No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR,
SAN FRANCISCO DISTRICT OF IMMIGRATION AND
NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HYUNG JOON KIM

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

REPLY BRIEF FOR THE PETITIONERS

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In 1996, Congress adopted the mandatory detention requirement of 8 U.S.C. 1226(c) because it concluded that the prior regime of bond orders and other conditions of release had failed to ensure that criminal aliens would appear for their deportation proceedings, or for actual removal from the United States if a final order of deportation was entered against them. Congress further concluded that the demonstrated failure of individualized bond orders endangered public safety and welfare, and impaired the Nation's sovereign power to determine what aliens should be removed from the United States.

Respondent accepts "the government's authority to use detention to ensure the appearance of immigrants at their hearings * * * or to protect the public." Br. 1. Respondent's core argument, therefore, is that this Court should override Congress's assessment that detention of the criminal aliens specified in 8 U.S.C. 1226(c) during the pendency of their removal proceedings is necessary and appropriate to safeguard the sovereign right of removing dangerous and

undesirable aliens. Congress's assessment, however, is amply supported by the legislative record and entitled to deference under this Court's cases.

A. ALIENS IN REMOVAL PROCEEDINGS HAVE NO ABSOLUTE ENTITLEMENT TO INDIVIDUALIZED BOND ORDERS

Respondent urges (Br. 16) a bright-line constitutional rule that "any detention scheme" violates due process unless the government justifies detention with an "individualized showing" about the need to detain the "particular person" in custody. Respondent cites no case that states such a bright-line rule. His new rule is particularly unfounded as applied to Section 1226(c), because the persons in custody are not citizens and may never have been admitted into the United States, see Gov't Br. 44-45; mandatory detention is based on prior criminal convictions that were obtained after full criminal process, see *id.* at 41-42; detention lasts only for the limited duration of administrative removal proceedings, which are streamlined and expedited for aliens who are detained, see *id.* at 5 n.4, 26-31, 39-40; and the criminal aliens in custody have little chance of avoiding removal, and may end their detention by agreeing to depart the United States, see *id.* at 27-31, 46-47.

1. This Court has recognized that removable aliens may be detained based on reasonable categorical judgments. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), for example, the Court did not discern any constitutional problem with *mandatory* detention of criminal aliens during the 90-day "removal period" that follows a final order of removal. *Id.* at 683, 699, 701 (noting that aliens must be detained during removal period, but finding no "serious constitutional threat" based on that detention); see 8 U.S.C. 1231(a)(2). *Zadvydas* also affirmed (533 U.S. at 692-694) the continued vitality of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), in which the Court held that the fact that an alien has

been apprehended at the border without authorization to enter the United States is sufficient to justify detention without an individualized hearing. See *Mezei*, 345 U.S. at 212-215.

In *Carlson* v. *Landon*, 342 U.S. 524 (1952), the Court upheld detention during deportation proceedings based on determinations by the Attorney General that the aliens were active in the Communist Party. *Id.* at 541. Rather than requiring the Attorney General to produce individualized evidence that detention of each alien in that category was necessary to prevent the alien from fleeing or committing crimes before deportation proceedings were completed, as had been urged by the aliens and ordered by the courts below (see *id.* at 528-534), this Court determined that detention without bail was justified by "*Congress' understanding* of [Communists'] attitude toward the use of force and violence * * * to accomplish their political aims." *Ibid.* (emphasis added); see also *id.* at 558-559, 568 (Frankfurter, J., dissenting). As the Court explained in *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), "[w]hat was significant in *Carlson* was not simply the threat of 'active subversion,' but rather the fact that Congress had enacted legislation based on its judgment that such subversion posed a threat to the Nation." *Id.* at 193.[1]

Reno v. *Flores*, 507 U.S. 292 (1993), likewise stands for the proposition that, in the immigration area, detention may be

