14-2343

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER LORA,

Petitioner-Appellee,
v.

CHRISTOPHER SHANAHAN, New York Field Office Director for U.S. Immigration and Customs Enforcement, *et al.*,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE BRONX DEFENDERS, DETENTION WATCH NETWORK, FAMILIES FOR FREEDOM, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC, MAKE THE ROAD NEW YORK, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, NEW SANCTUARY COALITION OF NEW YORK CITY, AND NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS

IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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STATEMENT OF INTEREST

Amici curiae[1] are community groups, immigrant rights organizations, and legal service providers whose members and clients are directly affected by the Government's erroneous and overly broad interpretations of the mandatory detention statute in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), and *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007). *Amici* include the Bronx Defenders, Detention Watch Network, Families for Freedom, Immigrant Defense Project, Immigrant Legal Resource Center, the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, Make the Road New York, National Immigration Project of the National Lawyers Guild, the Neighborhood Defender Service of Harlem, New Sanctuary Coalition of New York City, and Northern Manhattan Coalition for Immigration Rights. Detailed statements of interest are submitted as Appendix A.

Amici share a strong interest in exposing the unjust, harsh, and arbitrary consequences of the Government's flawed interpretation of the mandatory detention statute, and many of the above organizations have appeared as *amici*

[1] All parties consent to the filing of this brief. 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. 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.

curiae before this Court and other Courts of Appeals in cases raising similar issues. *See, e.g.*, Brief of Amici Curiae in *Gomez v. Napolitano,* No. 11-cv-2682 (2d Cir.); Brief of Amici Curiae in *Desrosiers v. Hendricks* (No. 12-1053) (3d Cir.); Brief of Amici Curiae in *Khoury, et al. v. Asher, et al.* (No. 14-35482) (9th Cir.); Brief of Amici Curiae in *Olmos v. Holder* (No. 14-1085) (10th Cir.).

Amici agree with the Appellee's arguments in this case, and submit this brief to provide the Court with additional context on the real-world consequences of the Government's positions. In Point I, *infra*, *amici* describe Congress's chosen statutory scheme and the limited role that mandatory detention serves within it. In Points II and III, *infra*, *amici* provide case stories to demonstrate how the Government's interpretation of the law is contrary to this statutory scheme and leads to unreasonable and arbitrary results. 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 this case.

ARGUMENT

I. MANDATORY DETENTION DOES NOT APPLY TO NONCITIZENS WHO HAVE LONG BEEN RELEASED FROM ANY CRIMINAL INCARCERATION OR WHO WERE NEVER INCARCERATED

Immigration detention without the possibility of bond has profound effects on noncitizens, their families, and communities. In the Second Circuit, immigrant detainees are held in county jails and short-term and permanent Immigration and

Customs Enforcement ("ICE") facilities.[2] Noncitizens subject to mandatory detention are held in immigration custody for the entire length of their removal proceedings without any individualized assessment of their risk of flight or danger to the community. 8 U.S.C. § 1226(c); 8 C.F.R. § 1003.19(h)(2)(i)(D).

As a result, mandatory detention imposes serious legal, financial, and personal costs on detainees and their families. Noncitizens who are detained are significantly more likely to lack legal representation, which the federal government does not provide to indigent detainees, and to face enormous challenges in obtaining evidence and defending against deportation.[3] *See* 8 U.S.C. § 1229a(b)(4)(A) (noncitizens may be represented by counsel "at no expense to the

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[2] Numerous county and federal facilities hold immigration detainees in New York. *See* Detention Watch Network Map *at* http://www.detentionwatchnetwork.org/dwnmap; ICE Detention Facility Locator at http://www.ice.gov/detention-facilities. Jurisdiction over these detainees is allocated between the New York Field Office and the Buffalo Field Office. *See* ICE Enforcement and Removal Operations Field Offices, *at* http://www.ice.gov/contact/ero.

[3] Seventy-nine percent of detained noncitizens lack representation, compared to twenty-eight percent of noncitizens who were initially detained but released and twenty-three percent of noncitizens who were never detained. *See* U.S. Dep't of Justice, Executive Office of Immigration Review, Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55659-62 (Sept. 17, 2014), *available at* https://www.federalregister.gov/articles/2014/09/17/2014-21679/separate-representation-for-custody-and-bond-proceedings. Detention adversely affects noncitizens' ability to defend against removal. *See* Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.A.* 30-36 (Mar. 25, 2009) *at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

Government"). Detention also impacts the detainee's family members, including the detainee's spouse and children, as well as his or her community.[4] While an immigration judge is typically able to consider whether family and community ties merit an individual's release from detention, no such hearing can take place in a mandatory detention case. 8 C.F.R. § 1003.19(h)(2)(i)(D). An immigrant may languish in detention for months, or even years, awaiting the judge's final decision in his or her deportation proceedings, at significant taxpayer expense.[5]

