No. 15-1204

IN THE
Supreme Court of the United States

DAVID JENNINGS, *et al.*,
Petitioners,
v.

ALEJANDRO RODRIGUEZ, *et al.*, Individually and on Behalf of All Others Similarly Situated,
Respondents.

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

BRIEF FOR AMICI CURIAE AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Immigration Council ("Immigration Council") is a national nonprofit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of the immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council frequently appears in federal courts on issues relating to the interpretation of the Immigration and Nationality Act, and undertakes research and advocacy relating to immigration enforcement. This case is of critical concern to the Immigration Council in light of its longstanding commitment to securing due process rights for immigrants in removal proceedings, including immigrants subject to detention.

The American Immigration Lawyers Association ("AILA") is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members frequently represent detained foreign nationals before

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief. All parties have filed letters consenting to the filing of all amicus briefs.

the Department of Homeland Security ("DHS") and the Executive Office for Immigration Review ("EOIR"), as well as before the United States District Courts, Courts of Appeals, and this Court.

SUMMARY OF ARGUMENT

In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court relied in large part on certain factual assumptions about immigration detention and removal to reject a facial constitutional challenge to mandatory detention under 8 U.S.C. § 1226(c). Those factual assumptions have proven obsolete at best and inaccurate at worst. The Court should reconsider *Demore* and confine it to the factual predicate on which it relied or else overrule it outright.

The Court in *Demore* assumed, based on information provided by the government, that noncitizens subject to Section 1226(c) would be confined for only a "brief" and "limited" period necessary for their removal proceedings, and in turn held that that deprivation of liberty was justified by the government's concerns with preventing danger and flight risk. 538 U.S. at 513, 526. Yet in an extraordinary letter filed on the same date as the government's opening brief in this case, the government admitted that much of the information it gave the Court was wrong, and that the Court's opinion misinterpreted other key data. Both the corrected data from the time of *Demore* and the overwhelming weight of evidence since then show that individuals held under Section 1226(c) often face substantially longer detention periods than the Court assumed. Intervening developments have also shown that mandatory detention is not necessary to address the safety and flight risk concerns on which the government and the Court relied in *Demore*.

Reconsidering *Demore* is all the more appropriate because it was an unjustified departure from this Court's otherwise uninterrupted recognition that the Constitution requires that civil detention be based on individualized process, not blanket legislative categories. Contrary to *Demore*'s suggestion, Congress's plenary power over *immigration* does not translate into a plenary power to detain individual *immigrants* without an individualized inquiry into the need to do so. Indeed, even if the data the government presented in *Demore* had been accurate, it in no way demonstrated that detaining people without individualized process was necessary to prevent flight or protect the public. Rather, the data showed that the government's interests were attributable primarily to resource constraints, which have since been alleviated through increased appropriations and changes to detention and removal procedures.

Demore's constitutional ruling should accordingly be confined to the circumstances the Court had before it, if not overruled entirely. *Stare decisis* is no obstacle, given that changed circumstances have removed any justification *Demore* ever had, have shown *Demore* to be unworkable, and have reinforced that its rule imposed severe and unnecessary burdens on constitutional rights.

ARGUMENT

I. DEVELOPMENTS SINCE *DEMORE* CONFIRM THAT BLANKET MANDATORY DETENTION CANNOT BE JUSTIFIED

The Court's reasoning in *Demore* upholding the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) has been undermined by intervening events. As compelling data now demonstrates, the Court underestimated the length of detention under Section

1226(c) in cases where the detainee appeals; many immigrants are in fact imprisoned for months or years. *Demore* also failed to consider that many of those individuals will win their cases and thus will be entitled to remain lawfully in the United States. The immigrants' liberty interest under the Due Process Clause is thus much weightier than the Court in *Demore* suggested.

The government's interests in detention without individual process, by contrast, have only diminished. Alternatives to detention, such as in-person or telephonic check-ins and community-based case management programs, help ensure attendance at immigration proceedings; risk assessment tools can be used to analyze the risk of flight and danger to the community; and increased detention space reduces the likelihood that individuals who pose an actual threat or flight risk are released for resource-driven reasons. Those new advances significantly attenuate any interest the government had in blanket mandatory detention, without any individualized review, of everyone subject to Section 1226(c).

A. Because Mandatory Detention Is Significantly Longer Than The Court In *Demore* Suggested, Detainees' Liberty Interests Deserve Far Greater Weight

1. As the government now admits, *Demore*'s holding was based on erroneous information greatly understating the deprivation of liberty

This Court's decision in *Demore* rested on the understanding that individuals subject to mandatory detention were detained only for the "brief" and "limited" period necessary for removal proceedings, which, according to the decision, averaged "roughly … *about five*

months in the … cases in which the alien chooses to appeal." 538 U.S. at 513, 526, 530 (emphasis added); *see also Reid* v. *Donelan*, 819 F.3d 486, 499 (1st Cir. 2016) (*Demore*'s "holding was premised on the notion that proceedings would be resolved within a matter of months, *including* any time taken for appeal by the detainee").

Thirteen years later, the government now admits that *Demore*'s five-month figure was incorrect. *See* Letter from Acting Solicitor General Ian H. Gershengorn to Hon. Scott S. Harris 3, *Demore*, No. 01-1491 (Aug. 26, 2016) ("*Demore* Gov. Letter") (the Court's five-month calculation "was incorrect on the basis of EOIR's statistics at the time"). The government now states that, at the time of *Demore*, average detention in appealed cases actually *exceeded twelve months*, more than double *Demore*'s estimate. *See id.* ("The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal[.]").

