No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al*.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE DETAINED LEGAL SERVICES PROVIDERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, listed in the appendix to this brief, are non-profit organizations serving immigrant detainees through legal education and direct representation. Collectively, Amici visit more than 40 detention centers in 13 states, serving more than 53,000 individuals per year. Amici have a deep interest in the due-process rights of all noncitizens and write to refute the suggestion that lawful permanent residents (LPRs) rarely face prolonged detention under 8 U.S.C. § 1225 upon return to the United States, and to address the constitutional concerns that are implicated by such a practice. Amici believe their extensive experience serving detained noncitizens, including detained returning LPRs, will help the Court in considering this case.

Amici include The National Immigrant Justice Center, American Gateways, Capitol Area Immigrants' Rights Coalition, Centro Legal De La Raza, The Florence Immigrant and Refugee Rights Project, Immigrant Defenders Law Center, The Northwest Immigrant Rights Project, The Pennsylvania Immigration Resource Center, Political Asylum Immigration Representation Project, Refugee and Immigrant Center for Education and Legal Services, and The Rocky Mountain Immigrant Advocacy Network. Amici's statements of interest are in the appendix to this brief.

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[1] Counsel for all parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici agree with Respondents' position in its entirety, and write specifically to refute two central themes in the Government's brief concerning individuals detained under 8 U.S.C. § 1225. The Government asserts that few LPRs are in fact improperly subject to extended detention without access to a bond hearing upon return to the United States. It also asserts that prolonged detention of LPRs without bond hearings raises no serious constitutional concerns, and that the Ninth Circuit's avoidance of those concerns is a radical departure from this Court's jurisprudence. Both of these contentions are wrong.

I. First, the Government suggests that—at least in cases involving noncitizens designated as "arriving aliens"—constitutional violations are "rare." Pet'rs' Br. 14. To the extent this is a legal conclusion, it is wrong. And if the Government is suggesting, as a factual matter, that it is "rare" for LPRs to suffer extended detention, it is unsupported, and there is every reason to believe the contrary. Amici regularly encounter LPRs who are returning to the United States from brief travel abroad and who are detained as applicants for admission, often based on old or minor criminal convictions. Many of these individuals have plausible arguments against the inadmissibility charges or are ultimately granted immigration relief (*e.g.*, cancellation of removal, *see* 8 U.S.C. § 1229b, or a waiver of their criminal conviction, *see* 8 U.S.C. § 1182(h)), but they are often forced to be detained for the duration of their proceedings to seek that remedy. In Amici's experience, those proceedings can take months or years, and they often turn on complicated

legal and factual questions. This experience is confirmed by numerous cases before the Board of Immigration Appeals (BIA) and in federal courts involving LPRs who have been detained and charged with grounds of inadmissibility.

Under the regime that the Government advocates, the best a returning LPR can hope for is release on parole from an officer of the Department of Homeland Security (DHS). This option, says the Government, is good enough. But there are at least three problems with that contention. First, under the Government's theory, many returning LPRs won't be eligible for parole (Pet'rs' Br. 28), because they will be subject to inadmissibility under § 1182(a)(2), also a ground of mandatory detention. 8 U.S.C. § 1226(c)(1)(A). Second, the parole procedures are constitutionally insufficient: they grant enforcement agents unreviewable detention authority, which is often exercised in one-page boilerplate denials that result in prolonged, arbitrary detention. Third, there is not even a mechanism to contest the arriving-alien designation; once DHS makes such a designation it has sole control over the release *vel non* of a returning LPR. An immigration judge is barred from considering whether a returning LPR should actually be designated as an arriving alien and thus subject to detention without a bond hearing. The limits on immigration judges in this context are particularly troublesome because, in Amici's experience, cases involving returning LPRs often involve complex challenges to the arriving-alien designation itself.

II. Contrary to the Government's assertion that the decision below represents an impermissible revision of a long-standing legal regime, the Ninth Circuit's

decision in fact follows directly from over a century of this Court's cases construing immigration statutes—including those involving LPRs—to avoid serious constitutional concerns. The constitutional-avoidance canon is a long-accepted tool used to effectuate congressional intent, and it is premised on the "reasonable presumption that Congress did not intend [to enact laws that] raise[] serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This Court has repeatedly gone to great lengths to avoid construing statutes to raise constitutional doubts.

Indeed, for over a century, this Court has repeatedly construed immigration statutes to contain significant procedural and substantive limitations to avoid constitutional concerns. For example, the Court has: required notice and an opportunity to be heard when the statute did not expressly require it, *Yamataya v. Fisher*, 189 U.S. 86 (1903); construed ambiguous language to ensure impartial decision making in deportation hearings, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); limited seemingly unbounded language to ensure that criminal consequences only attached to conduct related to the deportation statute's purpose, *United States v. Witkovich*, 353 U.S. 194, 195 (1957); and refused to read immigration statues to provide for potentially indefinite detention of noncitizens without bond hearings, imposing a presumptive six-month limit on such post-order detention, *Zadvydas v. Davis*, 533 U.S. 678 (2001).

The Court has also repeatedly limited immigration statutes to protect the due-process rights of LPRs. The Court has refused to read immigration statutes

to subject LPRs to deportation based on capricious circumstances, construing the ambiguous term "entry" to prevent LPRs who had made involuntary or brief trips abroad from having made an "entry" that could result in deportation. *Delgadillo v. Carmichael*, 332 U.S. 388, 390-92 (1947); *Rosenberg v. Fleuti*, 374 U.S. 449, 458-62 (1963). The Court has also read statutes applicable to LPRs to contain substantial procedural limitations, construing them to provide deportation hearings, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953), and to impose a heightened burden of proof despite statutory silence on the issue, *Woodby v. INS*, 385 U.S. 276, 286 (1966).

The decision below rests comfortably in this long tradition, and correctly construed the statute to avoid serious constitutional doubts and to effectuate Congress's intent to follow the Constitution. As explained in depth in Respondents' brief (Resp'ts' Br. 42-48), Congress has not "inescapably said" that LPRs must be must be detained for prolonged period of time without a bond hearing. *Chew*, at 601-02. Thus, it is "fairly possible" (and indeed necessary) to construe Section 1225(b) to avoid the serious constitutional doubts created by subjecting LPRs—full-fledged members of American society—to prolonged detention without bond hearings.