Given the harsh effects of mandatory detention, it is not surprising that Congress created no-bond detention as an exception to the general rule. Under the general rule, immigration judges have the authority to choose whether to detain *or* release noncitizens (either on bond or on their own recognizance) based on an individualized assessment of their risk of flight and dangerousness. *See* 8 U.S.C. § 1226(a); *see also 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

[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), *available at* http://www.socialworkers.org/practice/intl/2011/HRIA-FS-84811.Immigration.pdf

[5] *See* National Immigration Forum, *Detention Costs Still Don't Add Up to Good Policy* (Sept. 24, 2014) *at* http://immigrationforum.org/blog/display/detention-costs-still-dont-add-up-to-good-policy (calculating that immigration detention costs taxpayers $161 per person per day).

finding that he is a threat to the national security, . . . or that he is a poor bail risk.") (citations omitted). This authority allows immigration judges to decide who should be detained by conducting individualized bond hearings based on evidence presented by the parties, which are similar to bail or bond hearings in the criminal context. *See* 8 C.F.R. § 1003.19 (procedures for bond hearings).

As the exception to this scheme, Congress chose to deny individualized bond hearings to a particular subgroup – immigrants who were about to be released from criminal custody for specific types of removable offenses. *See* 8 U.S.C. § 1226(c) (providing that the Attorney General "shall take into custody any alien who . . . is inadmissible . . . or deportable . . . [for enumerated categories of offenses] . . . *when the alien is released* . . .") (emphasis added). As a carve-out from the general bond and release provision, Congress mandated the detention of certain individuals at the time of their release from criminal custody so that there would be a continuous chain of custody from the jail or prison to the immigration detention facility. *See* S. Rep. No.104-48, at 21 (1995) (discussing the problem of noncitizens released from criminal sentences before deportation proceedings were completed, and suggesting expanded immigration detention was needed to address this). Congress was responding to a specific concern that immigration authorities were having trouble identifying, "much less locat[ing]" the noncitizens with

criminal records who they wished to remove. *Demore v. Kim*, 538 U.S. 510, 518 (2003).[6]

For all other immigrants who are not identified and taken into immigration custody at the time of their release, immigration judges are empowered to hold individualized bond hearings under 8 U.S.C. § 1226(a) and determine whether detention should continue or the noncitizen should be released on bond or parole. 8 U.S.C. § 1226(a)(1)-(2). Thus, the purpose of mandatory detention is not to sweep up all immigrants with past criminal convictions and deny them all bond hearings; if Congress intended this result, it would have been simple to construct the statute without referring to the time "when the alien is released" from criminal incarceration, listing only the convictions Congress wished to trigger mandatory detention indefinitely. 8 U.S.C. § 1226(c); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (rejecting an overly broad reading of a statute that would render an "express reference" superfluous). For this reason, the First Circuit correctly characterized the mandatory detention statute as narrowly describing "'specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply.'" *Castañeda v. Souza*,

[6] *Amici* do not suggest that they agree with Congress's choice to deprive certain noncitizens who are detained at the time of their release from incarceration of an individualized bond hearing. However, regardless of the merits of this policy choice, *amici* contend that the Government's interpretation of the reach of the mandatory detention statute goes much further than Congress intended.

769 F.3d 32, 43 (1st Cir.2014) (rejecting *Matter of Rojas*, and quoting *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009)); *see also Saysana*, 590 F.3d at 17 (holding that mandatory detention "serves this more limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses").

In construing the statute, however, the Board of Immigration Appeals ("BIA") has adopted a reading of the mandatory detention statute far broader than the text warrants or Congress intended. First, in *Matter of Rojas*, the BIA held that mandatory detention may apply to individuals who have already been released from any criminal incarceration for their removable offenses and thus have already reintegrated into the community when they are placed in removal proceedings. 23 I&N Dec. at 127. In *Matter of Rojas*, the BIA admitted that the text of 8 U.S.C. § 1226(c) "does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement," *id.* at 122, but went on to find that the government need not follow this directive literally, as the BIA disagreed that Congress meant to focus its attention only on immigrants being imminently released from criminal incarceration. *Id.*

In reaching this conclusion, the BIA held that the "when the alien is released" clause was not part of a "description of an alien who is subject to detention," but was part of a "statutory command" which was not limited by time,

despite its acknowledgment that part of the statutory command was to "immediately" detain certain immigrants upon release. *Id.* at 121-22. Therefore, mandatory detention could apply to noncitizens with relevant convictions even if months or years had passed since their release from criminal incarceration. *See id*. at 121, 122. Seven BIA members dissented from the decision, arguing that Congress intended for mandatory detention only to apply to individuals when they are released from criminal custody, not to individuals later placed in removal proceedings. *See id*. at 135 (Rosenberg, dissenting).

Second, in *Matter of Kotliar*, the BIA held that mandatory detention applied to individuals who were never sentenced to incarceration in their criminal proceedings. 24 I&N Dec at 125. The BIA recognized that an individual must have been "released" from criminal custody to trigger mandatory detention, but construed a release from a pre-conviction arrest to suffice – even if the criminal court imposed no sentence of jail or prison time on the individual for the offense. *Id.* Thus, noncitizens who have never been incarcerated for any removable offense are deemed to have been "released" for purposes of denying them bond hearings based on the few hours they may have spent under arrest.