The government's letter explains that, at the time of *Demore*, EOIR had calculated the average length of detention in appealed cases as 233 days—about eight months. *Demore* Gov. Letter 3. Yet the government admits that it "did not separately flag th[at] statistic[]" in its briefs in *Demore*. *Id.* The result was that the Court erroneously relied on other data to make its lower five-month estimate. *See id.* at 2-3; 538 U.S. at 529 (citing Pet. Br. 39-40). And the government now admits that even the 233-day figure reported by EOIR was an understatement; the correct number at the time of *Demore* was 382 days, more than twelve months. *Demore* Gov. Letter 3. And as explained below, even twelve months understates the actual average length of

detention for noncitizens subject to mandatory detention. *See infra* pp. 6-8.[2]

2. Since *Demore*, recent data shows that many individuals in mandatory detention are detained for far longer periods of time than the Court realized

Current EOIR data demonstrates that many Section 1226(c) detainees have been imprisoned much longer than the brief period contemplated in *Demore*. In its brief, the government refers to updated data compiled by EOIR that tracks the length of detention for mandatory detainees through 2015. Pet. Br. 35 n.10. That data reveals that, from 2003 to 2015, 32,654 people were detained for over six months, 10,027 people were detained for over a year, and 2,123 people were detained for two or more years. EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf. The data further reveals that the average detention time in appealed cases has remained more than double the five-month estimate the Court relied on in *Demore*. *Id.* (336 days in 2001; 313 days in 2015).

Moreover, there are several reasons to believe that the EOIR data continues to understate the length of imprisonment of Section 1226(c) detainees. *First*, EOIR does not count the time an individual is detained prior to the government's filing of the charging document in immigration court, which formally commences removal proceedings. The government's statistics suggest that

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[2] The government does not explain why it took no action to advise the Court of the error in the *Demore* opinion until thirteen years later, when it filed its opening brief in this case.

this period can be "significant." *See Demore* Gov. Letter 11 n.3 ("In some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR.").

Second, EOIR does not count the time spent in detention during any appeal to a federal court of appeals or during any remand proceeding before the agency—proceedings that can take months or even years. *See, e.g.*, ACLU, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants* 9 (2016) ("*Detained Without Process*"), *available at* http://www.aclu-md.org/uploaded_files/0000/0858/mandatory_detention_report_2016.pdf (detention time for Section 1226(c) detainees who petition for review "runs closer to a year or longer, in some cases lasting up to two years or more"); *Sopo* v. *Attorney Gen.*, 825 F.3d 1199, 1202-1206 (11th Cir. 2016) (describing Section 1226(c) detainee who filed a petition for review and was detained for four years).

Third, and relatedly, the EOIR data does not accurately reflect the fact that individuals who have significant defenses to removal or meritorious claims for relief are detained much longer than those who do not challenge their removal at all. Like the Court's opinion in *Demore*, the EOIR data lumps all Section 1226(c) detainees into a single *average* length-of-detention figure, which necessarily masks the many cases in which individuals are detained for lengthy periods of time because they exercise their legal right to fight their deportation, often with success.

More probative is the data that forms the record in this case, which, unlike the EOIR data, was actually subject to adversarial testing through discovery and cross-examination. The record shows that 460 mem-

bers of the respondent Section 1226(c) subclass were detained for an average of 427 days (over fourteen months) with some individual detention periods exceeding *four years*. J.A. 92 (Table 20). Data for a similar class of Section 1226(c) detainees in Massachusetts reveals detention times of one to three years. *Reid*, 819 F.3d 486 (1st Cir. 2016) (No. 14-1270), Supp. App. for Appellee/Cross-Appellant A700(¶10), A701(¶19), A705(¶10), A706(¶16), A524(¶13), A732-733(¶¶8, 12), A521-522(¶¶4, 7, 8), A735(¶4), A737(¶13).[3]

Ironically, it is those noncitizens who have substantial challenges to or claims for relief from removal who are most likely to endure lengthy detention, as they assert their arguments before the agency, a federal appeals court, and through one or more agency remands. That also distinguishes this case from the premise of *Demore*, which was that Mr. Kim "conced[ed] that he was deportable." 538 U.S. at 514.[4]

For example, the record here shows that the vast majority of respondent Section 1226(c) subclass members—who were all imprisoned for more than six

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[3] Amici are prepared to lodge the *Reid* appendix with the Court upon request.

[4] As the *Demore* dissents pointed out, the Court's assumption was questionable even based on the record in *Demore*, because Mr. Kim was in fact "challenging his removability." *Demore*, 538 U.S. at 542 (Souter, J., dissenting); *see also id.* at 577 (Breyer, J., dissenting). Indeed, Mr. Kim was ultimately held *not* removable and his removal proceedings were terminated because his criminal convictions were found not to constitute deportable offenses—but only after Mr. Kim had been re-detained for an additional ten months. *See Matter of Kim*, A027-144-740 (I.J. Jan. 6, 2014); Brief of Petitioner, *People* v. *Kim*, No. S153183, 2007 WL 4792392, at *28 (Cal. Nov. 28, 2007). Amici are prepared to lodge Mr. Kim's Immigration Judge decision with the Court upon request.

months—were *prima facie* eligible for relief from removal, and a significant number (38%) won their cases. J.A. 135 (Table 38); *see* J.A. 93 (Table 21) (73% applied for relief from removal); *see also Detained Without Process* 7 (describing a Maryland study where "more than half [of Section 1226(c) detainees] may have been eligible for some form of relief from removal"). The success rate for mandatory detainees was more than five times greater than the success rate of the general detained population in removal proceedings. *Compare* J.A. 86 (Table 17).