ARGUMENT

I. PROLONGED DETENTION OF LPRS WITHOUT BOND HEARINGS IS FAR FROM RARE, AND IT RAISES GRAVE CONSTITUTIONAL PROBLEMS

The Government implies that LPRs are infrequently detained under Section 1225(b), and that this practice "does not raise constitutional

doubts." *See* Pet'rs' Br. 26-29. A close reading of its brief shows that the Government does claim outright that extended detention is rare (though it may be suggesting this), but merely that when it happens, it is constitutional. This assertion is inaccurate, and it largely misses the point. There are certainly noncitizens who are detained under Section 1225 but then released on parole, and others whose proceedings are resolved promptly. These individuals are not the subject of this litigation. Instead, the question is whether detention under Section 1225 is permissible for members of the Plaintiff class, *i.e.*, in cases of prolonged detention. With this subset in mind, the Government's assertion that detention under Section 1225 is "clearly constitutional in virtually all of its applications" as to the "overwhelming majority of aliens" is an inaccurate, straw-man argument. Pet'rs' Br. 29. The Government's regular practice of detaining LPRs—who are full-fledged members of American society protected by the Due Process Clause—for prolonged periods of time without bond hearings raises deeply troubling constitutional concerns.

A. Immigration statutes, as interpreted by the Board of Immigration Appeals, provide for the detention of returning LPRs.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996)—the current statutory scheme governing immigration detention—certain LPRs returning from brief trips abroad can be, and in fact frequently are, subject to detention without bond hearings, often for prolonged periods.

Specifically, the Government denies bond hearings to certain detained "applicants for admission" who are stopped at a port of entry. 8 U.S.C. §§ 1225(a)(1), 1225(b)(2)(A); 8 C.F.R. § 236.1(c)(2). The BIA has held that IIRIRA overturned longstanding precedent that declined to treat returning LPRs as if they were initial entrants when they returned after brief trips abroad. *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998) (en banc). Following IIRIRA, the BIA treats returning LPRs as "seeking admission into the United States" whenever they "fall into any of six enumerated categories" in the statute. *Vartelas v. Holder*, 132 S. Ct. 1479, 1485 (2012) (citing § 1101(a)(13)(C)).

Thus, LPRs who leave the country for any reason may be treated as "seeking admission" and detained as "arriving aliens" for lengthy periods without access to a bond hearing if, for example, they have committed various (often minor) offenses at some point prior to travel. *See* 8 U.S.C. § 1101(a)(13)(C)(v); *see, e.g.*, *Matter of Abosi*, 24 I. & N. Dec. 204, 205 n.1 (BIA 2007) (possession of under 30 grams of marijuana).

Prior to *Collado-Munoz*, LPRs returning from brief, non-meaningful absences were afforded the same procedural rights as LPRs remaining in the United States. *See Vartelas*, 132 S. Ct. at 1485 ("[B]efore IIRIRA, [LPRs] who had committed a crime of moral turpitude could, under the *Fleuti* doctrine, return from brief trips abroad without applying for admission to the United States."). Under the Agency's current interpretation, returning LPRs with acknowledged due-process rights, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), face extended

detention without even the possibility of an immigration judge (IJ) considering their case for bond.[2]

B. The Government regularly subjects returning LPRs to prolonged detention without bond hearings.

Moreover, the Government relies on this authority to detain returning LPRs for lengthy periods of time without a bond hearing.

1. Returning LPRs are commonly detained under Section 1225 for extended periods.

The Government implies that it is "rare" for returning LPRs to be treated as "arriving aliens," but that is simply not true. The BIA has published many cases involving LPRs returning from international travel who were treated as "arriving aliens." *See, e.g., Matter of Gonzalez Romo*, 26 I. & N. Dec. 743 (BIA 2016); *Matter of Pena*, 26 I. & N. Dec. 613 (BIA 2015); *Matter of Valenzuela-Felix*, I. & N. Dec. Dec. 53 (BIA 2012); *Matter of Guzman Martinez*, 25 I. & N. Dec.

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[2] Amici believe that *Collado-Munoz* is wrongly decided, and would urge the Court to reserve the question of its correctness, as the Court did in *Vartelas*, 132 S. Ct. at 1484 n.2. *Collado-Munoz* implicates more than detention; it affects whether an LPR returning from brief travel abroad may be removed under the grounds listed in 8 U.S.C. § 1182, or only on those within 8 U.S.C. § 1227. For instance, an LPR who commits a single moral-turpitude offense, or who is suspected but not convicted of certain offenses would not generally be removable under § 1227, but might be inadmissible under § 1182. *See*, *e.g.*, *In re Jeffrey Constance Morgan*, A36 810 171, 2005 WL 3833046 *1 (BIA Nov. 16, 2005) (unpublished) (LPR detained and charged as arriving alien due to assault conviction with one day sentence, which made him inadmissible but not deportable).

845 (BIA 2012); *Matter of U. Singh*, 25 I. & N. Dec. 670 (BIA 2012); *Matter of Rivens*, 25 I. & N. Dec. 623 (BIA 2011); *Matter of A- M-*, 25 I. & N. Dec. 66 (BIA 2009); *Matter of Abosi*, 24 I. & N. Dec. 204 (BIA 2007); *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (BIA 2006); *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998). This number is significant given that the BIA publishes less than 0.1 percent of the cases it decides.[3]

Publicly available information does not specify how long each of these individuals spent in detention, but Amici have been able to verify that respondents in at least half of the listed cases were detained for a prolonged period of time.[4] For instance, the Respondent in *Matter of U. Singh* spent more than 2½ years in detention while the Agency considered his eligibility for a waiver of inadmissibility. *See generally Following Fourth Circuit's Remand of Matter of* U. Singh*, BIA remands to IJ for Further Proceedings*, 90 INTERPRETER RELEASES 2192 (Nov. 18, 2013). And, the Respondent in *Gonzalez Romo* is currently detained in Arizona, where she has been for nearly 2½ years. *See* Detainee Locator, U.S. IMMIGRATION CUSTOMS & ENF'T, http://bit.ly/2dM9BWU (last visited Oct. 21, 2016) (The BIA decision indicates that she was taken into

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[3] In Fiscal Year 2015, a typical year, the BIA completed 34,244 cases and published 28 decisions. *Cf.* Exec. Office of Immigration Review, U.S. Dep't of Justice, FY 2015 Statistics Yearbook, Q2 (Apr. 2016) (2015 Yearbook); BIA Precedent Decisions, Decisions 3817-3848, http://bit.ly/2ekAR42.

[4] Details regarding the detention of these individuals are on file with Amici.

custody on May 3, 2014, and the detainee locator indicates that she is still detained.). She was detained "when she attempted to reenter as a lawful permanent resident" for an offense that, according to the BIA, makes her inadmissible even though it would not have made her removable. *Gonzalez Romo*, 26 I. & N. Dec. at 743.

Numerous circuit-court cases also involve detained returning LPRs. Many of these cases reach federal court raising legal questions regarding whether a criminal conviction involves moral turpitude or is otherwise a basis for inadmissibility. *See, e.g.*, *Escobar v. Holder*, 561 U.S. 1001 (2010) (detained a year in total); *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006) (detained for at least five years); *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) (detained for at least a year), *vacated*, 526 U.S. 1142 (1999).

