09-2951-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

HIGINIO ALEJANDRO GARCIA,

Petitioner-Appellee,

—against—

CHRISTOPHER SHANAHAN, Field Officer Director for the Office of Detention and Removal for U.S. Immigration and Customs Enforcement at 201 Varick Street, New York, NY,

Respondent-Appellant,

WAYNE MULLER, Assistant Field Office Director for the Office of Detention and Removal for U.S. Immigration and Customs Enforcement, JANET NAPOLITANO, Secretary of Homeland Security, ERIC H. HOLDER, U.S. Attorney General and U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

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

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER-APPELLEE AND IN SUPPORT OF AFFIRMANCE

MANUEL D. VARGAS, ESQ.
IMMIGRANT DEFENSE PROJECT
3 West 29th Street, # 803
New York, New York 10001
(212) 725-6285

Attorney for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), IDP hereby represents that its parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of FCNY's stock.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Immigrant Defense Project ("IDP") submits this brief as *amicus curiae* in support of Petitioner-Appellee Higinio Garcia.

STATEMENT OF INTEREST

Amicus IDP is a not for-profit legal resource center dedicated to defending the rights of immigrants. IDP trains and advises criminal defense and immigration lawyers, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

This Court, as well as the United States Supreme Court, has accepted and relied on *amicus curiae* briefs prepared by IDP (and its former parent organization the New York State Defenders Association) in many key cases involving the intersection of immigration and criminal laws. *See* Decl. of Manuel D. Vargas in Support of Motion of IDP for Leave to Appear as Amicus Curiae (collecting cases).

IDP offers this brief to highlight for this Court the real-world import of the Government's illogical interpretation of the unambiguous language of the mandatory detention statute here in issue, Immigration and Nationality Act ("INA") § 236(c), 8 U.S.C. § 1226(c). The Government's position strains the language of the statute and perversely requires mandatory detention of a category of noncitizens whose removable convictions are over ten years old and whose reintegration into the community and likelihood of successfully contesting removal make them among the last immigrants convicted of crimes that Congress, in enacting § 236(c), would have intended to subject to mandatory detention. *Amicus* is concerned that this unwarranted interpretation, rejected by every federal court to have squarely considered the issue since the BIA's decision in *Matter of Saysana,* has harmed and will continue to harm residents of the Second Circuit. In addition, against the background reality of routine transfers of detained respondents from New York and its environs to higher-capacity detention centers under the jurisdiction of other federal circuits, the Government's expansive interpretation of its detention mandate has the troubling practical effect of depriving some residents of this Circuit of relief for which they would have been eligible had they not been erroneously detained without bond.

ARGUMENT

I. Congress did not intend for INA § 236(c), providing for mandatory detention upon release from criminal custody, to apply to immigrants who have already been released and reintegrated into society.

A. *Congress provided that § 236(c) applies to immigrants upon their release from criminal custody connected to a designated § 236(c) offense and before any reintegration into society.*

For the reasons set forth in Appellee Mr. Garcia's brief (Appellee Br. 17–25), the limiting "when . . . released" language of § 236(c) does not support the construction urged by the Government and by the BIA in *Matter of Saysana*, 24 I. & N. Dec. 602 (BIA 2008).[1] Congress could easily have created a detention scheme in which every noncitizen removable for criminal activity must be detained, but it did not. *See* INA § 236(a), 8 U.S.C. § 1226(a) (providing the Attorney General discretion to release removable immigrants on bond). Instead, in enacting § 236(c), it elected to single out certain categories of removable immigrants whom it determined could be presumed to represent a danger to the community or flight risk upon release from their criminal sentence for the removable offense. For example, in

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[1] For the reasons Mr. Garcia discusses at points II.B.1 and III of his brief, the Government's strained interpretation also creates severe constitutional difficulties.

defining the subcategories of immigrants subject to § 236(c) in subparagraphs (1)(A)–(D), Congress applied mandatory detention to noncitizens removable for a crime falling within the subcategory of an aggravated felony or a crime involving moral turpitude with a prison sentence of at least one year but chose to exempt noncitizens removable for a crime involving moral turpitude who had not been sentenced to at least one year of imprisonment. *See* 8 U.S.C. § 1226(c)(1)(A)–(D).

