12-1053

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT DESROSIERS,
PETITIONER-APPELLANT
v.

ROY L. HENDRICKS, WARDEN, ESSEX COUNTY CORRECTIONAL FACILITY;
SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY;
ATTORNEY GENERAL OF THE UNITED STATES;
BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY;
FIELD OFFICE DIRECTOR FOR DETENTION AND REMOVAL FOR NEW JERSEY,
RESPONDENTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF *AMICI CURIAE*
DETENTION WATCH NETWORK, FAMILIES FOR FREEDOM, IMMIGRANT DEFENSE PROJECT, IMMIGRANT RIGHTS CLINIC, IMMIGRATION EQUALITY, IRATE & FIRST FRIENDS, KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC, THE LEGAL AID SOCIETY, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT, NEW SANCTUARY COALITION OF NEW YORK CITY, RUTGERS-NEWARK IMMIGRANT RIGHTS CLINIC, AND SETON HALL UNIVERSITY SCHOOL OF LAW CENTER FOR SOCIAL JUSTICE

IN SUPPORT OF PETITIONER-APPELLANT AND IN SUPPORT OF REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* state that no publicly held corporation owns 10% or more of the stock of any of the parties listed herein, which are nonprofit organizations and community groups.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored any part of the brief, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT OF INTEREST

Amici curiae are community groups, immigrant rights organizations, and legal service providers whose members and clients are directly affected by the Government's application of *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), and its improper, expansive interpretation of the mandatory detention statute. *Amici* include the following local and national organizations: Detention Watch Network, Families for Freedom, Immigrant Defense Project, Immigrant Rights Clinic, Immigration Equality, IRATE & First Friends, Kathryn O. Greenberg Immigration Justice Clinic, The Legal Aid Society, National Immigrant Justice Center, National Immigration Project, New Sanctuary Coalition of New York City, Rutgers-Newark Immigrant Rights Clinic, and Seton Hall University School of Law Center for Social Justice. Detailed statements of interest for each organization are appended to this brief.

Amici share a profound interest in exposing the unjust, harsh, and arbitrary consequences of *Matter of Rojas*. *Amici* agree with the arguments presented by the Petitioner in his case, and submit this brief to provide this Court with the broader context in which *Matter of Rojas* operates. In Point I, *infra*, *amici* describe Congress's chosen statutory scheme and the limited role that mandatory detention serves within this scheme. In Points II and III, *infra*, *amici* provide case stories to illustrate how *Matter of Rojas* is contrary to this statutory scheme and leads to

unreasonable and arbitrary results. As these cases illustrate, *Matter of Rojas* contravenes Congress's chosen scheme by requiring the mandatory, no-bond detention of those individuals most likely to be released on bond: individuals who have long since reintegrated into their communities prior to their immigration detention. Moreover, these cases demonstrate how *Matter of Rojas* leads to unreasonable and arbitrary results by undermining the rule of law; disrupting the lives of individuals, families, and communities; and leading to detention that often raises serious constitutional concerns. Because of the harsh consequences for our members and clients, unintended by Congress in enacting its detention scheme, *amici* urge this Court to reject the Government's interpretation in *Matter of Rojas*.[1]

ARGUMENT

I. Congress Did Not Intend For Mandatory Detention To Apply To Noncitizens Who Have Long Been Released From Criminal Custody And Have Reintegrated Into Their Communities.

Mandatory detention—detention without the opportunity to seek bond—has profound effects on noncitizens, their families, and communities. Noncitizens subject to mandatory detention are held in immigration custody without any individualized assessment of their risk of flight or danger to the community. 8

[1] *Amici* also support Petitioner's other arguments regarding the applicability of discretionary detention authority to his case. *See* Pet'r Br. at 14-24 (arguing that 8 U.S.C. § 1226(c) does not apply following the completion of administrative proceedings or to individuals who did not receive a custodial sentence of incarceration).

U.S.C. § 1226(c). They are subject to transfer to any jurisdiction in the country, including to detention facilities hundreds or thousands of miles away from their families, communities, and access to counsel.[2] As a result, detained noncitizens are significantly more likely to lack legal representation and face other, often insurmountable, obstacles in defending their removal cases than non-detained noncitizens.[3] However, the effect of detention on the detainee, his or her family members—even the children, spouse, or parents of the detained—or his or her community cannot be considered by an immigration judge in a mandatory

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[2] Noncitizens are often transferred to remote detention facilities in the Southeastern U.S., where there is less access to family and legal representation. *See, e.g.*, Human Rights Watch, *A Costly Move: Far and Frequent Transfer Impede Hearings for Immigrant Detainees in the United States* (Jun. 14, 2011), *at* http://www.hrw.org/node/99660; Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (Nov. 2009), *at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf.

