Nos. 01-1491

IN THE
Supreme Court of the United States

CHARLES DEMORE, District Director,
Immigration and Naturalization Service, *et al.*
Petitioners,

v.

HYUNG JOON KIM,
Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. BOB BARR, JOE BARTON, GEORGE GEKAS, WALTER JONES, LAMAR SMITH, JOHN SWEENEY, AND DAVE WELDON; U.S. SENATOR JESSE HELMS; AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether Respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment, where Respondent was convicted of an aggravated felony after his admission into the United States?

The case also raises the following antecedent question:

Whether a federal district court possesses jurisdiction under 28 U.S.C. § 2241 to set aside the action of the Attorney General in detaining a removable alien who was convicted of an aggravated felony after his admission into the United States, despite 8 U.S.C. § 1226(e)'s admonition that "[n]o court may set aside any action or decision by the Attorney General" to detain an alien under § 1226?

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INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Washington Legal Foundation, *et al.,* are set forth in the motion for leave to file a brief in *Elwood v. Radoncic,* No. 01-1459, which involves issues substantially similar to those raised herein.[1] *Amici* are filing their motion and brief in *Elwood* simultaneously with the filing of this brief. *Amici* are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari. In brief, Hyung Joon Kim is 24-year-old citizen of Korea who has been a permanent resident alien living in California since 1986. The Immigration and Naturalization Service (INS) has been seeking his removal from the country because of his repeated criminal offenses.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Mr. Kim's *adult* criminal record dates to July 1996, when he was convicted at age 18 of first degree burglary in California state court. Pet. App. 2a. In August 1997, he was convicted in California state court of "petty theft with priors," and was sentenced to three years imprisonment. *Id.* After serving 18 months of that sentence, he was release to the custody of the INS on February 2, 1999. *Id.* The INS in 1998 had charged him with being a deportable alien under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 8 U.S.C. § 1101(a)(43)(G). Mr. Kim's removal hearing before an Immigration Judge was scheduled for March 2002 but has been delayed at his request.

One year prior to Mr. Kim's aggravated felony conviction, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, which *inter alia* added a new § 236(c) to the Immigration and Nationality Act, 8 U.S.C. § 1226(c). Section 1226(c) *requires* the INS (with one exception not relevant here) to take into custody, pending removal, any alien deportable by reason of having been convicted of an aggravated felony. Section 1226(c) is merely the latest federal mandatory detention statute; a series of federal statutes dating back to 1988 required detention pending deportation of various categories of alien criminals. *See* Pet. App. 35a-36a.

After bringing charges against Mr. Kim, the INS determined that § 1226(c) precluded his release on bond. *Id.* at 33a. On May 17, 1999, Mr. Kim filed a habeas corpus petition in U.S. District Court for the Northern District of California, seeking release from detention. On August 11, 1999, the district court granted the petition. *Id.* at 31a-51a.

The court held that § 1226(c) was facially invalid as a violation of both substantive and procedural due process because: (1) the Constitution prohibits the detention of aliens in the absence of evidence that they pose a risk of flight or a threat to the community; and (2) aliens are entitled to an "individualized bond hearing" to determine whether they pose a risk of flight or a threat to the community. The INS subsequently released Mr. Kim on $5,000 bond. *Id.* at 2a.

On January 9, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* at 1a-30a. The appeals court did not concur with the district court's holding that § 1226(c) was facially invalid, but it held that § 1226(c) is unconstitutional as applied to Mr. Kim and similarly situated permanent resident aliens. *Id.* at 6a. The court held that Mr. Kim had "an obvious and important" due process interest in liberty "during the pendency of removal proceedings." *Id.* at 8a. The court held that that liberty interest outweighed the INS's justifications for seeking to detain him -- including preventing him from fleeing and protecting public safety -- in the absence of "an individualized determination" that he posed a risk of flight or a risk to public safety. *Id.* at 12a-21a, 30a.

REASONS FOR GRANTING THE PETITION

Amici fully support the arguments put forth by Petitioners (hereinafter, the "INS"). The Ninth Circuit has held an Act of Congress unconstitutional; that alone warrants review of the court of appeals decision. Moreover, the appeals court's decision directly conflicts with a decision of the U.S. Court of Appeals for the Seventh Circuit.