The clear majority of federal courts have rejected the BIA's reasoning on the "when . . . released" clause. *See* Appellee's Br., Addendum at I-IV (collecting cases dealing with challenges to *Matter of Rojas*). These courts have generally held

that mandatory detention applies only when ICE detains a noncitizen when he or she is released from custody for the offense that renders him or her removable. *Id.* For noncitizens who are detained months or years after their release from criminal incarceration, they may still be taken into immigration custody, but 8 U.S.C. § 1226(a) applies, and the immigration court retains the authority to continue detention, set a bond, or release the noncitizen on recognizance. Similarly, for noncitizens who were never incarcerated, a growing number of habeas courts are finding that mandatory detention is not triggered. *See* Appellee's Br., Addendum at V-VI (collecting cases dealing with challenges to *Matter of Kotliar*).

The minority of courts that have upheld the BIA's reasoning, however, have done so by ignoring the various rules of statutory construction. Rather than construe the plain language within the statutory scheme as a whole, these courts have chosen a reading that "pervert[s] the statue's plain meaning," as the district court below aptly described the Government's interpretation. *See Lora v. Shanahan*, 15 F. Supp. 3d 478, 488 (S.D.N.Y. 2014). *Amici* agree with Appellee's arguments as to the interpretive errors committed by the Third and Fourth Circuits and by the minority of district courts. *See* Appellee's Br. at 15-26, 36-41.

II. AS CASE EXAMPLES SHOW, THE BIA'S ERRONEOUS DECISIONS DEPRIVE THE GOVERNMENT OF ITS AUTHORITY TO RELEASE NONCITIZENS MOST LIKELY TO ESTABLISH THAT THEY MERIT RELEASE ON BOND

Since the BIA's decisions in *Matter of Rojas* and *Matter of Kotliar*, the Government has vigorously applied those decisions by detaining large numbers of noncitizens without bond, months or years after their release from criminal custody.[7] The individuals swept up by the Government's position in this case are not the ones Congress sought to deny bond hearings—rather, as the below examples show, they are among the individuals who are *most likely* to merit release on bond and ultimately win their immigration cases due to their equities. These are individuals who have long ago returned to their families and communities following their release from incarceration, or who were never incarcerated in the first place, but have built positive equities in the time since their last removable offenses. To deny them bond hearings after they have been living free in the community, often for months or years, does not serve the limited and focused purpose of the mandatory detention statute.

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[7] In 2009, a year in which ICE placed 378,582 noncitizens in detention or on supervised release, and held over 30,000 noncitizens in detention on any given day, ICE reported that sixty-six percent of detainees were subject to mandatory detention, although it is unknown how many of these individuals were held pursuant to *Matter of Rojas* and *Matter of Kotliar*. *See* Dora Schriro, Immigration Detention Overview and Recommendations at 2, 6, *at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

A. Noncitizens Detained Under *Matter of Rojas* Are Likely To Have Developed Positive Factors Relevant To Bond While Living Free in Their Communities

The Government argues that Congress wanted "*all* criminal aliens" to be detained without bond hearings, regardless of how long ago their convictions occurred or how much evidence of positive equities, family ties, work history, and rehabilitation they have accumulated in the interim. *See* Appellant's Br. 29 (emphasis in original) (quoting *Rojas*, 23 I&N Dec. at 122). The Government's position not only strains the plain language of the statute, which applies only to noncitizens who are detained by ICE "when . . . released" from criminal custody, but leads to particularly harsh results for individuals who have developed significant equities and evidence that they are not dangerous or flight risks in the months or years since release from criminal custody. *See Castañeda*, 769 F.3d at 47 ("[T]hose who have resided in the community for years after release cannot reasonably be presumed either to be dangerous or flight risks."). These individuals are able to demonstrate the numerous factors relevant to meriting release on bond, including length of residence in the community, strong family ties, stable employment history, passage of many years since any criminal activity, and lack of dangerousness. *See Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987) (describing the factors relevant to bond determinations); *Matter of Guerra*, 24 I&N

Dec. 37, 38 (BIA 2006) (same). However, the Government's erroneous reading of the statute denies judges the authority they should have to weigh these factors.

1. Julie Evans

Julie Evans is a long-time lawful permanent resident who has lived in Dutchess County, New York for nearly fifty years, since she entered the United States at the age of seven. *See* Habeas Pet., *Evans v. Shanahan*, No. 10-cv-8322 (S.D.N.Y. filed Nov. 3, 2010) at 6. During an extremely difficult period of her life in which she experienced domestic violence, a serious car accident and homelessness, Ms. Evans struggled with addiction and was convicted of several misdemeanor controlled substance offenses. *Id.* at 6-7. She served approximately three months in jail and was released in April 2009. *Id.* at 7.