[3] Eighty-four percent of detained noncitizens lack representation, compared to fifty-eight percent of all noncitizens in removal proceedings. Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.A.* 30 (Mar. 25, 2009) *at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf. Detention adversely affects noncitizens' ability to defend themselves against removal. *See id.* at 30-36; *see also* OIG Report OIC-10-13, *supra* note 1, at 4 ("Difficulty arranging for counsel or accessing evidence may result in delayed court proceedings. Access to personal records, evidence, and witnesses to support bond or custody redeterminations, removal, relief, or appeal proceedings can also be problematic in these cases."); NYU Immigrant Rights Clinic, *Immigration Incarceration: The Expansion and Failed Reform of Immigration Detention in Essex County, NJ* 31-35 (Mar. 2012), *at* http://www.afsc.org/sites/afsc.civicactions.net/files/documents/ImmigrationIncarceration2012.pdf (describing barriers to legal representation, law libraries, and support services in immigration detention facilities in NJ).

detention case.[4] 8 C.F.R. § 1003.19(h)(2)(i)(D) (depriving immigration judges of jurisdiction to consider whether to release detainees subject to 8 U.S.C. § 1226(c)). Moreover, according to the Government, noncitizens who are subject to mandatory detention must remain detained for the entirety of their administrative removal proceedings—whether such proceedings take days, months, or years.[5] This comes at significant taxpayer expense.[6]

In creating the statutory scheme governing immigration detention for noncitizens in removal proceedings, Congress chose *not* to mandate detention without bond in all cases. Rather, Congress created mandatory detention as the exception to the general rule. Under the general rule, federal immigration officials

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[4] The mandatory detention of noncitizens can create severe trauma for their families, particularly children. *See* Amy Bess, National Association of Social Workers, *Human Rights Update: The Impact of Immigration Detention on Children and Families* 1-2 (2011), *at* http://www.socialworkers.org/practice/intl/2011/HRIA-FS-84811.Immigration.pdf.

[5] The Department of Homeland Security ("DHS") has argued that mandatory detention is constitutional regardless of how long it lasts. *See, e.g.*, *Diop v. ICE/Homeland Sec*., 656 F.3d 221, 232 (3d Cir. 2011) (rejecting DHS's arguments that detention of a noncitizen for three years pending removal proceedings was constitutionally permissible). As discussed below, *see infra* Point III.C, *amici* agree with recent court decisions in this Court and others that have found that prolonged detention raises serious constitutional concerns and that Congress should not be presumed to have authorized such lengthy detention without a bond hearing.

[6] Immigration detention costs federal taxpayers $122 per person per day, or $45,000 per person per year, for a total of $1.9 billion a year. *See* DHS, *FY12 Congressional Budget Justification* 938-39 *at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf.

have the authority to choose whether to detain or release noncitizens based on an individualized assessment of their risk of flight and dangerousness. *See, e.g.*, *Matter of Patel*, 15 I&N Dec. 666, 666 (BIA 1976) ("An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, . . . or that he is a poor bail risk." (citations omitted)). In creating an exception to this rule, Congress enacted mandatory detention to serve a limited purpose: to ensure that noncitizens who are incarcerated for certain types of removable offenses will remain in custody until they can be removed.

Congress set forth this statutory scheme for detention in 8 U.S.C. § 1226. Section 1226(a) maintains the Government's longstanding general authority to detain *and* release noncitizens who are placed in removal proceedings. The section states that a noncitizen "may be arrested and detained pending a decision on whether alien is to be removed" and that the Government "may release the alien" on bond or other conditions, "*[e]xcept* as provided in subsection (c)." 8 U.S.C. § 1226(a) (emphasis added). Subsection (c) thus provides the mandatory detention provision:

> (c) Detention of criminal aliens.
>
> (1) The Attorney General shall take into custody any alien who
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii),(B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(I) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphasis added). Section 1226(c)(2) states that the Attorney General may only release noncitizens "described in paragraph (1)" if the release is "necessary to provide protection to a witnesses, a potential witness" and other witness-related provisions. 8 U.S.C. § 1226(c)(2). The effective date of the mandatory detention provision is October 9, 1998. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. 3009, 3009-586 (Sept. 30, 1996). Read in its entirety, 8 U.S.C. § 1226 provides the Attorney General with the authority to arrest, detain, and release immigrants pending removal proceedings, except for a specified class of noncitizens whom the Attorney General detains "when . . . released" from custody for certain enumerated criminal offenses.

In *Matter of Rojas*, the BIA adopted a much more expansive view of the scope of mandatory detention. *See* 23 I&N Dec. at 127. Notably, the BIA acknowledged that the "when . . . released" clause in § 1226(c) "does direct the

Attorney General to take custody of aliens immediately upon their release from criminal confinement." *Id.* at 122. However, the BIA held that the "when . . . released" clause was a "statutory command" rather than a "description of an alien who is subject to detention," and therefore mandatory detention could apply to any noncitizens with a relevant conviction, even if months or even years had passed since their release from criminal custody. *See id*. at 121, 122.