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[1] Respondent claims (Br. 23) that *Carlson* was not briefed as a challenge to "a 'mandatory' or 'blanket' detention policy." In fact, the unsuccessful argument of the petitioners in *Carlson* was remarkably similar to respondent's argument in this case. The *Carlson* petitioners contended that legislative determinations could not justify "depriving [an alien] of his liberty without facts personal to the individual." Br. for Pet. at 12, *Carlson*, *supra* (No. 35). They further argued that Congress's legislative determinations about alien Communists did not hold true in their particular cases and, therefore, the Attorney General's denial of bail based on Congress's determinations was unlawful. *Id.* at 21-28.

based upon "reasonable presumptions and generic rules." *Id.* at 313. In *Flores* the Court specifically rejected the argument that, when deciding between institutional placement of unaccompanied juveniles and placement with a relative or other guardian, the INS could not "rely on categorical distinctions." *Id.* at 311 n.6 (brackets and internal quotation marks omitted). Respondent attempts (Br. 20) to distinguish *Flores* as a case involving juveniles, but the Court was clear that for the juveniles who were aliens, that alien status was dispositive for its due process analysis. 507 U.S. at 305 ("If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles * * * who are aliens."). Furthermore, although respondent is correct (Br. 20 n.14) that the INS's detention decisions in *Flores* were reviewable (see 507 U.S. at 308-309), that is true of Section 1226(c) detention as well. An alien covered by Section 1226(c) is ensured an opportunity for an individualized determination by an immigration judge (IJ) and the Board of Immigration Appeals (BIA) whether he is within one of the categories of criminal aliens about whom Congress made a legislative judgment that detention is necessary and appropriate to ensure proper enforcement of the immigration laws and to protect the community. See Gov't Br. 26-27. The important point is that, in *Flores* and under Section 1226(c), reasonable categorical classifications are acceptable grounds for detention.

2. Outside the immigration context, federal and state practice confirms that detention permissibly may be based on legislative determinations about the significance of a criminal conviction. Federal law, for example, requires detention pending appeal of defendants who have been sentenced to a prison term for a crime of violence or other specified crime, unless the defendant shows (among other things) "exceptional reasons" for his release. 18 U.S.C.

3143(b)(2), 3145(c). Contrary to respondent's proposed rule (see Br. 16), a defendant who is appealing his conviction for one of the statutorily specified crimes cannot obtain release merely by showing that he is not dangerous or a flight risk. Analogous state statutes likewise prohibit release pending appeal, based on categorical legislative determinations about the significance of the conviction that is under appeal. See, *e.g.*, Ark. Code Ann. § 16-91-110(b)(2), (3) (Michie Supp. 1987); Ga. Code Ann. § 17-6-1(g) (1997); Okla. Stat. Ann. tit. 22, § 1077 (West 1986).

B. THE LEGISLATIVE JUDGMENTS UNDERLYING SECTION 1226(c) ARE ENTITLED TO JUDICIAL DEFERENCE

Respondent argues (Br. 21-25) that the Court should attach no significance to the immigration context in which this case arises. As already explained, however, the political Branches' plenary power over immigration, and the lesser due process protection afforded to aliens as opposed to citizens, are highly relevant to this Court's assessment of immigration-related detention. See Gov't Br. 23, 25, 31-33, 44-47. Furthermore, categorical legislative determinations of the sort underlying Section 1226(c) are an inherent and well-accepted feature of immigration law. As the Court emphasized in *Flores*, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." 507 U.S. at 305-306 (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977)) (internal quotation marks omitted); see *Zadvydas*, 533 U.S. at 700 (judicial review of post-removal-order detention "must take appropriate account" of the political Branches' responsibility for, and expertise in, immigration matters and related policy judgments).

1. Respondent says (Br. 22-23) that judicial deference in the immigration area reaches only Congress's substantive decisions to exclude or expel aliens, and not the imple-

mentation of those decisions. But the cases on which respondent relies stand for the very different proposition that the implementation of Congress's decisions about which categories of aliens will be excluded or expelled (unlike those decisions themselves) is not *entirely* beyond judicial review. See *Zadvydas*, 533 U.S. at 695; *INS* v. *Chadha*, 462 U.S. 919, 941-942 (1983); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). The government does not dispute the availability of judicial review for compliance with the Due Process Clause in this case. The issue, instead, is whether that due process analysis should recognize Congress's particular power and expertise to determine whether the undeniable risk associated with releasing aggravated felons and other criminal aliens during the pendency of proceedings instituted to remove them from the United States undermines the Nation's immigration policies and control of the Nation's borders. See Gov't Br. 15-17. That determination about what steps are needed to make Congress's exclusion and expulsion policies effective is subject to highly deferential judicial review. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 67-68 (1981) ("We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. * * * [W]e must be particularly careful not to substitute our judgement of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.").

