm in the criminal justice context. The ABA estimates that more than 55% of immigration detainees are incarcerated in penal facilities while awaiting their immigration hearings.

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whether or not he may be deported.[3] The sole relief Respondent Kim seeks is an individualized hearing in which he may demonstrate that his detention is not necessary to ensure his appearance at subsequent proceedings or to protect the community. Likewise, this case does not challenge the Government's power to detain, pending a deportation decision, those individuals who are found to pose a danger to the community or present a particular risk of flight. Mr. Kim asserts only that due process entitles him to a demonstration that the Government has some particularized reason why depriving him of his liberty is necessary to secure the legitimate state interests the Government says it seeks.

Second, this case concerns individuals such as Mr. Kim, who have a right under federal law to reside permanently in the United States, and to remain in this country until a final order of removal has been entered. 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p). Most of these individuals have, like Mr. Kim, resided in the United States since they were children. Petitioner's Brief ("Petr. Br."), 3 (citing Pet. App. 2a, 31a-32a). Many of them have committed offenses no more inherently "dangerous" than tax evasion or shoplifting. 8 U.S.C. § 1226(c); 8 U.S.C. § 1101(a)(43). Contrary to the Government's assertion, only a tiny fraction of immigrant "aggravated felons" released under the discretionary provision that preceded Section 1226(c) ever engaged in felony activity again. According to the INS' Law Enforcement Support Center, of nearly 1200 potentially removable "aggravated felons" who were released from prison, only 15 were subsequently convicted of additional felony charges – a recidivism rate of just 1.25%.[4] Indeed, because what counts as a "conviction" or "term of imprisonment" is uniquely defined under the 1996 immigration law (for example, a "term of imprisonment" can include a suspended sentence), an individual mandatorily detained under Section 1226(c) may never previously have spent a day in jail. *See* 8 U.S.C. § 1101(a)(48). And detention may extend for years because, while there is a "clearly identifiable event marking completion of the detention period (i.e. issuance of a final order)," there is no "clearly identifiable deadline by which that event must take place." *Welch v. Ashcroft*, 293 F.3d 213, 227 (4th Cir. 2002).

Third, none of the individuals at issue in this case has been finally determined to be subject to removal. Courts have uniformly recognized their jurisdiction to determine whether the conviction for which the INS seeks removal was an "aggravated felony" under 8 U.S.C § 1227(a),[5] and many like Mr. Kim have successfully disputed the classification of their convictions under 8 U.S.C. § 1101(a)(43).[6] Further, as this Court has made clear, a "great

[3] Respondent Kim was detained under the portion of the statute mandating detention for individuals who are facing deportation for a wide variety of offenses, including drug addiction, 8 U.S.C. § 1227 (a)(2)(B)(ii); "moral turpitude crimes," *id.* § 1227(a)(2)(A)(i); and "convictions" for offenses classified as "aggravated felonies," *id.* § 1227(a)(2)(A)(iii). Under 8 U.S.C. § 1101(a)(43), an "aggravated felony" includes offenses that are typically considered misdemeanors or minor crimes.

[4] U.S. General Accounting Office, Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement, at 3 (Feb. 1999).

[5] *See e.g., Bell v. Reno*, 218 F.3d 86 (2nd Cir. 2000), cert. denied, 2001 WL 12704 (U.S. 2001); *Wireko v. Re*no, 211 F.3d 833 (4th Cir. 2000); *Camacho-Marroquin v. INS*, 188 F.3d 649 (5th Cir. 1999), opinion withdrawn on other grounds, reh'g dismissed, 222 F.3d 1040 (5th Cir. 2000); *Herrerta-Soto v. INS*, 175 F.3d 1024 (8th Cir. 1999); *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000); *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000).

[6] *See, e.g., Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000); *Santos v. Reno*, 228 F.3d 591 (5th Cir. 2000); *Rivera-Sanchez v. Reno*, 198 F.3d 545 (5th Cir. 1999); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999);

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number" of individuals convicted of "aggravated felonies" remain eligible for discretionary relief after IIRIRA. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).[7] And the statute itself provides several avenues by which immigrants who have been convicted of an aggravated felony under section 1227(a)(2)(A)(iii) may avoid removal altogether.[8] In short, the fact that a lawful permanent resident has a prior "conviction" does not, of itself, establish that he is subject to deportation or will be ordered deported.

Fourth, the categories of individuals subject to detention pending the outcome of deportation proceedings have changed repeatedly in the past fifteen years. As a result, statistics and legislative history purporting to describe the "actual consequences" of discretionary release during this period cannot be readily compared, and until 1996, demonstrate nothing about the consequences of discretionary release of lawful permanent residents following a bond hearing. Before 1988, *everyone* subject to deportation hearings was entitled to a bond hearing and was presumptively eligible to be released. *Matter of Patel*, 15 U. & N. Dec. 666 (BIA 1976). Between 1988 and 1990, any immigrant (legal or illegal) who had been convicted of an "aggravated felony" – then defined narrowly to include only murder, drug trafficking, and trafficking in firearms – was to be detained without bond. Former 8 U.S.C. §1101(a)(43), §1252 (1988). Courts soon concluded that this restriction was unconstitutional. *See, e.g., Kellman v. District Director*, 750 F. Supp. 625, 626-27 (S.D.N.Y. 1990); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1376-77 (E.D. La. 1996) (citing cases). Accordingly, in 1990, Congress amended the law again to expand eligibility for bond – lawful permanent residents were again eligible for custody hearings and release. Just a year later, "lawfully admitted" immigrants were added to those eligible for release (even if currently in unlawful status). Former 8 U.S.C. §1252 (1991) (1992). In 1996, Congress substantially expanded the types of crimes deemed to be "aggravated felonies," but the INS retained discretion to release "lawfully admitted" immigrants after a bond hearing until 1998.

