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

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

REPLY BRIEF FOR THE PETITIONERS

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

In the Supreme Court of the United States

No. 15-1204

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

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

REPLY BRIEF FOR THE PETITIONERS

Respondents brought this sweeping class action asking whether aliens detained during removal proceedings must be given bond hearings before an immigration judge (IJ), and thus be potentially released, after six months. The court of appeals answered that question in the affirmative as a matter of statutory interpretation. The controlling text, however, clearly establishes that the court of appeals was wrong. Indeed, 8 U.S.C. 1226(c) provides that the Secretary of Homeland Security "shall take into custody" a covered criminal alien during removal proceedings, and "may release" him "*only if*" a narrow and inapplicable exception is satisfied. *Ibid.* (emphasis added). That plainly precludes any additional, unwritten exceptions. And for a century, 8 U.S.C. 1225(b) and its predecessors have provided that an alien seeking admission "shall be detained" pending removal proceedings if he

is "not clearly and beyond a doubt" entitled to be admitted. *Ibid.* Such aliens have been released in the interim, if at all, solely via the Executive's discretionary parole authority. Bond hearings before an IJ have never been available.

Respondents have little to say about the controlling statutory text. In defending the six-month cap, respondents instead primarily contend that Sections 1225(b) and 1226(c) can be unconstitutional in some applications. But they do not contend that the Due Process Clause would itself require a rigid six-month cap. And the canon of constitutional avoidance does not apply when the statutory text is clear or when the supposed saving construction would subvert Congress's intent. Here, the detention of criminal aliens and aliens seeking admission is a vital, intended, and clear feature of U.S. immigration law, not a problem Congress wanted to avoid.

Moreover, even the court of appeals recognized that Section 1225(b) is plainly constitutional in "likely the vast majority" of its applications. Pet. App. 86a. To the extent doubts could conceivably arise in an extraordinary case involving a lawful permanent resident (LPR) returning from abroad, those doubts would appropriately be resolved in an as-applied challenge to the provision that authorizes treatment of an LPR as an applicant for admission in narrow circumstances, 8 U.S.C. 1101(a)(13)(C), not a sweeping challenge to Section 1225(b).

Similarly, under *Demore* v. *Kim*, 538 U.S. 510 (2003), Section 1226(c) is constitutional in the vast majority of its applications. Given Section 1226(c)'s unambiguous mandate, challenges to its constitutionality in outlier cases must be assessed in a case-by-

case inquiry that takes into account the unusual circumstances that made the case an outlier in the first place. There is no basis for imposing rigid rules that would blind courts to the case-specific reasons why removal proceedings are ongoing.

I. THE STATUTORY TEXT FORECLOSES THE COURT OF APPEALS' SIX-MONTH RULE

A. Section 1226(c) Forecloses A Six-Month Rule

Section 1226(c) is crystal clear. It mandates that the Secretary "shall" take specified criminal aliens into custody, and "may release" them during removal proceedings "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c). Respondents have no response. Indeed, the phrase "only if" does not appear in their brief.

Respondents nonetheless seek to defend the court of appeals' six-month cap by asserting (Br. 34) that Section 1226(c) "does not say for how long" detention lasts. That is incorrect. Section 1226 expressly governs detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). The statute provides that, during that period, the Secretary may either detain an alien or release him on bond—"*[e]xcept as provided in subsection (c)*." *Ibid.* (emphasis added). Section 1226(c)'s mandate therefore applies throughout removal proceedings.

Contrary to respondents' assertion (Br. 35), reading "only" to mean "only" does not render "superfluous" the USA PATRIOT Act (Patriot Act), Pub. L. No. 107-56, § 412(a), 115 Stat. 350-351. Section 1226(c) and the Patriot Act both mandate detention of terrorists, but the Patriot Act is broader in several key respects.

