UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-7988

OSVALDO HODGE,
***Petitioner - Appellant*,**

v.

THOMAS BROPHY, in his official capacity as Acting Field Office Director, Buffalo Field Office, U.S. Immigration and Customs Enforcement, MERRICK B. GARLAND, United States Attorney General, in his official capacity as Attorney General, U.S. Department of Justice, ALEJANDRO MAYORKAS, United States Secretary of Homeland Security, in his official capacity as Secretary, U.S. Department of Homeland Security, MICHAEL BALL, in his official capacity as Officer-in-Charge, Buffalo Federal Detention Facility,
***Respondents - Appellees*.**

ON APPEAL FROM THE U.S. DISTRICT COURT OF THE WESTERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND NATIONAL IMMIGRATION PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Emma Winger, attorney for amici curiae certify that the American Immigration Council, American Immigration Lawyers Association, and National Immigration Project are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

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I. INTRODUCTION AND STATEMENT OF AMICI[1]

Immigration and Customs Enforcement (ICE) has held Petitioner Osvaldo Hodge (Mr. Hodge) for over two and a half years. ACMS No. 2 at 7. During that time, no neutral decisionmaker has ever found that he is either a flight risk or a danger to the community. *Id.* Instead, he has been incarcerated[2] without a bond hearing under the mandatory detention statute at 8 U.S.C. § 1226(c). Over two years into his civil detention, the district court denied his habeas petition. The district court did not base its decision on Mr. Hodge's particular circumstances or a finding that his continued detention is necessary to protect the public or ensure his appearance in immigration proceedings. Instead, extending the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), the lower court found that the generic concerns for public safety and flight underlying Section 1226(c) *always* justify detention, no matter the length, because noncitizens may "voluntarily" end their incarceration by self-deporting. ACMS No. 2 at 13-16, 19-20, 24-27. Amicus

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amici curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

[2] This Court has recognized that noncitizens in ICE custody, like Mr. Hodge, are not merely "detained" but in many instances "incarcerated under conditions indistinguishable from those imposed on criminal defendants sent to prison following convictions." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020).

agree with Mr. Hodge that these generalized concerns cannot justify unreasonably prolonged detention without a bond hearing.

Amici write separately to further explain that Section 1226(c) is a broad statute that sweeps in minor criminal offenses and dispositions that do not amount to convictions under state law, undermining any generalized public safety concerns. Moreover, in the decades since Congress passed Section 1226(c) and the Court decided *Demore*, the immigration detention landscape has changed dramatically. Recent data demonstrate that noncitizens have extraordinarily high rates of voluntarily attendance throughout all stages of removal proceedings. And as the government's use of a wide range of alternatives to detention has skyrocketed, incarceration of noncitizens has become increasingly unnecessary to address the safety and flight risk rationale cited as justification for mandatory detention in *Demore* and relied on by the district court's sweeping ruling in this case.

The American Immigration Council (Council) is a non-profit organization that works to strengthen America by shaping how America thinks about and acts towards immigrants and immigration and by working toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council frequently

appears as amicus curiae before the Board of Immigration Appeals, the U.S. Courts of Appeals, and the U.S. Supreme Court.

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, nonpartisan, nonprofit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the federal courts. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeals and the U.S. Supreme Court.

The National Immigration Project (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and secure fair administration of the immigration and nationality laws. NIPNLG provides technical assistance to immigration attorneys; litigates on behalf of noncitizens; hosts continuing legal education seminars on the rights of noncitizens with criminal convictions, removal defense, and various other immigration matters; and is the author of numerous practice advisories, as well as Immigration Law and

Crimes and three other treatises published by Thomson Reuters. NIPNLG has participated as amicus in several significant immigration-related cases before the U.S. Supreme Court, the courts of appeals, and the Board of Immigration Appeals. Through its membership work and its litigation, NIPNLG is acutely aware of and interested in the realities, challenges, and administration of immigration detention, including mandatory detention.

Collectively, Amici have a substantial interest in ensuring that individuals are not unjustly prevented from seeking release from immigration detention.

II. THE SCOPE OF SECTION 1226(C), WHICH REQUIRES DETENTION OF PEOPLE WITH ALTERNATIVE DISPOSITIONS AND MINOR, NONVIOLENT OFFENSES, WEIGHS AGAINST PROLONGED DETENTION WITHOUT AN INDIVIDUALIZED CUSTODY DETERMINATION

The district court, stretching the Supreme Court's decision in *Demore v. Kim*, found that the government's concerns about "criminal aliens" justify prolonged detention without any individualized determination of dangerousness or flight risk – not only in the case of Mr. Hodge, but in virtually all cases. ACMS No. 2 at 1, 13-16. While such interests may support a "brief period" of mandatory detention, *Demore*, 538 U.S. at 523, any such interest must evaporate when detention becomes unreasonably prolonged, *see id.* at 532 (Kennedy, J., concurring); *Reid v. Donelan*, 17 F.4th 1, 7-8 (1st Cir. 2021); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020); *Sopo v. U.S.*

Att'y Gen., 825 F.3d 1199, 1213-14 (11th Cir. 2016), *vacated and dismissed as moot*, 890 F.3d 952 (11th Cir. 2018); *see also Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015)*, cert. granted, judgment vacated on other grounds*, 583 U.S. 1165 (2018).[3] This is particularly true because Section 1226(c) is startling in its breadth – sweeping in noncitizens who are inadmissible or deportable under virtually all removal grounds related to criminal dispositions or conduct, regardless of the de minimis offenses covered by those provisions. *See Reid*, 17 F.4th at 17 (Lipez, J., dissenting) ("Section 1226(c) sweeps broadly, encompassing . . . those who have committed nonviolent crimes and simple drug offenses. The difference between a § 1226(a) discretionary detainee and a § 1226(c) mandatorily detained 'criminal alien' may be a conviction or two for shoplifting or marijuana possession.").