The vast majority of federal courts have rejected the BIA's reasoning in *Matter of Rojas*.[7] In examining the "when . . . released" clause and the overall

[7] *See, e.g.*, *Kot v. Elwood*, No. 12–1720 (FLW), 2012 WL 1565438, at *8 (D.N.J. May 2, 2012) (holding that § 1226(c)(1) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense); *Nunez v. Elwood*, No. 12–1488 (PGS), 2012 WL 1183701, at *3 (D.N.J., Apr. 9, 2012) (same); *Ortiz v. Holder*, No. 2:11CV1146 DAK, 2012 WL 893154, at *3 (D.Utah Mar. 14, 2012) (same); *Jaghoori v. Lucero*, No. 1:11–cv–1076, 2012 WL 604019, at *3 (E.D.Va. Feb. 22, 2012) (same); *Christie v. Elwood*, No.11–7070 (FLW), 2012 WL 266454, at *8 (D.N.J. Jan. 30, 2012) (same); *Rosario v. Prindle*, No. 11–217, 2011 WL 6942560, at *3 (E.D.Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D.Ky. Jan. 4, 2012) (same); *Parfait v. Holder*, No. 11–4877 (DMC), 2011 WL 4829391, *6 (D.N.J. Oct. 11, 2011) (same); *Rianto v. Holder*, No. CV–11–0137–PHX–FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011) (same); *Beckford v. Aviles*, No. 10-2035 (JLL), 2011 WL 3444125, at *7 (D.N.J. Aug. 5, 2011) (same); *Keo v. Lucero*, No. 11-614 (JCC), 2011 WL 2746182 (E.D. Va. July 13, 2011) (same); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (same); *Sylvain v. Holder*, No. 11-3006 (JAP), 2011 WL 2580506, at *5-6 (D.N.J. June 28, 2011) (same); *Aparicio v. Muller*, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011) (same); *Louisaire v. Muller*, 758 F.Supp.2d 229, 236 (S.D.N.Y. 2010) (same); *Gonzalez v. Dep't of Homeland Sec.*, No. 1:CV-10-0901, 2010 WL 2991396, at *1 (M.D. Pa. July 27, 2010) (same); *Bracamontes v. Desanti*, No. 2:09cv480, 2010 WL 2942760, at *6 (E.D. Va. June 16, 2010), *adopted by*, 2010 WL 2942757 (E.D. Va. July 26, 2010) (same); *Dang v. Lowe*,

statutory scheme, these courts have held that mandatory detention applies only when the government detains a noncitizen "on or about the time he is released from custody for the offense that renders him removable." *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010). When the government initiates removal proceedings against someone months or years after their release from criminal custody, § 1226(a) applies: the government retains the authority to detain the person, but may also release him or her on bond or other conditions if he or she does not pose a flight risk or danger to the community. As the majority of federal courts have explained, this reading of 8 U.S.C. § 1226 and the "when . . . released"

No. 1:CV-10-0446, 2010 WL 2044634, at *2 (M.D. Pa. May 20, 2010) (same); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (same); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010) (same); *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) (same); *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (same); *Bromfield v. Clark*, No. C06-0757-JCC2006, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007) (same); *Zabadi v. Chertoff*, No. C05-03335, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (same). *But see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Matter of Rojas*); *Santana v. Muller*, No. 12 Civ. 430(PAC), 2012 WL 951768, at *4 (S.D.N.Y. Mar. 21, 2012) (same); *Guillaume v. Muller,* No. 11 Civ 8819, 2012 WL 383939 (S.D.N.Y. Feb. 7, 2012) (same); *Mendoza v. Muller*, No. 11 Civ. 7857(RJS), 2012 WL 252188 (S.D.N.Y. Jan. 25, 2012) (same); *Hernandez v. Sabol,* --F.Supp.2d. --, 2011 WL 4949003 (M.D.Pa. Oct. 18, 2011) (same); *Garcia Valles v. Rawson*, No. 11-C-0811, 2011 WL 4729833 (E.D. Wis. Oct. 7, 2011) (same); *Diaz v. Muller*, No. 11-4029, 2011 WL 3422856 (D.N.J. Aug. 4, 2011) (same); *Gomez v. Napolitano,* No. 11-cv-1350, 2011 WL 2224768 (S.D.N.Y. May 31, 2011) (same); *Sulayao v. Shanahan*, No. 09-Civ.-7347, 2009 WL 3003188 (S.D.N.Y. Sept. 15, 2009) (same); *Serrano v. Estrada*, No. 3:01CV1916M, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002) (holding that mandatory detention was unconstitutional but noting in dicta that § 1226(c) is ambiguous).

clause gives meaning to Congress's plain language and overall statutory scheme.[8]

Contrary to these court decisions, the Fourth Circuit recently deferred to the BIA in *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012). Concluding that § 1226(c) is a "command" that requires "some degree of immediacy," *Hosh* nonetheless held that "a criminal alien who is detained *after* that exact moment [of release from criminal custody] is not exempt from mandatory detention." *Id.* at 381. In reaching this conclusion, the court declined to apply various rules of statutory construction, *id.* at 381 n.7, including the longstanding immigration rule of lenity, *id.* at 383-84. Instead, it presumed the validity of an expansive reading based on its assumption of Congress's general "aggressive[]" intent against "criminal aliens"—the opposite of a rule of lenity. *See id.* at 380.