Solorzano-Patlan v. I.N.S., 207 F.3d 869 (7th Cir. 2000); *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000); *Leyva-Licea v. I.N.S.*, 187 F.3d 1147 (9th Cir. 1999); *Leon v. I.N.S.*, 27 Fed. Appx. 868 (9th Cir. 2001).

[7] *St. Cyr* carves out a significant exception to IIRIRA's denial of discretionary relief for aggravated felons by preserving discretionary relief for aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § [1226 (c)] relief at the time of their plea under the law then in effect." 533 U.S. at 326. By the Court's own estimation, the impact of its decision is sweeping, since the number of aliens who relied on Section 1226(c) prior to the passage of IIRIRA "is extremely large," *id*., at 295-96 (noting that that in years immediately prior to the statute's passage more than 50% of the applicants under Section 1226(c) were granted relief) and that 90% of convictions are through guilty pleas, *id*., at 323-25, n. 51, n. 54. Moreover, because IIRIRA "expanded the definition of 'aggravated felony' substantially" to include "more minor crimes which may have been committed many years ago," an "increased percentage of applicants will meet the stated criteria for § [1226(c)] relief." *Id.*, at 296 n.6.

[8] An immigrant may not be removed if the Attorney General decides (1) that removal to a particular country might threaten the alien's life or freedom because of the alien's race, religion, nationality, membership in a particular social group, or political opinion, and (2) the alien has not participated in persecution, has not committed a particularly serious crime, and does not pose a danger to the United States. 8 U.S.C. § 1231(b)(3). Removal may also be avoided through private legislation from Congress, *see Vargas v. Reno*, 966 F. Supp. 1537, 1549 (S.D. Cal. 1997), or under international treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *see Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

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Because of these numerous changes, statistics purporting to describe recidivism or absconding by "aliens" during this period in fact describe widely differing groups of immigrants. They provide no basis for demonstrating that, as the Government would suggest, mandatory detention works and discretionary release does not. As important, it is only recently that there has been *any* information about what happens to the current class of "aggravated felons" when released following an individual determination of flight risk or dangerousness. The single study during the relevant period that does examine how lawful permanent residents like Mr. Kim fared upon discretionary release pending deportation hearings found appearance rates of 90% or better. Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program (June 7, 2000).[9]

SUMMARY OF ARGUMENT

As this Court has recognized time and again, lawful permanent residents in this country enjoy the protection of the Fifth Amendment to the Constitution: no "person" in this country may be deprived of physical liberty without due process of law. By denying lawful permanent residents a meaningful, individualized opportunity to be heard before detaining them for an unspecified period, Section 1226(c) deprives these individuals of a liberty interest that the Constitution presumes they retain.[10]

Amicus confines its discussion here to two key points supporting this conclusion: (1) an individualized determination of the reasons why the absolute deprivation of liberty is necessary is the touchstone of U.S. civil and criminal detention systems, and (2) mandatory detention for every immigrant pending a deportation determination is both unnecessary and grossly out of step with standard methods for ensuring appearance and protecting the public in analogous civil or criminal detention systems in the United States.

Where the Government seeks to deprive an individual of a significant liberty interest, this Court has left no question that due process demands a determination that the Government's legitimate purposes are served by the deprivation in the individual case. This rule is past question when the Government's purpose in detention is punitive. It is equally essential when the Government's purpose is "regulatory." This rule is borne out in this Court's due process jurisprudence governing pretrial detention of arrestees; post-conviction termination of parole rights; the civil system of juvenile detention (for citizens and immigrants alike); and civil commitment of the mentally ill – *even when* commitment follows a jury finding of not guilty by reason of insanity. Without exception, the same rule has governed this Court's decisions regarding immigrants present in the United States. The insistence on individualized determinations in all of these contexts is with good reason. As the Court has only recently emphasized, absent a statement of particular reasons why detention in the individual case is necessary, regulatory detention could become simply an easier mechanism for the Government to inflict punishment.

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[9] The Vera Institute study is discussed in greater detail below.

[10] The ABA maintains that all persons detained pending removal proceedings, regardless of immigration status, are entitled under the Constitution to an individualized hearing on whether a flight risk or danger to society is present. In keeping with the Ninth Circuit's decision in this case, however, the ABA limits the discussion in this brief to lawful permanent residents.