For those Section 1226(c) detainees, their lengthy detention can create substantial difficulty while they fight to remain in the United States. For example, Anthony Whyte, a lawful permanent resident ("LPR") since 1981 with seven U.S. citizen children, seven U.S. citizen siblings, and a U.S. citizen father, was detained for more than twenty-six months, causing extreme financial and emotional hardship to his family. *Reid*, Supp. App., A699-701(¶¶4-6, 10, 18-19). Mr. Whyte eventually won his petition for review at the First Circuit, which vacated his removal order because Mr. Whyte's conviction was not even a removable offense. *Whyte* v. *Lynch*, 807 F.3d 463, 465 (2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016).

3. Once the facts are properly considered, immigration detainees' liberty interests deserve far greater weight, and the government's interests far less weight, than the Court articulated in *Demore*

Despite acknowledging the extraordinary errors in its representations to the Court in *Demore*, the government's suggested remedy is woefully insufficient; the government asks only that the Court "amend its

opinion to delete [the five-month] clause." *Demore* Gov. Letter 3. Amici respectfully suggest the problems created by the government's inaccurate submission in *Demore* are not so narrowly confined. The Court's acceptance of the government's figures was not a passing statement, but rather a core basis of the opinion, and "delet[ion]" of the Court's reliance on them calls for a reevaluation of the opinion's reasoning and result.

The Court's mistaken assumptions about the brevity of mandatory detention were essential to its ruling that a noncitizen's liberty interest in avoiding confinement deserved slight regard in the due process analysis. *See Demore*, 538 U.S. at 513, 526, 530. But the facts as now revealed, both through the government's admissions and the developed record in this case, show that individuals who spend months or years in detention challenging their removal and winning their cases have a much stronger liberty interest than the Court previously articulated. Every circuit that has addressed the issue since *Demore* has so found, concluding that prolonged mandatory detention under Section 1226(c) raises serious concerns under the Due Process Clause. *See, e.g.*, *Reid*, 819 F.3d at 494; *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011) ("We do not believe that Congress intended to authorize prolonged, unreasonable[ ] detention without a bond hearing.").

Moreover, the government's interest in subjecting noncitizens to prolonged detention without any individualized process is diminished for those individuals who are pursuing substantial challenges to their removal. Because those individuals are seeking to vindicate their right to remain in the United States, the government's interest in detaining them is much lower than for those who concede removability. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("[T]he ultimate purpose be-

hind [Section 1226(c)] detention is premised upon the alien's deportability."); *Reid*, 816 F.3d at 500 ("As the likelihood of an imminent *removal* order diminishes, so too does the government's interest in detention *without a bond hearing*."); *see also id.* at 499 ("As Justice Kennedy noted in his *Demore* concurrence, the government's categorical denial of bond hearings is premised upon the alien's *presumed* deportability and the government's *presumed* ability to reach the removal decision within a brief period of time." (citing *Demore*, 538 U.S. at 531 (Kennedy, J., concurring))).

The Court's assumption that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight" (538 U.S. at 520) has also been undermined. The Court relied on data suggesting "that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings." *Id.* In this case, the government claims that, in 2015, 41% of "initial case completions by immigration judges for released aliens … were *in absentia* orders after the alien absconded." Pet. Br. 22.

Once again, there are several reasons to be skeptical of the government's *in absentia* figures. Had the government subjected its statistical assertions to adversarial testing, the courts below would have been able to consider them in light of recent analysis by the Transactional Records Access Clearinghouse ("TRAC"), which found that the actual rate in 2015 of individuals who failed to appear after being released on bond by an Immigration Judge ("IJ") was only 14%. *See* TRAC, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, App. Table 3 (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/. TRAC explains that the government's 41% figure is a serious mischaracteriza-

tion for three reasons. First, the government ignores that its figure pertains to *all* releases that lead to *in absentia* orders, not only individuals released by IJs after bond hearings. *Id.* Second, the government's figure reflects the outcome only of initial proceedings, not final proceedings; individuals who inadvertently miss a hearing, successfully reopen their cases, and appear at later hearings are still counted as "*in absentia*" by the government. *Id.* at n.7. Third, the government's supposed *in absentia* rate arbitrarily excludes "around a quarter of the cases" that immigration courts decided in favor of the noncitizen in 2015. *Id.* And, as the following section demonstrates, the actual *in absentia* rate would decrease even further if the government were to employ alternative methods of addressing flight risk developed since *Demore*.

Demore is the second immigration case in which the government has recently admitted providing inaccurate information to this Court. In 2012, the government informed the Court that, in *Nken* v. *Holder*, 556 U.S. 418 (2009), the government had erroneously argued that it had a "policy and practice" of restoring deportees who won their cases to their pre-removal status—a representation on which the Court had relied in the *Nken* opinion. Letter from Deputy Solicitor General Michael R. Dreeben to Hon. William K. Suter, *Nken*, No. 08-681 (Apr. 24, 2012); *see* 556 U.S. at 435. The government's errors in *Demore* and *Nken* are not surprising; factual assertions submitted for the first time in this Court have not been tested through the adversary process of discovery and cross-examination, but rather represent one litigant's hearsay statements about its own practice. The Court has now been twice bitten; it should be especially wary of relying on untested government statistics when weighing critical liberty interests.