Section 1226(c) applies to a noncitizen who is inadmissible or deportable "by reason of having committed *any* offense" covered in 8 U.S.C. §§ 1182(a)(2), 1182(a)(3)(B), 1227(a)(2)(A)(i),[4] (a)(2)(A)(ii), (A)(iii), (B), (C), or (D). 8 U.S.C. § 1226(c) (emphasis added). These provisions, in turn, incorporate the broad

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[3] *See Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *6 (S.D.N.Y. May 23, 2018) ("[T]he Court concludes that under the Second Circuit's case law, the opinion in *Lora* is no longer binding but carries significant persuasive weight.").

[4] Section 1226(c) includes individuals deportable under § 1227(a)(2)(A)(i) so long as the noncitizen receives a sentence of imprisonment, suspended or imposed, of at least one year. 8 U.S.C. § 1226(c)(1)(C).

definition of "conviction" and "sentence" at 8 U.S.C. § 1101(a)(48). Thus, ICE can and does hold people in mandatory detention who are deportable or inadmissible for a wide range of misdemeanor, non-violent conduct, including retail theft,[5] two misdemeanor marijuana possession convictions,[6] and a single conviction for simple possession of a controlled substance.[7] A statute this broad cannot justify detention of months or years without any determination that the person currently presents a danger to the community.

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[5] *See, e.g., Vallejo v. Decker*, No. 18-CV-5649 (JMF), 2018 WL 3738947, at *2 (S.D.N.Y. Aug. 7, 2018) (noncitizen subject to mandatory detention because of convictions for shoplifting and receipt of stolen property that were over ten years old).

[6] *See, e.g., Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016) (noncitizen held in mandatory detention based on two misdemeanor marijuana convictions), *rev'd and remanded sub nom. Nielsen v. Preap*, 139 S. Ct. 954 (2019), *and vacated sub nom. Preap v. McAleenan*, 922 F.3d 1013 (9th Cir. 2019) ; *Vazquez v. Green*, No. CV 16-3451 (JMV), 2016 WL 6542833, at *1 (D.N.J. Nov. 3, 2016) (noncitizen detained under § 1226(c) because of municipal court conviction for possession of marijuana and conviction for possession of marijuana/hash).

[7] *Castaneda v. Souza*, 952 F. Supp. 2d 307, 310 (D. Mass. 2013), *aff'd,* 769 F.3d 32 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Jan. 23, 2015), *on reh'g en banc,* 810 F.3d 15 (1st Cir. 2015), and *aff'd,* 810 F.3d 15 (1st Cir. 2015) (noncitizen detained under § 1226(c) after completing probation for simple possession conviction).

A. Section 1226(c) Applies to Individuals Without Criminal Convictions Under Federal and State Law

1. Many grounds of inadmissibility that subject noncitizens to mandatory detention do not involve a criminal conviction under federal immigration law.

The range of conduct swept up by the mandatory detention statute is perhaps most evident by its incorporation of various grounds of inadmissibility for which a conviction as defined under immigration law is not required. The inclusion of these wide-ranging non-conviction-based grounds significantly undermines a blanket presumption of dangerousness for everyone covered by the statute.

First, the criminal grounds of inadmissibility encompass numerous alleged acts that do not require a formal conviction or indeed any judgment from a court of law. *See* 8 U.S.C. § 1182(a)(2)(A)(i), (C), (D), (E), (G), (H), (I). Notably, the statute categorizes as inadmissible, and therefore subject to mandatory detention, any noncitizen "who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude (CIMT) or a controlled substance offense. *See id.* § 1182(a)(2)(A)(i); *see also Barton v. Barr*, 140 S. Ct. 1442, 1456 (2020) (Sotomayor, J., dissenting) ("A criminal ground of inadmissibility can be made out by showing ... that the noncitizen admitted to conduct meeting the elements of a crime[.]").