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As the same cases have made clear, a legitimate purpose alone is not enough to justify the absolute deprivation of liberty when alternative, less restrictive methods are available that serve the Government's asserted interests equally well. For lawful permanent residents, any number of conditioned or supervised release programs can more than adequately satisfy the Government's interests in ensuring court appearances and protecting the public. Indeed, immigration detention is the only context in the United States in which such conditional release programs are not employed as a matter of course. Pretrial services programs in the criminal justice system have been the norm for the past four decades – to enormously beneficial effect. Moreover, the single such pilot program that has been conducted in the immigration context has demonstrated the overwhelming effectiveness of even a modicum of post-release supervisory assistance.

Everything that has been learned from conditional or supervised release programs in these contexts point to the same conclusion: long-term members of a community, who have close ties to that community, are overwhelmingly likely to satisfy all conditions of release and appear at court proceedings as scheduled. Despite the Government's suggestion otherwise, there is no evidence reasonably supporting the conclusion that immigration detention alone must operate outside the bounds of standard practice in the United States. Rather, the INS, like every other law enforcement body, should employ conditions of release that are no more extensive than necessary to accomplish the Government's stated goals.

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ARGUMENT

I. AN INDIVIDUALIZED DETERMINATION THAT DETENTION IS NECESSARY TO SERVE THE GOVERNMENT'S PURPOSES IS THE TOUCHSTONE OF U.S. CRIMINAL AND CIVIL DETENTION SYSTEMS

Freedom from physical detention "lies at the heart" of the liberty interest the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987). Because detention involves a complete deprivation of all personal liberty, due process requires that it may be imposed only through a process that affords considered procedural protections. While the scope of procedures afforded may vary depending on the length and nature of the detention at issue, due process has always required some independent arbiter to determine that the Government's legitimate purposes justify the deprivation of liberty in the individual case.

In this case, the Government asserts two interests supporting the detention of lawful permanent residents who have not yet been found deportable: (1) the risk that they will fail to appear for subsequent court proceedings ("flight risk"); and (2) the risk that, if released, they will pose a danger to the public. Petr. Br., at 12. While insisting that such individuals are afforded ample hearing prior to their detention under Section 1226(c), Petr. Br., at 26-27 (citing *In re Joseph*, 22 I.&N. Dec. 799, 1999 WL 339053 (BIA 1999)), the Government can point to no determination at any stage as to whether the individual is in fact a flight risk or a danger. Indeed, there is no individual hearing evaluating whether there is *any* relationship between the Government's asserted interests and the deprivation to be inflicted. In this respect, Section 1226(c) falls short of every other detention scheme this Court has approved.

Due process requirements are stringent and unconditional where the state seeks to detain an individual as punishment for a crime. The Government may not sentence a person to imprisonment absent a finding of guilt. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *see also Ingraham v. Wright*, 430 U.S. 651, 671 -672 n. 40, 674 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 -167, 186 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Indeed, between the "Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466-67 (2000).[11] Punitive detention outside the strictures of these protections may not be imposed.

Where the Government's asserted interest is regulatory, rather than punitive, the procedural safeguards required are only slightly less exacting. But they invariably include the requirement that detention of an individual serves the purposes the Government seeks to advance. Thus, the Government may not detain a person on suspicion of having committed a crime for any substantial period absent an individualized showing that there is reason to believe that the person committed the crime. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 294-95 (1973);

[11] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which remains a narrow exception to the *Apprendi* rule, does not alter the analysis. There, the fact that the defendant had a prior conviction was itself sufficient to increase his sentence. The fact of prior conviction *was not* used as an irrebuttable proxy for a determination that defendant was dangerous or posed a risk of flight.

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Ex parte Bollman, 4 Cranch 75 (1807); *Ex parte Burford*, 3 Cranch 448 (1806). Recognizing the "necessary accommodation between the individual's right to liberty and the State's [regulatory] duty to control crime," this Court determined that arrest by an officer on the street could be accompanied by a simple finding of probable cause to believe that the individual to be detained "had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). But once the individual has been detained, the Government's reasons for avoiding the delay of an individualized hearing lest a crime be committed no longer apply, and a prompt judicial determination is required. "The consequences of prolonged detention may be more serious than the interference occasioned by arrest, . . . imperil[ing] the suspect's job, interrupt[ing] his source of income, and impair[ing] his family relationships." *Id.*, at 114. Indeed: "When the stakes are this high, the detached judgment of a neutral magistrate is essential" to justify an "extended restraint of liberty." *Id.*, at 114; *see also County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (probable cause hearing must be held within 48 hours of arrest).

Likewise, in upholding the 1984 Bail Reform Act, the Court relied on the existence of an individualized process for considering whether to permit release on bail before allowing a federal court to detain an arrestee pending trial. Balancing the same set of interests – individual liberty against the Government's "regulatory" goal of preventing danger to the community – this Court upheld the Act based on its series of strict procedural protections. *Salerno*, 481 U.S. at 747. Among other things, the Government was required to demonstrate by clear and convincing evidence after a "full-blown" adversarial hearing that *no conditions of release* could "reasonably assure the safety of the community or any person." *Id*. at 742-751. Further, the Act operated only on arrestees charged with "extremely serious offenses," and detention was subject to the "stringent time limitations" of the Speedy Trial Act. *Id.* at 747-750. As the Court explained, the "extensive" procedural safeguards set forth by the Act were "specifically designed to further the accuracy of [the] determination" in the individual case. *Id.* at 751.