First, it mandates detention of an alien whom the Secretary certifies is engaged in "activity that endangers the national security of the United States." 8 U.S.C. 1226a(a)(3)(B). Section 1226(c) does not. Under the Patriot Act, the Secretary must renew his certification every six months, 8 U.S.C. 1226a(a)(7), but there is nothing comparable to a "*Joseph* hearing" for a criminal alien to challenge the basis for his mandatory custody, *Demore*, 538 U.S. at 514 n.3. And whereas detention under Section 1226(c) ends upon a decision "*whether* the alien is to be removed," 8 U.S.C. 1226(a) (emphasis added), detention under the Patriot Act lasts "until the alien *is removed,*" 8 U.S.C. 1226a(a)(2) (emphasis added). Congress has thus sensibly provided multiple, partially overlapping authorities for responding to terrorism, but they are different, not superfluous.

B. Section 1225(b) Forecloses A Six-Month Rule

1. Respondents make virtually no effort to defend the Ninth Circuit's interpretation of Section 1225(b) as mandating bond hearings for all covered aliens at six months. They devote less than a page (Br. 47-48) to that question, simply asserting that 8 U.S.C. 1225(b)(2)(A) "should be read" as capped at six months "for LPRs" returning from abroad—apparently to avoid supposed constitutional doubts—and that "[i]t follows" that 8 U.S.C.1225(b)(1)(B)(ii) should be construed the same way for asylum seekers with a credible fear of persecution.[1]

---

[1] The injunction here requires bond hearings for *all* aliens detained for six months during removal proceedings under Section 1225(b), not merely LPRs and asylum seekers. Pet. App. 140a-144a.

As our opening brief explains (Br. 24-29), the possibility that a returning LPR might be subject to detention under Section 1225(b) raises no significant constitutional problem, and in any event would not justify a six-month cap on detention of all aliens under Section 1225(b) without a bond hearing. If any constitutional question were to arise in an extraordinary case involving an LPR, it should be resolved in an as-applied challenge to Section 1101(a)(13)(C)—the provision allowing returning LPRs to be treated as seeking admission in narrow circumstances—not a broad attack on Section 1225(b).

Moreover, respondents never explain how Section 1225(b)(2)(A) can be fairly construed to mandate bond hearings at the six-month mark, for LPRs or anyone else. And it would not "follow[]" that Section 1225(b)(1)(B)(ii) should be interpreted the same way. That provision *never* applies to LPRs, and thus is constitutional in all of its applications under this Court's longstanding jurisprudence. This Court accordingly should reverse the judgment in favor of the Section 1225(b) subclass, which was based on those erroneous interpretations.

2. Respondents now primarily press a novel argument. They tacitly accept (Br. 42-44) that Section 1225(b) mandates detention, but contend that it applies only *before* removal proceedings begin, and that Section 1226(a) takes over at that point. In doing so, they seek to distinguish mandatory detention "for" removal proceedings in 8 U.S.C. 1225(b)(1)(B)(ii) and (2)(A), from detention "pending" a decision on removal, in 8 U.S.C. 1226(a). Mandatory detention "for" removal proceedings, they now insist (Br. 42), does not apply once removal proceedings begin.

Respondents forfeited this argument below. They obtained an injunction requiring bond hearings for aliens "detained under 8 U.S.C. § 1225(b)" for six months "pending completion of removal proceedings," Pet. App. 139a-140a, based on the subclass they defined on the same basis, *id.* at 108a, and their evidence about its members, *e.g.*, J.A. 97. Respondents cannot now argue that no such aliens exist and that the subclass is a null set.

Respondents claim (Br. 44 n.17) that they "had no occasion" to make this argument below because circuit precedent established that Section 1225(b) does not authorize "prolonged" detention during removal proceedings. But their new position is inconsistent with that precedent, because it would mean that Section 1225(b) does not authorize detention during removal proceedings at all—*not even for a single day*. No court has ever accepted that radical position, which would dramatically weaken the Secretary's ability to protect our Nation's borders.

3. Respondents' elaborate gloss on the word "for" is also wrong. Since 1917, Congress has mandated that aliens who are not clearly entitled to be admitted (or enter) "shall be detained *for*" proceedings to determine whether the alien should be removed. 8 U.S.C. 1225(b)(2)(A) (emphasis added); Immigration and Nationality Act, ch. 477, Tit. II, § 235(b), 66 Stat. 199 (same); Immigration Act of 1917, ch. 29, § 16, 39 Stat. 886 (same). Congress has repeatedly amended that provision without departing from the longstanding practice that parole is the exclusive means for releasing such aliens during removal proceedings.