Amici write separately in order to emphasize several points. First, the appeals court's decision is directly contrary

to numerous decisions of this Court. The Ninth Circuit failed to accord the deference demanded by this Court to decisions of Congress and the Executive Branch with respect to immigration matters. That failure is particularly troubling in light of overwhelming evidence that: (1) aliens released from detention pending deportation after having been convicted of aggravated felonies pose a serious public safety risk; (2) the INS has no effective means of assuring the removal of alien felons following the completion of administrative proceedings unless it can detain them while those proceedings are ongoing; and (3) in a very real sense, alien felons being detained pending deportation hold the keys to their jail cells because they can win their freedom at any time so long as they agree to leave the country while their administrative appeals are pending.

Second, the Ninth Circuit's reliance on *Kansas v. Hendricks*, 521 U.S. 346 (1997), and other civil commitment case law was misplaced. Mr. Kim was convicted of an "aggravated felony" in 1997 after being afforded all the constitutional rights to which criminal defendants are entitled -- *e.g.*, right to assistance of counsel, trial by jury, innocence until proven guilty by proof beyond a reasonable doubt. Congress in 1996 established several consequences of such convictions when the criminal defendant is an alien: deportability (under 8 U.S.C. § 1227(a)(2)(A)(iii)) and mandatory detention until removal can be effected (under § 1226(c)). Mr. Kim has no more right to complain about his detention for a finite period under § 1226(c) than he does to complain about the three-year sentence he received under California state law.

Third, the Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in no way reduces the need to resolve the

conflict between the decision below and the Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). *Parra* is fully consistent with this Court's *Zadvydas* decision, and the Seventh Circuit has given no indication since *Zadvydas* was decided in June 2001 that it is considering abandoning its *Parra* decision.

Fourth, Congress has unambiguously decreed that the federal courts are not to "set aside any action or decision" of the INS taken pursuant to 8 U.S.C. § 1226 "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). It is undisputed that the INS acted pursuant to 8 U.S.C. § 1226 in determining that Mr. Kim should be detained pending removal. Accordingly, the Court should grant review in this case to determine whether the lower courts possessed jurisdiction to overturn the INS's decision to detain Mr. Kim; § 1226(e) clearly suggests that they did not.

I. DEPORTABLE ALIENS CONVICTED OF AGGRAVATED FELONIES HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY WHILE THEY CONTEST THEIR REMOVAL

Mr. Kim has been convicted as an adult of two criminal offenses, including a serious felony for which he was sentenced to three years imprisonment. Although he is contesting removal, he almost surely will be deported to Korea because he is statutorily ineligible for withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B)(ii).[2] Congress has

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[2] The Ninth Circuit's suggestions to the contrary are frivolous.

(continued…)

decreed that those in Mr. Kim's position "shall" be detained by the INS pending removal. The Ninth Circuit nonetheless ruled that Mr. Kim has a substantive due process right to be free from detention while he contests the removal order, in the absence of an "individualized" finding that he poses either a risk of flight or a threat to the community.

In so holding, the Ninth Circuit did not merely dismiss considered views to the contrary from both Congress and the Seventh Circuit. Its decision is also in conflict with numerous decisions of this Court that have emphasized the need for the federal courts to defer to the views of the elected branches of government in immigration-related matters. The Court should grant review to resolve that conflict.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving

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[2](...continued)
The Ninth Circuit noted that some alien felons, particularly those convicted of felonies in the distant past, are eligible for discretionary relief under former § 212(c), 8 U.S.C. § 1182(c) (1995). Pet. App. 14a. But Mr. Kim's most recent felony conviction dates from 1997, after the repeal of § 212(c); accordingly, he is not even arguably eligible to invoke that statute. *See INS v. St. Cyr,* 121 S. Ct. 2771, 2293 (2001); *see also* 8 U.S.C. § 1229b(a)(3). The Ninth Circuit also asserted that "some aliens detained under [§ 1226(c)] may be able to demonstrate that the conviction for which the INS seeks to remove them was not an aggravated felony." Pet. App. 14a. That assertion undoubtedly is correct, but it is of little relevance to Mr. Kim and his as-applied challenge to § 1226(c) because there is no dispute that he has, in fact, been convicted of an "aggravated felony" within the meaning of 8 U.S.C. § 11101(a)(43).