Because civil commitment implicates precisely the same, powerful liberty interest as imprisonment, this Court has repeatedly recognized that an individualized determination of reasons is precisely as essential. There is plainly a substantial liberty interest in avoiding confinement in a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (commitment entails "a massive curtailment of liberty,"); *Parham v. J. R.*, 442 U.S. 584, 600; *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (due process requires at least that the nature and duration of commitment to a mental hospital "bear some reasonable relation to the purpose" of the commitment). Accordingly, the Court has required the use of exacting – and manifestly individualized – procedural protections to guard against error in allowing for civil detention of the mentally ill.

Thus, in *Addington v. Texas*, this Court invalidated a Texas civil commitment statute because it lacked a sufficiently demanding standard of proof to justify depriving an individual of his liberty. *Addington* arose from a petition by the appellant's mother for his involuntary commitment. Under Texas law, the son was entitled to retain counsel, and trial was held before a jury to determine whether he could be committed. *Addington*, 441 U.S. at 420. Despite the substantial procedural protections Texas law already provided, this Court held that the standard of proof the state Supreme Court accepted, a "preponderance of the evidence," was

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insufficiently strict given the magnitude of the liberty interest involved. While the state "has a legitimate interest" in providing care to its citizens, and in protecting the community from those who may pose a danger, "the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others." *Id.* at 426. As this Court explained: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427. Accordingly, states must meet a burden "equal to or greater than the 'clear and convincing' standard" to satisfy due process constraints. *Id.* at 433.

Particularly when commitment is employed as an alternative to criminal detention, procedural protections must include an individualized finding to support it. In *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992), the Louisiana law at issue automatically committed defendants found not guilty by reason of insanity on the grounds that such a verdict established that the defendant was dangerous. The state could then continue to detain such defendants indefinitely without any adversarial hearing in which the state was required to demonstrate that the defendant was actually dangerous. *Id.* The Court held the Louisiana law unconstitutional, finding that the law did not even approach the Bail Reform Act requirement upheld in *Salerno*, which provision required the Government to show that the "arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 81; *see also Addington*, 441 U.S. 418; *Jackson*, 406 U.S. at 738 (state may not detain defendant who lacks capacity to stand trial without satisfying procedures for civil commitment). Among other things, *Foucha* plainly rejects the notion that because a finding in a criminal proceeding might logically support administrative detention, such detention is, irrebuttably, justified in every case.

Jones v. United States, 463 U.S. 354 (1985), demonstrates precisely the same point. There, the Court held that a state may commit a defendant to a mental hospital upon a verdict of not guilty by reason of insanity. At the very outset of its discussion, the Court made clear that such a verdict was sufficiently probative of mental illness justifying institutionalization because the verdict itself established the fact that defendant "committed the act because of mental illness." *Id.* at 363. While the *Jones* Court also found that evidence of "violence" per se was not a "prerequisite for a constitutional commitment," *id.* at 365 (suggesting that petitioner's conviction itself was probative of dangerousness), the Court has since emphasized that it would not be permissible to assume this in every case "without regard for [the individual's] particular crime." *Foucha*, 504 U.S. at 88 (O'Connor, J., concurring) ("[T]he strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively minor crime."). In this case, Mr. Kim's simple verdict of theft with priors establishes no fact relating to his flight risk, no fact demonstrating his deportability, and, as an individual determination would establish, no evidence supporting a finding of dangerousness.[12]

The Court again highlighted the importance of this principle in the context of civil commitment just last Term in *Kansas v. Crane*, 534 U.S. 407 (2002) (Constitution prohibits civil

[12] In any event, the insanity acquittees subject to the District of Columbia detention scheme in *Jones* were at least entitled by law to a hearing within 50 days of commitment at which they would have an opportunity to demonstrate that they were no longer mentally ill or dangerous. *Id.* at 357-58. The immigration statute here promises no such assessment – of flight risk or dangerousness – at any point.

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commitment of a convicted sexual offender absent some specific finding that the offender lacked the ability to control his behavior). In reaching its conclusion, the Court followed closely the guidance of *Kansas v. Hendricks*, 521 U.S. 346 (1997), which upheld a civil commitment statute targeting sexual offenders. As the Court explained: "*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" *Crane*, Slip. Op. at 5 (quoting *Hendricks*, 521 U.S. at 360). That distinction, the Court emphasized, "is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence.'" *Id.*

The distinction – and the requirement that a court make a specific finding of flight risk or dangerousness despite a prior conviction – is just as essential in the ostensibly non-punitive context of immigration detention. "Whether a due process right is denied when [here, potentially] removable aliens who are flight risks or dangers to the community are detained turns," at least in part, "on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Government detention violates due process unless there exists, at a minimum, some "special justification" for detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). To determine whether such a "special justification" exists, this Court has always required that non-punitive detention be based on a "special," individual assessment.

The liberty interest of a lawful permanent resident in such an individual determination is no weaker because he *may*, as a result of his prior conviction, be deportable. Just as the liberty interest of a parolee is still cognizable even though he may well be subject to re-incarceration, the mere *possibility* of deportation that exists here does not of itself suffice to eliminate respondents' powerful interest in living at liberty in this country for as long as they may remain.