2. The evidence before Congress in 1996 was that criminal aliens' failure to appear for deportation proceedings endangered the public and encouraged illegal immigration into the United States. Congress also was anxious to speed the removal of criminal aliens so that the Nation could devote its limited capacity to accept resident aliens to the admission of additional law-abiding aliens. See Gov't Br. 15-18 (discussing legislative findings). Mandatory detention of

removable criminal aliens was intended to, and does, address those problems. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 111 (1996) ("[O]ur immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories.").[2]

Just as the draft-registration criteria in *Rostker* could not be separated for purposes of due process analysis from the conduct of actual military operations in which the draftees would engage (see 453 U.S. at 68-69), it is "blinking reality" (*id.* at 68) for respondent to contend (Br. 22-23) that detention in aid of removal is separable from Congress's power over immigration policy. "Detention is necessarily a part of th[e] deportation procedure." *Carlson*, 342 U.S. at 538. Like the policy concerning detention of juveniles considered in *Flores*, the detention policy expressed in Section 1226(c) was adopted in Congress's "exercise of its broad power over immigration and naturalization" (507 U.S. at 305 (quoting *Fiallo*, 430 U.S. at 792) (internal quotation marks omitted)), and therefore is subject to "unexacting" rational-basis review (507 U.S. at 306).

In arguing to the contrary, respondent misses the critical point of *Zadvydas*. See Resp. Br. 22-23. In that case, the Court determined that the discretionary detention of deportable aliens after their final orders of removal "ha[d] as its

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[2] A 1992 General Accounting Office (GAO) Report on which respondent relies (Br. 6 n.7, 7 n.9) emphasized that detention of deportable aliens was "part of the larger enforcement questions relating to aliens—preventing aliens from illegally entering the country and removing those who do not have a legal basis to remain." GAO, No. GAO/GGD-92-85, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 35 (June 25, 1992) (*1992 GAO Report*). The GAO report noted specific instances in which policies requiring detention of certain groups of removable aliens contributed to a reduction in immigration violations. See *id.* at 35-36.

basic purpose effectuating [the] alien's removal." 533 U.S. at 697. Once removal could not be accomplished, the Court found no "reasonable relation" between continued detention and that immigration policy. *Id.* at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972)). The Court also concluded that the aliens' dangerousness was not *alone* sufficient to support "potentially permanent" confinement. *Id.* at 691. In this case, by contrast, detention during administrative removal proceedings directly serves Congress's immigration objectives of assuring the aliens' presence at those proceedings and the aliens' "prompt exclusion or removal" (H.R. Rep. No. 469, *supra*, at 111) if they are ordered removed, and it does not present the problem of "potentially permanent" detention that concerned the Court in *Zadvydas* (see Part D, *infra*).

3. Respondent further suggests (Br. 24-25) that courts should give less deference to the political Branches' plenary power over immigration in a case involving a permanent resident alien. Although respondent's immigration status is relevant to determining his protectable interests (see Gov't Br. 44-45), it does not affect the deference due to Congress's judgments. As the Court explained in *Carlson*, aliens who "fail to obtain and maintain citizenship by naturalization * * * remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." 342 U.S. at 534. That "plenary power of Congress" underlies the requirement of judicial deference.