The statute further includes any noncitizen who "has engaged in prostitution within 10 years" of applying for a range of immigration benefits. 8 U.S.C. §

1182(a)(2)(D)(i). It has no requirement that a person have a conviction for engaging in such conduct before being deemed inadmissible and thus covered by Section 1226(c). *See also* 8 C.F.R. § 40.24(c) (stating that a noncitizen is inadmissible for engaging in prostitution within the last ten years even if the relevant conduct was not illegal under the laws of the country where the acts occurred). Finally, a noncitizen is inadmissible, and subject to mandatory detention, based only on an immigration officer's "reason to believe" – which the Board of Immigration Appeals (BIA) has found to be akin to mere probable cause – that the person is involved in drug distribution. *See* 8 U.S.C. § 1182(a)(2)(C)(i); *Matter of Mariscal-Hernandez*, 28 I. & N. Dec. 666, 673 (BIA 2022) ("The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause." (citation omitted)); *In re: Jose Luis Gutierrez-Rodriguez A.K.A. Jose Gutierrez*, No. : AXXX XX5 106 - ELO, 2016 WL 6519977, at *3 (BIA Sept. 26, 2016) (finding probable cause the appropriate standard for determining whether noncitizen is inadmissible under § 1181(a)(2)(C)(i)); *In re: Jose Calazan Mendez*, No. : AXXX XX9 414 - NEW, 2009 WL 1030713, at *1 (BIA Mar. 27, 2009) (same); *see also Magassouba v. Holder*, 526 F. App'x 66, 68 (2d Cir. 2013) ("[A] showing that does not include a conviction can provide the Attorney General with 'reason to believe'" that a noncitizen trafficked drugs and is therefore inadmissible).

Second, Section 1226(c)'s inclusion of the inadmissibility grounds at 8 U.S.C. §1182(a)(2)(C)(ii) and (a)(3)(B)(i)(IX) sweeps up people whose only fault is being related to someone who themself has never been charged or convicted of any crime. *See Nielsen v. Preap,* 139 S. Ct. 954, 960 (2019) ("[S]ome who satisfy subparagraph (D) [of § 1226(c)]--e.g., close relatives of terrorists . . . ---may never have been charged with any crime in this country" (internal citations omitted)). Section 1182(a)(2)(C)(ii) makes "the spouse, son, or daughter" of any noncitizen whom the government has "reason to believe" is involved in drug distribution inadmissible if they received "*any* financial or other benefit" from the alleged conduct. 8 U.S.C. § 1182(a)(2)(C)(ii) (emphasis added). The statute does not except sons or daughters who were children at the time of receiving the benefit. *Compare id*. (no exception) *with* § 1182(a)(2)(H)(ii), (iii) (exception). Similarly, "the spouse or child" of a noncitizen found inadmissible for purportedly having "engaged in a terrorist activity"[8] is also inadmissible and subject to mandatory detention without any requirement that the family member had knowledge of,

[8] The terrorism inadmissibility grounds are notorious for covering a "vast waterfront of human activity," *Kerry v. Din*, 576 U.S. 86, 114 (2015 (Breyer, J., dissenting), that courts have recognized as "broad" and going far beyond the common understanding of what constitutes terrorism, *Hussain v. Mukasey*, 518 F.3d 534, 537-38 (7th Cir. 2008). *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IX), (iii). As the Ninth Circuit notes, the statutory definition of terrorist activities would likely include "armed resistance by Jews against the government of Nazi Germany," as it contains no exception for armed resistance that is permissible under international law. *Zumel v. Lynch*, 803 F.3d 463, 474 (9th Cir. 2015).

participated in, or even been associated with, the alleged conduct. *Id.* § 1182(a)(3)(B)(i)(IX); *see Nielsen*, 139 S. Ct. at 978 (Breyer, J., dissenting) (observing that noncitizens "subject to detention without a bail hearing [under 1226(c)] may be detained for months, sometimes years, without the possibility of release; [and] they sometimes may be innocent spouses of children of a suspect person").

2. Current agency precedent defines convictions broadly to include dispositions that do not qualify as convictions under the state law.

While Section 1226(c) also mandates unreviewable detention based on deportability grounds that require convictions, *see* § 1226(c)(1)(B), (C), over the past three decades the BIA has issued a series of decisions expanding the meaning of "conviction" under the INA to include dispositions that are not convictions under state law. *See Saleh v. Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007) ("Over the last 20 years, there has been a consistent broadening of the meaning of 'conviction' in the INA."). As such, a noncitizen may now be subject to prolonged civil immigration detention without review even where the qualifying offense has been modified, resentenced, vacated, expunged, where adjudication has been deferred, or where the adjudicating court classifies the offense as non-criminal.

In 1996, Congress adopted a statutory definition of "conviction" in the Illegal Immigration Reform and Immigration Responsibility Act. A conviction exists where:

- there is a "formal judgment of guilt . . . entered by a court" *or*,
- "if adjudication of guilt has been withheld, where . . . a judge or jury has found the [noncitizen] guilty, or the [noncitizen] has entered a plea of guilty or *nolo contendere*, or has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen's] liberty to be imposed."

8 U.S.C. § 1101(a)(48)(A). A few years later, the BIA in *Matter of Roldan* held that convictions that were expunged or "erase[d]" for **"**rehabilitative**"** reasons by state courts remain convictions under § 1101(a)(48)(A). 22 I. & N. Dec. 512, 521-23 (BIA 1999).