Following her release, Ms. Evans successfully completed drug rehabilitation, became a community leader in her re-entry program, and found consistent medical care for serious injuries she received during her period of homelessness. *Id*.; *see also* Decl. of Alina Das at ¶ 9 (on file with *amici*) (hereinafter "Das Decl."). She also applied to renew her permanent resident card. *Id.* at 8. In June 2010, over a year after her release, ICE officers came to her door, arrested her, and detained her in ICE custody without bond. *Id.* Her detention exacerbated her medical conditions and caused serious hardship to her and her family, including her adult daughter,

who was evicted from their apartment. *Id*. at 10-11 and Exh. A (release request submitted to ICE); *see also* Das Decl. at ¶10.

Ms. Evans filed a habeas petition seeking a bond hearing, and shortly thereafter, in December 2010, ICE released Ms. Evans from custody rather than litigate the habeas petition. *Id.* at ¶11. In fact, after holding Ms. Evans in mandatory detention for five months, ICE released her without requiring her to post any bond, which would have been the proper action from the outset, given that Ms. Evans did not in fact pose a danger or risk of flight and presented particularly strong equities and humanitarian factors. *Id.* In January 2011, as a result of the strong facts in her case, Ms. Evans was granted cancellation of removal, and ICE waived appeal, preserving her permanent resident status. *Id.* at ¶12.

2. Ramon Rodriguez

Ramon Rodriguez is a lawful permanent resident who came to the United States from the Dominican Republic at the age of seven. *See* Habeas Pet., *Rodriguez v. Shanahan*, No. 14-cv-9838 at 8 (S.D.N.Y. filed Dec. 12, 2014). Seven years ago, when he was in his twenties, Mr. Rodriguez was convicted of two nonviolent offenses for possession of controlled substances. For the more recent of these convictions, a November 2007 conviction for simple possession of marijuana, he was sentenced to five days in jail. *Id.* at 9. This brief 2007 jail sentence became a pivotal point in Mr. Rodriguez's life, and upon release, he

voluntarily joined and completed a rehabilitation program. *Id.* at 10. He worked, completed his GED, and began to take community college classes. *Id.* Mr. Rodriguez successfully completed his probation term, and sought a second job in order to save money to continue his college education. *Id.*

In September 2014, as he was preparing to hand in new hire paperwork at a supermarket in Staten Island, New York, Mr. Rodriguez was arrested by ICE agents without warning and detained without bond. *Id.* at 3, 5. He was improperly denied a bond hearing under *Matter of Rojas* despite being released from criminal custody seven years earlier, and had no opportunity to present his strong evidence of rehabilitation and reintegration into his community. *Id.* at 5, Exh. M (motion for bond and supporting exhibits). Mr. Rodriguez has filed a habeas petition seeking bond hearing, and remains detained at this time. *Id*. at 19-20.

3. Jose Luis Nunez

Jose Luis Nunez has lived in Westchester, New York as a lawful permanent resident since immigrating in 1992, when he was fifteen. *See Nunez v. Elwood*, No. 12-cv-1488, 2012 WL 1183701 at *1 (D.N.J. April 9, 2012); Bond Hearing Submission for Jose Luis Nunez at 4 (on file with *amici*). In March 2012, Mr. Nunez was detained by ICE without bond after pleading guilty to operating a motor vehicle without a license. *Nunez*, 2012 WL 1183701 at *1. However, the basis for Mr. Nunez's mandatory detention was not the vehicle offense, which did

not render him deportable, but instead, a single misdemeanor from twelve years earlier. *Id.* at *2. For this conviction, an offense that ICE claimed was a controlled substance offense rendering him deportable, Mr. Nunez had been sentenced to three days of jail. *Id.* at *1. Since the time of that 2000 conviction, Mr. Nunez has built up significant equities: he married his U.S. citizen wife, had a U.S. citizen son, worked at various jobs, paid taxes, and had just started training as a construction worker when he was arrested without notice. Bond Hearing Submission at 4-5, 20.

Mr. Nunez filed a habeas petition seeking an individualized bond hearing, which was, fortunately, granted promptly by the district court, minimizing the time he was away from his family. *Nunez v. Elwood*, No. 12-cv-1488, 2012 WL 1183701 at*1 (D.N.J. April 9, 2012) (*later abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)). Subsequently, judges at the New York Immigration Court not only released Mr. Nunez on bond, but later terminated his removal proceeding, finding that he had never been deportable in the first place, as his 2000 conviction, the sole basis on which ICE detained him and denied him access to a bond hearing, did not actually constitute a controlled substance offense under the Immigration and Nationality Act. *See In re Jose Luis Nunez* (N.Y. Imm. Ct. Sept. 20, 2013) (on file with *amici*). Mr. Nunez's case is a reminder that individuals wrongly subject to mandatory detention are not, as the

government asserts, facing "near 'certain' removal" and thus likely to flee. *See* Appellant's Br. 33 (internal citation omitted). Without federal courts correcting ICE's erroneous interpretation of the detention statute, individuals with strong defenses to deportation are wrongly left to fight their cases from behind bars.