C. THE LEGISLATIVE FINDINGS THAT SUPPORT SECTION 1226(c) ARE BASED ON CONCRETE HISTORICAL EVIDENCE

The record before Congress established that between 20% and 42% of criminal aliens whom the INS did not keep in custody failed to appear for their deportation proceedings, and approximately 90% of aliens who were not detained failed to

report for their actual deportation. Gov't Br. 19-20. Adding to the problem, most criminal aliens (about 80%) were recidivists. *Id.* at 17.[3]

1. Respondent contends (Br. 34) that the legislative record "d[id] not address the efficacy of individualized release determinations," because it was "collected during a period of time when INS detention and release decisions were driven by the lack of INS detention space," not by individualized determinations of flight-risk and danger to the community (as the law then required, see Gov't Br. 12-15). Respondent's suggestion that capacity-related releases inflated the observed flight-rate for criminal aliens is entirely speculative, and highly dubious. Although the INS sometimes set terms of release in light of its limited detention space, INS prioritized its use of available space. "As detention space bec[ame] limited, INS release[d] aliens who [we]re lower under its priority criteria in order to detain aliens who [we]re higher (e.g., aggravated felons)." *1992 GAO Report* 25. Lower-priority aliens such as non-criminal aliens who had been ordered deported, aliens apprehended while entering the United States illegally, and aliens detained for working without authorization, were released to make room for aliens with criminal convictions. See *id.* at 14; see also *id.* at 35 ("INS generally followed its detention criteria."). Even when shortages of detention space did affect detention of

[3] Amicus ABA wrongly suggests (Br. 4) that the INS has identified "a recidivism rate of just 1.25%" for alien aggravated felons after the completion of their criminal sentences. The GAO report on which the ABA relies tabulated only post-incarceration recidivism that was recorded in INS databases. GAO, No. GAO/T-GGD-99-47, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement* 3, 4 (Feb. 25, 1999). The GAO did not consider aliens' actual criminal histories, or likely future recidivism by aliens who had been released from prison very recently. Furthermore, the figure cited by the ABA is for post-incarceration *felony convictions* known to the INS, not arrests, pending charges, total convictions, or other indications of recidivism by the released aliens. See *id.* at 3.

criminal aliens, the INS made room for felons and aliens convicted of other serious crimes. See *id.* at 43. Thus, there is no basis to conclude that the INS's lack of detention space generally affected bond determinations for criminal aliens, and particularly for aggravated felons like respondent.

Furthermore, and as respondent himself emphasizes (Br. 36-37 & n.35), Congress was well aware in 1996 that the INS needed additional detention space to carry out its mandate of removing criminal aliens. Congress provided funding for the additional space. See *id.* at 7. Congress, however, had been advised—by the Congressional Task Force on Immigration Reform and others who were thoroughly familiar with the INS's difficulties in removing criminal aliens (such as investigators from the GAO and the Justice Department, a federal prosecutor, and a representative from the Executive Office for Immigration Review)—that detention of criminal aliens during their removal proceedings was the only certain cure for criminal aliens' unacceptable flight rate. See Gov't Br. 20-21.[4]

Respondent is demonstrably wrong when he contends (Br. 34-38) that Congress never decided whether adding detention space would suffice to ensure criminal aliens' appearance for removal proceedings and their ultimate removal from the United States, without also providing for mandatory detention. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, provided the Attorney General the option of invoking, for a period of up to two years, transitional custody rules that delayed expansions of the class of

[4] Congress compiled testimony and other evidence about detention of criminal aliens over several years, and sometimes in connection with bills that would not have required mandatory detention. See Resp. Br. 35-36, 43 n.44. But Congress's consideration and rejection of lesser alternatives to mandatory detention on that record strengthens, rather than weakens, the case for deference to Congress's ultimate determination that mandatory detention is necessary.

removable criminal aliens subject to mandatory detention, and allowed the Attorney General to release criminal aliens who were not aggravated felons if he determined that they would not present a danger to the safety of other persons or property and would be likely to appear for their removal proceedings. IIRIRA § 303(b), 110 Stat. 3009-586 (*reprinted in* 8 U.S.C. 1226(c) note); see Gov't Br. 37. Congress thus required mandatory detention of aggravated felons even if the INS had an overall shortage of detention space. For other criminal aliens, Congress adopted as a temporary half-measure the regime urged by respondent—individualized bond determinations and an expansion of INS detention capability. But Congress required mandatory detention of specified criminal aliens who were not aggravated felons as soon as the necessary detention space could be secured (and in any event no later than two years after Section 1226(c) initially was to take effect), thus manifesting its judgment that, even with ample detention space, individualized bond determinations for the specified criminal aliens do not allow an effective immigration policy or sufficiently protect the public.[5]