> "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. . . . We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."

Morrissey v. Brewer, 408 U.S. 471, 478 (1972). Accordingly, even where an individual's liberty interest is arguably weakened, due process requires a case-by-case determination – not that the individual committed a crime in the first instance – but that the current deprivation of liberty is justified anew. That rule holds for the termination of pre-parole conditional supervision

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programs, *Young v. Harper*, 520 U.S. 143 (1997) (opinion of unanimous Court); the revocation of probation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); the revocation of prison good-time credits, *Walpole v. Hill*, 472 U.S. 445, 454 (1985); and for involuntary transfer from a prison to a mental institution, *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (inmate's "residuum of liberty" demands that the state satisfy "minimum requirements of due process" before proceeding with transfer).[13]

The requirement of an individualized assessment of the need for detention likewise applies without exception in the context of civil juvenile detention – where, as this Court has asserted, due process liberty interests may also be diminished. In *Schall v. Martin*, 467 U.S. 253 (1984), this Court upheld a New York statute allowing for pretrial detention of a juvenile after an individualized finding that the arrested juvenile posed a "serious risk" of committing a crime before his return date. *Id.* at 255. The *Schall* Court emphasized that the important risk of "erroneous and unnecessary deprivations of liberty" was checked by the fact that "notice, a hearing, and a statement of facts and reasons are given prior to any detention. . . . [and a] formal probable-cause hearing is then held within a short time thereafter, if the factfinding hearing is not itself scheduled within three days." *Id.* at 270, 274. Since *Schall*, virtually all state juvenile court acts have adopted specific requirements about who may be detained pending adjudication; have required a judicial detention hearing following soon after admission to detention; and have strictly limited the duration of pretrial detention. Indeed, under most state codes, only those charged with criminal offenses may be detained pre-adjudication for any length of time. At the detention hearing, the state bears the burden of proving reasonable cause for believing that the minor has committed an offense, and that detention – as opposed to any other less restrictive alternative – is necessary. Office of Juvenile Justice and Delinquency Programs, U.S. Dept. of Justice, Desktop Guide to Good Juvenile Detention Practice, at 27-28 (Oct. 1996).[14]

In *Reno v. Flores*, 507 U.S. 292, 297 (1993), the Court reaffirmed these principles in the context of immigration proceedings involving juveniles. There, the Court considered INS regulations permitting juveniles who are detained pending deportation hearings to be released

[13] Even where the individual liberty interest is significantly less than the total deprivation affected by detention, the Constitution affords individuals, at a minimum, an "opportunity to present reasons . . .why proposed action should not be taken." *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest'"; hearing required before termination of employment); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (hearing required before cutting off utility service); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (at minimum, due process requires "some kind of notice and . . . some kind of hearing" before suspension of students from public school); *Wolff v. McDonnell*, 418 U.S. 539, 557 -558 (1974) (hearing required before forfeiture of prisoner's good-time credits); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (hearing required before issuance of writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits).

[14] The ABA's Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition likewise recognize the importance of such procedural protections. Under these standards, an accused juvenile taken into custody should be accorded a hearing in court within a day of the filing of a petition for a release hearing. The burden is on the state to show probable cause to believe that the juvenile has committed an offense charged, and the juvenile is entitled to actual notice of the hearing and the presence of an attorney. *Id.*, Standard 7.6.

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only to their parents, close relatives, or legal guardians. In contrast to this case, the *Flores* regulations preserved the INS district director's discretion in "unusual and compelling circumstances" to release the juvenile to some other adult and the juvenile was entitled to appeal a refusal of release. *Id.* at 310. While concluding that juveniles' interest in "freedom from physical restraint" was less powerful than adults', *id*., at 302, the *Flores* Court emphasized that the regulations afforded juveniles substantial protection: the INS district director had discretion, subject to review in a hearing before an immigration judge, to release a juvenile to a non-enumerated custodian, *id*., at 313-14; 8 CFR § 263.3(c)(4). Under these circumstances, the Government's suggestion that *Flores* somehow *approves* non-discretionary, *mandatory* detention of *adults* in the same context cannot withstand scrutiny.

In contrast to all of the foregoing, the cases cited by the Government do not suggest that an irrebuttable presumption of flight risk or dangerousness can justify non-punitive detention. Particularly in *Carlson v. Landon*, the Court upheld the Attorney General's authority to detain Communist aliens pending hearings, but emphasized that he retained discretion, subject to judicial review, to grant bail when appropriate. 342 U.S. 524, 544 (1952) ("Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail . . . ."); *id.*, at 543-44 ("[T]he Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity."). A presumption against granting bail to certain classes of persons must be distinguished from a categorical refusal even to evaluate a person's flight risk and dangerousness.[15]

Finally, the Government's suggestion that a pre-detention determination of deportability satisfies any constitutional requirement relating to detention misses the point. Petr. Br., at 26-27 (citing *In re Joseph*, 22 I. & N. Dec. at 806, 1999 WL 339053, at *6-7). Whether a person falls within the class of immigrants *deportable* under Section 1226(c) does not resolve whether they should be *detained* – based on flight risk or dangerousness – while the Government determines whether or not they may be deported. As this Court has recognized, even an immigrant who has been ordered deported (which Mr. Kim has not) retains a cognizable liberty interest. *See Zadvydas*, 533 U.S., at 679-80, 696. Thus, regardless of whether an immigrant may be *deportable*, the Government may not *detain* him pending further proceedings unless the Government also has a "special," particularized reason for doing so. *See Foucha*, 504 U.S. at 81-82.