As numerous federal courts have concluded, it is equally plain from the language of the statute that Congress intended the mandatory detention provision to apply only to immigrants completing criminal custody related to the designated removable conduct after the statute's effective date.[2] The

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[2] *See, e.g.*, *Park v. Hendricks*, No. 09-4909, 2009 WL 3818084 (D.N.J. Nov. 12, 2009); *Ortiz v. Napolitano*, No. 009-0045, 2009 WL 3353029 (D. Ariz. Oct. 19, 2009); *Mitchell v. Orsino*, No. 09-7029, 2009 WL 2474709 (S.D.N.Y Aug. 13, 2009); *Hy v. Gillen*, 588 F. Supp. 2d 122 (D. Mass. 2008); *Saysana v. Gillen*, No. 08-11749, 2008 WL 5484553 (D. Mass. Dec. 1, 2008); *Thomas v. Hogan*, No. 1:08-0417, 2008 WL 4793739 (M.D. Pa. Oct. 31, 2008); *Cox. v. Monica*, No. 1:07-0534, 2007 WL 1804335 (M.D. Pa. June 20, 2007); *Alikhani v. Fasano*, 70 F. Supp. 2d 1124 (S.D. Cal. 1999). *See also, e.g.*, *Scarlett v. U.S.D.H.S.*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009); *Waffi v. Loiselle*, 527 F. Supp. 2d 480 (E.D. Va. 2007); *Bromfield v. Clark*, No. 06-757, 2007 WL 527511 (W.D. Wash. Feb. 14, 2007); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004); *Boonkue v. Ridge* No. 04-566, 2004 WL 1146525 (D. Or. May 7, 2004); *Aguilar v. Lewis*, 50 F. Supp. 2d 539 (E.D. Va. 1999); *Alwaday v. Beebe*, 43 F. Supp. 2d 1130 (D. Or. 1999); *Pastor-Camarena v.*

statute specifically provides for detention of covered individuals "*when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again *for the same offense*." 8 U.S.C. § 1226(c)(1) (emphasis added).[3] And even supposing that the statute's plain terms were in any way ambiguous, the development of § 236(c) over time makes Congress' intent in this regard unmistakable. The predecessor statute, enacted as section 7343(a)(4) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4470 (Nov. 18, 1988), required the Attorney General[4] to take into custody "any alien convicted of an aggravated felony *upon completion of the alien's sentence* for *such* conviction." *Id.* (codified at

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Smith, 977 F. Supp. 1415 (W.D. Wash. 1997) (interpreting parallel provision of Transitional Period Custody Rules).

[3] The statute became effective upon expiration of the Transitional Period Custody Rules on October 9, 1998, and thus applies only to "release[]" on or after that date. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1007–09 (BIA 1999).

[4] The functions of the former Immigration and Naturalization Service are now performed by the Department of Homeland Security, and the Secretary of Homeland Security now fulfills this responsibility in place of the Attorney General. *See Rajah v. Mukasey*, 544 F.3d 449, 451 n.3 (2d Cir. 2008).

8 U.S.C. § 1252(a)(2)) (emphasis added).[5] In response to arguments that criminal defendants released from incarceration into less restrictive forms of criminal custody (such as parole) were exempt from this statute, *see, e.g.*, *Matter of Eden*, 20 I. & N. Dec. 209 (BIA 1990), Congress soon amended the language to specify that the subject noncitizens should be detained "upon the release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (Nov. 29, 1990) (codified at 8 U.S.C. § 1252(a)(2)).

As the Government correctly notes (Appellant Br. 9), Congress later broadened the categories of immigrants subject to the provision in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (Apr. 24, 1996), while retaining the limitation that such immigrants be detained "upon release of the alien from incarceration," *id.* Finally, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") further expanded the categories of

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[5] The amendment was purely prospective, affecting immigrants convicted of aggravated felonies on or after the date of enactment. *Id.* § 7343(c), 102 Stat. at 4470.

criminal removability triggering such detention, while retaining substantially identical language prescribing mandatory detention only "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense," Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. 3009, 3009-585 (Sept. 30, 1996).