Hosh's flawed reading of the statute not only renders the "when . . . released" clause superfluous, it imposes a "layer of arbitrariness" to the detention scheme. *See Judulang v. Holder*, __ U.S. __, 132 S.Ct. 476, 486 (2011); *see also* Point II (discussing the arbitrary results under the Government's position). The decision will deprive individuals detained years after their release from criminal

[8] *Amici* do not suggest that they agree with Congress's choice to deprive bond hearings to noncitizens who are detained at the time of their release from incarceration for the convictions specified in the mandatory detention statute. Regardless of the merits of Congress's choice, however, *amici* submit that *Matter of Rojas* goes much further than even Congress intended.

custody, with no subsequent criminal activity, of any ability to demonstrate a lack of flight risk and danger.

Contrary to the Fourth Circuit's view, Congress never intended its civil immigration detention scheme to so arbitrarily deprive people within the community of the opportunity to demonstrate their lack of flight risk and dangerousness while they defend their removal cases. As the First Circuit explained in a related context,

> The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply. . . . [F]inding that the "when released" language serves this more limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses, as opposed to the amorphous purpose the Government advances, avoids attributing to Congress the sanctioning of the arbitrary and inconsequential factor of any post-[Oct. 8, 1998] custodial release becoming the controlling factor for mandatory detention.

Saysana v. Gillen, 590 F.3d 7, 17 (1st Cir. 2009). Seeking to prevent a *return* to a community, Congress linked mandatory detention to the period immediately following release rather than simply specifying criminal behavior as an automatic ground for mandatory detention at any time. This reading of the detention statute explains why Congress chose to specify a temporal indicator—"when . . . released"—for mandatory detention, but none at all for the baseline discretionary detention provision of §1226(a). "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress

acts intentionally." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11–393, slip op. at 12 (U.S. June 28, 2012). Congress intended for mandatory detention to serve a specific and limited function—to ensure that individuals who are incarcerated for certain types of removable offenses will *remain* in a continuous chain of custody until the timely completion of their removal proceedings. This "focused purpose" is not served when mandatory detention applies to individuals long released from criminal custody.

II. As Case Examples Illustrate, *Matter of Rojas* Is Contrary To Congress's Statutory Scheme.

In the years following *Matter of Rojas,* the Government has vigorously applied the majority's decision by detaining, without bond, untold numbers of noncitizens months or years after their release from criminal custody. As demonstrated through the case examples below, this application of the mandatory detention is contrary to Congress's intent and has routinely led to the detention, without bond, of individuals who are neither flight risks nor dangers to the community.

A. *Matter of Rojas* Requires The Mandatory Detention of Noncitizens Who Are Most Likely To Establish That They Are Not A Flight Risk Or Danger To The Community—Individuals Who Have Long Since Been Released From Criminal Custody For An Enumerated Offense.

The BIA justified its expansive reading of the mandatory detention statute in *Matter of Rojas* as being necessary to give meaning to Congress's intent to

effectuate the removal of noncitizens with certain types of criminal convictions, whom Congress deemed to be per se flight risks or dangers to the community. *Id.*, 23 I&N Dec. at 122. However, the BIA's reading of the law has had the opposite effect: it prevents immigration officials from granting bond to the noncitizens who are most likely to establish that they are not a flight risk or danger to the community—individuals who, by definition, have had no recent convictions for any offense enumerated in § 1226(c)(1)(A)-(D).

For example, under the Government's position, Mr. Patrick Monestime, a longtime lawful permanent resident from Haiti who came to the United States at the age of nine, was detained for nearly a year at Hudson County Correctional Center in New Jersey. *See Monestime v. Reilly*, 704 F. Supp. 2d 453, 455 (S.D.N.Y. 2010); *see also* Hab. Pet'n, *Monestime v. Reilly*, No. 10-cv-1374 (WHP) (S.D.N.Y. filed Feb. 23, 2010) (hereinafter "Monestime Hab. Pet'n"). Prior to his detention in 2009, he was living with his mother, a U.S. citizen, helping to support his family and working in the construction field. *See* Monestime Hab. Pet'n at 7; Decl. of Alina Das, Esq. (hereinafter "Das Decl.") (on file with *amici*). DHS charged him with removability based on two misdemeanors, from 1997 and 2002, and subjected him to mandatory detention despite the nearly eight years that had passed since his last allegedly removable offense. *See id.* at 6. DHS continued to detain him for several months without a bond hearing, even after the January 2010

earthquake in Haiti and temporary moratorium on removals to Haiti guaranteed that his proceedings would become prolonged. *See Monestime*, 704 F. Supp. 2d at 458.