Subsequently, in *Matter of Pickering*, the Board found that a conviction that is vacated "for reasons unrelated to the merits of the underlying criminal proceedings" remains a conviction under the INA. 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). The decision establishes the rule that "[i]f a court vacates [a noncitizen's] conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes." *Pickering*, 23 I. & N. Dec. at 621. This Court has deferred to the BIA's interpretation of conviction in *Pickering*. *Saleh*, 495 F.3d at 24-25. The result is that while some vacated convictions do not render someone subject to Section 1226(c), others now do.

Offenses deemed insufficiently "serious" to be classified as convictions under state law may also qualify as convictions under the INA that subject someone to mandatory detention. Earlier this year, this Court in *Wong v. Garland* deferred to the BIA's reading of § 1101(a)(48)(A) to include a New Jersey disorderly persons offense. 95 F.4th 82, 91-92 (2d Cir. 2024). The agency's interpretation encompasses offenses not labeled as convictions under state law as long as the proceedings afford defendants the "minimum constitutional requirements for criminal prosecutions." *Id.* at 91 (quoting *Matter of Wong*, 28 I. & N. Dec. 518, 525-26 (BIA 2023)). The offense in question in *Wong* did not "give rise to any legal disability or legal disadvantage, as a conviction for a crime under New Jersey law does." *Wong*, 28 I. & N. Dec. at 520. Moreover, the penalty was limited to six months' imprisonment, which the BIA acknowledged was an indication that the offense was "not serious." *Id.* at 526 And yet, that offense provided one of the two convictions the government needed to charge Mr. Wong with removability under § 1227(a)(2)(A)(ii), a charge that also renders him subject to mandatory detention. *See* 8 U.S.C. § 1226(c)(1)(B); *see also Matter of Cuellar-Gomez*, 25 I. & N. Dec. 850, 852-55 (BIA 2012) (holding a Kansas municipal court judgment of guilt for marijuana possession in violation of a municipal ordinance to be a criminal conviction for immigration purposes).

Courts have similarly found noncitizens inadmissible and deportable based on deferred adjudications, generally available only for minor offenses and first-time offenders, that do not amount to convictions under state law. *See, e.g. Jaquez v. Sessions*, 859 F.3d 258, 259, 261-62 (4th Cir. 2017) (Virginia first-time offender disposition, in which judge vacated finding of guilt and dismissed charge after successful completion of probation, was conviction); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004) (holding a Texas deferred adjudication for possession of less than one gram of LSD that resulted in dismissal after successful completion of community probation was a conviction).

Thus, even where the criminal justice system has determined that an individual merits a lenient disposition without the collateral consequences of a criminal conviction under state law, they may remain subject to prolonged detention without any individualized review under Section 1226(c).

B. Section 1226(c) Applies to Individuals with De Minimis Criminal Offenses

Even when a conviction is required, Section 1226(c) applies to noncitizens who are inadmissible or deportable for a wide range of minor criminal offenses. To determine whether a noncitizen is deportable or inadmissible under an enumerated provision and therefore properly subject to mandatory detention under Section 1226(c), immigration courts and reviewing federal courts generally employ the

categorical approach. *See Debique v. Garland*, 58 F.4th 676, 680 (2d Cir. 2023). Under this approach, adjudicators determine "whether the state statute defining the crime of conviction categorically fits within the generic federal definition" for the relevant removal ground. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (internal quotations omitted). The sole question is "whether the elements of the crime of conviction sufficiently match the elements of [the generic removal ground], while ignoring the particular facts of the case." *Mathis v. United States*, 579 U.S. 500, 504 (2016). Therefore, whether a noncitizen is subject to mandatory detention under Section 1226(c) turns almost entirely on the breadth of the INA's removal provisions, without consideration of the culpability or seriousness of the noncitizen's underlying conduct. *See Mellouli v. Lynch*, 575 U.S. 798, 805 (2015) (a noncitizen's "actual conduct is irrelevant to the inquiry[.]").

The INA's removal provisions based on criminal conduct are expansive. A crime involving moral turpitude (CIMT) – which can provide a basis for both inadmissibility and deportability – includes a host of minor offenses. A single conviction for simple possession of a controlled substance renders a noncitizen both deportable and inadmissible. And the aggravated felony removal ground is a misnomer – sweeping in offenses that are neither aggravated nor felonies. Given the reach of these provisions, there is no legitimate generalized public safety

concern that can support unreasonably prolonged detention without individualized review under Section 1226(c).

1. Crimes Involved Moral Turpitude

A noncitizen with one CIMT conviction may be subject to mandatory detention, regardless of the age of the conviction. *See* 8 U.S.C. § 1226(c)(1)(A)-(C). A single CIMT conviction renders a noncitizen inadmissible (unless the offense falls within two narrow exceptions[9]). 8 U.S.C. § 1182(a)(2)(A)(i)(I). A noncitizen is deportable, and falls within Section 1226(c), if they have one CIMT conviction committed within five years of their admission (so long as there is a sentence of imprisonment, suspended or imposed, of at least one year) or two CIMT convictions at any time regardless of the penalties. 8 U.S.C. § 1226(c)(1)(C); *see* 8 U.S.C. § 1227(a)(2)(A)(i), (ii).