Despite these clear, repeated and consistent indications of Congress's intent to require detention only of those completing prison sentences for designated removable conduct, the Government now asserts that § 236(c) is intended to reach *any* immigrant described at § 236(c)(1) who is "released" from custody for *any* reason since the statute's effective date. As set forth below, this strained interpretation has led in practice to deeply unfair, arbitrary, and illogical results that fly in the face of Congress's manifest intent to subject to mandatory detention only those taken from criminal incarceration for the removable offense. It has disrupted the lives of immigrants who are fully reintegrated into the community; gravely interfered with the needs of their U.S. citizen family members, employees and employers; and subjected to mandatory detention precisely those immigrants who, under other provisions of the INA, are most likely to merit release on bond and to have strong claims to discretionary relief from

removal. Perhaps most troublingly, this unwarranted detention frequently interferes with the ability of affected immigrants to gain access to counsel and evidence and to present their meritorious claims to statutory relief from deportation.

B. *The DHS policy of applying INA § 236(c) to immigrants who have already been released from custody connected to their § 236(c) offense subjects to mandatory detention immigrants who often have successfully reentered society and disrupts their families, workplaces, and lives.*

While detention of removable immigrants upon release from the incarceration tied to their removable offense effectuates Congress's purpose of preventing incarcerated respondents from absconding from their proceedings, mandatory detention of immigrants who have lived in the community for years is quite different. Detention of such immigrants does substantial damage precisely because these individuals have reentered society and thereby developed responsibilities that individuals in continuous custody lack. When immigrants living in the community are subjected to mandatory detention, they are prevented from fulfilling their responsibilities as caregivers, providers of financial and emotional support to their families, and employers, employees and members of their communities.

i. <u>Mandatory detention for individuals living in the community disrupts families.</u>

Immigrants who have been released from criminal custody may play crucial parenting roles in the lives of their children, who are often United State citizens. Mr. Garcia was the custodial parent and primary caregiver for his U.S. citizen daughter at the time of his detention. (J.A. 60–61; 82–83). Similarly, the U.S. citizen daughters of lawful permanent resident ("LPR") Jose Reyes were placed in stranger foster care when he was in mandatory detention and their mother was deemed unfit to care for them on her own. He was removable because of a seventh-degree drug possession offense, for which he had been sentenced to time served nearly ten years earlier. Mr. Reyes also suffers from end-stage kidney disease. Decl. of Heidi Altman, Esq. (on file with *amicus*). After initially subjecting Mr. Reyes to mandatory detention, ICE eventually stipulated to his release rather than litigating his habeas case. Stipulation and Order of Dismissal, *Reyes v. Shanahan*, No. 09-06339 (S.D.N.Y. Aug. 19 2009).

Released individuals may provide care to family members other than children. Houng Saysana, in whose case the BIA issued the precedent decision that the Government relies on, provides care for his seriously ill U.S. citizen wife, to whom he has been married for more than twenty-seven years. At the time Mr. Saysana was taken into ICE custody, he was responsible for transporting her to her thrice-weekly dialysis appointments.

Mr. Saysana arrived in the United States in 1980 and has a U.S. citizen child and step-children. Petition for Writ of Habeas Corpus 4–5, *Saysana v. Gillen*, No. 08-11749 (D. Mass. Oct. 15, 2008). The district court granted his habeas petition, which is currently on appeal before the First Circuit. *Saysana v. Gillen*, No. 09-1179 (1st Cir. argued Sept. 16, 2009). Mr. Saysana had been convicted of indecent assault and battery in 1990, and the Government claims he is subject to mandatory detention as a result of a dismissed charge for failure to register as a sex offender. If the Government prevails, his wife will be left without her caregiver even before a decision is reached in his immigration case. *See also* First Amended Petition for Writ of Habeas Corpus 4-5, *Hy v. Gillen*, No. 08-11699 (D. Mass Oct. 23, 2008) (detailing serious ailments suffered by Mr. Hy's U.S. citizen wife of eighteen years and her reliance upon Mr. Hy for financial and emotional support at the time of his detention by ICE).

ii. Mandatory detention for individuals living in the community disrupts workplaces and communities.