B. The Government's Erroneous Interpretation of the Detention Statute Inflicts Serious Hardship on Detained Immigrants and their Families

The stories of people affected by *Matter of Rojas* also make clear the high stakes involved in correctly interpreting the reach of 8 U.S.C. § 1226(c). Individuals in New York who are held in mandatory detention on the basis of years-old convictions are often long-time residents who have spouses, children, parents, and employers who depend on their care, income, and hard work. Erroneously expanding the reach of § 1226(c) to individuals who should be afforded bond hearings exacts a serious toll on immigrant detainees and their families. *See Castaneda*, 769 F.3d at 47 (noting that the government acknowledged "the harsh consequences of uprooting these individuals from the community," and expressing concern about the "arbitrary nature" of arresting individuals years after release from custody) (internal quotation marks omitted); *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1266 (D.N.M. 2012) ("[M]andatory detention is a harsh penalty that should be strictly and narrowly enforced.").

Amici do not argue that this Court should read § 1226(c) narrowly merely because detention is difficult to endure; rather, these examples underscore why adopting the correct interpretation of the statute is not only an intellectual exercise, but a question which has real-life consequences for many New York families. *See Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 183 (D. Mass. 2009) (in finding that petitioner's prolonged immigration detention required a bond hearing to avoid constitutional concerns, emphasizing that the court should employ "simple fairness, if not basic humanity," when analyzing the period "in which a person has lost his liberty").

1. Feguens Jean

Feguens Jean has been a lawful permanent resident for nearly thirty years and graduated from junior high and high school in Westbury, New York. *See* Habeas Pet., *Jean v. Orsino*, No. 11-cv-3682 at 2-3, Exh. I (S.D.N.Y. filed May 31, 2011). In March 2011, Mr. Jean was arrested and detained by ICE without notice on the basis of a drug possession and misdemeanor assault conviction from ten years prior, for which he had been sentenced to probation. *Id.* In 2010, Mr. Jean had been sentenced to probation for operating a vehicle under the influence of alcohol, but this offense did not render him deportable, and he was demonstrating significant rehabilitation; he was attending counseling and Alcoholics Anonymous meetings, coached soccer, and was a trusted member of his community who often

watched his friends' children. *See id*. at Exh. F-J (evidence of equities). Because of his detention without a bond hearing, Mr. Jean was separated from his U.S. citizen fiancée and two U.S. citizen daughters, for whom he was the main caregiver, meeting them at the school bus and cooking dinner every day. *See id.* at Exh. A (declaration of Mr. Jean's fiancée). Because he could not return to work, Mr. Jean was suspended from his job at a Marriott hotel, putting his eldest daughter's health insurance in jeopardy. *Id.* at 4. His fiancée expressed deep concerns about the emotional health of their children, the youngest of whom cried on a daily basis during his detention. *See id.*at Exh. A. Despite Mr. Jean's significant family ties and evidence of rehabilitation, the immigration judge ruled that he could not hold a bond hearing in the case. *Id.* at 3.

Mr. Jean remained detained for several months, until he filed a habeas petition and the district court ordered the Government to provide him with a bond hearing. *See* Judgment, *Jean v. Orsino*, No. 11-3682, (S.D.N.Y., issued June 30, 2011). Mr. Jean was granted bond and released to his family. *See* Decl. of Thomas Moseley (on file with *amici*). He subsequently won cancellation of removal before the immigration court, which the government did not appeal, preserving his permanent resident status. *Id.*

2. Patrick Baker

Patrick Baker has been a lawful permanent resident of the United States for twenty-five years, since arriving from Jamaica in 1989. *See* Habeas Pet., *Baker v. Jones*, No. 14-cv-9500 (S.D.N.Y. filed Dec. 2, 2014) (hereinafter "Baker Habeas Pet.") at 5. Mr. Baker has two convictions from twenty years ago, one for which he served 10 months in jail and one for which he served no jail time, which do not trigger mandatory detention because he was released from his criminal sentence well before the current statute went into effect. *Id.* at Exh. 3; *see Matter of Garcia Arreola*, 25 I&N Dec. 267, 268-69 (BIA 2010) (individuals released prior to October 1998 are not subject to 8 U.S.C. § 1226(c)). Ten years ago, Mr. Baker pleaded guilty to misdemeanor menacing and was sentenced to a conditional discharge, serving no jail time and no probation. Baker Habeas Pet. at Exh. 3. Five years ago, Mr. Baker was arrested for jumping a subway turnstile, a B misdemeanor, and was sentenced to 3 days community service, again with no jail sentence. *Id.*

Following his 2009 arrest, Mr. Baker committed to improving himself and contributing to his family and community. For the last three years, he has worked at a steady job at a packing facility in Brooklyn, and has lived with his U.S. citizen girlfriend, raising their young son and his girlfriend's daughter, both U.S. citizens. *Id.* at 5. In 2014, although Mr. Baker was working full-time, the family did not yet

make enough to rent their own apartment, so they were living in a family homeless shelter and saving money for their own home. *Id.*