Some returning LPRs have managed to obtain habeas relief to remedy extended detention.[5] *See, e.g., Thomas v. Shanahan*, No. 26-cv-5401 (S.D.N.Y. Aug. 1, 2016); *Singh v. Shanahan*, No. 16-cv-6142 (S.D.N.Y. Sept. 14, 2016); *Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016). The Government speculates that some cases result from

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[5] In Amici's experience, many individuals who remain detained for prolonged periods are unable to take the steps necessary to petition for a writ of habeas corpus because they have no right to appointed counsel, limited access to legal assistance, and limited knowledge of the legal system. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 fig. 6 (2015) (studying immigration cases from 2007 through 2012 and finding that 86% of noncitizens lacked access to counsel).

recent circuit precedent like the decision below, limiting prolonged detention. Pet'rs' Br. 26, n.7. But such petitions were being brought long before this precedent. *See, e.g., Kasneci v. Dir. of Bureau of Immigration & Customs Enf't*, No. 12-12349, 2012 U.S. Dist. LEXIS 119683, at *2 (E.D. Mich. Aug. 23, 2012); *Rosario v. Prindle*, No. 2011-217, 2012 WL 12920 (E.D. Ky. Jan. 4, 2012); *Velazquez v. Moore*, No. SA-08-CA-635-XR (NSN), 2008 U.S. Dist. LEXIS 91531 (W.D. Tex. Nov. 10, 2008); *Mejia v. Ashcroft*, 360 F. Supp. 2d 647 (D.N.J. 2005); *Made v. Ashcroft*, 2001 U.S. Dist. LEXIS 25611 (D.N.J. May 31, 2001).

And these cases are the tip of the iceberg. Amici examined the Board's unpublished case law that discusses noncitizens designated as "arriving aliens,"[6] and found that 34.9% of those cases involved returning LPRs.[7] Individuals who receive decisions from the BIA will on average have waited at least six

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[6] Amici searched for all arriving alien cases in the Board's published and unpublished case law, which is available in Westlaw's FIM-BIA database. Amici identified 199 out of 570 cases as involving returning LPRs who were treated as arriving aliens. It should be noted that Westlaw's selection of unpublished BIA decisions is not a complete collection of the Board's unpublished authority, as the Board releases unpublished authority selectively. Moreover, unpublished Board decisions often lack full factual exposition, and briefing before the Board is unavailable on Westlaw. Amici acknowledge these failings in the Westlaw data set, but have employed it because no better data is available.

[7] These unpublished cases generally do not specify the noncitizen's detention status, but under what the Government frames as a plain reading of the statute (Pet'rs' Br. 15-29), nearly all would have been subject to detention without access to a bond hearing under 8 U.S.C. § 1225.

months since the initiation of removal proceedings. Pet'rs' Br. 35 n.10. As explained *infra*, LPRs are detained for longer periods than other noncitizens, whether due to greater complexity of their cases or to their increased stake in continued residence in this country. *See infra* Part I.B.2.

The evidence from published and unpublished cases is consistent with Amici's on-the-ground experiences serving detained immigrants. Amici regularly encounter such detainees—their existence is far from "rare."

2. Returning LPRs often face prolonged detention because they are litigating meritorious claims.

Studies have demonstrated that individuals with lawful status—such as returning LPRs—are likely to be detained far longer than average. *See* TRAC, *Legal Noncitizens Receive Longest ICE Detention* (June 3, 2013), http://bit.ly/2dQ3J0A ("[I]ndividuals who were legally entitled to remain in the United States typically experienced the longest detention times."); *see also generally* Donald Kerwin & Serena Yi-Ying Li, Migration Policy Institute, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 16-18, 19 n.39 (Sept. 2009), http://bit.ly/2dMmqAx (noting disparities between short-term and long-term immigration detention).

Amici's experiences confirm these findings: returning LPRs face prolonged detention because litigating meritorious claims takes time and these individuals are often unable to do so outside of detention.

For example, Aldo Rangel de los Reyes, is a Mexican national who became an LPR when he was 17 years old. *See Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016).[8] He was detained after returning from a wedding in Mexico. The Government sent him to deferred inspection and then paroled him into the United States, instructing him to report back in one month. When he returned, in September 2015, immigration officials detained and charged him with inadmissibility, arguing that a series of dorm thefts (Mr. Rangel was in college) involved moral turpitude and made him inadmissible. In December 2015, an immigration judge granted Mr. Rangel's request for termination, finding that these offenses did not involve moral turpitude and concluding that Mr. Rangel was not removable. The Government appealed that decision and Mr. Rangel remains detained to this day, 13 months so far. During this time, he has been separated from his fiancé, children, mother, and siblings, all U.S. citizens. He is consistently fighting feelings of desperation with the end to his detention nowhere in sight.

The Petitioner in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), further illustrates how prolonged these cases can be. Mr. Robles-Urrea—an LPR for more than 20 years—returned from a brief trip abroad in 2005 and was declared inadmissible for a

[8] Amici have limited case examples to individuals who are the subject of publicly available information due to a federal-court case or a published BIA decision. Additional details about the cases, including information about the duration of detention, are on file with Amici.

2002 conviction for misprision of a felony under 18 U.S.C. § 4. The BIA found that this offense categorically involved moral turpitude. The Ninth Circuit rejected that determination and Mr. Robles-Urrea was eventually granted cancellation of removal. But fighting his case took nearly a decade. After the Agency's initial denial, he appealed to the Ninth Circuit and received a stay of removal. Following a year of detention without the possibility of a bond hearing, he withdrew his stay and returned to Mexico for the pendency of his appeal. When the Ninth Circuit granted his petition for review (after six years separated from his family), he returned to the United States to continue litigating his case, and was *again* detained as a returning LPR. He spent an additional seven months detained in Eloy, Arizona, before a judge granted his application for relief.

The Government insinuates that detention takes time because of delays on the noncitizen's part. This assertion is disingenuous. For example Mr. Rangel—whose case is described above—has been detained for more than a year despite having *never* requested a continuance. He was granted relief by a judge in December 2015, approximately three months after his initial detention and despite multiple trial-level continuances caused by the court or the Department of Homeland Security. In short, his prolonged detention results from the Government's appeal, which it filed on the last possible day (and then extended the briefing deadline). The case has been pending at the BIA for more than six months.[9]

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[9] Moreover, the Government decides how to allocate its resources, and in recent years it has chosen to prioritize, *inter*

The option to litigate these cases without simultaneously facing detention is limited to a returning LPR's access to parole. The Government claims that parole is regularly granted to returning LPRs (Pet'rs' Br. 28), but, again, in Amici's experience this is far from clear.