The BIA has defined a CIMT as "a class of offenses involving reprehensible conduct committed with some form of scienter--that is, with a culpable mental state, such as specific intent, deliberateness, willfulness, or recklessness." *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849 (BIA 2016) (internal quotations omitted). Under this definition, "[c]onduct is reprehensible if it is inherently base,

[9] There are two exceptions to the CIMT inadmissibility ground: (1) a single CIMT conviction where the maximum possible sentence does not exceed one year and any sentence imposed is less than six months and (2) CIMTs committed more than five years before an application for admission and when the person was under eighteen. 8 U.S.C. § 1182(a)(2)(A)(ii).

vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Id.* (internal quotations omitted). Judges have repeatedly observed that this standard is both outdated and highly subjective. *See, e.g.*, *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring) ("It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law."); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 922 (9th Cir. 2009) (en banc) (Berzon, J., dissenting) ("[I]t is hard to say that any articulable principle distinguishes the offenses that are CIMTs from those that are not."); *Marciano v. INS*, 450 F.2d 1022, 1026 n.1 (8th Cir. 1971) (Eisele, J., dissenting) ("[T]hat the phrase 'crime involving moral turpitude' is unconstitutionally vague . . . seems manifest by the variety and inconsistency of the various opinions attempting to deal with the phrase.").

Moreover, the Board has held "that neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." *Matter of Serna*, 20 I. & N. Dec. 579, 581 (BIA 1992); *Matter of Tran*, 21 I. & N. Dec. 291, 293 (BIA 1996). So long as an offense meets the imprecise and broad mens rea and actus reus elements of the CIMT definition, the "triviality" of the crime is "irrelevant." *Michel v. I.N.S.*, 206 F.3d 253, 265 (2d Cir. 2000); *see Matter of Serna*, 20 I. & N. Dec. at 582 ("[T]he fact that a crime may be

considered only a minor offense does not preclude a finding that it involves moral turpitude.").

In light of this framework, the BIA and federal courts have found noncitizens inadmissible or deportable for host of minor, nonviolent CIMTs, including:

- Possession of stolen bus transfers, *Michel*, 206 F.3d at 256, 265;
- Shoplifting, *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. at 847, 854-55, *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 33-34 (BIA 2006);
- Using a fraudulent Social Security number to work, *De Martinez v. Holder*, 770 F.3d 823, 825 (9th Cir. 2014), *Marin-Rodriguez v. Holder*, 710 F.3d 734, 735 (7th Cir. 2013);
- Jumping a subway turnstile, *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286, 288 & n.2 (E.D.N.Y. 2000); and
- Using a false driver's license, *Montero-Ubri v. I.N.S.*, 229 F.3d 319, 321 (1st Cir. 2000).

In fact, virtually all offenses involving fraud or theft are considered CIMTs, regardless of their triviality. *See Jordan v. De George*, 341 U.S. 223, 227 (1951); *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. at 853-55; *Matter of Serna*, 20 I. & N. Dec. at 582.

2. Controlled Substance Offenses

The removability grounds involving controlled substances are perhaps even more draconian. For those noncitizens considered to be "seeking admission," any

controlled substance conviction makes them inadmissible and subject to mandatory detention – there are no exceptions. 8 U.S.C. § 1182(a)(2)(A)(i)(II); *see* 8 U.S.C. § 1226(c)(1)(A). For noncitizens subject to the grounds of deportability, all controlled substance convictions make them deportable and subject to mandatory detention, except for one conviction of possession for personal use of 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B)(i); *see* 8 U.S.C. § 1226(c)(1)(B). As a result, courts have found noncitizens inadmissible based on a single conviction for simple possession of marijuana, *Heredia v. Sessions*, 865 F.3d 60, 67 (2d Cir. 2017), and deportable for having two marijuana possession convictions. *Flores-Garza v. INS*, 328 F.3d 797, 798, 802 (5th Cir. 2003).

A full and unconditional state pardon does not waive the controlled substance offense ground of removal. *Aristy-Rosa v. Att'y Gen. United States*, 994 F.3d 112, 115, 117 (3d Cir. 2021); *see* 8 U.S.C. § 1227(a)(2)(A)(vi). As discussed, the BIA has held that expungement does not eliminate a conviction for immigration purposes – only vacatur based on a substantive or procedural defect is given effect. *See Saleh*, 495 F.3d at 19, 25. Thus, even as states decriminalize possession of marijuana,[10] and transition to treating possessory offenses outside the

[10] *See* Kate Bryan, Nat'l Conf. of State Legislatures, *Cannabis Overview* (updated Apr. 9, 2024), https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview (last visited Apr. 18, 2024).

carceral system,[11] and even as the President and governors issue pardons for marijuana and other minor drug offenses[12] noncitizens still face potentially lengthy mandatory detention for these convictions.

3. Aggravated Felonies

In addition to limiting eligibility for relief from removal, an aggravated felony conviction subjects noncitizens to mandatory detention. 8 U.S.C. §§ 1226(c)(1)(B),1227(a)(2)(A)(iii). The term "aggravated felony" is defined by statute to include twenty broad categories of offenses, plus attempt and conspiracy. 8 U.S.C. § 1101(a)(43). While this Court has expressed "misgivings that Congress, in its zeal to deter deportable non-citizens from re-entering this country, has improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors," it is clear that misdemeanor offenses may be

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[11] *See* U.S. Dep't of Health & Hum. Servs., *What Are Drug Courts?* (last updated Dec. 16, 2022), https://www.hhs.gov/opioids/treatment/drug-courts/index.html (last visited Apr. 18, 2024); New York State Unified Ct. Sys., *Drug Treatment Courts*, https://ww2.nycourts.gov/courts/problem_solving/drugcourts/index.shtml (last visited Apr. 18, 2024).