Immigrants who have been released from criminal custody also return to economic productivity, and their workplaces may be substantially disrupted by their detention. Sassan Parinejad arrived in the United States in 1979. He is married to a U.S. citizen and has a U.S. citizen child. His underlying deportable conviction was a ten-year-old drug possession charge

for which he had been sentenced to, and successfully completed, a thirty-day treatment program. At the time he was detained by ICE, Mr. Parinejad employed four people full-time and several others on a contract basis at his successful software start-up. He was subjected to mandatory detention after release from a 2006 arrest. *See* Second Amended Complaint ¶¶ 37–39, *Parinejad and Calcano v. United States Immigration and Customs Enforcement*, No. 07-10432 (D. Mass. May 29, 2007). As a direct result of his detention, Mr. Parinejad's business lost important contracts. He was forced to lay off his employees and close the business, his family's sole means of support. Decl. of Sassan Parinejad (on file with *amicus*). *See also* Verified Complaint and Habeas Corpus Petition, *Park v. Hendricks*, No. 09-4909 (D.N.J. Sept. 24, 2009) (describing Mr. Park, LPR of twenty-nine years detained under *Saysana*, who owns his business and home, where he and his three U.S. citizen children live with his U.S. citizen wife).

Guillermo Ortiz arrived in the United States as an infant and became an LPR in 1990, at age ten. Although he had been convicted of robbery seventeen years earlier, at the time ICE detained him, Ortiz had a position of substantial responsibility as a fleet manager for a trucking company, providing financial support for his family. Brief in Support of Respondent's Eligibility for 212(c) Relief, *Matter of Guillermo Ortiz*, No. A 36-725-656

(EOIR Nov. 14, 2008) (on file with *amicus*). He and his wife, a U.S. citizen, have been married for more than twenty years and have two U.S. citizen children. Their younger child suffers from mental retardation. *Ortiz v. Napolitano*, Civ. Case No. 009-0045, 2009 WL 3353029, at *1 (D. Ariz. Oct. 19, 2009). ICE took Mr. Ortiz into custody after a non-deportable DUI offense. He spent thirteen months in mandatory detention, depriving his employer of skilled labor and his family of income, before the district court granted his habeas petition and he was granted bond. *Id.*; *Matter of Guillermo Ortiz*, No. A 36-725-656 (BIA Oct. 28, 2009).

Eighteen years after Carlos Calcano was convicted of transporting firearms, an offense for which he served no jail time, Mr. Calcano had risen to become manager of the dining hall at Phillips Andover Academy, where he supervised twelve employees. He and his U.S. citizen wife were raising their two teenage U.S. citizen children in the home that they owned. Mr. Calcano was applying to become a citizen when ICE detained him after his naturalization interview. He had immigrated to the United States with his family in 1979, at the age of nine. The criminal custody that rendered Mr. Calcano subject to *Saysana* lasted less than twenty-four hours and all charges stemming from it were promptly dropped. Second Amended Complaint, *Parinejad and Calcano*, *supra*, at ¶¶ 33–36. He was eligible for,

and later secured, relief from deportation. *Matter of Carlos Andres Calcano*, No. A036-015-247 (EOIR June 20, 2007). Under the Government's expansive interpretation of § 236(c), however, no immigration judge was ever given the opportunity to consider whether Mr. Calcano's property, substantial responsibilities, and community ties reduced the risk that he would abscond.

II. Congress' expressed intent makes sense because immigrants who have already been released and reintegrated into society may be able to show that they do not present a danger to the community or a risk of flight and that they may merit relief from removal.