Even if Section 1226(a) nonetheless somehow applied here, respondents' argument would still fail.

Section 1226(a) "does not grant bail as a matter of right." *Carlson* v. *Landon*, 342 U.S. 524, 540 (1952). Rather, that decision is left to the Attorney General's discretion. See 8 U.S.C. 1226(a) ("may"). Controlling regulations in turn provide that IJs "may not" conduct bond hearings for "[a]rriving aliens." 8 C.F.R. 1003.19(h)(2)(i)(B).[2] That regulation codifies the rule that has protected our Nation's borders for a century, and forecloses respondents' position.

II. RESPONDENTS' CONSTITUTIONAL ARGUMENTS REGARDING SECTION 1225(b) LACK MERIT

As explained above, Section 1225(b) cannot be read to impose a six-month cap. Nor would principles of constitutional avoidance support such an effort even if the text permitted it.

A. In urging the Court to impose a six-month cap out of supposed constitutional concerns, respondents ask this Court (Br. 27-31) to jettison the legal regime that has governed the border since 1917, and disregard *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). But this case provides no occasion for revolutionizing immigration law.

Even if the Court were someday to curtail the force of the entry doctrine, that would provide no basis for affirming. The Due Process Clause itself still could not be read to support a rigid six-month cap on detention under Section 1225(b) for every alien, regardless of individual circumstances. In addition, all nine Justices in *Mezei* agreed that the returning LPR could be indefinitely detained to effectuate his exclusion, if he

---

[2] This prohibition does not apply to the aliens in *In re X-K-*, 23 I. & N. Dec. 731 (B.I.A. 2005), who already entered the United States and thus were not "arriving aliens." *Id.* at 732.

was given notice of and opportunity to dispute the basis for his exclusion. *E.g.*, 345 U.S. at 222-223 (Jackson, J., dissenting). Every alien detained under Section 1225(b)(1)(B)(ii) or (2)(A) has those protections and more: They are in proceedings before an IJ; they can appeal; and the Secretary may release them on parole. Time spent in detention during removal proceedings in turn is ordinarily a signal that the alien is taking advantage of the process available to them, not that process is lacking.

Moreover, unlike in *Mezei*, detention here has a "definite termination point," *Demore*, 538 U.S. at 529; "likely the vast majority" of aliens detained under Section 1225(b) are *not* LPRs, Pet. App 86a; and many aliens here can voluntarily end detention simply by returning home. In *Mezei*, by contrast, the alien's home countries had refused to "take him back." 345 U.S. 207. Respondents' discussion of *Mezei* therefore furnishes no basis for sustaining a six-month rule.

B. In any event, respondents' radical argument lacks merit. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). And the Court in *Mezei* did more than "mention[]" detention. Resps. Br. 28. It affirmed the alien's exclusion and detention, which were flip sides of the same coin. See *Zadvydas* v. *Davis*, 533 U.S. 678, 694 (2001) (describing *Mezei* as rejecting "both" the alien's "challenge to the procedures by which he was deemed excludable" and "his challenge to continued detention").

Respondents contend (Br. 29-30) that *Mezei* is anachronistic. But "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered" is not unique to *Mezei*: it "runs throughout immigration law," *Zadvydas*, 533 U.S. at 693, and is central to maintaining the security and integrity of the Nation's borders. The *stare decisis* force of this deep-rooted and oft-repeated distinction is extraordinary. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972).