[12] *See* Office of the Pardon Attorney, U.S. Dep't of Justice, *Presidential Proclamation on Marijuana Possession, Attempted Possession, and Use* (updated Apr. 15, 2024), https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession (last visited Apr. 18, 2024); *Press Release: Governor Healey Announces Nation-Leading Effort to Pardon Marijuana Possession Misdemeanor Convictions* (Mar. 13, 2024), https://www.mass.gov/news/governor-healey-announces-nation-leading-effort-to-pardon-marijuana-possession-misdemeanor-convictions.

aggravated felonies. *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (cleaned up). Several categories of aggravated felony, including theft offenses, receipt of stolen property, crimes of violence, counterfeiting, and forgery, require a sentence of imprisonment of one year or more, even if the sentence is suspended. 8 U.S.C. §§ 1101(a)(43)(F)-(G), (R), (a)(48)(B); *see, e.g., Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001) (suspended sentence of one year meets aggravated felony category based on length of sentence imposed). Many other categories of aggravated felony, such as "illicit trafficking in a controlled substance," do not require any particular penalty. 8 U.S.C. § 1101(a)(43)(B). In other words, a noncitizen may be subject to mandatory detention due to an aggravated felony conviction without serving any time in jail. *See United States v. Christopher*, 239 F.3d 1191, 1193 (11th Cir. 2001) (holding a conviction for a misdemeanor shoplifting offense where the noncitizen receives a one-year suspended sentence was an aggravated felony).

The aggravated felony categories are expansive. Recidivist possession of a controlled substance, including marijuana, is "illicit trafficking of a controlled substance" in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006) (noting that "Congress did counterintuitively define some possession offenses as 'illicit trafficking[,]'" including "possession of cocaine base and recidivist possession"); *Matter of*

Cuellar-Gomez, 25 I. & N. Dec. at 851, 864-66 (finding a conviction for marijuana possession following a prior municipal ordinance judgment for marijuana possession to be an aggravated felony). A "theft offense" at 8 U.S.C. § 1101(a)(43)(G) includes a shoplifting conviction with a one-year suspended sentence. *See Christopher*, 239 F.3d at 1193.

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In response to a facial attack on Section 1226(c), the government defended the statute by claiming that it would "protect[] the public from dangerous criminal [noncitizens]." *Demore,* 538 U.S. at 515. While the Supreme Court determined that this purported concern provided sufficient justification to find that a "brief period" of mandatory detention under Section 1226(c) does not, on its face, violate due process, it cannot justify unreasonably prolonged detention. As demonstrated, mandatory detention is in no way limited to noncitizens with "dangerous" criminal convictions and, as such, due process requires, at a minimum, an individualized determination of dangerousness by a neutral arbiter once detention becomes prolonged. *See id.* at 532 (Kennedy, J., concurring); *Reid*, 17 F.4th at 8; *German Santos*, 965 F.3d at 210; *see also Lora*, 804 F.3d at 614.

III. INDIVIDUALIZED CONCERNS REGARDING FLIGHT RISK ARE AMELIORATED BY THE AVAILABILITY OF ALTERNATIVES TO DETENTION

The prevalence and success—according to the government's own metrics—of the range of programs deemed to be "alternatives to detention" has vastly diminished the government's interest in physically detaining noncitizens in order to ensure their appearance. *See Velasco Lopez*, 978 F.3d at 854 ("[T]he Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight."). Alternatives to detention, which include a spectrum of in-person and telephonic check-ins, round-the-clock monitoring via ankle bracelet, and community-based case management programs, have been touted by DHS itself as ensuring people's attendance at all stages of immigration proceedings. ICE's creation and widespread adoption of these programs over the past two decades has significantly attenuated any interest the government had in holding those subject to Section 1226(c) without any individualized review. Given the many effective tools the government now regularly deploys to ensure noncitizens' appearance while better safeguarding due process rights and the public fisc, this Court should reject the district court's unwarranted extension of *Demore*.

A. High Appearance Rates and Technological Advances Have Vitiated the Need for Mandatory Detention

Due process requires that all incarceration, including civil immigration detention, "bear a reasonable relation to [its] purpose." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). The government's proffered purposes of mandatory detention, as recognized by the Supreme Court and this Court, are to mitigate flight risk and prevent danger to the community. *See, e.g., id.* at 690-91; *Lora,* 804 F.3d at 614. In *Demore*, the Court considered data that it interpreted to support the concern that "even with individualized screening, releasing deportable criminal [noncitizens] on bond would lead to an unacceptable rate of flight." 538 U.S. at 520. In the record were studies showing that "more than 20% of deportable criminal [noncitizens] failed to appear for their removal hearings," and that "one out of four criminal [noncitizens] released on bond absconded prior to completion" of proceedings. *Id.* at 519-20; *see also* ACMS No. at 15. This evidence, now over twenty years old, is entirely outdated and no longer accurate.

