

No. 11-3357

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MICHEL SYLVAIN,
Petitioner-Appellee

v.

ATTORNEY GENERAL OF THE UNITED STATES;
BRIAN ELWOOD, Warden of Monmouth County Jail; CHRISTOPHER
SHANAHAN, Field Office Director; JOHN MORTON, Director,
Bureau of Immigration and Customs Enforcement;
SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents-Appellants

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, 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-APPELLEE AND IN SUPPORT OF
PETITION FOR REHEARING EN BANC**

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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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In *Sylvain v. Attorney General*, 714 F.3d 150 (3d 2013), a panel of this Court held that the government must automatically deny bond hearings to immigrants who have been placed into removal proceedings years after any past removable offense. This decision has enormous consequences affecting the liberty interests of noncitizens who defend their cases against removal. *Amici curiae*—community groups, immigrant rights organizations, and legal service providers whose members and clients are directly affected by the outcome of this case, *see* Appx.—submit this brief in support of the Petition for Rehearing En Banc to illustrate the exceptional importance of this case and to describe the errors in the decision.

As explained below, the panel decision will subject certain immigrants who are detained within the Third Circuit to no-bond detention for the pendency of their removal proceedings. These noncitizens, who have been released from past criminal custody and have returned to their communities in the U.S. long before their immigration detention, will be deprived of any individualized hearing on their lack of flight risk or danger to the community despite years of evidence of rehabilitation and positive contributions to society. Contrary to the First Circuit's recent reading of a similar issue regarding the same statutory provision, the panel's decision fails to engage in the proper analysis of the statute. As a result, its decision ignores Congressional intent and the limited, focused purpose that mandatory detention serves: to prevent noncitizens who are serving criminal

sentences for certain removable offenses from returning to the community prior to their removal—not to deprive immigration judges of their authority to conduct bond hearings for noncitizens who have long since reintegrated into their communities. *Amici* respectfully request that this Court reconsider the decision.

ARGUMENT

I. Rehearing is Warranted Because the Decision Involves An Issue of Exceptional Importance.

As noted in depth in our initial *amici* brief, the issue in this case affects the liberty interest of countless noncitizens, including asylees and lawful permanent residents like the petitioner, Mr. Sylvain, who have long since been released from custody for old criminal convictions. *See* Washington Square Legal Services *Amici Br.*, *Sylvain v. Attorney General* (3d Cir., filed Jan. 23, 2013) (“*Amici Br.*”). These are individuals who by definition were detained by immigration officials *not* from criminal custody for an enumerated removable offense, but from their homes, workplaces, and communities, often years following a past criminal conviction. *See id.* at 19-35 (describing cases of men and women detained in New Jersey and Pennsylvania years after their last removable offense). These include individuals who are eligible for relief from removal and will be spending months or years in removal proceedings pursuing this relief, often successfully: 43.4% of all immigrants in removal proceedings are ultimately permitted to remain in the United States. *See* Transactional Records Access Clearinghouse, Proportion of

Individuals Ordered to Leave Country at Historic Lows So Far in FY 2013, last visited on January 16, 2013, available at http://trac.syr.edu/immigration/reports/latest_immcourt/#fn. These are individuals who are not presumptively flights risks or dangers to the community, who have years of evidence of rehabilitation from any past criminal conduct, and whom, like Mr. Sylvain, ultimately are granted bond when courts have intervened to order individualized hearings. *See Amici Br.* at 11-19 (describing cases). Depriving these individuals of their liberty without an individualized hearing, as the panel decision requires, raises serious constitutional issues, and often results in prolonged detention and other due process concerns. *See id.* at 24-27; *see also* Point II, *infra*.

Moreover, because of the frequency of long-distance transfers between detention facilities, a decision in any one circuit that applies an overbroad reading of the mandatory detention provision imposes consequences on individuals and communities throughout the entire nation. *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>. The Third Circuit is home to over a dozen immigrant detention facilities, holding thousands of immigrants each year. *See* Detention Watch Network Immigration Detention Map, at <http://www.detentionwatchnetwork.org/dwnmap>. Any noncitizen transferred to a detention facility within the Third Circuit will be subject to this

rule, significantly disrupting families and communities. *See Amici Br.* at 3 & n.3 (describing the hardship on children and families of detainees).