For example, Qingwen Chen is a Chinese national who traveled to Toronto for two days to attend his nephew's graduation, and was detained as a returning LPR at a New York airport. *See Chen v. Shanahan,* No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016). At the time, Mr. Chen had been an LPR for nine years and was previously living in the United States on a business visa. At the airport he was initially paroled into the United States, but he was ordered to check in with the immigration authorities monthly. Two weeks after his first check in, immigration officials came to his home and detained him. DHS charged him with inadmissibility based on a 2010 offense for selling counterfeit goods and welfare fraud (for which he had completed probation and paid restitution in full). His attorneys requested parole in October 2015 and received a boilerplate denial. His

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(continued)

alia, recently-arrived children and others seeking asylum, many of whom are not detained. *See* Print Maggard, Acting Chief Immigration Judge, Revised Docketing Practices Relating to Certain EOIR Priority Cases (Feb. 3, 2016), http://bit.ly/2ey7euq. Amici do not raise the point to challenge the wisdom of these priorities but to illustrate that adjudicative delays are far more in the control of the Government than of (frequently unrepresented) detained noncitizens. *See generally* Resp'ts' Br. 23-25.

attorneys then filed a petition for habeas corpus.[10] Only after this petition was filed (and after he spent seven months in detention), did immigration officials finally agree to parole him. Because of Mr. Chen's prolonged detention, his wife had to take a second job to make ends meet. He almost lost his home, and his youngest child was referred to counseling because of mental health concerns relating to her father's detention.

Mr. Rangel has had a similar experience. He has asked for parole on three separate occasions—two of which were after the judge granted termination of proceedings—and has been denied each time. He asked the judge to consider his case for bond, and the judge concluded that he lacked jurisdiction to do so. So now, Mr. Rangel has a pending petition for habeas corpus, which will only take additional time to adjudicate. *Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016). Notably, even if DHS's appeal to the BIA is successful, it is still not the end of the road for this individual. He remains eligible for an alternate form of relief: a stand-alone waiver of his criminal conviction under 8 U.S.C. § 1182(h).

These cases, and many others, illustrate that parole, which the Government describes as the "sole mechanism" for guarding against unconstitutional prolonged detention of returning LPRs (Pet'rs' Br. 24), is not an adequate safeguard of such an LPR's due-

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[10] *See* Pet'rs' Br. 26, n.7 (citing *Chen v. Shanahan*, No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016) (dismissed following release on parole)).

process rights. In Amici's experience, parole is routinely denied with no reason given, and with no opportunity for review of the decision. Indeed, without intervention from counsel (something unavailable to most detained noncitizens, *see* Eagly & *Schafer, supra* n.5) many individuals in this posture would likely remain detained.

3. Returning LPRs are deprived of even the inadequate protections of *Matter of Joseph*.

In *Demore v. Kim*, 538 U.S. 510 (2003), this Court found significant the possibility that an individual allegedly subject to mandatory detention could challenge that designation in a hearing under *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). 538 U.S. at 514 & n. 3. It is striking, then, that Petitioner does not cite *Joseph* or suggest its relevance here.

In fact, that is because the BIA has consistently found *Matter of Joseph* hearings unavailable to returning LPRs designated as "arriving aliens." *Matter of Joseph* is premised on the regulatory provision at 8 C.F.R. § 1003.19(h)(2)(ii), which permits a noncitizen to seek a determination "by an immigration judge that [she] is not properly included" in categories of cases for which individualized bond hearings are barred. But the regulations that govern whether a noncitizen is "properly included" in mandatory-detention categories only apply to specified paragraphs. The regulations do not explicitly permit such review as to the provision at 8 C.F.R. § 1003.19(h)(2)(i)(B), which bars custody determinations for individuals charged as arriving aliens.

In other words, the BIA has held that a returning LPR cannot even request a determination from an IJ that she is not properly included in the category of arriving aliens: "[t]he regulations, as currently written, do not allow either Immigration Judges or this Board to even consider whether an alien is correctly classified as an arriving alien." *In re Jose Cesario De Jesus-Rivera*, A44 333 089, 2003 WL 23521903 *1 (BIA Nov. 14, 2003) (unpublished) (reversing bond grant where IJ had terminated removal proceedings and DHS had appealed the termination). Dozens of BIA decisions confirm that this is the Board's settled view. *See, e.g.*, *In re Israel Perez Leon*, A34 617 650, 2006 WL 901332, *1 (BIA Mar. 1, 2006) (unpublished) ("[W]here the DHS has designated an alien as an 'arriving alien,' the Immigration Judge is precluded from undertaking a determination as to the propriety of the DHS's designation."); *In re Victor Picon-Alvarado*, A90 316 931, 2004 WL 2374542 (BIA July 30, 2004) (unpublished) (same); *In re Jesus Guadalupe Maese-Castro*, A035 897 322, 2009 WL 1653771, *1 (BIA May 22, 2009) (unpublished) (same).

The Board has applied this interpretation in various contexts, without regard to the injustice worked by the inflexible application. It has deemed returning LPRs ineligible for bond hearings based on minor convictions occurring years or decades earlier. *See In re Gachelin Louis*, A042 496 475, 2009 WL 3713282, *2 (BIA Oct. 27, 2009) (unpublished) (LPR held without bond as arriving alien due to single drug possession conviction from 14 years prior to brief trip abroad). It precludes bond even for noncitizens granted relief. *In re Andrzej Stankiewicz*, A91 648 013, 2004 WL 880272, *1 (BIA Mar. 10, 2004)

(unpublished) (finding no jurisdiction over custody despite IJ grant of § 212(c) relief). The fact that a noncitizen was paroled into the United States years earlier does not matter. *See In re Thao Lee*, A028 009 671, 2009 WL 2437133, *1 (BIA July 28, 2009) (unpublished) (Laotian designated as arriving alien due to having been paroled as refugee in 1988, more than 20 years earlier).

And, as noted above, the BIA applies this rule even where the IJ finds that the returning LPR is not properly treated as an applicant for admission in the first place. *See In re Hun Dai Trang*, A28 248 701, 2005 WL 1396803 (BIA Apr. 22, 2005) (unpublished) (overturning bond of $6,500 on jurisdictional grounds where IJ terminated and DHS appealed).

For instance, on December 1, 2008, an IJ found that returning LPR Lazaro Armando Ramos Hernandez was not properly classified as an arriving alien; the IJ therefore terminated removal proceedings. *In re Lazaro Armando Ramos Hernandez*, A039 280 159, 2009 WL 1863814 *1 (BIA June 18, 2009) (unpublished).[11] Three weeks later, Mr. Ramos Hernandez was still detained, pending a DHS appeal of the termination order. So, he asked for a bond. The IJ granted bond, but DHS appealed

[11] The immigration court system does not have a publicly available online docket, but it does maintain a case information status line which includes various details regarding removal proceedings. *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, *Customer Service Initiatives*, https://www.justice.gov/eoir/customer-service-initiatives (last updated Sept. 16, 2015). The description of this case is taken from both the Board decision and from the case information status line.

again. *Id.* The BIA found that the IJ lacked authority to redetermine the bond, even though Mr. Ramos Hernandez was (in the IJ's view) not an "arriving alien." The BIA ultimately concurred with the IJ's termination of the case, but that decision did not come until April 7, 2010, 15 months after the IJ's decision terminating proceedings.