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[5] A report cited by respondent (Br. 7-8, 39) indicates that, during the period of the transitional detention rules, 23% of criminal aliens released on parole or bond in New York failed to appear for their deportation hearings, and 66% failed to appear for actual removal from the United States. 1 Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 8-9, 36, 38 (Aug. 1, 2000). Respondent cites that report as evidence of an alternative to mandatory detention—a pilot program under which a pre-screened group of aliens (see *id.* at 13 (screening criteria)) was released by the INS and "required to report regularly to supervision officers in person and by phone" (*id.* at 2). For high-priority participants such as aggravated felons who were admitted to the program before the mandatory detention requirement took effect (see *id.* 11, 34), program staff "monitored [the alien's] whereabouts and assessed each individual's risk of flight" (*id.* at 2), contacted the alien before deportation hearings to ensure his appearance (*id.* at 14), and accompanied the alien to his hearings (*ibid.*). If program administrators feared that the alien might abscond, he was returned to

2. Respondent asserts that Congress was "irrational and arbitrary" (Br. 40) when it designated the particular crimes that trigger mandatory detention during removal proceedings. He notes (Br. 2-3, 28-29) that Section 1226(c) sometimes can be triggered by convictions for theft crimes that States may label as misdemeanors. Respondent, however, fails to mention that such theft offenses are "aggravated felonies" that trigger Section 1226(c) only if they are offenses "for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). Similarly, a criminal alien who is deportable for having committed a crime involving moral turpitude is thereby subject to Section 1226(c) detention only if (1) the alien has multiple convictions (see 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii)), or (2) "the alien has been sentence[d] to a term of imprisonment of at least 1 year" and, in addition, the offense was committed within a specified period of time (generally five years) after the alien's admission to the United States (see 8 U.S.C. 1226(c)(1)(C), 1227(a)(2)(A)(i)).

More generally, respondent repeats the court of appeals' mistake (Pet. App. 20a) of ignoring Congress's reasons for selecting the particular crimes that trigger Section 1226(c).

INS detention. *Id.* at 14-17. But despite the screening for admission to the program and the intensive supervision of aliens in the program, approximately ten percent of program participants still failed to appear for their deportation proceedings. *Id.* at 3.

Amici (ABA Br. 24-25; Alienikoff, et al. Br. 17) cite, as another alternative to detention under Section 1226(c), the Institutional Removal Program (IRP). The IRP is a cooperative program of the INS, the Executive Office for Immigration Review, and federal and state corrections agencies, under which criminal aliens are placed in removal proceedings while incarcerated. Congress already has mandated use of that program "to the extent possible" in the case of aggravated felons like respondent. 8 U.S.C. 1228(a)(3). Factors that may render use of the IRP impossible include the pendency of an appeal that renders the alien's criminal conviction nonfinal, a corrections agency's failure to report that an alien is in custody, or a State's decision not to participate fully in the IRP.

When it drafted and relied on the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43), Congress was not concerned solely with identifying crimes that are facially "indicative of [physical] danger" (Resp. Br. 29). Congress additionally sought to ensure removal of aliens whose crimes—such as counterfeiting, fraud, racketeering, and narcotics offenses —commonly contribute to the extremely serious problems of international terrorism, drug trafficking, and organized alien-smuggling. See Gov't Br. 34-35. Thus, respondent is incorrect when he assumes (Br. 28-29) that the importance of assuring removal of a criminal alien depends on only the length of the prison term that the alien received for a particular conviction.