In June 2014, four and a half years after his arrest for turnstile jumping, and nearly nine years after the most recent conviction for which ICE has charged him as deportable, ICE arrested Mr. Baker without warning outside the homeless shelter on his way to work. *Id.* at 6. He was detained without bond. *Id.* His girlfriend was nine months pregnant with their second child at the time, and gave birth to their son alone five days later. *Id.* at 5. Mr. Baker has been unable to bond with his infant son, now seven months old, and without his income and care his girlfriend has been unable to move out of the homeless shelter and has struggled to raise three children on her own. *Id.* Mr. Baker has now been detained for seven months without a bond hearing at which he can present his evidence of rehabilitation, employment, family ties, and eligibility for relief from removal. He has filed a habeas petition seeking release on bond, which is still pending, and remains separated from his family. *Id.*

3. Diomedes Martinez-Done

Diomedes Martinez-Done is a fifty-five year-old man who came to the United States as a lawful permanent resident from the Dominican Republic in 1983, over thirty years ago. *See* Mem. of Law, *Martinez-Done v. McConnell*, No. 14-cv-3071 at 1 (S.D.N.Y. filed May 9, 2014) (hereinafter "Martinez Mem. of

Law"). He is the father of three U.S. citizen children, pays taxes and works as a restaurant chef in New York City. *Id.* at 1, 3.

In 2003 and 2012, Mr. Martinez was convicted of nonviolent drug possession offenses and was sentenced to probation in both cases. *Martinez-Done v. McConnell*, -- F. Supp. 3d --, 2014 WL 5032438 at *1 (S.D.N.Y. Oct. 8, 2014). *Id.* Mr. Martinez has been a productive member of his community, attending his probation appointments, working in restaurants, and supporting his children. Martinez Mem. of Law at 1. In April 2014, two years after his most recent conviction and ten years since he had arguably last been in criminal custody, ICE arrested and detained Mr. Martinez without a bond hearing. *Martinez-Done*, 2014 WL 5032438 at *2. Mr. Martinez's family experienced serious hardship without his income while he was detained, as did Mr. Martinez himself, who suffers from diabetes and glaucoma. *See* Decl. of Paul Grotas (on file with *amici*) (hereinafter "Grotas Decl.").

Mr. Martinez was detained for nearly six months before the district court ruled that he was not subject to mandatory detention, and furthermore, that his lengthy detention raised constitutional concerns. *Martinez-Done*, 2014 WL 5032438 at *8. (finding that the government's reading of the statute wrongly conferred "limitless authority on the Attorney General to pluck immigrants from their families and communities with no hope of release pending removal").

Subsequently, the immigration judge set a low bond of $4,000 due to Mr. Martinez's strong equities, and he was released to his family. *See* Grotas Decl. Had he been given a bond hearing when first detained, his entire detention and separation from his family and community would have been avoided.

III. Noncitizens Are Wrongly Detained Without Bond Under *Matter of Kotliar* in Cases Where the Criminal Court Itself Did Not Find Any Incarceration

Mandatory detention is only intended to apply to immigrants who are sentenced to a period of incarceration following a criminal conviction and who are taken into custody by ICE upon their release from incarceration, so as to create a continuous chain of custody that prevents their return to the community. *See* Point I, *supra*. In the same way that *Matter of Rojas* expands mandatory detention from this core purpose, *Matter of Kotliar* also takes detention to a new extreme. Under *Matter of Kotliar*, a noncitizen need never have been sentenced to any period of incarceration to be detained in ICE custody without an opportunity to make his case at a bond hearing. *Matter of Kotliar* often combines with *Matter of Rojas* to create extraordinarily harsh results for individuals who have never served a day of jail time before being subjected to no-bond detention months or years after an old conviction.

It is important to note that among the stories listed above, Mr. Baker and Mr. Jean both faced mandatory detention based on convictions for which they served

no jail time. The criminal courts in these cases did not deem their offenses worthy of any custodial sentence, and thus there was no incarceration from which they were "released." Yet, under the BIA's strained reading of the statute, while they face deportation for that very same underlying criminal offense, their civil detention is mandated. This Court can correct the BIA's harsh and incorrect interpretation.

1. Alexander Lora

The Appellee's own story illustrates the harsh results of mandatory detention of individuals who served no time for the offenses triggering their detention. Mr. Lora has lived in the United States as a lawful permanent resident for nearly twenty-five years, since he arrived at age seven with his mother. *See* Habeas Pet., *Lora v. Shanahan*, No. 14-cv-2140 at 8 (S.D.N.Y. filed Mar. 26, 2014) (hereinafter "Lora Habeas Pet."). He attended Brooklyn schools and has a long work history, a young U.S. citizen son and a U.S. citizen fiancée. *Id.* at 1, 8-9. Mr. Lora lives with and helps care for his U.S. citizen mother, who has serious and chronic health problems, including a heart condition and diabetes. *Id.* at 8.