B. The Government's Interest In Mandatory Detention Is Also Significantly Lower Due To Changes In Detention And Removal Procedures

The government's interest in mandatory detention is also significantly less forceful than it was at the time *Demore* was decided because procedures have since been adopted that provide alternatives to Section 1226(c)'s blanket detention regime.

1. Alternatives to detention

In 2003, the government's primary means of ensuring that individuals appeared for their removal proceedings was to detain them. Since then, the government has implemented alternative-to-detention programs that allow detainees to be released on bond and other conditions of supervision, which have significantly reduced the risk that they will fail to appear at immigration proceedings.

The government's primary alternative-to-detention program for individuals in removal proceedings is the Intensive Supervision Appearance Program ("ISAP"), which was launched in 2004. Operated by the private firm BI Incorporated, ISAP employs a comprehensive case management system and location monitoring systems to facilitate hearing attendance and compliance with final court orders. *See* The Intensive Supervision Appearance Program, https://bi.com/immigration-services/ (last visited Oct. 24, 2016). ISAP has two supervision options. The "full-service" option includes intensive case management, in-person supervision, unannounced home visits, employer verification, electronic monitoring technology, and individual service plans incorporating legal, translation, and transportation services, referrals to community resources, and departure

preparation. *Id.* The "technology-only" option consists of electronic monitoring only. *Id.* The electronic monitoring services, used for both options, include ankle bracelets that enable Global Positioning System ("GPS") monitoring or the installation of biometric voice recognition software for telephonic reporting. U.S. Gov't Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* 10-11 (2014), *available at* http://www.gao.gov/assets/670/666911.pdf.

ISAP has been effective at ensuring that individuals in removal proceedings do not abscond.[5] From 2011 to 2013, "over 99 percent" of participants in the full-service program "with a scheduled court hearing appeared at their scheduled court hearings." *Id.* at 30; *see also* J.A. 565 (testimony of Eric Saldana, U.S. Immigration and Customs Enforcement ("ICE") Assistant Field Office Director, stating that compliance with ISAP in the San Bernardino, California area is "at, if not close to, 100 percent … for people going to their immigration court hearing pre-order"). As ICE's 2016 congressional budget request states, ISAP "can be a cost-effective way to ensure individuals' appearances for immigration hearings and for removal" and "significantly lowers the risk that aliens ordered removed will become fugitives." Dep't of Homeland Sec., *U.S. Immigration and Customs Enforcement Salaries and Expenses* 3 (2016),

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[5] Community-based alternative-to-detention programs remain preferable to electronic monitoring. Community-based programs help ensure immigrants' attendance at their removal proceedings without restrictions on their liberty and facilitate their access to legal services and culturally appropriate case management. Lutheran Immigration and Refugee Service, *Community-Based Alternatives to Immigration Detention*, http://lirs.org/our-work/people-we-serve/immigrantsfamilies/alternatives-to-detention/ (last visited Oct. 24, 2016).

available at https://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

2. Risk assessment tools

At the time of *Demore*, the government did not have sophisticated tools to assess which Section 1226(c) detainees would pose a greater flight risk or public safety threat, and accordingly argued that it had a pressing need to detain all of them. Since then, many states have developed risk assessment tools for pretrial criminal detainees that, as empirical studies have demonstrated, accurately predict flight risk and likelihood of reoffending. Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (2015), *available at* http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20(May%202015).pdf.[6]

ICE also implemented its own risk assessment tool in 2013, called the Risk Classification Assessment ("RCA"), to assess which immigration detainees can safely be released during the pendency of removal proceedings. *See* Noferi & Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immig. L.J. 45, 48

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[6] *See also* Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release* 54 (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (recommending that every jurisdiction "establish a pretrial services agency or program to ... present risk assessments"); Nat'l Conf. of Chief Justices, Resolution 3 (Jan. 30, 2013), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx (urging "adoption of evidence-based assessment of risk in setting pretrial release conditions").

(2014). Using information gathered from an intensive interview when the noncitizen is first detained, the RCA assigns risk scores, which classify each individual as "high," "medium," or "low" risks of flight and danger. *Id.* at 47-48. ICE then uses the risk scores to generate standardized recommendations for (1) detention or release; (2) custody classification level for detained individuals; (3) immigration bond amount, if applicable; and (4) community supervision level (including ISAP) for released individuals. *Id.* at 65. Although commentators have criticized the RCA as being biased in favor of detention, *id.* at 76-81, ICE's adoption of the RCA shows that it has the capacity to develop more precise and empirically grounded mechanisms for making detention and release decisions.

Furthermore, a recent study based on 485 RCA scores found that "mandatory detainees are no more dangerous, or risky, than any other immigrant in immigration custody," including those who are eligible for bond or released outright. Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, Laws 15 (2016), *available at* http://www.mdpi.com/2075-471X/5/3/30/htm. For example, 75% of mandatory detainees were classified by ICE as only medium or low risks to public safety. *Id.* at 9. These scores were similar to those for individuals for whom ICE is permitted to make a discretionary determination as to their bond or release. *Id.* Mandatory detainees were also found to pose a *lower* flight risk than discretionary detainees; most of their convictions were for minor non-violent crimes, and many had strong family and community ties. *Id.* at 10-11. Overall, under ICE's own guidelines, 5% of those mandatorily detained should have been released outright, and 48% should have been referred to a supervisor for a discretionary detention decision. *Id.* at 9.