II. THERE IS NO REASONABLE BASIS FOR AN IMMIGRANTS-ONLY EXCEPTION TO THE DUE PROCESS RULE

The ABA does not dispute that ensuring appearances in immigration proceedings and protecting the public are legitimate Government interests. But "the mere invocation of a legitimate purpose," *Schall*, 467 U.S. at 269, is not enough to justify the mandatory detention, for

[15] *See Salerno*, 481 U.S. at 765 n.6 (Marshall, J., dissenting) ("The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause.").

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an unknown period of time, of lawful permanent residents who are not being punished for a crime. Rather, when less restrictive alternatives are equally capable of serving the Government's interests in public safety and speedy process, due process plainly favors their use. *Zadvydas*, 533 U.S., at 690 (Government must present "special justification" for detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint'" (quoting *Hendricks*, 521 U.S. at 356)); *Salerno*, 481 U.S. at 747 (detention for a non-punitive purpose must not be "excessive" means of fulfilling Government purpose); *id.*, at 750 (upholding federal pretrial detention scheme only in the "narrow circumstances" where a neutral magistrate had found that *"no conditions of release* can reasonably assure the safety of the community") (emphasis added). This disposition toward liberty rather than detention unless necessary is part of the fabric of the U.S. judicial system.[16] As this Court has very recently emphasized: "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 (citations omitted).

A. Numerous Less Restrictive "Conditions of Release" Are Available

Any number of "conditions of release" can more than adequately satisfy the Government's asserted interests here. Indeed, such conditioned release programs have long been the norm in United States criminal and civil detention schemes. Limited by continually strained resources, and driven by the same due process concerns that have animated the Court's jurisprudence in this area, jurisdictions throughout the country make it standard practice to avoid unnecessary detention and to conduct individual assessments of individuals' suitability for some form of release. Pretrial release programs for criminal suspects awaiting trial have been implemented in more than 300 counties and in all 94 districts in the federal court system. National Institute of Justice Issues and Practices, Pretrial Services Programs: Responsibilities and Potential, at 8 (March 2001). In fact, immigration detention is the *only* area in which supervised release programs are not pursued as a matter of course.

To ensure that courts reach objective and consistent decisions regarding release, the ABA has urged that every jurisdiction establish a pretrial services agency to collect information and risk assessments, to monitor and assist released defendants, and to review the status (and eligibility for release) of detained defendants. *Id.*, Standard 10-1.10.[17]

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[16] The reasons for this presumption are plain: "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." ABA Standards on Pretrial Release, Standard 10-1.1.

[17] The ABA maintains that courts should employ "the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person." *Id.* Standard 10-1.2. Only if it can be determined that "no conditions of release" would satisfy these needs may defendants be detained. *Id.; see also* 18 U.S.C. § 3142(e) ("If, after a hearing pursuant to the provisions of subsection (f),… the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before to trial."); The National Association of Pretrial Services Agencies NAPSA Performance Standards and Goals for Pretrial Release, Standard I & comm. at 4 (2d ed. 1998).

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In keeping with these standards, pretrial services programs have been operating for the past four decades and now vigorously perform two key functions: supervising defendants who are released from custody while awaiting trial, and gathering information about newly arrested defendants and available release options for use by a judicial officer who will be determining the defendant's custody or release status. *See generally* U.S. Department of Justice, National Institute of Justice, Pretrial Services Programs: Responsibilities and Potential, NCJ 181939 (March 2001) (hereinafter "DOJ Pretrial Services Survey"). Most programs manage the risk of harm to the public or nonappearance in court by monitoring defendants' compliance with conditions of release (such as regular phone or in-person check-ins, movement restrictions, or electronic monitoring, and, in certain cases, confinement). *Id.*, at 37-48. Through their decades of accumulated experience, these programs have taught law enforcement a great deal about strategies that can dramatically improve appearance rates (including numerous steps as simple as reminding defendants of upcoming court appointments) and manage risk to the public. *Id.*

Recognizing that such programs had tremendous potential for relieving its perennially overburdened detention system, the INS commissioned a study by a well-known nonprofit research organization to determine whether various supervised release techniques – from monitoring through regular phone and in-person appearances before program staff to providing regular reminders of court hearings and referrals to relevant services – could boost appearance rates at deportation proceedings. Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program (August 1, 2000).[18] Although the appearance rates of the lawful permanent residents who had served criminal sentences was already quite high (89%) without any supervisory assistance, when these individuals were given the benefit of even limited appearance assistance support, their appearance rate exceeded 94%. *Id.*, at 33-36.[19] In the end, about 90% of all of the supervised immigrants participating in the program appeared at all court hearings. As the bipartisan leadership of the Senate Judiciary Committee recognized, the results from the Vera Institute's program "exceeded expectations, resulting in . . . an impressive appearance rate at court hearings." Letter to the Honorable John Ashcroft, Attorney General from Senators Leahy, Kennedy, Hatch, and Brownback (Aug. 16, 2002).