Mr. Lora was convicted in July 2010 of controlled substance offenses for which he was "not sentenced to any period of incarceration [and] was never taken into custody." *Lora*, 15 F. Supp. 2d at 480. He was successfully serving probation and was due to be released early. Lora Habeas Pet. at 10. In November 2013, over

three years after his conviction, a large group of armed ICE officers arrested and shackled Mr. Lora on the street corner in front of his fiancée's home. *Id.* at 11. He was detained and denied a bond hearing, and was separated from his fiancée, ill mother, and one-year-old son, for whom he was the primary caretaker. *Id.* at 12-13; *see* Appellee's Br. 4. Mr. Lora spent almost six months in ICE custody, during which time he lost his job and his son was placed in foster care. *See* Appellee's Br. 6. After filing a habeas petition, the district court ordered that he was not subject to 8 U.S.C. § 1226(c) and must be provided a bond hearing. *Lora*, 15 F. Supp. 2d at 493-94. The government agreed to a $5,000 bond, and he was released to his family in May 2015, after six months of separation that could have been avoided from the beginning of his case. Appellee's Br. 6-7.

2. Myles Straker

Myles Straker has lived in the United States since immigrating from Trinidad and Tobago at the age of thirteen, and has attended school and worked in Brooklyn. Habeas Pet., *Straker v. Jones*, No. 13-cv-6915 at 1 (S.D.N.Y. filed Sept. 30, 2013). As a young man, Mr. Straker was convicted on two nonviolent drug charges. *Id*. at 9. The first, in 2008, resulted in a sentence of five days community service, and the second, in 2009, resulted in a sentence of probation. *Id.* In both cases, Mr. Straker was released without bond at his arraignments and did not serve a day of jail time. *Id.* Following his 2009 conviction and after being the victim of a

violent attack, Mr. Straker committed to change his life for the better, enrolled in GED classes, maintained steady employment in construction, and became the active father of a U.S. citizen daughter. *Id.* at 10. Mr. Straker was discharged early from his probation for good behavior. *Id.*

In May 2013, four years after his last conviction, ICE detained Mr. Straker without bond following his arrest on a criminal charge that was dismissed. *Id*. at 12. Mr. Straker's detention was extremely hard on his young daughter, for whom he had been a primary caretaker while his daughter's mother worked. *Id*. Mr. Straker was detained for seven months before the district court rejected *Matter of Kotliar* and ordered that he must be provided a bond hearing. *Straker v. Jones*, 986 F. Supp. 2d 345 (S.D.N.Y. 2013).

3. Santos Cid-Rodriguez

Santos Cid-Rodriguez has been a lawful permanent resident and a resident of Brooklyn, New York for over 22 years. *See* Habeas Pet., *Cid-Rodriguez v. Shanahan*, 14-cv-3274 (S.D.N.Y. filed May 6, 2014) (hereinafter "Cid-Rodriguez Habeas Pet.") at 7. His wife is a permanent resident, and he is the father of four children, three permanent residents and one U.S. citizen. *Id.* Prior to his detention, he lived with his wife and three of his children in New York, and has worked managing a bodega and for cleaning and medical equipment companies. *Id.* at 7-8.

In March 2014, Mr. Cid-Rodriguez was suddenly awoken and arrested in his bedroom by ICE officers, who detained him in ICE custody without bond. *Id.* at 8-9. Mr. Cid-Rodriguez was detained based on a fourteen-year-old misdemeanor conviction for simple drug possession, for which he received a conditional discharge and served no jail time and no probation. *Id.* at 9. His only other conviction is a thirteen-year-old nonviolent conviction for failing to report cash at customs, for which he was sentenced to probation, and which does not render him removable. *Id.* The immigration judge at the Varick Street Court noted that he would ordinarily be inclined to set a bond for someone who is only removable on the basis of a years-old conviction, but believed he was constrained by BIA precedent. *Id.* at 10.

During Mr. Cid-Rodriguez's detention, his 22-year-old son had to support the entire family without him. *See* Pet'r's Decl., *Cid-Rodriguez v. Shanahan*, 14-cv-3274 (S.D.N.Y. filed May 6, 2014) at ¶ 9. Detention exacerbated Mr. Cid-Rodriguez's chronic back condition, which arose from an on-the-job fall several years before. *Id.* at ¶ 16. Mr. Cid-Rodriguez filed a habeas petition seeking release or a bond hearing. *See* Cid-Rodriguez Habeas Pet. Before the district court ruled on the petition, however, the immigration judge granted Mr. Cid-Rodriguez's application for cancellation of removal, and the government waived appeal. Joint Stipulation, *Cid-Rodriguez v. Shanahan*, 14-cv-3274 (S.D.N.Y. filed July 7, 2014).

Mr. Cid-Rodriguez was released to his family after months of unjustified detention, during which time the immigration judge was improperly restricted from setting a bond for a father who posed no danger or risk of flight.