Although the RCA has not been supported by empirical research—and may still lead to more detention than is appropriate—the government's application of risk assessment to immigration detainees demonstrates two critical facts: First, ICE has the capacity to develop refined tools that would more accurately predict which individuals should be detained and which can safely be released; and second, its own risk assessment tool demonstrates that many immigrants subject to mandatory detention can be safely released.

Thus, unlike at the time of *Demore*, ICE is now able to make, and does make, individualized assessments regarding flight risk and danger, and many individuals currently subject to mandatory detention are—under ICE's own assessment criteria—no more a risk of flight or to public safety than those who are eligible for release on bond or released outright.

3. Increased detention space

In *Demore*, the Court credited Congress's concern that "criminal aliens" were released from detention not based on whether they "present[ed] an excessive flight risk or threat to society," but rather based on "severe limitations on funding and detention space." 538 U.S. at 519; *see also id.* at 563 (Souter, J., dissenting) (limited detention space "meant that the INS often could not detain even the aliens who posed serious flight risks" and "had led the INS to set bonds too low"); *id.* at 563-564 (flight "rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities" (internal quotation marks omitted)). Congress noted that "the INS had only 3,500 detention beds for criminal aliens in the entire country." *Id.* at 563 (citing S. Rep. No. 104-48 (1995), at 23).

That problem no longer exists. Due to a series of congressional directives and administrative decisions, beds for immigration detainees have increased significantly. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2498 (providing funding to ICE so that it "shall maintain a level of not less than 34,000 detention beds").

* * *

Demore was based on factual assertions that were wrong when proffered and are wrong today. The record in this case—and even EOIR's new data—show that respondents' liberty interest is far stronger and the government's countervailing interest far weaker than the Court previously suggested. At the very least, therefore, *Demore* should be confined to the factual predicate on which it purportedly rested, and which plainly does not govern the very different facts presented in this case. As the balance of this brief shows, however, *Demore*'s constitutional analysis was incorrect even on its own factual premises, because it was and remains irreconcilable with the Court's due process jurisprudence in the civil detention context.

II. *DEMORE* WAS INCORRECT EVEN ON ITS OWN PREMISES AND SHOULD BE OVERRULED

A. The Constitution Requires That Deprivations Of Individual Physical Liberty Result From An Individualized Determination Of Flight Risk And Danger—Including For Immigrants

The "Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (emphasis added). "Freedom from imprison-

ment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 690; *see also Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997) ("[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992))). Accordingly, physical detention requires "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356). In particular, due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

Furthermore, due process prohibits detention without "adequate procedural protections." *Zadvydas*, 533 U.S. at 690. In numerous cases decided before *Zadvydas*, this Court made clear that "adequate" protections must include individualized process in which the government bears the burden of proving to a neutral factfinder that detention is necessary. For example, in upholding the constitutionality of pretrial detention without bond under the Bail Reform Act, this Court stressed that the act permitted such detention only after "a full-blown adversary hearing" in which "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *United States* v. *Salerno*, 481 U.S. 739, 750 (1987). Likewise, in *Hendricks*, this Court upheld a state statute permitting involuntary civil commitment for certain sex offenders because the statute required "strict procedural safeguards" including a

jury trial and proof beyond a reasonable doubt. 521 U.S. at 368; *see also Addington* v. *Texas*, 441 U.S. 418, 433 (1979) (state may not civilly commit a mentally ill individual without showing by "clear and convincing evidence" that the person was dangerous to others). And in *Foucha*, this Court struck down a state civil commitment statute that placed the burden on the detainee to prove eligibility for release. 504 U.S. at 81-83.

Due process also requires that the class of persons subject to confinement be narrow and the duration of confinement appropriately limited. *Zadvydas*, 533 U.S. at 691. For example, in *Salerno*, this Court emphasized that no-bond pretrial detention could apply only to defendants suspected of "the most serious of crimes" and that pretrial detention was temporally limited "by the stringent time limitations of the Speedy Trial Act." 481 U.S. at 747. The statute in *Hendricks* similarly permitted detention only of "a limited subclass of dangerous persons" who had committed "a sexually violent offense" and who suffered from "a mental abnormality or personality disorder" disposing them to sexual violence—and even then, detention was reviewed annually. 521 U.S. at 357 (internal quotation marks omitted). Conversely, the statute this Court struck down in *Foucha* contained no time limitation. 504 U.S. at 82.

This Court made clear in *Zadvydas* that these principles apply with equal force to immigration detention. The government had argued that the relevant statute, 8 U.S.C. § 1231(a)(6), placed no limit on the length of time for which a person ordered removed could be detained while the government attempted to effectuate removal. 533 U.S. at 689. This Court observed that the government's reading raised "serious" and "obvious" constitutional problems. *Id.* at 692. In particular, the statute did not narrowly target particularly dangerous nonciti-

zens, but rather affected "aliens ordered removed for many and various reasons, including tourist visa violations," and was not subject to time limitations like those that saved the pretrial detention statute in *Salerno*. *Id.* at 691. The Court addressed those due process concerns by construing the statute to permit detention only for a "presumptively reasonable" period of six months, after which "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 700-701. In so holding, the Court applied due process standards from prior civil detention cases outside the immigration context, including *Jackson*, *Salerno*, *Foucha*, and *Hendricks*. *See id.* at 690-691. Nowhere did the Court in *Zadvydas* suggest that the protected liberty interest in avoiding physical confinement, or the amount of process due before depriving someone of that interest, was any different in the immigration context—even for persons already ordered removed—compared to those earlier cases. *See Demore*, 538 U.S. at 552-554 (Souter, J., dissenting).