Respondent similarly ignores (Br. 33, 39) the explanation for why Congress allowed criminal aliens who are subject to mandatory detention during their removal hearings nevertheless to be released in the Attorney General's discretion if, after the entry of a final removal order, they cannot be removed within 90 days: The post-removal-order provision addresses the possibility of an indefinite delay in removal that is beyond the government's control, which has no analog when an alien is detained during his administrative removal proceedings. See Gov't Br. 39 n.16. Section 1536 of Title 8, which respondent also cites as casting doubt on the rationality of mandatory detention (see Resp. Br. 39-40 (incorrectly citing 8 U.S.C. 506, rather than 8 U.S.C. 1536), 47), likewise reflects no inconsistency on Congress's part. Section 1536 authorizes discretionary release of permanent resident aliens who are charged with being deportable as terrorists, when the removal proceeding arises from classified information and is conducted before a specially convened Article III court. See 8 U.S.C. 1531(1), 1532, 1533, 1536. Both the substance and the procedure of the removal proceedings to which Section 1536 applies are different than in proceedings covered by Section 1226(c). Unlike Section 1226(c), Section

1536 does not apply when the government can establish removability through straightforward proof, in administrative proceedings, of the fact of a criminal conviction.

Respondent's attack on Congress's legislative judgment is not advanced by his observation (Br. 25-26 & n.18) that, in the past, Executive Branch witnesses urged Congress to vest the INS with greater discretion whether to release certain criminal aliens. As previously explained (see Gov't Br. 36-37), the INS took the position during Congress's consideration of IIRIRA that it should retain discretionary authority to release many criminal aliens who, under Section 1226(c), now must be detained. That policy disagreement about administrative discretion and the best allocation of INS enforcement resources was (and is) for the political Branches, not the courts, to resolve. See *Flores*, 507 U.S. at 315 ("It may well be that other [detention] policies would be even better, but we are not a legislature charged with formulating public policy.") (brackets and internal quotation marks omitted).

D. SECTION 1226(c) DOES NOT AUTHORIZE "INDEFINITE" DETENTION

Unlike the post-removal-period detention provision at issue in *Zadvydas*, Section 1226(c) does not present any serious possibility of "indefinite, perhaps permanent, detention" (533 U.S. at 699). See Gov't Br. 38-40. In *Zadvydas*, the Court deemed it "important[]" that "post-removal-period detention, *unlike detention pending a determination of removability* * * *, has no obvious termination point." 533 U.S. at 697 (emphasis added).

Respondent does not dispute that the duration of Section 1226(c) detention is, on average, very short. See Gov't Br. 26-27. Accordingly, respondent's contention that removal proceedings sometimes last more than a few weeks (see Br. 26-27) cannot support his facial challenge to Section 1226(c). See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (party

bringing facial challenge "must establish that no set of circumstances exists under which the Act would be valid"); Gov't Br. 48-49.

Respondent maintains that the average length of detention is "skewed downward by the substantial percentage of Section 1226(c) detainees who do not challenge their removal." Resp. Br. 27. That argument also does not advance respondent's case, because it does not suggest that criminal aliens are held for the very long periods of time that concerned the Court in *Zadvydas*. Moreover, absent mandatory detention, criminal aliens who lack any genuine basis for challenging their removal and now do not do so, would be induced to contest removal in the hope of obtaining release from custody and the chance to flee. In any event, if there are exceptional cases in which the duration of detention would present special due process concerns, such cases would appropriately be addressed on their own facts. See Gov't Br. 48-49.[6]