In other words, a returning LPR may challenge the allegation that she should be treated as an arriving alien (*e.g.*, because an offense did not involve moral turpitude), and may defeat removal on that ground, but even if the challenge is found meritorious, it does not permit a judge to order release from custody. The noncitizen has no recourse but to hope that the prosecutors (and their client Agency) will see fit to release her from custody while the case is litigated.

4. Returning LPRs can carry the arriving-alien designation long after reentry.

Even worse, returning LPRs can be, and often are, detained as arriving aliens long after their actual "return" to the United States. In Amici's experience, many LPRs are subject to something called "deferred inspection" when they initially present themselves at a port of entry. They are then paroled into the United States only to later be detained, sometimes at a check in, other times at home, and other times because of an interceding conviction. Even if this detention occurs *years* later, the individual is still subject to a charge of inadmissibility as an "arriving alien."

For example, in September of 2006, Miguel de Jesus Familia Rosario (who was then 60 years old) left the United States to travel to his native Dominican Republic. *Rosario v. Prindle*, No. 2011-217, 2012 WL 12920 (E.D. Ky. Jan. 4, 2012). When he

returned to the United States, he was not granted admission but was instead subject to deferred inspection. A year later, Mr. Familia pleaded guilty to aiding and abetting a conspiracy (for distributing condoms with knowledge that they would be used by individuals engaged in prostitution). The Government conceded that he was "a minor participant" in the conspiracy, and he was sentenced to time served: 28 days. In 2010, nearly five months after the conclusion of his criminal case and over 33 months after he was released from jail, the Government initiated removal proceedings, arguing that Mr. Familia was inadmissible under 8 U.S.C. § 1182(a)(2). In the end, a three-year long deferred inspection resulted in nearly two years in immigration detention separated from his family and children, all LPRs or U.S. citizens. He repeatedly requested both parole and bond. The Agency denied parole, and the immigration judge found that he lacked jurisdiction to consider Mr. Familia for bond because he was an "arriving alien." Mr. Familia had to file a petition for habeas corpus in order to obtain release even when it had been determined that he was eligible for relief in the form of cancellation of removal (which he was later granted).

This ongoing treatment of returning LPRs as "arriving aliens," potentially for years after their actual return from international travel, only further undermines the Government's general contention that individual who are detained under Section 1225 are unknown to the United States and are at the threshold of their initial entry to the United States.

C. Prolonged detention of LPRs without a bond hearing raises serious constitutional doubts.

The Government's argument that detention of LPRs "under Section 1225(b) does not raise constitutional doubts," Pet'rs' Br. 26, incorrectly minimizes the extensive constitutional protections LPRs receive, given their deep ties to this country. While Amici believe that all noncitizens subject to Section 1225 have due-process rights to be free from arbitrary detention, prolonged detention of returning LPRs without bond hearings presents particularly severe constitutional concerns.

LPRs are full-fledged members of American society, who are granted the right to reside permanently in the United States. 8 U.S.C. § 1101(a)(20). LPRs, "like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). Indeed, "many [LPRs] have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens." *Woodby v. INS*, 385 U.S. 276, 286 (1966).

In light of LPRs' special status, they enjoy robust constitutional protections. "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence[,] his constitutional status changes accordingly." *Plasencia*, 459 U.S. at 32. An LPR's "weighty" interest in remaining in the United States implicates the "right to stay and live and work in this land of freedom"—and in many cases, "the right to rejoin [his or her] immediate family, a right that ranks high among the interests of the individual." *Id.* at 34 (internal

quotation marks omitted). Thus, it is well established that LPRs "may not be deprived of . . . life, liberty or property without due process of law"—whether present in the country or returning from brief international travel. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *see also Plasencia*, 459 U.S. at 29, 32 (LPRs returning from brief absences are entitled to the same constitutional protections they would have received had they not traveled abroad).

The due-process rights enjoyed by LPRs include freedom from unnecessary prolonged detention without adequate procedural protections. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civil detention can only be justified by "certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (internal quotation marks and citation omitted).

Prolonged civil detention of individuals entitled to the full protection of the Due Process Clause, without adequate "procedural protections" to ensure that continued detention is actually necessary, presents obvious constitutional problems. *See id.* at 690-92. In many cases, returning residents (even those amenable to removal proceedings) pose no serious risk of flight or safety threat—and plainly either risk is far too low to rationally justify a *conclusive* presumption that LPRs detained under Section 1225(b) must never be afforded bond hearings.

Prolonged detention of LPRs without bond hearings is thus extremely constitutionally dubious. *See id.*

II. THE DECISION BELOW CORRECTLY INTERPRETED THE STATUTE TO AVOID SERIOUS CONSTITUTIONAL PROBLEMS, IN ACCORDANCE WITH OVER A CENTURY OF THIS COURT'S JURISPRUDENCE

The Government's argument that prolonged detention of LPRs without bond hearings accords with a supposedly "unbroken legal tradition" gets it backwards. Pet'rs' Br. 20. Rather, for over a century, this Court has consistently avoided construing immigration statutes concerning LPRs and other noncitizens in ways that would raise serious constitutional doubts, in order to effectuate congressional intent. The decision below that follows inexorably from this Court's jurisprudence.

A. For over a century, this Court has consistently construed immigration statutes to avoid serious constitutional doubts.

The Government's contention that the decision below "flies in the face of . . . this Court's precedents" and works a "radical judicial revision of the legal regime that has protected our Nation's borders for a century" is flatly wrong. Pet'rs' Br. 16, 21. Rather, the decision below follows directly from this Court's longstanding practice of construing the immigration statutes to avoid serious constitutional doubts—in order to effectuate Congress's intent to abide by the Constitution. Much as the decision below did, this Court has repeatedly "read *significant* limitations into" immigration statutes to avoid serious constitutional doubts. *See Zadvydas*, 533 U.S. at 689

(emphasis added) (citing *United States v. Witkovich*, 353 U.S. 194, 195 (1957)).

1. The constitutional-avoidance canon is a vital tool to effectuate congressional intent.

The constitutional-avoidance canon of statutory construction, applied by the Ninth Circuit below, is a familiar tool used to effectuate Congress's intent. It is based on the "presumption that Congress did not intend" to compel a construction of a statute "which raises serious constitutional doubts," unless a competing interpretation of the statute is not "plausible." *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). "This canon is followed out of respect for Congress," which of course is presumed to "legislate[] in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). As Congress "swears an oath to uphold the Constitution," courts must not "lightly assume that Congress intended to infringe constitutionally protected liberties." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Under the avoidance canon, whenever "a serious doubt [regarding a statute's] constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (emphasis added) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). That is, "the Court will construe the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at

575 (emphasis added). Indeed, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Id.* (emphasis added) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). While the canon does not permit courts to "judicially rewrit[e]" statutes raising serious constitutional doubts, the "Court will [nonetheless] often strain to construe legislation so as to save it against constitutional attack." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)).