a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a federal law that mandates detention of removable aliens who have been convicted of aggravated felonies and who wish to remain in the United States while they contest their removal, particularly where detention is limited to the relatively brief period necessary for all removal proceedings to be completed.[3]

Government detention of individuals -- even noncitizens -- unquestionably implicates the Due Process Clause's prohibition against unwarranted deprivations of "liberty." As the Court has made clear, "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause

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[3] Although the Ninth Circuit was not altogether clear on this point, *amici* do not understand the appeals court to have held that the INS violated Mr. Kim's rights to *procedural* due process. The appeals court indicated that the Constitution prohibited Mr. Kim's detention in the absence of individualized findings that he presented a flight risk or a threat to safety, *without regard to how much process the INS afforded him* before taking him into custody. Pet. App. 10a-11a.

protects." *Zadvydas*, 121 S. Ct. 2491, 2498 (2001). But the federal government will often have legitimate reasons to impinge on personal liberty, and any claim that abridgement of personal freedom "shocks the conscience" must be judged in light of the government's justifications for its actions:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed by Congress and the Executive Branch in the name of national security and safety. Indeed, when it comes to matters of immigration policy, the judicial branch has a very limited role to play. "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v.*

Albright, 523 U.S. 420, 455 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

In conflict with this Court's case law, the Ninth Circuit declined to defer to Congress's judgment that sound immigration policy requires the detention of deportable aliens who have been convicted of aggravated felonies. Pet. App. 10a-11a. The appeals court asserted that this Court's decision in *Zadvydas* dictated that no deference be accorded. *Id.* But that assertion was a misreading of *Zadvydas*. The appeals court's quotation from *Zadvydas*, *id.* at 11a, involved a discussion of case law arising from government detention of *citizens*; but as even the Ninth Circuit recognized, "'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 9a (quoting *Mathews v. Diaz*, 426 U.S. at 79-80). *Zadvydas* does not indicate that the courts should not defer to Congress's judgment that alien felons should be detained during the brief period required to effect their removal. Rather, the Court

stated expressly that it was addressing the limited issue of "whether aliens that the Government finds itself unable to remove are to be condemned to an *indefinite* term of imprisonment within the United States." *Zadvydas,* 121 S. Ct. at 2502-03. The Court held that under those limited circumstances, *indefinite* detention raised serious constitutional concerns despite the substantial deference due to Congress's decisions.

In adopting § 1226(c), Congress determined that release of alien felons pending removal would entail such an extraordinarily high risk of flight and of danger to the community that detention of all such aliens (pending completion of removal proceedings) was mandated. In conflict with numerous decisions of this Court, the appeals court refused to defer to Congress's assessment of the risks involved. Congress had good reason to fear that release of alien felons pending removal posed a significant risk to public safety. For example, a General Accounting Office report cited during floor debates by a House sponsor of 1996 immigration reform legislation found that "77 percent of noncitizens convicted of felonies are arrested at least one more time" before being deported. 142 Cong. Rec. 7972 (1995). A major study of criminal aliens conducted by Los Angeles County reached a similar conclusion. Los Angeles County Wide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County," July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year*, and those 772 had been arrested a total of 1,522 times. *Id.* at iv.

The INS introduced substantial evidence in this case that alien felons released on bond pending removal also pose a significant risk of flight. For example, the INS cited a study indicating that 90% of criminal aliens not detained during removal proceedings end up fleeing.[4] Rather than deferring to Congress's judgment that this evidence justified detention of all alien felons, the Ninth Circuit re-interpreted the study's data and arrived at the remarkable conclusion that releasing aliens on bond *decreases* the skip rate and is thus "key to effective deportation." Pet. App. 16a. The court also asserted that substantive due process prohibited the INS from detaining any alien felon unless it could demonstrate that *that* alien posed a danger to public safety: "the fact of a prior conviction alone, without individualized consideration of the dangerousness of the underlying crime, or of the individual's present condition, can be unreliable evidence of dangerousness." *Id.* at 20a.