Respondents' reliance (Br. 27) on *Addington* v. *Texas*, 441 U.S. 418 (1979), is likewise misplaced. Aliens on the threshold of initial entry are in a fundamentally different position than U.S. residents. *Before* the U.S. resident in *Addington* was taken into custody, he was living here and indisputably had a substantive right to be at liberty inside the United States that could not be denied without due process of law. By contrast, aliens on the threshold of initial entry lack prior contacts with the United States and have failed to show that they are "clearly and beyond a doubt entitled" to be at liberty inside the United States at all. 8 U.S.C. 1225(b)(2)(A). It thus puts the cart before the horse—and conflicts with fundamental principles of sovereignty and constitutional authority, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950)—to argue that the Due Process Clause requires that aliens arriving at our borders must be given individualized IJ hearings to provide for their possible release into the United States during their removal proceedings. The point of removal proceedings is to decide *whether the alien should be allowed to be at liberty inside the United States in the first place.*

This Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (citation omitted); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). By contrast, a State's authority to deprive a resident of personal liberty has long been subject to close judicial supervision. See *Addington*, 441 U.S. at 425. *Addington* also involved confinement "for an indefinite period." *Id.* at 420. Detention here does not. See *Demore*, 538 U.S. at 528-529. And unlike individuals subject to *involuntary* civil commitment, aliens arrive at our borders through voluntary private conduct, and they can voluntarily end detention by returning home.

C. To be sure, some aliens fear persecution if returned home. But a detailed scheme exists for determining whether an asylum claim is *bona fide*, while preventing abuse of the system. Gov't Br. 2-4. Among other protections, aliens initially in expedited removal proceedings who establish a credible fear are referred for proceedings before an IJ. 8 C.F.R. 208.30(f). The policy of U.S. Immigration and Customs Enforcement (ICE) is to consider every such alien for release on parole and ordinarily to release them, unless ICE concludes that the alien has not adequately established his identity or is a security or flight risk. J.A. 48-49, 53-54.

Respondents allege that several asylum seekers were nonetheless improperly denied parole, and they claim (Br. 30-32) that parole is "not an adequate substitute for an IJ hearing." But the lower courts made no factual findings regarding respondents' allegations,

which were contested.[3] *E.g.*, D. Ct. Doc. 299-3, at 13-14 (Mar. 15, 2013); D. Ct. Doc. 303, at 22-27 (Mar. 15, 2013). And this class action would provide no basis for considering claims by particular asylum seekers (or LPRs returning from "brief travel abroad," Resps. Br. 31-32), because any such claim would depend on individualized considerations that could not support a rigid six-month cap. Nor is it (*id.* at 28 n.10) "arbitrary" to detain aliens arriving at our borders during removal proceedings when necessary to avoid a risk of flight or danger to the community. And such detention comports with the United States' obligations under international law. See Gov't C.A. Reply Br. 34 n.12.

III. RESPONDENTS' CONSTITUTIONAL ARGUMENTS REGARDING SECTION 1226(c) LACK MERIT

Section 1226(c)'s text likewise forecloses the six-month cap on mandatory detention the Ninth Circuit imposed as a matter of statutory interpretation, see pp. 3-4, *supra*, and principles of constitutional avoidance would not support such a rule.

In arguing otherwise, respondents contend (Br. 19) that *Demore* carved out only a "narrow exception" to what they assert is a general rule that individualized bond hearings are required as a precondition to confinement. But respondents rely (Br. 17-19) on domestic civil-commitment and criminal-law precedents. *Demore*, by contrast, relied on the distinct principles and precedent concerning Congress's broad power over

---

[3] For example, respondents assert (Br. 7) that one alien was mistakenly denied parole because of concerns about apparently correlated claims by Somali detainees, when he "was *not* Somali." That alien used a fake passport, had no valid documentation, and claimed his Somali-origin clan faced persecution. D. Ct. Doc. 281, Arulanantham Decl., Ex. 73, at 1-4; Ex. 74, at 1-2 (Feb. 8, 2013).

immigration, without characterizing its holding as a narrow exception. See 538 U.S. at 521-531. In any event, *Demore* leaves no room for the rigid six-month rule respondents defend.

A. Respondents Cannot Distinguish *Demore*

1. Respondents contend (Br. 12) that "the deprivation of liberty at issue here is greater than in *Demore*," as subclass members are "often" detained for longer than in *Demore*. But they are also "often" detained for comparable or shorter times. The alien in *Demore* (Hyung Joon Kim) was detained for 197 days before obtaining habeas relief, and this Court's judgment meant that he would be returned to custody until his removal proceedings finished. Gov't Br. 35-36 & n.11. That would certainly take time: Kim had not yet had his removal hearing, and he could later appeal. *Demore*, 538 U.S. at 530-531; see Am. Immigration Council et al. Amicus Br. 8 n.4 (asserting that Kim was detained ten more months). Many class members were released in shorter or similar periods. See J.A. 188 (44.3% of in-period class members released by 9 months, 67% by 12 months, and 84% by 16 months).[4] Moreover, Kim was an LPR who had lived in the United States virtually his entire life. *Demore*, 538 U.S. at 513. Many subclass members are not.