In granting his habeas petition, the district court emphasized the lack of any negative public safety factors evident in his case. *See id.* As the court noted, "given that eight years have passed since Monestime was convicted of his second misdemeanor, there appear to be no public safety factors justifying his prolonged detention." *Id.* at 458. The court explained that a bond hearing "is particularly important when, as here, an alien is being deported for an offense *committed many years prior to his detention and removal charges*." *Id.* (emphasis added). Under these circumstances, when an individual is not detained when released from criminal custody, the Government "can only determine whether [that individual] poses a risk of flight or danger to the community through an individualized bond hearing." *Id.* The court ordered the Government to provide Mr. Monestime a bond hearing, and Mr. Monestime was later released from detention. *See* Das Decl.

Like Mr. Monestime, all of the individuals affected by *Matter of Rojas* have, by definition, committed no further offenses designated in the mandatory detention statute, 8 U.S.C. § 1226(c)(1)(A)-(D), since their past offense. This simple fact illustrates how *Matter of Rojas* undermines Congress's statutory scheme by

denying bond hearings to persons who do not present a categorical danger to the public.

Nor does *Matter of Rojas* further Congressional intent to deny bond hearings to those persons who are categorically flight risks, i.e., noncitizens presumed to be high risks for eluding immigration authorities. Indeed, many of the noncitizens who are affected by *Matter of Rojas* come to the attention of federal immigration officials precisely because they affirmatively present themselves to immigration officials—by applying to renew their permanent resident cards (green cards), applying for citizenship, appearing for immigration inspection after a brief trip abroad, or even after presenting themselves to federal immigration offices or immigration court.

For example, Mr. Y Viet Dang is a longtime lawful permanent resident from Vietnam who was detained in Pike County Correctional Facility in Pennsylvania pursuant to *Matter of Rojas* on February 9, 2010, when he applied for U.S. citizenship and came to immigration authorities to check the status of his application. *See Dang v. Lowe,* No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780, *3 (M.D. Pa. May 7, 2010) (Report and Recommendation). After applying for citizenship, he was placed in removal proceedings based on two decade-old convictions involving possession of a firearm and theft, for which he was eligible for relief from removal. *See id.* at *3 (noting his pending application for

adjustment of status and a discretionary waiver). In the ten years that had passed since his release from criminal custody for those crimes, Mr. Y Viet Dang had reintegrated into his community, working and raising his U.S. citizen child with his U.S. citizen wife, a U.S. Army lieutenant. *See id.* at *4 n.8; Decl. of Brennan Gian-Grasso, Esq. (on file with *amici*) (hereinafter "Brennan Decl."). At no time did he attempt to elude immigration authorities; in fact, he repeatedly made himself and his criminal records available to immigration officials through his applications to renew his lawful permanent resident card and to become a U.S. citizen. *See id.* at *3. As the district court noted in granting his habeas petition, ICE waited almost ten years, with no explanation, to take Mr. Dang into custody. *Id.* The court noted that, contrary to Congress's intent behind mandatory detention to prevent the release of individuals whom Congress presumed were categorically flight risks, "it appears from the record that Petitioner Dang is very likely to appear for his removal proceedings based on the various other applications he has filed over the years with ICE and the fact that he appeared to have cooperated with ICE with respect to these applications." *Id.* at *4 n.8. After winning his habeas petition, Mr. Dang was released on $5,000 bond. *See* Brennan Decl. Yet, because of *Matter of Rojas*, Mr. Dang spent three months of his life—nearly a decade after his removable convictions—in a remote detention center in Pike County, Pennsylvania, separated from his wife and child and unable to work—before his

habeas victory. *See id.* at *6. Like many others affected by *Matter of Rojas*, no purpose was served by his mandatory detention.

B. Noncitizens Who Have Won Habeas Challenges To *Matter Of Rojas* Have Been Subsequently Granted Release On Bond.

Indeed, since the BIA's decision in *Matter of Rojas*, scores of noncitizens who have been detained months or years after their release from criminal custody have filed habeas petitions, seeking a bond hearing. In reviewing these cases, *amici* has found numerous examples where Immigration Judges have granted bond because the individual—despite having been subjected to mandatory detention under *Matter of Rojas*—clearly posed no flight risk or danger to the community.

This should be unsurprising since individuals affected by *Matter of Rojas* are precisely the individuals who have built up months or years of evidence since their prior convictions demonstrating their deep ties to the community and evidence of rehabilitation. In order to qualify for bond, a detained noncitizen must demonstrate that she does not pose a flight risk or danger to the community. *See Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006). Indeed, under the BIA's view, an Immigration Judge is powerless to grant bond, even under 8 U.S.C. § 1226(a), if the noncitizen presents a danger to the community. *See Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). Factors relevant to determining flight risk or danger to the community include the "length of residence in the community," the "existence of family ties," and "stable employment history," *Matter of Andrade*, 19 I&N Dec.