The Court has also affirmed these standards in the years since *Zadvydas* and *Demore*. In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), this Court considered the process necessary to detain a U.S. citizen as an enemy combatant. A majority of the Court agreed that "this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law." *Id.* at 528 (plurality opinion) (citing *Zadvydas*, 533 U.S. at 690; *Addington*,

441 U.S. at 425-427).[7] While recognizing "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," the majority nevertheless concluded that Hamdi was entitled to notice of the government's asserted basis for detention, and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 531, 533 (plurality opinion); *see also id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting agreement that "someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker").[8]

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[7] The plurality in *Hamdi* concluded that if a person was determined to be an enemy combatant after sufficient process, detention would be authorized under the post-September 11, 2001 Authorization for Use of Military Force ("AUMF"). 542 U.S. at 517. Justices Souter and Ginsburg agreed as to the minimum process necessary for determining enemy combatant status, but disagreed that the AUMF would authorize Hamdi's detention even if he were an enemy combatant. *Id.* at 540-541 (Souter, J., concurring in part and dissenting in part).

[8] The distinction drawn in *Hamdi* between the process required for *initial* detention on the battlefield and the process required for continued detention away from the fight echoes the distinction Mr. Kim raised in *Demore*. The parties in *Hamdi* agreed that "initial captures on the battlefield need not receive the process" the plurality opinion described, and that such process was "due only when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 542 U.S. at 534 (emphasis in original). Likewise, in *Demore*, Mr. Kim's challenge was not to his *initial* arrest by immigration authorities, but rather his continued detention by the government without a bond hearing. *See Demore*, 538 U.S. at 514 n.2 ("[Respondent] does not challenge INS's authority to take him into custody after he finished serving

Although *Hamdi* concerned the detention of a U.S. citizen on U.S. soil, 542 U.S. at 509, nothing in *Hamdi* suggested that its due process analysis would not apply to *noncitizens* detained on U.S. soil. To the contrary, in discussing the procedural protections required for detention, *see id.* at 528-534, the Court repeatedly relied on prior cases, including *Zadvydas*, that discussed the process due before locking up "persons" or "individuals," not only "citizens." *See, e.g.*, *Zadvydas*, 533 U.S. at 693; *Addington*, 441 U.S. at 419-420 ("The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital."); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause[.]"); *Foucha*, 504 U.S. at 79 ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Salerno*, 481 U.S. at 755 (permitting "detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing" to be dangerous).

Moreover, immigration detention leads to ancillary deprivations of other constitutionally protected liberties. As the court of appeals ruled in this case, detained immigrants are isolated from their families and are unable to work, creating economic hardship for themselves and their families, which often include U.S. citi-

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his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk.").

zens. Pet. App. 20a-21a. Furthermore, detained immigrants are at risk of prison-related harms, including sexual assault and lack of adequate medical care. J.A. 30(¶62); Human Rights Watch, *US: Immigration Detention Neglects Health* (Mar. 17, 2009), https://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health. All of these harms implicate constitutionally protected liberty interests. *See, e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982) ("the right to rejoin [one's] immediate family [is] a right that ranks high among the interests of the individual" (citing *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499, 503-504 (1977) (plurality opinion))); *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause").

These additional deprivations increase the need for individualized process before imposing detention. *See Hamdi*, 542 U.S. at 529 (plurality opinion) (process due is determined by "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest" (quoting *Mathews* v. *Eldridge*, 424 U.S. at 335)). Indeed, this Court has required individualized process where a state seeks to deprive an individual of rights less weighty than physical liberty. *See, e.g.*, *Santosky* v. *Kramer*, 455 U.S. 745, 748 (1982) (due process requires proof by clear and convincing evidence prior to termination of parental rights).[9] At least as much process is required before locking someone up for months or years.

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[9] *See also*, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1,

B. The *Demore* Court's Creation Of A Different Constitutional Principle For Physical Liberty Of Immigrants Was Erroneous And Should Be Overruled

The Court in *Demore* departed from the due process principles discussed above, even on the facts the Court believed were before it. As Justice Souter noted in dissent, "[d]etention [under the statute] is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor," such as "possession of stolen bus transfers" or "issuance of a bad check." *Demore*, 538 U.S. at 558 (Souter, J., dissenting). Nor is Section 1226(c) detention "limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year." *Id.* Furthermore, under the government's reading of the statute, "Section 1226(c) neither require[d] nor permitt[ed] an official to determine whether [an immigrant's] detention was necessary to prevent flight or danger." *Id.* Thus, *Zadvydas*—and the precedent on which it rested—supported Mr. Kim's claim for individualized process to justify detention. *Id.* at 554.