More fundamentally, any due process challenge to Section 1226(c) must be assessed in the context of the administrative adjudicatory system as a whole, under which the proceedings of the great majority of covered aliens are completed in a short period of time.

---

[4] The government's expert focused on "in-period" aliens to correct for a selection bias in the sampled data. J.A. 140-143. Figures are similar even without this correction. J.A. 188.

See pp. 17-19, *infra*. That assessment must also take into account the many procedural protections afforded to aliens for contesting removability or seeking relief from removal. Aliens' invocation of those opportunities can lengthen proceedings and, hence, detention. The subclass of aliens here, consisting of aliens detained under Section 1226(c) for more than six months, reflects that unremarkable aspect of the overall adjudicatory system.

Self-selection of cases that take longer to resolve thus cannot itself make detention under Section 1226(c) unconstitutional. Section 1226(c) is constitutional so long as detention serves its "purported immigration purpose" of preventing fight and recidivism. *Demore*, 538 U.S. at 527; see *id.* at 532-533 (Kennedy, J., concurring). It thus matters *why* a particular detained alien's proceedings have not been completed, including whether the alien sought continuances, contested the charges of removability, sought relief from removal notwithstanding that he is removable, filed an appeal, or engaged in dilatory tactics. A rigid cap, however, precludes consideration of the reasons why an outlier case is an outlier in the first place.

Respondents contend (Br. 23-24) that aliens often have good reasons to seek continuances. But this Court upheld Kim's detention during a continuance he sought "to obtain documents" to support his request for relief from removal. *Demore*, 538 U.S. at 531 n.15. And the reasons for seeking continuances, their number, and their length, are highly individualized.

Respondents contend (Br. 25) that class members "do not control how long the [Board of Immigration Appeals (BIA)] and circuit courts take to resolve appeals." But IJs and the BIA prioritize cases involving

detained aliens. Gov't Br. 49. And in the end, an alien must make the "difficult judgment[]" whether to appeal an adverse decision notwithstanding that detention is mandatory during the appeal. *Demore*, 538 U.S. at 530 n.14 (citation omitted). Aliens who choose to petition for judicial review and to seek a stay of removal also can request the court to expedite their cases. For example, respondents highlight (Br. 55) that Alejandro Rodriguez spent "three years and three months" in detention. But three quarters of that time was under a stay of removal he requested. See Br. in Opp. 9 ("approximately nine months" in agency proceedings).

2. Respondents assert (Br. 12, 19) that *Demore* was based on Kim's concession that he was deportable, whereas, they say, many aliens here do not make that concession. But contrary to respondents' assertion (Br. 20 n.5), an alien is "deportable" if the charges against him are valid. *E.g.*, 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony * * * is deportable."). Relief from removal thus might prevent an alien from "*ultimately be[ing] deported*," but not from being "*deportable*." *Demore*, 538 U.S. at 523 n.6. This Court's analysis also does not indicate why Kim's concession that he was deportable would make a difference; instead, the Court noted that aliens could request a "*Joseph* hearing" to challenge the basis for mandating detention. *Id.* at 514 n.3. Moreover, the subclass likely includes many aliens who concede they are deportable. Indeed, challenges to deportability appear to be uncommon and rarely succeed. See J.A. 96 (only 20 of 460 subclass cases were "terminated").

Respondents contend (Br. 13) that "a large majority of Class members present substantial defenses to removal" and "have powerful incentives to appear" that "were largely absent in *Demore*." But that is no distinction: Kim himself applied for withholding of removal; his counsel characterized that as presenting a "substantial question not for purposes of delay," *Demore* Oral Arg. Tr. 42, and his counsel argued that LPRs have "an obvious incentive to appear for removal hearings" because they have "the strongest claims to relief from removal," *Demore* Resp. Br. 32.