II. Rehearing Is Warranted Because This Case Rests Upon Significant Errors of Law.

Contrary to over 30 federal district court decisions in the Third Circuit that have addressed this issue, *see Sylvain Pet'n for Reh'g* at 7, n.1, and the majority of federal court decisions across the country, *Amici Br.* at 6, n.6, the panel decision adopts an arbitrary and expansive interpretation of the no-bond, mandatory detention provision. The detention statute provides the Attorney General with the discretionary authority to detain and release noncitizens on bond pending removal proceedings, “[e]xcept as provided in subsection (c).” 8 U.S.C. § 1226(a).

Subsection (c) requires the mandatory, no-bond detention of certain noncitizens who are removable based on specified criminal offenses “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). In *Matter of Rojas*, the BIA held that the “when . . . released” clause was not part of the description of which noncitizens fell into the exception to the Attorney General’s discretionary authority, and therefore immigration officials may apply mandatory detention to immigrants regardless of when they detain them. 23 I&N Dec. 117, 122 (2001).

Detainees and *amici* have argued that *Matter of Rojas* is contrary to the plain

language and statutory context of 8 U.S.C. § 1226. By contrast, the government has argued that the statute is ambiguous and that *Matter of Rojas* is entitled to deference. Rather than resolve this issue, the *Sylvain* panel purported to avoid the main statutory question by holding that “[e]ven if the statute calls for detention ‘when the alien is released,’ and even if ‘when’ implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay.” *Sylvain*, Slip Op. at *16.

In coming to this conclusion, the panel decision did, in fact, take a position on the statutory language by siding with the government’s argument that the “when . . . released” clause is a deadline for the government’s actions rather than part of the substantive description of which noncitizens are subject to no-bond detention. The panel never explains the basis for its conclusion that the clause is a mere timing deadline. As Mr. Sylvain argues in his petition for rehearing, this interpretation is contrary to the statutory language and context. *See* Pet’n for Reh’g at 6-11. Moreover, as Mr. Sylvain argues, even if the panel correctly read the “when . . . released” clause as a deadline, it does not follow that detention should therefore be *required* regardless of the government’s compliance with the statute. *See id.* at 11-15. A bond hearing is not a sanction to the government—it is a recognition of its statutory authority to make appropriate detention decisions in

cases involving immigrants who have returned to the community following an old removable offense. *Id.*

Amici agree with Mr. Sylvain's arguments on these points, and further emphasize the harsh implications of the panel's reasoning. The government has never argued that Mr. Sylvain is, himself, a flight risk or danger to the community. Indeed, the government did not pursue an administrative appeal of Mr. Sylvain's discretionary release on bond, nor has it done so in any of the cases *amici* has tracked where an Immigration Judge was ordered to hold a bond hearing by a federal court in this Circuit. Yet Mr. Sylvain—the many other longtime lawful permanent residents whom the government *chose* to release from their detention in this Circuit once they were given the authority to do so—is now required to be detained. *See Amici Br.* at 11-27 (describing stories).

The Third Circuit has never before upheld an interpretation of the mandatory detention statute that requires detention even when immigrants are not flight risks or dangers to the community. While the Supreme Court has upheld the constitutionality of mandatory detention, it has done so only 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). It has never authorized a reading of the statute that would permit DHS to detain noncitizens without bond in cases where flight risk and danger to the community cannot be

reasonably presumed. *See id.* at 533. (Kennedy, J., concurring) (“If the government cannot satisfy [the minimal threshold burden of showing the relationship between detention and its purpose] then permissibility of continued detention pending deportation proceedings turns solely upon the alien’s ability to satisfy ordinary bond procedures”). This Court has previously construed the statute to avoid serious constitutional concerns, such as those that would arise when detention becomes prolonged. *See Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 n.10 (3d Cir. 2011). This Court has similarly acknowledged that the passage of time between a noncitizen’s allegedly removable offense and his or her detention at a later date can significantly blunt the presumption that he or she is a flight risk or a danger to the community. *See Ngo v. INS*, 192 F.3d 390, 398 (3d 1999) (“The fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing a crime does not place them forever beyond redemption.”). For these reasons, “[m]easures must be taken to assess the risk of flight and danger to the community on a *current* basis.” *Id.* (emphasis added).