2. This Court has repeatedly limited immigration and other statutes to avoid serious constitutional doubts.

This Court has reiterated, for more than 100 years, the principle that to avoid serious constitutional doubts, "significant limitations" must be read into immigration statutes when necessary and fairly possible. *See Zadvydas*, 533 U.S. at 689.

At least as far back as *Yamataya v. Fisher*, 189 U.S. 86 (1903), this Court has read immigration statutes to contain necessary procedural protections to avoid constitutional doubts when the statute did not explicitly exclude such protections. To avoid serious constitutional problems, the Court read the immigration laws to require notice and a hearing before deportation of a noncitizen who had been present in the country for just four days. *Id.* at 97-98, 101-02. Because the statutes at issue "d[id] not necessarily exclude opportunity to the immigrant to be heard," the Court refused to construe the statute to "disregard the fundamental principles that inhere in 'due process of law.'" *Id.* at 100. The Court explained that an "interpretation ought to be adopted

[that], without doing violence to the import of the words used, will bring [the statute] into harmony with the Constitution." *Id.* at 101. Thus, since the statute's "words . . . [did] not *require* an interpretation that would" vest the executive with "absolute, arbitrary power" to deport, the Court construed the statute to provide for notice and hearing to avoid the serious constitutional problem. *Id.* (emphasis added).

In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), *superseded by statute as stated in Ardestani v. INS*, 502 U.S. 129 (1991), the Court applied the constitutional-avoidance canon to read the immigration laws to require deportation hearings to be adjudicated by an independent and neutral officer, rather than one simultaneously charged with investigative and prosecutorial functions. *Id.* at 45-51. This separation of functions was required by the Administrative Procedure Act only when "required by statute." *Id.* at 48. Even though the immigration statute at issue did not explicitly require such a hearing, the Court applied the avoidance canon to construe the statute to require such a hearing (and the consequent separation of prosecutorial and adjudicative functions). *Id.* at 49-51. The Court reasoned that a contrary reading "might" bring the immigration statute into "constitutional jeopardy," given the potentially life-and-death stakes involved in deportation proceedings. *Id.* at 49-51. Such a construction did not "do[] violence to the import of the words used," and was therefore required to avoid the grave constitutional problems posed by vesting the same individual with adjudicative and prosecutorial functions in deportation proceedings. *Id.*

The Court has also avoided constitutional doubts by limiting seemingly unbounded language. In *United States v. Witkovich*, 353 U.S. 194 (1957), the Court avoided serious due-process problems by construing a grant of authority to the Attorney General to ask noncitizens whatever questions he "deem[s] fit and proper" as limited to questions "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens." *Id.* at 197. While the statutory text seemed to be "unbounded," and would allow the Attorney General to ask whatever questions he pleased, the Court applied "[a] restrictive meaning for what appear to be plain words" because the "broader meaning would generate constitutional doubts." *Id.* at 199. Specifically, the broad reading would raise constitutional doubts by "giv[ing] an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask." *Id.* at 198, 202 (internal quotation marks omitted). Because the purpose of the overall legislative scheme was to ensure noncitizens' availability for departure, it was a "permissible and therefore an appropriate construction to limit the statute to authorizing" questions relating to serving that purpose. *Id.* at 202.

Indeed, the Court has recently applied the concept of constitutional avoidance to questions regarding immigration detention, the issue presented here. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court applied the constitutional-avoidance canon to "read an implicit limitation into" a statute providing for potentially indefinite detention of certain removable noncitizens, including LPRs. *Id.* at 689. To avoid the "serious constitutional problem" presented by

indefinite detention, the Court read the statutory provision that "an alien 'may' be detained after removal" to limit such "detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. Because the statute lacked "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Court construed the statute to avoid the serious constitutional problem. *Id.* at 697-99. Moreover, in order to guide lower courts in applying the correct construction of the statute, the Court imposed a presumption that post-removal order detention becomes unreasonable when it exceeds six months.[12] *Id.* at 701.

In sum, when grave constitutional concerns are present, the Court has repeatedly read ambiguous language and statutory silence to contain procedural

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[12] The Court has also applied the avoidance canon to read similar procedural limitations into statutes outside of the immigration context. *See*, *e.g.*, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 368 (1971) (construing an obscenity statute to contain implicit time limits for commencing and completing judicial proceedings). Similarly, the Court has construed statutes that authorize deprivations of liberty or property to require notice and a meaningful opportunity to be heard, "[n]otwithstanding the absence of express statutory language." *Burns v. United States*, 501 U.S. 129, 137-38 (1991). Even in the face of statutory "silence," the Court has repeatedly inferred various "statutory protections essential to assuring procedural fairness." *Id.* at 138 (collecting cases). Where the statute "does not *clearly state*" that Congress meant to eliminate such protections, the Court will "decline to impute such an intention to Congress" in order to avoid "confront[ing] [a] serious [due process] question." *Id.* (emphasis added).

protections, and read seemingly unbounded language to contain implicit limits.

3. This Court has repeatedly applied the avoidance canon to afford procedural protections for LPRs.

The Court has also repeatedly applied the avoidance canon in the face of the grave constitutional concerns presented when LPRs—who are full-fledged members of American society—are deprived of vital procedural and substantive protections.

For example, in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), the Court construed the term "entry" not to include an LPR's involuntary departure and return to the country. *Id.* at 391-92. Although it was possible to read the term "entry" to include "*every* return of an alien from a foreign country," the Court declined to adopt that broad construction in light of the serious constitutional concerns presented by deporting LPRs "irrational[ly]" based on "fortuitous and capricious" circumstances. *Id.* at 390-91 (emphasis added).

Then, in *Rosenberg v. Fleuti*, 374 U.S. 449, 458 (1963), the Court construed the term "entry" not to include an LPRs' voluntary but brief departure and return to the United States. By that point, the statutory definition of "entry" had been amended to incorporate the *Delgadillo* exception for involuntary departures. *Id.* at 452. While the statute and legislative history only explicitly referenced involuntary departures, the Court nonetheless refused to deem an LPR's two-hour voluntary trip abroad to be an entry potentially subjecting him to deportation. *See id.* at 462-63. In light of the serious constitutional concerns presented, the Court refused

to read the statute "woodenly," and instead read the exceptions to the definition of entry "nonrestrictively" to exclude brief voluntary departures as well. *Id.* at 459-62. This construction was necessary in order to "obviate[]" the need to reach the serious constitutional problems presented. *Id.* at 463.