Respondents' assertion (Br. 20 n.5) that 97% of subclass members who sought relief have a "substantial defense" is also exaggerated. They define (*ibid.*) "substantial" to mean *any* challenge to the charged ground of removability, and *any* claim for relief from removal (except withholding of removal). A frivolous request for cancellation of removal thus counts as "substantial." That cannot be the measure of constitutionality. Indeed, respondents have not disputed our submission that "criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed"—even among subclass members. Gov't Br. 45.

3. Respondents contend (Br. 39) that "many individuals released through [*Rodriguez*] hearings pose no danger." But *Demore* cannot be distinguished on the basis of *ex post* anecdotes. Congress enacted Section 1226(c) because IJs could not predict *ex ante* which released criminal aliens would reoffend or flee, and experience showed that they did so "in large numbers." *Demore*, 538 U.S. at 513. Congress responded with a categorical judgment that no such aliens should

be released on bond, and this Court upheld that judgment in *Demore*. *Ibid.*

Respondents cannot show that IJs today are materially better at predicting the future than they were at the time of *Demore*. Respondents tout (Br. 40) "alternatives to detention." But "monitoring mechanisms which can be employed as viable alternatives to detention" existed at the time of *Demore*. 538 U.S. at 555 n.10 (Souter, J., concurring in part and dissenting in part) (citation omitted). Although some programs are effective in reducing flight, that is true only for the "low risk individuals" placed into those programs in the first place. J.A. 364. Aliens who pose a danger are not included. See *ibid.*; see also *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

This Court also may consider other support for the proposition that "flight and recidivism remain serious concerns." Gov't Br. 33 (citing Exec. Office for Immigration Review, *FY 2015 Statistics Yearbook* P3 (Apr. 2016) (*2015 Yearbook*)); cf. *Arizona*, 132 S. Ct. at 2500 (relying on official yearbook data); *Demore*, 538 U.S. at 520 (non-record study of failure to appear); *Demore* Resp. Br. 8, 39 (same). Indeed, respondents cite (Br. 41 & n.15) a new non-record study by their expert witness reporting flight by 14% of the aliens the expert found relevant. That study confirms that flight remains a serious concern, as this Court found it "striking" that 20% of released aliens failed to appear. *Demore*, 538 U.S. at 520. The 14% figure is also understated, because it includes "other completions," which encompasses aliens whose cases were "administratively closed" and thus had nothing to flee. See *2015 Yearbook* C5.

B. This Court Should Not Overrule *Demore*

Respondents assert in passing (Br. 22-23) that the Court should overrule *Demore*. Principles of *stare decisis* "weigh heavily" against doing so. *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). "[E]ven in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some 'special justification.'" *Ibid.* (citation omitted). Respondents offer only one (Br. 22): that *Demore* "rests on erroneous facts." The government regrets that it provided inaccurate information to the Court, but the relevant data do not undermine the Court's core holding concerning the constitutionality of mandatory detention.

The Court discussed statistics after distinguishing *Zadvydas* on the grounds that detention under Section 1226(c) "serve[s] its purported immigration purpose" and is not "indefinite" or "potentially permanent," but instead is "of a much shorter duration." *Demore*, 538 U.S. at 527-528 (citation omitted). Both distinctions are valid. Indeed, the Court in *Zadvydas* itself distinguished Section 1226(c) on this basis, and did so without statistical support. See 533 U.S. at 697.

This Court in *Demore* then went on to say that, "[u]nder § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529. The Court's phrasing suggests that this was an additional point, apparently intended to illustrate the practical impact of its ruling on other cases.

Moreover, the corrected figures from the Executive Office for Immigration Review (EOIR) still show that, "in the majority of cases" detention lasted less than 90 days. *Demore*, 538 U.S. at 529. Indeed, they show that the vast majority of cases ended *faster* than the Court stated. Gov't *Demore* Letter 2 (median of 15 days, not 30 days, for non-appealed cases). EOIR's corrected calculations also show that BIA appeals were relatively infrequent and took roughly the same time the Court stated. An average and median of 141 and 119 days to complete an appeal, *ibid.*, is materially identical to "an average of four months, with a median time that is slightly shorter," *Demore*, 538 U.S. at 529. Aliens deciding whether to appeal thus must make the same "difficult judgment[]" this Court discussed. *Id.* at 530 n.14 (citation omitted).