The overbroad application of the mandatory detention statute is likely to sweep in immigrants who would be released from custody under § 236(a) if afforded an individualized determination. As the above-described cases demonstrate, individuals not immediately transferred from criminal custody on a removable offense to immigration custody can form deep community ties and rehabilitate themselves substantially. These factors carry substantial weight in an immigration judge's determination of whether an immigrant will be released on bond, as well as increasing the likelihood she will ultimately qualify for relief from removal.

A. *Individuals released and reintegrated into the community are substantially more likely to qualify for bond than the group which Congress intended to subject to mandatory detention, because they*

> *are far less likely to present a risk of flight or a danger to the community.*

In order to qualify for bond, an individual in immigration custody must demonstrate that she does not pose a flight risk or a danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). Section 236(c) represents Congress' desire to except from this test those individuals released directly from criminal to immigration custody because of a removable offense, creating a *per se* rule that these individuals present flight risks, dangers to the community, or both. This exception, however, in terms does not apply to individuals who committed designated removable offenses and were released back into the community years ago; the Government's attempt to extend it this far is inconsistent with Congress' presumption. Factors relevant to determining whether an individual presents a flight risk or a danger to the community include "stable employment history," "the length of residence in the community," and "the existence of family ties," *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (BIA 1987), as well as "the alien's criminal record, including . . . the recency of such activity," *Guerra*, 24 I. & N. Dec. at 40. LPRs who have spent time living in the community since conviction for a removable offense are substantially more likely to be able to demonstrate that these factors weigh in their favor than those who are taken immediately into immigration custody.

Further, bond determinations often turn on the respondent's eligibility for relief from removal. Respondents with a higher probability of securing relief from deportation have greater incentives to appear for hearings than those with a lower probability of securing relief. *Andrade*, 19 I. & N. Dec. at 490. As discussed *infra* in Part II.B, many of the group of individuals subject to the Government's improperly broad reading of § 236(c) are eligible to seek discretionary waivers of deportation or other relief, and become even more likely to do so as their deportable criminal conduct recedes into the past. Thus, the availability of relief from removal, and the likelihood of securing that relief, decrease the probability that an immigration judge will find an individual in either of these groups to present a risk of flight. *See id.*

When empowered by an intervening federal court to consider an individual immigrant's circumstances, it is not unusual for an immigration judge to set low or no bond for an immigrant whom the Government argues is subject to mandatory detention under the BIA's *Saysana* decision. When Duy Tho Hy was detained by ICE, the immigration judge initially denied him a bond hearing. *Hy v. Gillen*, 588 F. Supp. 2d 122, 124 (D. Mass 2008). Although his removable conviction for indecent assault and battery predated the effective date of § 236(c) by seven years, Mr. Hy had been arrested for

simple assault and criminal threatening in 2007, and, while the charges were subsequently dismissed, the immigration judge accepted the Government's argument that release from that custody triggered mandatory detention under § 236(c). *Id.* The district court subsequently granted Mr. Hy's habeas petition requesting an individualized hearing. *Id.* at 128. At that hearing, the immigration judge released Mr. Hy on his own recognizance. Brief for Petitioner-Appellee 6–7, *Saysana v. Gillen*, No. 09-1179, *Hy v. Gillen*, No. 09-1182 (1st Cir. May 11, 2009). By that time, Mr. Hy had been an LPR for twenty-seven years, and he had been released from custody on the conviction rendering him removable thirteen years before. *See id.* at 5–6. He had been married to his U.S. citizen wife, who suffers from bipolar disorder and diabetes, among other ailments, for seventeen years, and he worked consistently as a cook in Chinese restaurants, filing income taxes every year. *Id.* That an immigration judge considering all these factors found Mr. Hy to present no risk of flight or danger to the community is not surprising. Nonetheless, the Government argues that Mr. Hy and others like him are subject to a *per se* rule that he presented a risk of flight or a danger. *See also, e.g.*, *Saysana*, 24 I. & N. Dec. at 603 (noting that the immigration judge initially set bond of $3,500 for Mr. Saysana); Brief for Petitioner-Appellee 4, *Saysana v. Gillen*, No. 09-1179 (1st Cir. May 11, 2009) (noting

that bond was again set at $3,500 after the district court rejected the Government's position); *Matter of Jorge Cristobal*, No. A40 042 067, 2008 WL 5244725 (BIA Nov. 26, 2008) (vacating immigration judge's determination that bond be set at $4,000 pursuant to *Saysana*).