488, 489 (BIA 1987), as well as "the alien's criminal record, including . . . the recency of such activity," *Guerra*, 24 I&N Dec. at 40.

These are precisely the factors that the individuals who have won habeas challenges to *Matter of Rojas* have routinely established. For example, after a federal court ordered a bond hearing for Harold Christie, the Immigration Judge ordered his release from Monmouth County Correction Institution in New Jersey on $3,000 bond. *See Christie v. Elwood*, No.11–7070 (FLW), 2012 WL 266454, at *2 (D.N.J. Jan. 30, 2012); Decl. of Sarah Gillman, Esq. (on file with amici) (hereinafter "Gillman Decl."). Mr. Christie, a lawful permanent resident who had been living in the United States for over thirty-five years, was detained at his workplace in 2011, twelve years after being released from a one-day sentence of incarceration for a drug offense. *Christie*, 2012 WL 266454, at *5; Gillman Decl. At his bond hearing, he presented evidence of ties to the United States, including his lengthy residency, the impact of his detention on his 82-year-old U.S. citizen mother and his siblings, his tax records and a letter from the company he had been working with for the last fifteen years. Gillman Decl. In light of the evidence, the Immigration Judge granted him $3000 bond, which his mother and sister posted that day. *Id.* Mr. Christie was released after five months of detention.

Similarly, after a federal court ordered a bond hearing for Lesly Parfait, an Immigration Judge ordered his release from Bergan County Jail in New Jersey on

$7,500 bond. *See* 2011 WL 4829391 (D.N.J. October 11, 2011); Letter Response to Order, *Parfait v. Holder*, No. 11–4877 (DMC) (D.N.J. filed Oct. 29, 2011) (noting bond and release). Mr. Parfait is a longtime lawful permanent resident from Haiti who has lived in the U.S. since the age of five. *Parfait*, 2011 WL 4829391, at *1. He has a U.S. citizen wife, six U.S. citizen children, and three U.S. citizen grandchildren. *Id.* He was released from incarceration in 2008, but was not picked up by ICE until two and a half years later, after he applied to renew his permanent resident card. *Id.* Upon being granted a bond hearing, Mr. Parfait, like many who would otherwise be subject to mandatory detention under *Matter of Rojas*, easily demonstrated that he should be granted bond given his extensive ties to the U.S.

Bond hearings are particularly important in these cases as many individuals who are granted bond have strong claims to relief from removal—a factor relevant to bond—and ultimately prevail in their removal proceedings. For example, after a federal court rejected *Matter of Rojas* and ordered a bond hearing for Ysaias Quezada-Bucio, the Immigration Judge ordered his release on $7,500 bond. *See Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004); Pet'r Motion for EAJA Fees, *Quezada-Bucio v. Ridge*, No. C03-3668L (W.D. Wash.) (filed on Jul. 1, 2004), at 2 (noting release on $7,500 bond). After his release, Mr. Quezada-Bucio eventually won his case, five years after federal immigration officials put

him into removal proceedings. *See In re: Quezada-Bucio*, Seattle, WA (Imm. Ct. Oct. 28, 2008) (on file with *amici*) (terminating Mr. Quezada-Bucio's case on the ground that his conviction is not a removable offense). No purpose would have been served by detaining him that entire time. Nor is his case unusual. In the last three months of 2011, 34.4% of all noncitizens in removal proceedings nationwide were ultimately granted permission to stay in the United States.[9] Many of the individuals subject to *Matter of Rojas*—lawful permanent residents and others with extensive ties to the community and years of rehabilitation following their past criminal conviction—are among those successfully pursuing relief from removal, yet are deprived of a bond hearing during this lengthy process.

III. As Cases Examples Illustrate, *Matter of Rojas* Leads To Unjust, Harsh, And Arbitrary Results.

These cases also illustrate the sheer unreasonableness of the Government's interpretation. In light of the examples described below, this Court should not permit such a manifestly unjust reading of the mandatory detention statute.

A. *Matter of Rojas* Undermines The Rule of Law By Permitting The Government To Wait Months Or Years Before Subjecting A Free Noncitizen To Detention Without a Bond Hearing.

[9] Transactional Records Access Clearinghouse, *Share of Immigration Cases Ending in Deportation Orders Hits Record Low*, last visited on June 29, 2012, *available at* http://trac.syr.edu/immigration/reports/272/.

Matter of Rojas permits the arbitrary denial of bond hearings to noncitizens whom the Government has waited months or years to detain for their past criminal convictions. However reasonable it may be for the Government to delay mandatorily detaining an individual when he or she actively attempts to elude authorities, the Government has no basis for explaining why it would wait months or years to detain an individual who simply returns to his or her family and community, and then deny that individual an individualized bond hearing once the Government seeks to commence removal proceedings.