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[6] In this case, respondent was served with the INS's charge of being removable and received an administrative custody determination on February 2, 1999, the same day that he was taken into custody. See C.A. E.R. 3-5. Respondent filed his habeas corpus petition approximately three months later. Pet. App. 2a. As this case illustrates, an alien's own requests for postponement of removal proceedings may prolong Section 1226(c) detention. See Resp. Br. 9 n.12; Gov't Br. 5. But new expedition policies have greatly reduced such delays (see Gov't Br. 5 n.4), and postponements requested by the alien are not attributable to the government in any event. The duration of detention also may be affected by other choices made by the alien, such as what claims the alien makes (see Resp. Br. 32) and whether the alien is represented by counsel who are available pursuant to 8 U.S.C. 1362 and 8 U.S.C. 1228(a)(2) (see *1992 GAO Report* 51 (unrepresented aliens in INS custody for average of 38 days, represented aliens in custody for average of 95 days)). "[T]he legal system[] is replete with situations requiring the making of difficult judgments as to which course to follow," and, even in criminal cases, there is no constitutional prohibition against requiring litigants to make those choices. *McGautha* v. *California*, 402 U.S. 183, 213 (1971) (internal quotation marks omitted); accord *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Respondent also states that Section 1226(c) detention generally lasts "between six months and well over a year" if the alien appeals his removal order to the BIA. Br. 4-5; see *id.* at 27. It is undisputed, however, that only about 15% of removal orders entered by IJs against criminal aliens are appealed. See Gov't Br. 40. For the remaining 85% of cases, removal proceedings generally are completed in much less than six months (47 days on average). See *id.* at 39-40. Furthermore, a criminal alien who has had a removal order entered against him by an IJ is especially poorly positioned to contend that his detention violates due process. IIRIRA limited the possible grounds for aggravated felons and other criminal aliens to challenge their removal. See *id.* at 27-30. The Executive Office for Immigration Review has determined that, when aliens charged as being criminals did appeal their removal orders, in Fiscal Year 2002 the BIA sustained their appeals less than two percent of the time. Thus, an IJ's entry of a removal order against a criminal alien almost certainly indicates that there will be a final order of removal. See *id.* at 46-47. As the Seventh Circuit has observed, an alien who cannot show a significant likelihood of successfully challenging removal has particularly poor grounds for contesting his detention during the removal proceedings. See *Parra* v. *Perryman*, 172 F.3d 954, 957-958 (7th Cir. 1999).

E. POSSIBLE CHALLENGES TO REMOVAL DO NOT RENDER SECTION 1226(c) UNCONSTITUTIONAL

Respondent intends to argue in his removal proceeding that his crimes do not make him removable from the United States. See Resp. Br. 11-12. For purposes of his habeas corpus challenge to Section 1226(c), however, respondent has conceded that he must be held in mandatory detention because he is subject to removal as an aggravated felon. See J.A. 9 ("Under the mandatory detention provisions, a bail hearing cannot be granted [respondent]."); Br. in Opp. 1-2

(same). Furthermore, although respondent invokes the Ninth Circuit's recent decision in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), to dispute his aggravated-felon status, respondent's 1996 burglary conviction and 1997 theft conviction are crimes involving moral turpitude that independently render respondent removable (see Gov't Br. 3 n.2) and require his detention under Section 1226(c).[7]

Respondent also echoes (Br. 29-33) the court of appeals' arguments about the possibility of being granted relief from removal. See Pet. App. 13a-15a. Those arguments are addressed in the government's opening brief (at 24-31), and respondent raises only a few new points. Respondent does not dispute that aggravated felons are ineligible for the principal forms of discretionary relief under IIRIRA—asylum and cancellation of removal. See 8 U.S.C. 1158(b), 1229b. He argues (Br. 29 n.25) that discretionary relief from removal may be available under 8 U.S.C. 1182(c) (1994) (repealed), as construed in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), to some permanent resident aliens who (despite the requirement of 8 U.S.C. 1226(c)(1)) were not timely taken into INS custody. But the possibility that the Attorney General could award relief from removal to such an alien in the exercise of his discretion is not relevant to the alien's detention during removal proceedings, because the alien has no entitlement to discretionary relief. See Gov't Br. 27. Respondent, moreover, admits (Br. 29 n.25) that he has only an "argument" that the rationale of *St. Cyr* should be extended to cover his

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[7] See 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(ii). See also *De La Cruz* v. *INS*, 951 F.2d 226, 228 (9th Cir. 1991) (per curiam) (burglary a crime of moral turpitude); *United States* v. *Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999) ("[E]very * * * circuit that has addressed the question in the context of the immigration laws has concluded that petty theft is a crime involving moral turpitude for purposes of those laws."), cert. denied, 531 U.S. 842 (2000).

case. Respondent is not within the class of aliens who are eligible to apply for discretionary relief under *St. Cyr* itself.