The Court did significantly understate the typical time, in appealed cases, to complete *both* the IJ and BIA stages, because cases that are later appealed typically take longer for IJs to decide in the first place. The Court stated that such cases typically take "about five months" total. *Demore*, 538 U.S. at 530. EOIR has calculated that the corrected figure is about nine months (median 272 days). Gov't *Demore* Letter 2-3.[5] But the Court's analysis turned on the reasons why detention is occurring, not merely its length. See *Demore*, 538 U.S. at 527-531.

The Court's discussion of medians and averages also cannot be read to establish outer boundaries for detention. By definition, half of cases last as long as

---

[5] The average EOIR calculated (382 days, see Gov't *Demore* Letter 3) is considerably longer, indicating "a short fat tail to the left and a long skinny tail to the right," with some cases taking an unusually long time. J.A. 168.

or longer than the median—and Kim's case was one of them, notwithstanding that he had not appealed. Yet the Court squarely upheld Kim's detention. *Demore*, 538 U.S. at 531. There is accordingly no basis for overruling that decision.

C. Any Claim That Detention Under Section 1226(c) Has Become Unconstitutional Must Be Resolved In An Individual As-Applied Challenge

1. Under *Demore*, Section 1226(c) is constitutional in the overwhelming majority of cases—with exceptional cases turning on why removal proceedings (and detention incident thereto) are ongoing. See Gov't Br. 46-50. Moreover, Section 1226(c) plainly forecloses any prophylactic rule as a statutory matter: It permits release "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2).

Even if it were permitted, the six-month rule is greatly overbroad and unduly rigid. The government does not claim it would be "rare" (Resps. Br. 26) for criminals to be released after *Rodriguez* hearings. The problem is that release would be *all too common*. In the vast majority of cases, detention under Section 1226(c) will end faster than in *Demore*—particularly when considering the time Kim would need to spend in detention on remand. See p. 12, *supra*. And "criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed." Gov't Br. 45. Yet a six-month rule would give most such aliens—criminal aliens who are constitutionally detained and will be ordered removed—a presumptive entitlement to be released on bond so long as detention lasts six months. See Resps. Br. 26 ("roughly 70%" of class members are granted bond). That would severely undermine Congress's purpose of preventing

criminal aliens from fleeing or reoffending during removal proceedings, and would create a powerful incentive for them to prolong their proceedings.

Respondents' one-size-fits-all approach is also incompatible with the flexible adjudicatory system Congress established for deciding removal cases. Among other available protections, aliens may (1) challenge their mandatory detention in a "*Joseph* hearing"; (2) concede they are deportable or inadmissible as charged but seek relief from removal; (3) seek continuances; (4) appeal to the BIA; and (5) file a petition for review in federal court and seek a stay of removal. Gov't Br. 46-50; *Demore*, 538 U.S. at 514 n.3. A deadline that treats every removal case as essentially interchangeable thus ignores that some will be very different from others, for good reason, due to the alien's choices and other individual circumstances. Challenges to exceptional applications of Section 1226(c) therefore must be decided on an individual basis that takes into account the exceptional circumstances of the case—not a rigid rule that makes them irrelevant.