CONCLUSION

For the above reasons, *amici* respectfully ask this Court to reject the BIA's decisions in *Matter of Rojas* and *Matter of Kotliar* as impermissible under the plain text of the statute, contrary to Congressional intent, and wholly unreasonable. Under a properly narrow scheme of detention and bond, our community members and clients will have a full and fair opportunity to receive individualized bond hearings, at which the months and years of evidence of their rehabilitation and reintegration into our communities will not be ignored.

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New York, NY

Respectfully submitted,

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APPENDIX A:
STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Bronx Defenders

Founded in 1997, The Bronx Defenders provides innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support and other civil legal services and advocacy to indigent Bronx residents. It represents over 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. It has been nationally recognized as a pioneer and leader in holistic representation, focusing on addressing the underlying issues that bring clients into contact with the criminal justice system and continuing to assist clients long after their criminal case is over. The Bronx Defenders also provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project, most of whom have past criminal justice contacts. Because the government's overbroad interpretation of its detention mandate subjects to mandatory detention those whom The Bronx Defenders has helped to successfully re-integrate into the community, The Bronx Defenders has an urgent and direct interest in the outcome of this case.

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. Since 2011, through its advocacy and organizing work, DWN has been advocating 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 specializes in advising and training criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. IDP 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 Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a national back-up center that is committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. The ILRC has special expertise in immigration consequences of crimes and since 1990 has consulted on thousands of cases in criminal and immigration proceedings, and has provided training to criminal court defense counsel, prosecutors and judges, as well as immigration practitioners. The ILRC has filed briefs as amicus curiae in key

decisions in this area, including Supreme Court cases such as *Padilla v. Kentucky*, 559 U.S. 336 (2010).

Kathryn O. Greenberg Immigration Justice Clinic

Started at the Benjamin N. Cardozo School of Law in 2008, the Kathryn O. Greenberg Immigration Justice Clinic responds to the vital need 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 community-based organizations on litigation and advocacy projects related to immigration enforcement issues. The clinic's focus is on the intersection of criminal and immigration law, and thus the clinic has a particular interest and expertise in detained removal proceedings generally and the proper application of the mandatory detention law specifically.

Make the Road New York

Make the Road New York (MRNY) is a not-for-profit organization that builds the power of Latino and working class communities to achieve dignity and justice through organizing, policy innovation, transformative education and survival services. For 16 years, MRNY has integrated adult education, workforce development, youth programming, legal and health services, and community organizing to expand civil rights and promote self-sustainability for low-income

immigrant New Yorkers. MRNY are the largest participatory grassroots immigrant organization in New York with over 16,000 individual members, the vast majority of whom are Latin American immigrants. The organization has storefront community centers located in Bushwick, Brooklyn; Jackson Heights, Queens; Port Richmond and Midland Beach, Staten Island; and Brentwood, Long Island. MRNY offers a range of immigration legal services, including representation in removal proceedings, and the organization has represented non-citizens affected by mandatory detention laws. This has proven to be a drain on MRNY's limited resources to provide free legal services to non-citizens, in particular when it has compelled MRNY attorneys to travel upstate to represent the family members of MRNY members. MRNY's membership base also includes many immigrant families who have been directly affected by mandatory detention laws. For these reasons, MRNY has a strong awareness of the impact of mandatory detention laws and an interest in the outcome of this litigation.

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 of the National Lawyers Guild

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a nonprofit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides technical assistance to the bench and bar, litigates on behalf of noncitizens as amici curiae in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories as well as IMMIGRATION LAW AND DEFENSE and three other treatises published by Thompson-West. Through its membership network and its litigation, the National Immigration Project is acutely aware of the problems faced by noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c).

The Neighborhood Defender Service of Harlem

The Neighborhood Defender Service of Harlem is a lead innovator in holistic public defense practice. NDS represents clients using a team-based, client-centered, holistic defense model. A core aspect of holistic representation is the commitment to search for the underlying issues that bring clients into contact with

the criminal justice system, and to work with clients to help to avoid or minimize future contact with the system. As a part of its holistic approach, NDS represents non-citizens detained by Immigration and Customs Enforcement in removal proceedings.

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.

Northern Manhattan Coalition for Immigrant Rights

Northern Manhattan Coalition for Immigrant Rights (NMCIR) was founded in 1982 as a community response to the influx of immigrants settling in Northern Manhattan and the Bronx. Every year, NMCIR helps keep thousands of immigrant families together by providing free and affordable, personalized support around a vast array of family-based immigration petitions. NMCIR helps the immigrant community build visibility and political power via voter registration, civic education, and supporting its member-driven advocacy campaigns around

deportation issues. NMCIR has an interest in ensuring that the immigrants it serves have a full and fair opportunity to be heard when facing detention and removal.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because the brief contains 6,418 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

Dated: January 14, 2015
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CERTIFICATE OF SERVICE

I, Andrea Saenz, hereby certify that on January 14, 2015 copies of this Brief of Amici Curiae were electronically filed via the Court's CM/ECF system. Hard copies have also been served via UPS Next Day Air to:

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