Respondent suggests (Br. 30 n. 26) that aliens who apply for withholding of removal obtain that relief as much as 20% of the time. Respondent arrives at his figure by comparing the number of cases in which IJs *deny* an application for asylum, with the number in which IJs *grant* withholding of removal, on the premise that withholding applications would not be adjudicated unless asylum is first denied.[8] The more straightforward and relevant figure, however, is the percentage of filed withholding applications that are granted by an IJ, which is approximately seven percent. Gov't Br. 30.

F. RESPONDENT'S ALTERNATIVE READING OF SECTION 1226(c) IS NOT PLAUSIBLE

Invoking the doctrine of constitutional avoidance, respondent argues (Br. 40-50) that the Court should construe Section 1226(c) to authorize detention of only those aliens who are subject to a final administrative order of removal. The courts of appeals have rejected that argument, finding respondent's proposed construction plainly incorrect. See Pet. App. 27a-29a; *Hoang* v. *Comfort*, 282 F.3d 1247, 1260-1261 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002); see also *Welch* v. *Ashcroft*, 293 F.3d 213, 220 n.7 (4th Cir. 2002) (suggesting *different* alternative construction).

Section 1231(a) of Title 8, which this Court interpreted in *Zadvydas*, governs detention of aliens after the entry of a

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[8] In most cases, the scenario respondent posits would not occur because an alien who fails to establish asylum eligibility could not satisfy the stricter test for withholding of removal. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423-424 (1987). Moreover, respondent excludes from his calculations cases in which the application for withholding of removal is not granted, if asylum is granted or asylum is not pursued because of the statutory bar rendering certain criminal aliens ineligible for asylum despite their eligibility for withholding of removal (see 8 U.S.C. 1158(b)(2), 1231(b)(3)(B)).

final order of removal. Whereas Section 1226 is entitled "Apprehension and detention of aliens" (8 U.S.C. 1226), Section 1231(a) is entitled "Detention, release, and removal of aliens *ordered removed*" (8 U.S.C. 1231(a) (emphasis added)). As *Zadvydas* explains, Section 1226 provides that "[*w*]*hile removal proceedings are in progress*, most aliens may be released on bond or paroled." 533 U.S. at 683 (citing 8 U.S.C. 1226(a)(2)) (emphasis added). "After entry of a final removal order and during the 90-day removal period, however, aliens must be held in custody" under Section 1231(a)(2). 533 U.S. at 683. "Subsequently," under Section 1231(a)(6), "the Government 'may' continue to detain an alien who still remains here or release that alien under supervision." *Ibid.*

If both the mandatory detention requirement of Section 1226(c) and the discretionary rule of Section 1231(a)(6) applied to aliens subject to a final order of removal, then detention of those aliens would be governed by conflicting statutory provisions. Furthermore, plain statutory language shows that Section 1226(c) applies to aliens who are taken into INS custody for the purpose of removal proceedings. The mandatory detention requirement of Section 1226(c) is an "[e]xcept[ion]" to Section 1226(a), which authorizes discretionary release "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1226(c)(1) specifies that its detention requirement becomes applicable to an alien "when the alien is released" from criminal custody "on parole, supervised release, or probation" (8 U.S.C. 1226(c)(1))—not when a final order of removal is entered. The statutory exception to mandatory detention under Section 1226(c)(1), moreover, requires the Attorney General to determine whether an alien seeking release for witness-protection purposes "is likely to appear for any scheduled proceeding," thus confirming that Section 1226(c) applies while removal proceedings are pending. 8 U.S.C. 1226(c)(2).

Respondent asserts (Br. 45) that Section 1231(a) does not authorize detention of aliens who have obtained a judicial stay of their administrative removal order pending court review, and that Section 1226 simply "covers [this] gap." Nothing in the language of Section 1226 indicates that it was intended to cover such cases. Nor can respondent find any legislative history expressing the intent he attributes to Congress. See *id.* at 46-48; see also *id.* at 46 n.46 (noting government's position that Section 1231(a)(1)(C), not Section 1226, applies to aliens with judicially stayed removal orders). Regardless, however, respondent's "gap-filling" argument suggests at most that an alien who has obtained a judicial stay of his removal order should be treated, for detention purposes, as if there were no removal order. The application of Section 1226 to such aliens would not affect its obvious application to respondent, whose removal proceedings are pending.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2002