In refusing to defer to Congress's considered judgment on this issue, the Ninth Circuit appeared to assume that an individual felon's propensity to flee or to commit additional crimes could be determined as a factual matter. That assumption is without foundation; there is never any means by which government officials can predict future behavior of any given individual with 100% accuracy. All Congress can be expected to do is to use available information to predict how a class of individuals is likely to behave if released from detention. It has determined that *any* alien in Mr. Kim's

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[4] The Seventh Circuit relied in part on this study in rejecting a due process challenge to § 1226(c)'s mandatory detention provision. *Parra*, 275 F.3d at 956 (citing 62 Fed. Reg. 10,312, 10,323 (1997)). As the INS points out in the Petition, the Ninth Circuit's rejection of the study as support for the INS's position was based on a misreading of the study's findings. Pet. 17.

position is much more likely than not, if released from detention while removal proceedings continue, either to flee or to commit additional crimes. The Ninth Circuit's refusal to accept that determination is in conflict with the numerous decisions of this Court that have counseled judicial deference to the political branches of government on immigration matters. *See, e.g., INS v. St. Cyr,* 121 S. Ct. 2271, 2287 n.38 (2001) ("the scope of review on habeas [in immigration cases] is considerably more limited than on APA-style review"). *See also Jones v. United States,* 463 U.S. 354, 364 n.13 (1983) ("The lesson we have drawn [from the difficulty in predicting future dangerousness] is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.")

A. Keys to His Own Jail Cell. In contrast to the government's strong interest in detaining him, Mr. Kim has a minimal "liberty" interest in being allowed to roam freely in American society. Indeed, Mr. Kim's detention was not solely or even primarily the INS's doing. In a very real sense, Mr. Kim at all times held the keys to his cell. Unlike aliens such as Mr. Zadvydas (who could not locate a country willing to admit him), Mr. Kim was free to leave detention provided that he agree to return to his native Korea. Accordingly, when deportable aliens such as Mr. Kim (who, in light of their aggravated felony convictions, have virtually no chance of avoiding removal and regaining their right to live freely in American society) choose incarceration as the price for remaining in this country, their claims that incarceration is depriving them of Fifth Amendment "liberty" ring hollow.[5]

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[5] The Ninth Circuit placed considerable emphasis on the fact that (continued…)

B. Kim's Detention Is a Direct Result of His Conviction. In support of its finding that Mr. Kim's substantive due process rights were violated, the Ninth Circuit relied on *Kansas v. Hendricks*, 521 U.S. 346 (1997), and other "civil" commitment cases in which the Court has placed substantive due process restrictions on the power of government to detain citizens in connection with noncriminal proceedings. Pet. App. 11a, 17a-18a. The appeals court said:

> Existing Supreme Court precedents establish that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public. In such cases the government has had the burden of proving that the particular individual meets the criteria for detention.

Id. at 17a.

Leaving aside that the cited precedents all involved detention of *citizens*, the Ninth Circuit's analysis fails to account for the fact that Mr. Kim was convicted of an aggravated felony. Congress in 1996 established several consequences of such convictions when the criminal defendant is an alien: deportability (under 8 U.S.C.

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[5](...continued)
Mr. Kim retains his status as a "permanent resident alien" until a final order of removal is entered against him. Pet. App. 7a-8a. But the level of rights that comes with that status is not constitutionally mandated; rather, any such rights (beyond those rights that are possessed by *any* alien) are a product of federal statutes and regulations. While Congress has chosen to grant numerous rights to permanent resident aliens, one right that it has *not* granted is the right to remain free in American society if a permanent resident alien is deportable by virtue of having committed an aggravated felony. 8 U.S.C. § 1226(c).

§ 1227(a)(2)(A)(iii)) and mandatory detention until removal can be effected (under § 1226(c)). Mr. Kim, who was convicted a year after § 1226(c) was adopted, has no more right to complain about his detention for a finite period under § 1226(c) than he does to complain about the three-year sentence he received under California state law.