These harsh results and serious constitutional concerns were ignored in the panel’s decision. By failing to apply tools of statutory interpretation, including the canon of constitutional avoidance and the rule of lenity, to determine Congress’s intent regarding when bond hearings are prohibited, the panel missed these

important issues. *See Rust v. Sullivan*, 500 U.S. 173, 190–191 (1991) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” (citations omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (describing the immigration rule of lenity, “the longstanding principle construing any lingering ambiguities in deportation statutes in favor of the alien”). Instead, the panel invoked a rule regarding procedural deadlines to curtail the government’s authority to provide bond hearings, and in doing so, assumed the most severe reading of the statute.

Given these legal errors and the extraordinary liberty interest at stake in this case, *amici* respectfully urge this Court to grant the petition for rehearing.

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New York, NY

Respectfully submitted,

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**APPENDIX:
STATEMENTS OF INTEREST OF *AMICI CURIAE***

Detention Watch Network

As a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network (DWN) has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for more than two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. Mandatory detention is primarily responsible for the exponential increase in the numbers of people detained annually since 1996, and it is the primary obstacle before DWN members in their work for meaningful reform of the system. Together, through the “Dignity Not Detention” campaign, DWN is working for the elimination of all laws mandating the detention of immigrants.

Families for Freedom

Families for Freedom (FFF) is a multi-ethnic network for immigrants and their families facing deportation. FFF is increasingly concerned with the expansion of mandatory detention. This expansion has led to the separation of our families without the opportunity for a meaningful hearing before an immigration judge and has resulted in U.S. citizen mothers becoming single parents; breadwinners becoming dependents; bright citizen children having problems in school, undergoing therapy, or being placed into the foster care system; and working American families forced to seek public assistance.

Immigrant Defense Project

The Immigrant Defense Project (“IDP”) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seek to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

Immigrant Rights Clinic

Immigrant Rights Clinic (IRC) of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or *amicus* in several cases involving federal courts' interpretation of the government's mandatory detention authority under 8 U.S.C. § 1226(c). *See, e.g., Demore v. Kim*, 538 U.S. 371 (2005) (*amicus*); *Beckford v. Aviles*, No. 10-2035 (JLL), 2011 WL 3444125 (D.N.J. Aug. 5, 2011) (*amicus*); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (*amicus*); *Louisaire v. Muller*, 758 F.Supp.2d 229 (S.D.N.Y. 2010) (counsel of record); *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010) (counsel of record); *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009) (counsel of record); *Matter of Garcia-Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (*amicus*).

Immigration Equality

Immigration Equality is a national organization that works to end discrimination in immigration law against those in the lesbian, gay, bisexual, and transgender ("LGBT") community and immigrants who are living with HIV or AIDS.

Incorporated in 1994, Immigration Equality helps those affected by discriminatory practices through education, outreach, advocacy, and the maintenance of a nationwide resource network and a heavily-trafficked website. Immigration Equality also runs a pro bono asylum program and provides technical assistance

and advice to hundreds of attorneys nationwide on sexual orientation, transgender, and HIV-based asylum matters. Immigration Equality is concerned by the Department of Homeland Security's use of *Matter of Rojas* to detain noncitizens and hold them for months and years without the possibility of a bond determination to assess their individualized risk of flight or community ties. While in detention, noncitizens, particularly LGBT noncitizens, often face hostile and unsafe detention conditions that deprive them of access to medically necessary treatments and leave them vulnerable to abuse. Also, detained noncitizens are routinely transferred far from available counsel and family to remote and rural detention facilities, where the noncitizen faces insurmountable odds in defending against a removability charge.

Kathryn O. Greenberg Immigration Justice Clinic

Initiated at the Benjamin N. Cardozo School of Law in 2008, the Kathryn O. Greenberg Immigration Justice Clinic responds to the vital need today for quality legal representation for indigent immigrants facing deportation, while also providing students with invaluable hands-on lawyering experience. The clinic represents immigrants facing deportation in both administrative and federal court proceedings and represents immigrant community-based organizations on litigation and advocacy projects related to immigration enforcement issues. Our focus is on the intersection of criminal and immigration law and thus we have a particular

interest and expertise in detained removal proceedings generally and the proper application of the mandatory detention law specifically.