In attempting to distinguish *Zadvydas*, the Court in *Demore* first stated that, because *Zadvydas* concerned post-final-order immigrants for whom removal

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16 (1978) (due process requires, at minimum, opportunity for utility clients to argue their cases prior to termination of service); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979) (in-person hearing required for recovery of excess Social Security payments where beneficiary was at fault because "written review hardly seems sufficient to discharge the Secretary's statutory duty to ... assess the absence of 'fault'").

was "'no longer practically attainable,'" that detention no longer served its immigration purposes, whereas pre-final-order detention did. *Demore*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690). That distinction was flawed; as the Court in *Zadvydas* noted, post-final-order detention was designed to serve the same purposes as Section 1226(c) detention: "preventing flight" and "protecting the community." 533 U.S. at 690-691. And as Justice Souter explained, Section 1226(c) detention of individuals with meritorious challenges to removal no more serves the government's purposes than the detention of petitioners in *Zadvydas* whose removal was no longer reasonably foreseeable. *See Demore*, 538 U.S. at 561 (dissenting opinion).

Moreover, determining what process is due necessarily requires a "balance" between the individual's liberty interests and the government's stated purpose. *Mathews* v. *Eldridge*, 424 U.S. at 47. Thus, even if it were true that the detention in *Demore* served its purpose while the detention in *Zadvydas* did not, due process still required the Court to weigh the competing interests to determine whether detention without individualized process was justified. The closest the *Demore* majority came to performing such a balancing was to point to the evidence that Congress considered when enacting Section 1226(c), which supposedly showed that "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." 538 U.S. at 528. However, as Justice Souter pointed out, the relevant evidence before Congress—in particular, a Senate report showing that 20% of nondetained "criminal aliens" failed to appear—recognized that detention decisions were being made

"*not* on the ground of likelihood of flight or dangerousness, but 'in large part, according to the number of beds available in a particular region.'" *Id.* at 563 (dissenting opinion) (emphasis added). Thus, the data considered in *Demore* was premised on the fact that bond determinations were not made based on flight risk or danger, but were motivated by resource-based considerations. Release decisions made under such circumstances say nothing about whether the government's interests outweigh an individual's liberty interest when an IJ determines that the individual is neither a danger nor a flight risk. *Id.*

The Court in *Demore* also cited a study discussing flight rates for immigrants who had *already* been ordered removed. 538 U.S. at 519, 521. But such a report could not have shed any light on whether mandatory detention was justified for people who were still fighting removal, as respondents here are—and Mr. Kim was as well. *Id.* at 541-543 (Souter, J., dissenting); *see supra* n. 4. Indeed, the Court had before it evidence that LPRs like Mr. Kim were more likely to prevail in their removal proceedings. *Id.* at 567-568.

The Court in *Demore* also ruled that detention under Section 1226(c) was of a "much shorter duration" than the "'indefinite' and 'potentially permanent'" detention in *Zadvydas*. 538 U.S. at 528 (quoting *Zadvydas*, 533 U.S. at 690-691). But the premise of "much shorter" detention depended on averaging together detention periods for individuals challenging removal (like Mr. Kim) with detention periods for individuals who did not challenge removal at all, which the government conceded at the time represented the "vast majority" of cases. *Id.* at 567-568 (Souter, J., dissenting). Thus, to the extent *Demore* conducted any balancing of individual and government interests, the scales

were artificially tipped in the government's favor. Moreover, while *Zadvydas* happened to address a type of civil detention that could be permanent, the logic of *Zadvydas* was based on precedent that applied to civil detention more broadly, even where the detention was temporally limited. *See, e.g.*, *Salerno*, 481 U.S. at 750-752 (hearing required for pretrial detention even though Speedy Trial Act limited detention period).

Demore also invoked the Court's statement in *Mathews* v. *Diaz* that "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore*, 538 U.S. at 521 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 (1976)). But as the very next sentence in *Diaz* shows, the Court was referring to the government's unique power to expel immigrants from the country: "The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." 426 U.S. at 80. Nothing in *Diaz* suggested that Congress's plenary power over *immigration*—the authority to admit noncitizens to and remove them from the Nation's territory—amounted to a plenary power over the physical liberty of *immigrants*. Indeed, *Zadvydas* decisively rejected any such notion by emphasizing the applicability of the Due Process Clause to noncitizens and by relying on civil detention precedent from the non-immigration context. 533 U.S. at 690-694.

Demore was also incorrect to rely on *Carlson* v. *Landon*, 342 U.S. 524 (1952), and *Reno* v. *Flores*, 507 U.S. 292 (1993). *Demore*, 538 U.S. at 523-526. In *Carlson*, unlike in *Demore*, there had already been an individualized finding that each of the petitioners was a "menace to the public interest." 342 U.S. at 541. More-

over, the statute at issue in *Carlson*, the Internal Security Act of 1950, specifically targeted individuals who were engaged in activities or who were members of organizations that Congress thought were especially dangerous; for example, the Act targeted Communists based on Congress's "understanding of [Communists'] attitude toward the use of force and violence ... to accomplish their political aims." 342 U.S. at 527 n.5, 541. To the extent *Carlson* was relevant at all, it reinforced the principle that civil detention may apply only to a narrow class of persons (*see supra* pp. 20-21), whereas Section 1226(c) sweeps up individuals with no record of dangerous activity whatsoever. *Flores* was also off-point; the Court there rejected a claimed right of immigrant *juveniles* to be released to an alternative private custodian when no parent was available, because such a right was not fundamental. 507 U.S. at 302, 305 ("[I]mpairment of a lesser interest … demands no more than a 'reasonable fit' between governmental purpose … and the means chosen to advance that purpose."). *Flores* did not involve the fundamental right to physical liberty; indeed, the children at issue in *Flores* were eligible for bond hearings. *Id.* at 308-309.