The Ninth Circuit makes much of the fact that removal proceedings are civil in nature. But § 1226(c) limits mandatory detention to those convicted of an aggravated felony -- meaning that detention is limited to those who have been afforded all the safeguards of the criminal process, including assistance of counsel, trial by jury, and innocence until proven guilty by proof beyond a reasonable doubt. Moreover, a principal purpose of § 1226(c) is also a principal purpose of the criminal justice system: incapacitating criminals so as to protect public safety. When a defendant is convicted of a crime, we do not require prosecutors requesting a jail sentence to separately prove that he continues to pose a danger to society. Rather, the fact that a person has been found to have committed a criminal act "indicates dangerousness" and is "strong evidence that his continued liberty could imperil the preservation of the public peace" -- even if the case involves "a non-violent crime against property." *Jones v. United States,* 463 U.S. 354, 364-65 (1983). If courts are permitted to make that presumption in connection with criminal sentencing, there is no reason why Congress should not be permitted to make the same presumption in establishing finite periods of detention as part of its immigration policy.

In sum, review is warranted of the Ninth Circuit's determination that Mr. Kim's "liberty" interest in being released into American society outweighs the government's

interest in detaining, pending removal, *all* aliens who have been convicted of aggravated felonies, as a means of preventing flight and protecting public safety.

III. *ZADVYDAS* IN NO WAY LESSENS THE NEED FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS

The Ninth Circuit acknowledged that its decision striking down § 1226(c) was in conflict with the Seventh Circuit's *Parra* decision. Pet. App. 26a. The Ninth Circuit suggested, however, that any conflict was unlikely to persist because *Parra* had been superseded by *Zadvydas*: "*Parra* [was] decided prior to *Zadvydas*, in which the Court made clear that the government was required to provide 'special justification' for civil detention of aliens." *Id.*

The Ninth Circuit's suggestion is misguided; there is no inconsistency between *Parra* and *Zadvydas*. This Court made clear in *Zadvydas* that the detention of those who once were classified as permanent resident aliens -- even permanent resident aliens who have been convicted of aggravated felonies -- implicates the Due Process Clause. But the Seventh Circuit in *Parra* did not hold otherwise; it merely held that the minimal "liberty" interests of the alien felon being detained in that case were insufficient to overcome the INS's strong interests in detaining him. *Parra*, 172 F.3d at 958. That holding is in direct conflict with the Ninth Circuit's holding in this case: the Ninth Circuit found that the due process balance tilted in favor of the alien felon seeking release into American society.

Zadvydas involved an entirely different balancing process. That case involved permanent resident aliens from

Lithuania and Cambodia who, although subject to final removal orders, could not be sent anywhere in the foreseeable future because no country was willing to accept them. The Court concluded:

> [T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States. . . An alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, . . . the Constitution permits detention that is indefinite and potentially permanent.

Zadvydas, 121 S. Ct. at 2502.[6]

In sharp contrast, this case and *Parra* both involved alien felons whose removal proceedings were ongoing. Unlike in *Zadvydas*, neither Mr. Kim nor Mr. Parra faced "indefinite and potentially permanent" detention (because removal proceedings would be completed within a relatively short period of time). Moreover, because there is no evidence that Korea is unwilling to accept Mr. Kim or that Mexico was unwilling to accept Mr. Parra, both were free to end their detention at any time by leaving the country. Accordingly, nothing in this Court's *Zadvydas* decision is likely to cause the Seventh Circuit to reassess its conclusion

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[6] The Court did not answer that "serious question." Rather, it invoked the doctrine of constitutional doubt to interpret 8 U.S.C. § 1231(a)(6) as prohibiting detention of such aliens for more than six months after completion of the deportation process, if "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 121 S. Ct. at 2505.

that § 1226(c) passes constitutional muster,[7] and the conflict between the Ninth and Seventh Circuits is likely to persist until resolved by this Court.

III. THE COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER LOWER FEDERAL COURTS HAVE JURISDICTION TO OVERTURN § 1226(c) DETENTION DECISIONS

The Court should also grant review to consider an issue not raised in the petition: whether lower federal courts have jurisdiction to overturn § 1226(c) detention decisions. It is always appropriate, of course, for a court *sua sponte* to raise the issue of its own jurisdiction, and the jurisdictional issue is a "subsidiary question fairly included" within the question presented by Petitioner. SUP. CT. R. 14.1(a).

The district court and Ninth Circuit asserted jurisdiction over this case under the federal habeas statute, 28 U.S.C. § 2241. However, 8 U.S.C. § 1226(e) clearly suggests that no such jurisdiction exists in the lower federal courts:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole. (Emphasis added.)