Because the pilot program so exceeded expectations, Congress last year allocated $3 million for the implementation of "alternatives to detention" programs. Senate Appropriations Report 107-42, "Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 2002," p. 40. As a recent letter from the members of the Senate Judiciary Committee responsible for adding these appropriations makes clear, P.L. 107-77 "specially directed" the Department of Justice to devote these funds to using "community-based organizations to screen asylum seekers and other INS detainees for community ties, provide them with necessary services and help to assure their appearance at court hearings."

[18] The Vera Institute Appearance Assistance Program study was conducted between 1997 and 2000, and involved 534 participants, 127 of whom were presumptively subject to removal and detention based on their criminal convictions. Of this 127, all but six were lawful permanent residents. The Vera Institute study remains, to the ABA's knowledge, the sole effort to examine the appearance rates of the class of immigrants at issue in this case.

[19] Indeed, the lawful permanent residents involved in the study consistently demonstrated a higher appearance rate (with assistance or without) than any other immigrant group studied, including political asylum seekers and undocumented immigrant workers.

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Letter to the Honorable John Ashcroft, Attorney General from Senators Leahy, Kennedy, Hatch, and Brownback (Aug. 16, 2002).

In all events, the INS could fail to pursue the release program Congress has authorized and still employ a far less restrictive approach to determining removability – an approach that imposes no additional burden on the liberty of the individual potentially subject to removal. As the INS has long recognized, unnecessary detention can be avoided entirely simply by identifying those who are potentially deportable and conducting deportation hearings *while they are still incarcerated for a criminal offense*. U.S. General Accounting Office, Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement (Feb. 1999); *see also id.* (Oct. 1998); *id.* (July 1997). Faced with concerns that it was failing to identify potentially deportable immigrants while they were still in prison, the INS began efforts to implement an "Institutional Hearing Program" – an effort to ensure that potentially deportable immigrants were identified while still incarcerated, and subject to removal hearings during that same period, without the need for indefinite detention past the expiration of their sentences. The GAO found repeatedly that the INS had simply failed to identify these individuals while they were still serving their criminal sentences. As a result, the INS was forced to detain immigrants who did not complete the removal hearing process in prison (incurring on the order of $40 million in avoidable detention costs in the process). Perhaps worst of all, those immigrants whose deportation hearings happened to start *before* they were released from prison faced an average of 23 additional days in detention; for those whose hearings were commenced *after* their release, individuals were subject to an average of 88 additional days in detention. 1998 GAO Removal Study, at 36.

Taking into account the INS' ongoing IHP program, the Vera Institute's pilot Appearance Assistance Program, and Congress' own insistence that the INS pursue such alternatives to detention with the money Congress expressly earmarked for that purpose, there can be no justification for insisting upon mandatory detention of the class of immigrants here—lawful permanent residents—who are most likely to appear in court of their own accord.

B. Section 1226(c) Was Not Adopted After a Review of the "Actual Consequences" of Tailored Discretionary Release

The Government maintains that "[t]he mandatory detention requirement of 8 U.S.C. § 1226(c) is the product of Congress' close scrutiny of the actual consequences of allowing release of criminal aliens." Petr. Br., at 8. In fact, the Government presents no "actual" support for the conclusion that immigrants who fall within the definition of Section 1226(c) must be detained in order to protect the public or to guard against the risk of flight. On the contrary, as discussed above, the statistical and experiential evidence that does exist supports just the opposite conclusion.

The vast majority of the evidence in legislative history cited by the Government in support of its description of the "scrutiny" Congress applied was not in fact before the Congress that passed Section 1226(c) in 1996. As has been noted, *supra* at __, the mandatory detention policy challenged here was adopted in 1996 and put into effect for the first time in 1998. Before that, policy regarding the disposition of immigrants pending deportation hearings changed repeatedly – sometimes annually – with successive new enactments. The evidence cited

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by the Government from legislative history preceding *earlier* amendments to the Immigration and Naturalization Act cannot be said to have led the 1996 Congress to an "ineluctabl[e] conclu[sion]" about anything, much less about the need for the particular mandatory detention provision then enacted and now at issue in this case.[20] Worse, the evidence cited that was before these earlier congresses vacillates randomly between statistics describing the behavior of illegal entrants to the United States (only *legal* permanent residents are at issue in this case), and "aliens" generally without any description of whom this category includes.[21] Much of the rest of the legislative history cited by the Government is either inapposite (speaking to Congress' concern generally about the slow pace of removal, not the need for mandatory detention to speed things up), or would tend to lead Congress to just the opposite conclusion as the one the Government now maintains it reached. *See, e.g.*, Petr. Br., at 18 (citing high costs of incarceration and contribution to prison overcrowding resulting from detention of immigrants). Most striking in the Government's catalog of legislative history is the complete absence of any evidence that the Congress in enacting the latest Section 1226(c) devoted any time to weighing the necessity of mandatory detention for *all* immigrants potentially subject to deportation.