Similarly, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), the Court considered an immigration statute which seemed to deprive LPRs of a right to be heard before being deported by denying a hearing to certain "excludable" noncitizens. *Id.* at 599. The Court declined to read the statute in this manner, finding that Congress had not "inescapably" denied LPRs hearings. *Id.* at 601. Given the grave constitutional concerns with denying LPRs vital procedural protections such as the right to be heard, the Court refused to read the term "excludable" noncitizens to cover LPRs. *Id.* at 599. The Court reasoned that Congress had not used the term "expulsion," which the Court opined would be "the term that would apply naturally to aliens who are [LPRs]." *Id.* Accordingly, Congress had not "*inescapably said*" that the LPR could be excluded without a hearing. *Id.* at 601-02 (emphasis added). Therefore, the Court avoided serious constitutional doubts by reading the statute to provide the LPR with notice and a hearing. *Id.*

In *Woodby v. INS*, 385 U.S. 276 (1966), the Court avoided serious due-process concerns by reading an immigration statute to require proof of deportability by clear and convincing evidence, rather than by a preponderance of the evidence. Deporting LPRs under the lower burden of proof raised serious constitutional concerns, given the "drastic

deprivations" that follow from deporting LPRs who have developed strong ties to the United States. *Id.* at 487-88. Though Congress had "not addressed" the applicable standard of proof and the statute was silent on the matter, the Court construed the statute to avoid the serious constitutional concerns with deporting LPRs absent sufficient procedural protections. *Id.* at 284. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 572 (1990) (explaining that *Woodby* "relied heavily on constitutional considerations" in construing the statute).[13]

In sum, the Court has a long tradition of construing the immigration laws to contain significant limitations to avoid serious constitutional problems—including many prominent examples of cases involving LPRs. Given the weighty constitutional interests at stake, ambiguous language, statutory silence, and seemingly unbounded language have not prevented the Court from doing so. As discussed below, the Ninth Circuit's decision here follows directly from that long tradition—and it correctly construed the statute to avoid grave constitutional doubts.

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[13] For the reasons discussed in Respondents' brief, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), is inapplicable here. *See* Resp'ts' Br. 28-30.

B. The decision below correctly applied this Court's precedents to avoid grave constitutional problems.

The Ninth Circuit's decision here correctly followed the extensive authority discussed above to avoid the serious constitutional concerns implicated by subjecting LPRs to prolonged detention without bond hearings. Given those doubts, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (emphasis added) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, it is "fairly possible" to construe the statute not to allow for prolonged mandatory detention of LPRs without adequate procedural safeguards, and the Ninth Circuit was therefore correct to construe the statute to contain that limitation. *See Zadvydas*, 533 U.S. at 689. And the Court must do so to effectuate Congress's intent to abide by the Constitution. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Congress did not explicitly exclude the possibility of bond hearings when detention becomes prolonged. As explained in Respondents' brief, Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(a) do not apply to detention once removal proceedings have begun. *See* Resp'ts' Br. 42-47. And even if they did, the statute does not address the length of detention or the possibility of bond hearings at all. *See* Resp'ts' Br. 43-44, 47-48.

Moreover, Congress has not "inescapably said" that LPRs must be detained for prolonged period of time without a bond hearing under Section 1225(b). *Chew*, 344 U.S. at 602. Because the statute does not

expressly address extended detention, it follows that it does not "necessarily" dictate that LPRs must be subject to prolonged detention without bond hearings. *Zadvydas*, 533 U.S. at 697. It is "[i]n that respect . . . ambiguous." *Id.* The availability of bond hearings must be construed in light of the serious constitutional problems which arise in that context. *See Wong Yang Sung*, 339 U.S. at 49-51. Statutory silence may be read to contain such limitations, as this Court has repeatedly found. *See, e.g.*, *Woodby*, 385 U.S. at 284 (imposing heightened burden of proof when statute was silent); *see also Witkovich*, 353 U.S. at 197-99 (reading seemingly unbounded language to contain limitations). Because the statute does not provide "any clear indication of congressional intent" to subject LPRs to prolonged detention without bond hearings, it is "fairly possible"—and indeed necessary—to adopt a limiting construction of Section 1225(b) to avoid the serious constitutional doubts created by the Government's construction. *Zadvydas*, 533 U.S. at 689.

This limiting construction must be applied to all arriving aliens detained under Section 1225, given the grave constitutional problems raised by prolonged detention of LPRs without bond hearings. In determining whether a construction of a statute raises serious constitutional doubts, the Court considers whether *any* application of that statutory construction would raise such doubts. Even if some applications of a statutory construction are constitutionally benign, it is the "lowest common denominator"—the presence of any constitutionally doubtful application—that matters here. *Clark*, 543 U.S. at 380. Therefore, Section 1225(b) must be construed in light of the grave constitutional

problems with subjecting LPRs to prolonged detention without bond hearings. And as demonstrated above, the Government routinely detains LPRs without bond hearings under Section 1225 in ways that are unconstitutional.

Therefore, this Court should follow its many prior cases construing the immigration laws to avoid serious constitutional doubts, and affirm the judgment of the Ninth Circuit.

CONCLUSION

The reasonable limitations adopted below are necessary to avoid doubts about the statute's constitutionality. They should be affirmed in their entirety.

Respectfully submitted,

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APPENDIX—LIST OF *AMICI CURIAE*

American Gateways is a non-profit organization serving noncitizens in Central Texas. American Gateways' mission is to champion the dignity and human rights of refugees and immigrant survivors of persecution, torture, conflict, and human trafficking through legal services at no or low cost, education, and advocacy. As part of its mission, American Gateways provides know your rights presentations and assisted pro se workshops to more than 10,000 individuals annually at four immigration detention centers in Texas. We regularly encounter individuals who are subjected to prolonged detention by immigration officials, including LPRs who are returning to the United States from travel abroad. We have observed first-hand the difficulties that these and other long-term detainees experience in accessing legal counsel and advocating for their rights. For these reasons, American Gateways is committed to the importance of access to bond hearing for long term detainees.

The Capital Area Immigrants' Rights (CAIR) Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights presentations, impact and advocacy work, and the training of attorneys defending immigrants in the immigration and criminal justice arenas. The CAIR Coalition regularly sees immigrant men, women, and children who struggle daily with the trauma and hardship that accompany indefinite, long-term detention. While noncitizens are detained for

prolonged periods, their mental and medical statuses decompose and their U.S. citizen and LPR relatives suffer great hardship. Noncitizens in long-term detention are less equipped to apply for relief because many are isolated from their families and unable to produce evidence, often due to the isolation produced by detention in remote areas without reliable phone access. For these reasons, CAIR Coalition believes that all detained immigrants in removal proceedings should be free from indefinite detention and have the right to request release on bond through an individualized review of their circumstances.