The Legal Aid Society

The Legal Aid Society ("Legal Aid"), located in New York City, was founded in 1876 to serve New York's immigrant community and is the nation's oldest and largest not-for-profit law firm for low-income persons. For several decades, Legal Aid has maintained an Immigration Law Unit within its Civil Practice. The Immigration Law Unit focuses on defending immigrants in removal proceedings before the New York Immigration Courts. Many of the Immigration Unit's clients are detained in New Jersey pending the removal proceedings against them. Legal Aid's services include offering educational programs to detained immigrants on immigration court proceedings and defenses to removal, as well as promoting and facilitating pro bono representation. It also provides direct representation to detained respondents before the immigration court, the Board of Immigration Appeals ("BIA"), and the federal district and circuit courts. Many of Legal Aid's detained clients have been deemed subject to mandatory detention even though they were not detained by Immigration and Customs Enforcement until years after they were released from custody for a removable offense. The detention of Legal Aid's clients places a substantial burden on its scarce resources. Representing detained clients requires hours of travel time and additional travel expenses. In

addition, detained clients have almost no ability to assist in their own representation by gathering personal documents, such as employment, tax, medical, criminal, and other records. For these reasons, Legal Aid has a strong interest as amicus curiae in this case.

National Immigrant Justice Center

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based organization working to ensure that the laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 10,000 noncitizens per year, including 2000 per year who are detained. NIJC represents hundreds of noncitizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences.

National Immigration Project

The National Immigration Project of the National Lawyers Guild (NIP/NLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For nearly a quarter century, NIP/NLG has provided technical assistance to immigration lawyers on defenses to removal, use of immigration waivers and the immigration consequences of criminal conduct. The NIP/NLG has a direct interest in ensuring

that the Immigration and Nationality Act is interpreted consistently and that noncitizens receive a full and fair opportunity to present their cases before the immigration courts and the Board of Immigration Appeals.

New Sanctuary Coalition of New York City

The New Sanctuary Coalition of New York City (NSC-NYC) is an interfaith network of immigrant families, faith communities, and organizations, standing together to publicly resist unjust deportations, to create a humane instead of a hostile public discourse about immigration, and ultimately to bring about reform of the United States' flawed immigration system. NSC-NYC is deeply concerned about the expansion of mandatory detention and has a significant interest in the outcome of this litigation.

Rutgers-Newark Immigrant Rights Clinic

The Rutgers-Newark Immigrant Rights Clinic serves the local and national immigrant population through a combination of individual client representation and broader advocacy work. The clinic represents New Jersey immigrants seeking various forms of relief from removal, including asylum for persecuted individuals; protection for victims of human trafficking; protection for battered immigrants; protection for victims of certain types of crimes; protection for abused, abandoned, or neglected immigrant children; and cancellation of removal. The clinic also represents organizational clients in broader advocacy projects. For example, the

clinic is currently undertaking a project examining conditions of post-detention orders of supervision and release on recognizance, and the clinic is beginning a project aimed at encouraging increased representation of detained individuals by law school clinics and documenting the difficulties entailed in representing such individuals. As such, the clinic has an interest in ensuring that mandatory detention is not unnecessarily and improperly expanded.

Seton Hall University School of Law Center for Social Justice

The Seton Hall University School of Law Center for Social Justice (the Center) has a long history of defending immigrants' constitutional and human rights in New Jersey. The Center's Immigrants' Rights/International Human Rights Clinic represents detained and non-detained immigrants in removal proceedings and affirmative petitions and produces human rights reports on widespread practices that violate immigrants' rights. The Center's Civil Rights and Constitutional Litigation Clinic has been involved in federal class action litigation challenging raids by the Immigration and Customs Enforcement agency in immigrant communities and has represented immigrants in civil rights litigation and immigration appeals in the Third Circuit. The Center's Equal Justice Clinic represents immigrants in individual requests for relief as well as in a broad challenge to state restriction of health benefits to immigrants. The Center's International Human Rights/Rule of Law Project has produced training guides and

reports related to immigrants' rights. The Center has a longstanding commitment to protecting the human rights of immigrants, including challenging conditions of detention, and has a strong interest in the development of clear and cohesive guidelines or interpretation of any mandatory detention periods.

CERTIFICATE OF SERVICE

I, Alina Das, hereby certify that on June 11, 2013, copies of this Brief in Support of Petition for Rehearing En Banc were sent to counsel via CM/ECF:

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Dated: June 11, 2013

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