Having found no comfort in the record actually before Congress when Section 1226(c) was enacted, the Government turns to a 1996 study – apparently cited nowhere in the legislative history – purporting to show that fully 90% of immigrants like Respondent abscond. Petr. Br., at 23-24. (citing Office of the Inspector General, U.S. Dep't. of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar. 1996) (hereinafter "OIG Report"). Even a passing look at the OIG Report reveals that the study does not address the question at issue in this case: whether it is reasonable to presume – irrebuttably – that lawful permanent residents pose such a flight risk or danger that they must be detained, for an arbitrary period, until the Government gets around to determining their removability.

The OIG Report found, *simpliciter*, that 89% of non-detained aliens subject to a final removal order were never deported. This finding does not purport to address, in particular, the flight risk of immigrants subject to Section 1226(c), immigrants who have not yet been issued final orders of removal, immigrants released on bail after a hearing, or lawful permanent residents. At a minimum, as this Court is well aware, "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325; *see also Kim*, 276 F.3d at 535 ("[t]he incentives to flee are greater for an alien already ordered removed than for an alien still in removal proceedings"); *Cardoso v. Reno*, 127 F. Supp. 2d 106, 114 (D. Conn. 2001) ("applying a presumption of flight risk to aliens such as Ms. Cardoso is, in fact, counter-intuitive, because as her last opportunity to remain lawfully in the United States, Ms. Cardoso has every incentive to attend the . . . hearing at which her removability will be

[20] *See, e.g.*, Petr. Br., at 13 (quoting reasoning from 133 Cong. Rec. 28,840-41 (1987)); *id.*, at 16-17, 20 (studies cited in Hearing on H.R. 3333 Brief the Subcomm. On Immigration, Refugees, and International Law of the House Comm. On the Judiciary, 101st Cong., 1st Sess. 71-72 (1989); *id.*, at 17-21 (statistics from Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. On Investigations of the Senate Comm. On Governmental Affairs, 103rd Cong., 1st Sess. 21 (1993)).

[21] *Compare, e.g.*, Petr. Br., at 13 (citing 1987 testimony by then-pending legislation sponsor regarding arrest rates of "illegal aliens"), *with id.*, at 19 (citing statistics of number of "aliens" in 1992 who had committed an aggravated felony (presumably, as then quite narrowly defined) and then failed to appear for hearings).

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determined"); *see also* General Accounting Office, Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process (Sept. 2000).

Further, the reason given in the OIG Report as to *why* 89% of "non-detained" aliens are never deported after receiving final orders of removal has nothing to do with a finding that these individuals invariably pose a risk of danger or flight. Rather, the OIG Report concludes that the INS has simply failed to enforce final orders of deportation. The OIG Report repeatedly emphasizes that such factors as the lack of detention and transportation resources, delays in receipt of final orders by the detention and deportation centers, failure to send surrender requests, and failure to pursue or investigate abscondees contributed significantly to the low deportation rate. *Id.* at 5-11; *see also Serrano*, 201 F.Supp.2d at 726 n. 53 ("citing a 'shortage of investigative resources' the report noted that 'nondetained aliens who do not comply with a surrender request were rarely pursued actively'") (citations omitted). The OIG Report thus proposes reforms aimed at more "efficient use of detention resources," including "moving more quickly to present surrender notices to aliens after receiving final orders," delivering surrender notices instead of mailing them," actually "pursuing aliens who fail to appear," "coordinating with other governmental agencies to . . .[track] aliens who fail to appear," and "taking aliens into custody when final orders are issued." *Id.* at 14.

In contrast to the scant evidence supporting mandatory detention for all lawful permanent residents, there is no question that the "actual consequences" of mandatory detention of immigrants like Mr. Kim have been to overwhelm INS detention resources to the breaking point. This outcome is not surprising. As of December 2001, the INS had access to 21,304 beds in federal, state and local facilities to detain legal and illegal immigrants. In Fiscal Year 2000 alone, the INS admitted more than 188,000 aliens into custody for some period of time. Statement of Joseph R. Green, Acting Deputy Executive Associate Commissioner for INS Field Operations, Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, 107th Cong., 1st Sess., at 18 (Dec. 19, 2001).

Since the INS began asking Congress to reconsider implementing Section 1226(c)'s mandatory detention requirement as of 1998, the INS has maintained that it "will be unable to meet the custody requirements of IIRIRA." Testimony of Doris Meissner, Commissioner, Immigration and Naturalization Service before the Subcommittee on Immigration Committee on the Judiciary, U.S. Senate (Sept. 16, 1998). Justice Department studies conducted since then have in fact found resources deeply strained. Indeed, one INS district office reported that it was releasing aliens – not because the local officials wanted to authorize release, but because of lack of detention space. U.S. General Accounting Office, Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process, at 64-65 (Sept. 2000).

Whatever the formal strictures of due process, the system that produces such results – that detains and releases individuals on the basis of whether or not a bed happens to be available, *or* that detains individuals whether or not their detention actually serves the Government's purposes – is arbitrary at best. Even "removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). The liberty interests, and accompanying procedural safeguards, afforded to "persons" in this country are surely at least equal to this.

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CONCLUSION

For the foregoing reasons, amicus American Bar Association urges that the decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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