Centro Legal de la Raza (Centro Legal) was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income residents of Oakland's Fruitvale District and the greater Bay Area. Centro Legal's Immigration Project provides legal representation and consultations to detained and non-detained immigrants, refugees and asylum seekers throughout Northern California. Annually, Centro Legal advises and/or represents over a thousand detained individuals before the immigration courts and Board of Immigration Appeals each. Centro Legal provides legal right presentations and consultations three times a month to individuals in immigration detention at the West County Detention Facility and the Mesa Verde Detention Center in Bakersfield, California. Centro Legal also represents clients before the detained immigration court from these facilities as well as two others: the Rio Consumes Correction Center and the Yuba County Jail. As Centro Legal provides legal education, consultations and direct service representation to a high volume of detained individuals, it has a substantial interest in

the present case, and in ensuring that all noncitizens are able to pursue immigration remedies without facing the prospect of prolonged detention.

The Florence Immigrant and Refugee Rights Project (Florence Project) is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, the Florence Project provides orientation services to detained adult men and women as well as unaccompanied minors in removal proceedings. In 2015, over 11,000 detained children, men, and women facing removal charges observed a Florence Project presentation on immigration law and procedure. That same year, the Florence Project provided individualized *pro se* support services to approximately 2,500 detained adult immigrants. Every year, the Florence Project also directly represents individuals before the Immigration Judge and Board of Immigration Appeals. All of the adult immigrants we assist are detained by ICE and in removal proceedings in remote locations in Florence and Eloy, Arizona. In any given year we see hundreds of long term LPRs who have been detained as a result of criminal convictions, many of whom may seek relief in the form of termination of proceedings, waivers for their convictions, or cancellation of removal. Each year, a significant number of those LPRs are brought into custody from a port of entry where they were designated as an arriving alien seeking admission, typically as a result of criminal convictions. Such individuals often have meritorious arguments for relief, but remain detained for months and years. The Florence Project firmly believes that there must be appropriate constitutional limits on the application of mandatory detention provisions, particularly when such provisions impact LPRs.

The Immigrant Defenders Law Center (ImmDef) is an independent, non-profit law firm dedicated to advancing social justice for Southern California's most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody and their families. ImmDef's objective is to preserve families and communities by empowering individuals to know their rights in the immigration system, providing access to legal representation, and advocating for social change. In 2016, ImmDef will provide legal representation to approximately 625 clients in their immigration removal proceedings and will provide "Know Your Rights" classes to a total of approximately 2,000 individuals. The Immigrant Defenders Law Center is particularly concerned about the outcome of this case because as attorneys for noncitizen men, women, and children, we acutely understand that prolonged detention is a challenge that affects not only an individual's wellbeing but also her access to legal representation. Without lawyers in immigration court, most noncitizens, and especially children, are unable to effectively access justice and vindicate their right to obtain relief to which they are entitled.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit, accredited since 1980 by the Board of Immigration Appeals (BIA) to represent individuals in removal proceedings. Though its staff and network of more than 1,500 pro bono attorneys, NIJC has a long history of providing education and representation to low-income immigrants, refugees, and asylum seekers, especially when those individuals are detained. NIJC provides

legal education in the form of Know Your Rights presentations or Legal Orientation programming to detainees in seven detention centers scattered across four states (Illinois, Wisconsin, Indiana, and Kentucky). Through that programming NIJC and its partners provided educational programming to 3500 individuals in the last fiscal year. Given this work, NIJC has a deep interest in the due-process rights of noncitizens in removal proceedings, including LPRs, to be free from prolonged detention without the possibility of release on bond.

Northwest Immigrant Rights Project (NWIRP) is a nationally-recognized legal services organization based in Washington State. Each year, NWIRP provides direct legal assistance in immigration matters to over 9,000 low-income people from over 150 countries, speaking over 60 different languages and dialects. NWIRP also strives to achieve systemic change to policies and practices affecting immigrants through impact litigation, public policy work, and community education. Founded in 1984, NWIRP serves the community from four offices in Washington State in Seattle, Granger, Tacoma, and Wenatchee. NWIRP is the only organization on the List of Pro Bono Legal Service Providers for Washington State that is distributed to unrepresented individuals facing removal proceedings by the local immigration court. NWIRP has a deep interest in the subject of this litigation because it provides legal assistance each year to thousands of individuals facing removal proceedings who are detained at the Northwest Detention Center in Tacoma, Washington, and has experienced first-hand the adverse impact of prolonged detention on the wellbeing of noncitizens in immigration custody.

The Political Asylum/Immigration Representation Project (PAIR) is a non-profit organization in Boston and the leading provider of pro bono legal services to indigent immigrants and asylum seekers in Massachusetts, including those who are detained by DHS in the region. At any given time, PAIR is representing or advising several hundred asylum-seekers and immigration detainees with active removal cases, who originally came from over 90 countries worldwide. Since all of PAIR clients are low-income, they are unable to afford counsel on their own and must rely on pro bono counsel to seek protection from deportation. PAIR regularly conducts legal rights presentations and intakes for immigration detainees at three regional detention centers. During these visits, PAIR staff and volunteers provide a legal rights presentation, and then screen individual cases. In addition to these in-person presentations, PAIR conducts intake over the telephone with immigration detainees. PAIR provides presentations to and consultations with over 600 new immigration detainees a year and has had occasion to speak to many individuals who have experienced prolonged detention, including LPRs and those who have recently arrived in the United States.

The Pennsylvania Immigration Resource Center (PIRC) is a non-profit organization whose mission is to serve vulnerable immigrant populations in Pennsylvania. Through the Department of Justice's Legal Orientation Program, PIRC provides legal orientations, pro se deportation relief workshops, and pro bono referrals to individuals with cases before immigration judges and the BIA. All of the individuals who receive services through our detained programs are detained by DHS at the York

County Prison or the Berks County Residential Center, and the population includes family units and young children. PIRC also provides free direct representation to vulnerable detained individuals, with a focus on asylum seekers, survivors of trauma, the indigent, and those with competency issues. Through this work, PIRC provides educational programming and/or direct representation to approximately 2,000 detained individuals each year.

The Refugee and Immigrant Center for Education and Legal Services (RAICES) is a BIA-recognized, non-profit, legal services agency with seven offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. In 2015, RAICES provided legal services to over 10,000 individuals, including an extensive number of detained adults. In the past year, RAICES has provided legal services to individuals detained at nine detention centers in Texas and has frequently encountered individuals facing improper prolonged detention. RAICES believes that all noncitizens, whether they are new arrivals to the United States or have been present in this country for a period of time, should be able to pursue immigration remedies without facing prolonged detention.

The Rocky Mountain Immigrant Advocacy Network (RMIAN) is a nonprofit legal advocacy organization that serves two of the most vulnerable immigrant populations in Colorado: men and women in immigration detention, and immigrant children who have suffered from abuse, neglect, or violence. RMIAN's Detention Program provides direct removal-defense representation, educational

programming, and other services to people detained at the immigration detention center in Aurora, Colorado, including individuals designated as arriving aliens. In 2015, RMIAN served over 1,700 individuals at the immigration detention center in Aurora, Colorado. RMIAN has an interest in ensuring that noncitizens – particularly those who are detained, and consequently have limited access to both legal representation and evidence for their cases – are afforded the due process rights to which they are entitled.