2. This Court could offer some guidance, however, by making clear that detention under Section 1226(c) "is entitled to a strong presumption of constitutionality for its duration." Gov't. Br. 48. A criminal alien whose proceedings (and detention incident thereto) continue markedly beyond the range of time for resolving most similar cases could overcome that presumption, however, by showing that detention no longer furthers its immigration purposes and instead is for some other purpose (or no purpose at all). *Ibid.*

The record here also suggests time frames that, at least on a stage-by-stage basis, were markedly unusu-

al for class members. The IJ stage was almost always completed within 14 months. J.A. 191 (90% of in-period cases without an appeal ended by 435 days). And it was markedly unusual for a case with a BIA appeal to last 20 months total. *Ibid.* (90% of in-period cases appealed solely to the BIA appeal ended by a total of 563 days). Longer durations could fairly prompt a closer look into the reasons why the proceedings remain ongoing.[6]

IV. RESPONDENTS' ARGUMENTS ABOUT BOND PROCEDURES LACK MERIT

A. Respondents do not even try to square their arguments for wholesale revision of the procedures for bond hearings with the text of any relevant statute or regulation. They instead assert across-the-board (Br. 52) that "[n]one of the provisions Petitioners cite pertain to prolonged detention." But laws and regulations do not need to say "prolonged" to apply until removal proceedings end. Section 1226 governs detention "pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. 1226(a), and every relevant procedural provision here governs detention until that decision is made.

---

[6] Some circuits have held that Section 1226(c) applies during a stay of removal entered by a court of appeals, rather than 8 U.S.C. 1231. See Gov't Br. 8 n.4. Section 1231 generally permits release after 90 days; Section 1226(c) does not. An alien's "difficult judgment[]" whether to seek a stay of removal, *Demore*, 538 U.S. at 530 n.14, accordingly must be made by assessing the applicable law, the expected duration of review, and the prospects of success. This Court also may wish to urge courts to expedite consideration of cases involving detained aliens. Cf. *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1027-1028 (2013).

For example, until removal proceedings end, a criminal alien cannot be released even under the witness-protection exception unless *the alien* shows that he "will *not* pose a danger" or be a flight risk. 8 U.S.C. 1226(c)(2) (emphasis added). The regulations implementing bond authority under Section 1226(a)—including by placing the burden of proof on the alien—similarly govern all "[a]pprehension, custody, and detention" of aliens "[p]rior to [an] [o]rder of [r]emoval." 8 C.F.R. Pt. 236, Subpt. A; 8 C.F.R. Pt. 1236, Subpt. A. And the rule that IJs will provide subsequent bond hearings only when circumstances have materially changed is part of the immigration court rules of procedure, which apply in all proceedings "before Immigration Judges." 8 C.F.R. 1003.12.

Respondents contend that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." Br. 55 (quoting *McNeil* v. *Director*, 407 U.S. 245, 249 (1972)). But the confinement here is not "indeterminate." It has an "obvious termination point": the end of removal proceedings. *Zadvydas*, 533 U.S. at 697. The statutes and regulations here thus must be applied as written.

B. To the extent respondents contend that those procedures are unconstitutional as to every alien detained for six months, they are wrong. Their premise is (Br. 49) that "prolonged immigration detention constitutes such a significant deprivation of liberty as to require a custody hearing." But as set forth above, even respondents do not contend that the Due Process Clause itself requires bond hearings at the six-month mark, for every alien detained here, regardless of individual circumstances. There is accordingly no con-

stitutional basis for rewriting bond procedures across the board.

Even if bond hearings were requried, there would be "no problem" putting the burden on a criminal alien covered by Section 1226(c), when detention lasted longer than six months—as in *Demore*. *Demore* Oral Arg. Tr. 48. A convicted criminal seeking bail pending appeal similarly must show that he is *not* a danger or flight risk, see *Demore*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part) (analogizing to bail pending appeal), and appeals often take more than six months. And it would be plainly appropriate for the alien to bear the burden in the Section 1225(b) context, where Congress has long made that judgment. See 8 U.S.C. 1225(b)(2)(A) (mandating detention when alien is "not clearly and beyond a doubt entitled to be admitted").[7]

There would also be no constitutional problem with 8 C.F.R. 1003.19(e), which authorizes additional bond hearings only when circumstances have changed materially. And the length of detention need not be counted twice, both when deciding whether to grant a hearing—and again in the hearing when deciding whether to grant bond. Respondents cite (Br. 57) several pretrial detention cases, but each considered duration only once.

---

[7] Aliens detained under Section 1226(a) also validly bear the burden. See 62 Fed. Reg. 10,323 (Mar. 6, 1997); Gov't Br. 52-53.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

NOVEMBER 2016