The reality today is that "the overwhelming majority" of immigrants appear for almost all stages of their proceedings.[13] Recent data demonstrate that

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[13] *See* Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court* 4, 7 (Jan. 2021), https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court.

noncitizens with removal cases who are not detained[14] are highly likely to appear at their hearings, entirely of their own volition. A study analyzing data published by the Department of Justice shows that 83% of non-detained[15] noncitizens with pending or completed proceedings attended all their hearings from 2008 to 2018.[16] That rate jumped to 96% when the individual had an attorney.[17]

Moreover, when the various alternatives to detention programs used by ICE are considered, the percentage of people who fail to appear shrinks to less than one percent. ICE's own statistics show that individuals enrolled in alternative to detention programs had an immigration "court appearance rate [that] consistently surpassed 99 percent"[18] and a nearly 94 percent attendance rate at their final

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[14] This includes people who are covered by 8 U.S.C. § 1226(c). Many individuals who meet the statutory criteria for mandatory detention are not detained during their removal proceedings for a variety of reasons, including for medical reasons or because of court orders in class action litigation and individual habeas petitions requiring release or bond determinations. *See, e.g.,* Vera Inst. Of Just., *Analysis of Lora Bond Data: New York Immigrant Family Unity Project* 1 (2016), https://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf (finding that over the course of nine months, 62% of individuals who received bond hearings under *Lora* were granted release).

[15] The authors' data set included both individuals who had never been detained and individuals who were detained at some point in their proceedings but later released from custody. Eagly, *et al.*, *supra* note 14 at 7.

[16] *Id*. at 4.

[17] *Id.*

[18] Audrey Singer, Cong. Rsch. Serv., R45804, *Immigration: Alternatives to Detention (ATD) Programs* at 9 (July 8, 2019), https://sgp.fas.org/crs/homesec/R45804.pdf.

hearings.[19] The government's data further demonstrated that even when it came to actual removals, ICE exceeded its goals for numbers of removals of program participants.[20]

Notably, ICE only began to implement its alternatives to detention program in 2004 – the year after *Demore* was decided.[21] As such, in the intervening decades, the government's interest in mandatory detention has significantly lessened as changed patterns of appearance and technological advances have provided meaningful alternatives to indiscriminate incarceration. This vastly different reality—which went entirely unconsidered by the district court in this case— undermines the relationship between civil immigration detention and its stated purpose of ensuring appearance for the removal process and compels a narrow reading of *Demore*.

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19 *See* U.S. ICE, ICE Alternatives to Detention Data, FY23, "FY23 Year End Court Appearance: Total Hearings" table & "FY23 Year End Court Appearance: Final Hearings" table, "ATD EOFY23" Tab, https://www.ice.gov/detain/detention-management (showing a 99.1% attendance rate for all hearings and a 93.6% attendance rate for final hearings in Fiscal Year 2023 for participants with court tracking assigned). To access, click on "Previous Year-End Reports," below FY 2024 ICE Statistics at bottom of home page, then click on "FY 2023 Detention Statistics" to download the Excel Spreadsheet with the "ATD EOFY23" Tab. (Last visited Apr. 18, 2024.)

20 Singer, *supra* note 18 at 9.

21 *Id.* at 7.

B. Unlike Incarceration, Alternatives to Detention Can be Tailored to Better Meet the Interests of Noncitizens, the Government, and the Public

Under ICE's current practices, alternatives to detention include a wide range of monitoring tools and case management services. The range of available options under the ATD program gives the government the ability to make individualized assessments and tailor the level of supervision accordingly. They include in-person meetings, telephonic reporting, unannounced home visits, curfews, scheduled office check-ins, GPS monitoring via ankle bracelets or a smartphone application that deploys facial recognition software, and case management services.[22]

For noncitizens with extra vulnerabilities, including those who have "suffered significant trauma or who have direct dependents in need,"[23] ICE has at its disposal a recently re-started community-based case management program. These intensive services provide a meaningful example of how the government can support people navigating the removal process while reducing reliance on all forms of detention. The case management program offers services ranging from mental

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[22] *Id.*; American Immigration Council, *Alternatives to Immigration Detention: An Overview*, (July 11, 2023), https://www.americanimmigrationcouncil.org/research/alternatives-immigration-detention-overview.

[23] *See* DHS, U.S. Immigration and Customs Enforcement, Fiscal Year 2021 Congressional Submission at O&S 171-172, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement_0.pdf.

health care, legal referrals, connections to other community-based services, and repatriation support.[24] An earlier pilot program, which focused on families in removal proceedings, achieved over 99% compliance by participants with their immigration proceedings and ICE check-ins.[25]

The government's use of alternatives to detention has grown exponentially over the past two decades. These programs did not even exist when Congress debated and passed the statute that created the mandatory detention regime under § 1226(c). But today, ICE monitors over 180,000 people, both families and single adults, through its ATD programs.[26]

ICE has touted the program as a success, stating that use of ATDs "increases court appearance rates" and that absconder rates have dropped "dramatically" in the past two years.[27] ICE leadership has lauded the program as "an effective flight risk mitigation tool" that "has demonstrated great success in improving compliance rates." *Ramirez v. ICE*, 471 F. Supp. 3d 88, 104 (D.D.C. 2020) (quoting Deposition Testimony of ICE ATD Unit Chief Eric Carbonneau). Courts have similarly

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24 Women's Refugee Comm'n, *The Case Management Pilot Program*, (updated Jan. 2024), https://www.womensrefugeecommission.org/wp-content/uploads/2023/11/Case-Management-Pilot-Program-012024.pdf

25 *Id.* at 1.