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[7] The Seventh Circuit has been called upon to apply *Zadvydas* in several recent cases. Although none of those cases addressed § 1226(c), none of the opinions contains language suggesting that *Parra*'s continued vitality is subject to question. *See, e.g., Hoyte-Mesa v. Ashcroft,* 272 F.3d 989 (7th Cir. 2001).

There is no question that following Mr. Kim's release from state prison in February 1999, the INS detained him "under this section," *i.e.,* under 8 U.S.C. § 1226. Accordingly, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the INS's decision to detain Mr. Kim and other similarly situated criminal aliens.

Although each of the appeals courts to consider the issue has held that § 1226(e) is *not* a bar to habeas corpus claims such as Mr. Kim's, those courts have arrived at their decisions by simply ignoring the plain statutory language. The Seventh Circuit evaded the jurisdictional bar in *Parra* by claiming that § 1226(e) prohibits only "[t]wo particular avenues of attack" on detention decisions: (1) an argument that the Attorney General erred in applying § 1226 to an alien; and (2) an argument that he erred in deeming the alien statutorily ineligible for bail. *Parra*, 172 F.3d at 957. The court held that "[a] person who has different legal arguments may present them," including an argument that detention is improper because § 1226(c) is unconstitutional. *Id.* That interpretation of § 1226(e) is not plausible. The second sentence of § 1226(e) does not state that certain types of detention decisions or certain types of legal challenges to detention are barred; rather, it states categorically that "[n]o court may set aside" an INS decision to detain an alien felon pursuant to § 1226.[8]

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[8] The Seventh Circuit attempted to draw support from this Court's interpretation of another jurisdiction-limiting statute in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999). The comparison was not well-taken. The statute at issue in *American-Arab,* 8 U.S.C. § 1252(g), sharply limits judicial review of claims by an alien "arising from the decision or action by the Attorney General

(continued…)

The Ninth Circuit likewise held that § 1226(e) does not bar judicial review of a habeas corpus challenge to INS detention of an alien felon under § 1226. But it did so without any real analysis; it simply cited to *St. Cyr* and stated in conclusory fashion: "The district court had jurisdiction pursuant to 28 U.S.C. § 2241." Pet App. 2a.

Amici recognize that there is "a strong presumption in favor of judicial review of administrative action," and that the Court has a "rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr,* 121 S. Ct. 2271 (2001). Nonetheless, there is no plausible interpretation of § 1226(e) other than that Congress intended to preclude *all* lower-court review of an INS decision to detain an alien felon pursuant to § 1226.[9] The Court should

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[8](...continued)
to commence proceedings, adjudicate cases, or execute removal orders against an alien under this Act." The Court concluded that § 1252(g) imposed limits on judicial review *only* when the plaintiffs' claims addressed one of the three types of "decision[s] or action[s]" enumerated in § 1252(g); but the Court made clear that § 1252(g) applied *regardless* of the grounds raised by the alien to challenge the Attorney General's decisions or actions in these three areas. *American-Arab*, 525 U.S. at 482-83. Similarly, 8 U.S.C. § 1226(e) prohibits a court from "set[ting] aside" a decision by the Attorney General to detain an alien felon pursuant to § 1226, *regardless* of the basis for challenging detention.

[9] Section 1226(e) could plausibly be read as not barring claims that the detainee is not actually an alien or has not actually been convicted of an aggravated felony. Detention in such circumstances arguably is not detention "under this section," thereby rendering the statutory bar inapplicable. However, Mr. Kim does not contest that he is an alien or that the crimes of which he stands convicted are "aggravated felonies" within the meaning of 8 U.S.C. § 1101(a)(43).

grant the petition to consider whether the Ninth Circuit erred in asserting jurisdiction over Mr. Kim's claim.

The only plausible basis for upholding the Ninth Circuit's assertion of jurisdiction is a finding that § 1226(e) is void as a violation of the Suspension Clause of the Constitution. In light of *St. Cyr*, any effort to deny judicial review of INS detention decisions raises a "serious question" under the Suspension Clause. Nonetheless, *amici* note that the Court has never invoked the Suspension Clause to strike down a federal statute. Moreover, given the strong presumption of constitutionality of federal legislation, the Court should not permit federal courts to assert jurisdiction over a claim in violation of a federal statute without first granting review to determine whether the statute is constitutional.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

Respectfully submitted,

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