The case of Mr. Dang and his detention in Pike County, Pennsylvania, described above, *see* Point II, *supra*, demonstrates how *Matter of Rojas* leads to the mandatory detention of individuals years after their removable offenses, with no explanation by immigration officials for the delay. *See Dang,* 2010 WL 2044634, at *2. In the ten years that followed Mr. Dang's release from criminal custody, the Government did nothing to even suggest to Mr. Dang that he could be detained without bond for his past offenses, and instead permitted Mr. Dang to return to his family and community and re-establish himself over a nearly a decade. As the district court noted in Mr. Dang's case, "it appears that [Immigration and Customs Enforcement (ICE)] was able to take Petitioner Dang into custody long before February 2010, i.e., during the proceedings with respect to the various other applications Petitioner filed with ICE throughout the [ten] years after his release

from incarceration requesting permission to remain in the United States. Rather than taking Petitioner Dang into custody within a reasonable time after either his release from incarceration or when he appears to have been available to ICE, he was taken into immigration custody nine years and nine months after his release from custody." *Id.* at *11. The court found ICE's actions to be unreasonable and its reading of the statute unsupportable. *Id.*

Mr. Dang is not alone. The Government has arbitrarily and inexplicably waited months and often years to detain numerous lawful permanent residents for their past criminal convictions. *See, e.g.*, *Christie*, 2012 WL 266454, at *5 (twelve years); *Parfait*, 2011 WL 4829391, at *2 (two and a half years); *Sylvain*, 2011 WL 2580506, at *1 (four years); *Jean*, No. 11-3682 (LTS) (ten years); *Bracamontes*, 2010 WL 2942760, at *1 (eight years); *Khodr*, 697 F. Supp. 2d at 778 (four years); *Zabadi*, 2005 WL 3157377, at *5 (two years); *Quezada-Bucio*, 317 F. Supp. 2d at 1228 (three years). To deny these individuals bond without any notice or opportunity to present their individualized history of rehabilitation turns the mandatory detention scheme into an unreasonable and arbitrary trap for immigrants who had long since returned to their productive lives.

B. *Matter Of Rojas* Disrupts The Productive Lives Of Individuals, Families, And Communities.

By disrupting the lives of productive individuals who have long returned to their families and communities, *Matter of Rojas* creates considerable hardship for

lawful permanent resident and others who have sought to turn their lives around. This often results in lengthy detention, extreme difficulties in defending one's removal case, and other significant hardships for individuals in removal proceedings who otherwise would be able to remain with their families while pursuing relief from removal.[10]

For example, Mr. Errol Barrington Scarlett is a longtime lawful permanent resident from Jamaica who has lived in the United States for over thirty years. *See Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 216 (W.D.N.Y. 2009). After his release from incarceration for a drug possession offense, Mr. Scarlett returned to his family and found employment with his brother's real estate business. *See* Pet'r Resp. Br., *Scarlett v. U.S. Dep't of Homeland Sec.*, No. 08-CV-534 at 10 (filed Jun. 19, 2009) ("Scarlett Resp. Br.). He was successfully enrolled in a drug treatment program for over a year. *See id.* After a year and a half following his release from incarceration, Mr. Scarlett received a letter from DHS summoning him to their New York office. *See id.* At that appointment, he was

[10] These hardships—and the liberty interests at stake—underscore why the rule of lenity should apply to the extent that this Court finds "any lingering ambiguities" in the deportation statute (which includes the detention provisions at issue here). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *but see Hosh*, 680 F.3d at 383-84 (declining to apply the rule of lenity).

charged with removability based on his drug possession conviction, and summarily detained without a bond hearing. *See id.*

DHS then transferred Mr. Scarlett to a detention facility in Louisiana, thousands of miles from his family, where his case was adjudicated under Fifth Circuit precedent. *See id.*at 11. Under Fifth Circuit law at the time, his drug possession offense was deemed a "drug trafficking aggravated felony" and he was denied eligibility to seek cancellation of removal. *See id.* After years of litigation, he was eventually able to secure review within the Second Circuit, which rejected DHS's arguments that he had an aggravated felony. *See Scarlett v. U.S. Dept. of Homeland Sec.*, 311 Fed.Appx. 385 (2d Cir. 2009). A federal court also order the government to conduct a bond hearing, concluding that *Matter of Rojas* was contrary to Congressional intent and that Mr. Scarlett's prolonged detention raised serious constitutional concerns. *See Scarlett*, 632 F. Supp. 2d at 219-23. While Mr. Scarlett was released, he will never regain the five years of his life that he lost while he was in detention without a bond hearing.