26 TRAC Immigration, *Immigration Detention Quick Facts*, https://trac.syr.edu/immigration/quickfacts/ (last updated Apr. 6, 2024).

27 *See* ICE, *Alternatives to Detention*, https://www.ice.gov/features/atd (last updated Mar. 5, 2024).

recognized the efficacy of certain alternatives in ensuring participation throughout removal proceedings. *See, e.g., Flores v. Rosen*, 984 F.3d 720, 743 (9th Cir. 2020) (noting public comments "highlight[ing] the success of DHS' Family Case Management Program" and that participants "had a 100 percent attendance record at court hearings") (citations omitted); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (citing evidence that program relying on alternative release conditions "resulted in a 99% attendance rate at all EOIR hearings").

Additionally, every option under the ATD program umbrella is less expensive – by orders of magnitude – than incarceration.[28] ICE reports that the alternatives cost on average less than $8 per person per day, while physically detaining someone costs taxpayers around $150 per day.[29]

IV. IN LIGHT OF THE SCOPE OF SECTION 1226(c) AND THE VIABLE ALTERNATIVES TO DETENTION, AN INDIVIDUALIZED DETERMINATON OF FLIGHT RISK AND DANGEROUSNESS IS REQUIRED UNDER *MATHEWS V. ELRIDGE*

In determining the contours of the "important constitutional limitations" on immigration detention, this Court has utilized the balancing test laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Velasco Lopez*, 978 F.3d at 848,

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28 *See* Singer, *supra* n.19 at 15.

29 *See* ICE, Alternatives to Detention, https://www.ice.gov/features/atd (last updated Mar. 2024).

851; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' . . . is the test that we articulated in *Mathews*[.]"). That test requires weighing the noncitizen's interest in liberty against ICE's interest in continued detention. *Id.* at 529.

As discussed above, DHS's development and dedication to a wide range of ATDs to ensure appearance at all stages of immigration proceedings and the fact that Section 1226(c) sweeps in a wide range of minor and non-dangerous conduct dramatically lessens the government's interest in blanket detention without individualized review. This is particularly true given the immense cost savings that accrue to the government and the public from substituting alternatives to detention for physical incarceration. *See Velasco Lopez* at 854 & n.11 ("minimizing the enormous impact of incarceration in cases where it serves no purpose" "promotes the Government's interest").

As for the private interest at issue, this Court has already recognized that prolonged immigration detention forcibly separates families and takes parents, caregivers, breadwinners and employees away from their U.S. citizen dependents and communities. *See id.* 855 & n.12; *Lora*, 804 F.3d at 616 n.23. While not all the

options under the ATD umbrella fully safeguard individuals' liberty interests,[30] some – like the community-based case management programs piloted by ICE – have the potential to do so on a large scale. And the alternatives currently deployed by ICE can serve to minimize the "significant deprivation of liberty" that is the inherent consequence of civil immigration detention. *Velasco Lopez*, 978 F.3d at 851 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). The availability of these tools and the breadth of conduct covered by the statute requires a rejection of the premise, unquestioningly adopted by the district court below, that incarceration is the only way to mitigate risk of flight and protect the community.

To rely on *Demore*—an outdated case based on erroneous statistics—for this faulty premise ignores the realities of the scope of Section 1226(c), and the government's ability to more effectively protect its interests and those of noncitizens and the public through use of ATDs. Under the facts before this Court,

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[30] Benz, Evan, Capital Area Immigrants' Rights Coalition, *Community-Based Case Management Programs: A True Alternative to ICE's Harmful Surveillance Programs*, https://www.caircoalition.org/sites/default/files/documents/ATD%20Policy%20Brief%20Final.pdf.; American Immigration Council, *Alternatives to Immigration Detention: An Overview*, (July 11, 2023), https://www.americanimmigrationcouncil.org/research/alternatives-immigration-detention-overview; American Immigration Lawyers Association, *Case Management: An Effective and Humane Alternative to Detention*, (Nov. 2, 2022), https://www.aila.org/library/aila-policy-brief-case-management.

it is clear that an individualized determination of dangerousness and flight risk is required once detention becomes unreasonably prolonged.

V. CONCLUSION

For the foregoing reasons the Court should reverse the judgment below.

Respectfully submitted,

Dated: April 23, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Local Rules 32.1(a)(4)(A) and 29.1(c), because it contains 6,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief in Support of Petitioner with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system on April 23, 2024. I further certify that participants in the case are registered ACMS users and will be served by the appellate ACMS system.

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