Put simply, *Demore*'s constitutional analysis was not consistent with this Court's unbroken line of decisions applying the Due Process Clause, and it should be overruled.

C. *Stare Decisis* Does Not Save *Demore*

The doctrine of *stare decisis* does not prevent the Court from reconsidering and overruling *Demore*.

"Although 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,] ... [o]ur precedents are not sacrosanct.' ... '[W]e have overruled prior

decisions where the necessity and propriety of doing so has been established.'" *Hurst* v. *Florida*, 136 S. Ct. 616, 623 (2016) (quoting *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)). Although the Court requires some "special justification" to depart from precedent, *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), the existence of such a justification rests on a consideration of multiple factors, *see Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). The factors to be considered are "workability, ... the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 792-793 (citing *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)). The Court has also considered whether the "great weight of scholarly opinion has been critical" in determining whether to overrule a prior case, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977), and whether the prior decision relied on a factually flawed premise, *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 399 (1937). These considerations all weigh in favor of overruling *Demore*.

From a *stare decisis* perspective, *Demore* is a relatively recent decision. *See, e.g., Montejo*, 556 U.S. at 793 (overruling a decision partially on the basis that it is "only two decades old"). As explained above, *Demore* represents an unjustified deviation from an otherwise unbroken line of due process cases requiring individualized procedures to determine whether civil detention is justified. Accordingly, this Court's observation in *Adarand Constructors, Inc.* v. *Pena* is apt:

> Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely

> make the unjustified break from previously established doctrine complete.

515 U.S. 200, 231 (1995); *see also id.* at 233-234 (noting that, because a more recent case "itself *departed* from our prior cases—and did so quite recently … refusing to follow" that case "do[es] not depart from the fabric of the law" but "restore[s] it" (emphasis in original)).

In addition, *Demore* has been "consistently criticized by commentators," *Adarand*, 515 U.S. at 232, which further counsels overruling it. For example, *Demore* has been described as "significant—and troubling because its application of the plenary power doctrine to the detention of permanent resident aliens runs counter to two important undercurrents of the Court's immigration jurisprudence: the treatment of immigration detention as a procedural issue governed by normal due process principles, and the understanding that permanent resident aliens are entitled to robust constitutional protection." *The Supreme Court, 2002 Term: Leading Cases: i. Constitutional Law: d. Due Process*, 117 Harv. L. Rev. 287, 291 (2003); *see also* Lindsay, *Immigration As Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 Harv. C.R.-C.L. L. Rev. 1, 3, 55 (2010) (describing *Demore*'s invocation of the plenary power as "constitutionally and morally striking"); Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 862 (2013) (describing *Demore* as "remarkable insofar as it is the first time that the Supreme Court has upheld categorical preventive detention outside of a wartime context" and noting that "decisions in *Zadvydas* and [*Demore*] have arguably sent mixed signals").

Demore has also proven unworkable in the lower courts. Every circuit to have considered the question

has determined that there must be *some* constitutional limit on mandatory detention under Section 1226(c), but those courts have disagreed on what the limit is. *See Sopo*, 825 F.3d at 1212-1213 (collecting cases); Pet. 29. This Court has found such confusion among lower courts to be grounds for revisiting prior precedent. *See, e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2560, 2562 (2015) (overruling precedent upholding residual clause of Armed Career Criminal Act where clause had "created numerous splits among the lower federal courts" and "the experience of the federal courts [left] no doubt about the unavoidable uncertainty and arbitrariness of adjudication").

The government cannot claim any significant reliance interest on *Demore*. As discussed above, alternatives to detention and risk assessment tools can effectively serve the government's goals of protecting the public and preventing flight. *See supra* pp. 13-18. Moreover, due process would require only that immigrants potentially subject to detention under Section 1226(c) should have an opportunity to contest the need for detention. Given that the government routinely holds such bond hearings for other immigrants challenging detention, it cannot plausibly claim to have "relied" on *Demore* in any cognizable way.[10]

In addition, "the force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 n.5 (2013). *Demore* most assuredly concerns "procedural rules that implicate

[10] Permitting immigrants who are not dangerous or a flight risk to be released on bond or other conditions can actually *save* money for the government, given the high cost of detaining each individual. J.A. 529 (Fig. 2); J.A. 88-89 (Table 18).

fundamental constitutional protections"; *Zadvydas* clearly recognized that an immigrant's interest in physical freedom was a fundamental interest protected by the Constitution, 533 U.S. at 690, and nothing in *Demore* suggests otherwise.

Finally, this Court "would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it." *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009). Given the significant errors in the factual assumptions that underlay the Court's decision in *Demore*, the Court should at the very least decline to apply *Demore* to this case. Neither before nor since *Demore* has this Court endorsed the type of detention without individualized process that the government seeks to impose here; to the contrary, this Court has consistently rejected it.

Demore was inconsistent with the Court's settled due process doctrine and should be overruled. At the very least, it should be treated as nothing more than a narrow exception that applies *only* to the facts that the Court erroneously believed were before it: brief mandatory detention at the outset of removal proceedings. Either approach warrants rejection of the government's position in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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