Such mandatory detention often comes at a high price to the lives that noncitizens have worked hard to rebuild, and the wellbeing of noncitizens' families and communities. For example, Ms. Julie Evans is a longtime lawful permanent resident from the United Kingdom who has lived in the United States for nearly fifty years. *See* Hab. Pet'n, *Evans v. Shanahan*, No. 10-08332 (S.D.N.Y. filed

Nov. 3, 2010), at 6. After experiencing domestic violence and homelessness, Ms. Evans developed a drug addiction problem and received several convictions. *See id.* at 6-7. After her release from jail in 2009, she successfully participated in drug rehabilitation and received significant support from a local reentry and mentorship program. *See id.* She was able to support herself, find an apartment to live with her daughter, and receive medical treatment for serious injuries she received during her period of homelessness. *See id.* at 7. She also contributed back to the reentry and mentorship program that had assisted her. *See id.*

During this time, Ms. Evans applied to renew her permanent resident card. *See id.* at 8. After that point, nearly a year and a half after her release from incarceration, her life was disrupted when ICE officers came to her home, arrested her, and transferred her to a detention facility in Monmouth County Correctional Institution in New Jersey, several hours away from home. *See id.* As a result, she was separated from her daughter, who was evicted from her apartment, and she was unable to continue her work with her reentry program. *See* Das Decl. She spent five months in detention in Monmouth County Correctional Institution without receiving a bond hearing, pursuant to *Matter of Rojas*. *See id.* After she secured *pro bono* counsel, she filed a habeas petition seeking a bond hearing and DHS released her. *See id.* While she was able to rebuild her life following her

immigration detention, both she and her family went through significant hardships over the five month period she was detained without a bond hearing.

C. Detention Pursuant To *Matter of Rojas* Often Results In Detention Raising Serious Constitutional Concerns.

Disturbingly, *Matter of Rojas* cases often become intertwined with serious constitutional questions, because the application of *Matter of Rojas* tends to lead to the prolonged detention of individuals who have substantial challenges to their removability. In *Demore v. Kim*, the Supreme Court upheld the constitutionality of mandatory detention for the brief period of time necessary to complete removal proceedings for a noncitizen who had conceded removability. *Demore v. Kim*, 538 U.S. 510, 532 (2003).[11] Since *Demore,* federal courts have recognized that when detention has become prolonged, or when noncitizens raise substantial challenges to removability, the constitutionality of their detention without a bond hearing becomes suspect.[12] These are the very scenarios that often arise in *Matter of Rojas* cases.

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[11] Justice Breyer specifically noted that the mandatory detention of individuals who had substantial claims against their removability raised serious due process concerns. *See, e.g., Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part).

[12] *See, e.g.*, *Diop v. ICE/Homeland Sec*., 656 F.3d 221, 232 (3d Cir. 2011) (concluding that prolonged detention in the absence of an individualized hearing may raise serious constitutional concerns); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (same); *Ly v. Hansen*, 351 F.3d 263, 267, 271-72 (6th Cir. 2003) (same); *Tijani v. Willis*, 430 F.3d 1241, 1247 (9th Cir.

For example, as in the case of Mr. Scarlett, *see* Point III.B, *supra*, the government's application of mandatory detention under *Matter of Rojas* lead to significantly prolonged detention. Mr. Scarlett was detained for five years without a bond hearing before a federal district court intervened. *See Scarlett*, 632 F. Supp. 2d at 216. The district court found that Mr. Scarlett's detention far exceeded the constitutionally reasonable detention period discussed in *Demore* and *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). *See Scarlett*, 632 F. Supp. 2d at 220-23. Had the Government not relied on *Matter of Rojas* (which the district court also found to be an impermissible construction of Congressional intent, *id.* at 219), Mr. Scarlett would have received a bond hearing in 2004, when he was initially detained, and not lost over five years of his life while fighting his removal case.

Similarly, in Mr. Monestime's case, *see* Point II.A, *supra*, Mr. Monestime was facing prolonged and potentially indefinite detention in Hudson County Jail in New Jersey pending his possible removal to earthquake-struck Haiti. *See Monestime*, 704 F. Supp. 2d at 455. The court noted that the length of Mr. Monestime's detention, at eight months with no end in sight, had exceeded the thresholds for constitutionally permissible detention described in *Demore* and

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2005) (Tashima, J., concurring) (interpreting § 236(c) as applying only to immigrants who cannot raise "substantial argument[s] against their removability"); *Gonzales v. O'Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004) (noting that "[a] wholly different case arises when a detainee who has a good-faith challenge to his deportability is mandatorily detained").

Zadvydas. Given that individuals held under *Matter of Rojas*—i.e., individuals who by definition are facing removal for old convictions committed long before their custody—are the ones likely not to present a public safety risk, *see id.* at 458, their prolonged detention without a bond hearing raises particularly "serious constitutional concerns." *Id.* at 458, 459 ("For Monestime, who has been held for eight months on removal charges for misdemeanors committed long ago and is now facing indefinite detention, an individualized hearing on the necessity of his detention is constitutionally required."). In light of the high stakes, each day of unlawful mandatory detention comes at too high of a cost.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reject *Matter of Rojas* and the Government's interpretation of the mandatory detention statute as contrary to Congressional intent and wholly unreasonable. Doing so will ensure that our community members and clients will receive bond hearings where they may present their individual circumstances, so that the months and years of evidence of their rehabilitation and reintegration into their families and our communities will not be ignored.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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