As these cases demonstrate, individuals who are not placed in immigration custody immediately after release from custody connected to a removable offense can develop community and family ties, employment history, and a record of law-abiding behavior, all factors that make them more suitable for individual bond determinations than those transferred directly to immigration custody.

B. *Individuals released and reintegrated into the community are substantially more likely to qualify for relief from removal than those whom Congress intended to subject to mandatory detention.*

Lawful residents swept into mandatory detention under the Government's overbroad reading of § 236(c) may qualify for relief from removal in several ways. Many LPRs who agreed to plead guilty to removable offenses before the September 30, 1996 enactment of IIRIRA are entitled to seek relief under former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). *See INS v. St. Cyr*, 533 U.S. 289, 326 (2001). As Mr. Garcia's case illustrates, the Government's interpretation of § 236(c) affects a class of lawful residents that overlaps substantially with the class of those

eligible to seek § 212(c) relief, because *Saysana* applies to those whose removable conduct predates October 10, 1998. *See* 8 C.F.R. § 1003.44(b) (providing that in order to seek § 212(c) relief an immigrant must, among other things, have "[a]greed to plead guilty or nolo contendere to an offense rendering the alien . . . removable . . . before April 1, 1997"). Second, in many cases, LPRs whose removable convictions postdate the enactment of IIRIRA may seek cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a). Both forms of relief are granted at the discretion of the immigration judge, who must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf." *Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (articulating standard for § 212(c) relief); *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998) (finding *Marin* standard "equally appropriate in considering requests for cancellation of removal under section 240A(a) of the Act").

For both forms of relief, factors adverse to the application include the nature of the grounds for exclusion, the record of other violations of criminal or immigration law, and the "nature, recency, and seriousness" of the criminal record. *Marin*, 16 I. & N. Dec. at 584; *C-V-T-*, 22 I. & N. Dec. at 11. When years or decades have passed between release from custody on a

removable conviction and an application for relief, the weight of the factors adverse to the respondent will thus likely decrease, while the weight of the favorable factors increases. In addition to family ties and duration of residence in the United States, these factors include "evidence of hardship to the respondent and his family if deportation occurs, . . . a history of employment, the existence of property or business ties, evidence of value and service to the community, [and] proof of genuine rehabilitation if a criminal record exists." *Id.*; *Marin*, 16 I. & N. Dec. at 584–85. Individuals like those described in Part I.B., *supra*, who have been working, supporting their families financially and emotionally, and otherwise living productive lives since release are far more likely to find the equities tipping in their favor than those released directly from criminal custody to immigration custody.

Mandatory detention is particularly inappropriate for immigrants who live in the community and who will succeed in securing relief from removal. The Supreme Court has found that the purpose of mandatory detention is to prevent "deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore v. Kim*, 538 U.S. 510, 528 (2003). The Government's attempt to broaden the category of immigrants to

whom mandatory detention applies, thereby encompassing large numbers of individuals whom the availability of relief renders unlikely to ever be ordered removed, is thus illogical as well as contrary to law.

III. Subjecting immigrants who have already been released and reintegrated into society to mandatory detention undermines Congressional intent to provide relief from removal to immigrants who warrant such relief, since detention often leads to significant impairments to their ability to seek statutory relief.

The Government's overbroad interpretation of § 236(c) is particularly troubling in light of the background reality of an immigration detention system in which, as the New York Times recently reported, "[g]rowing numbers of noncitizens, including legal immigrants, are . . . transferred heedlessly," resulting in "a loss of access to legal counsel and relevant evidence" and, in some cases, the "evaporat[ion]" of meritorious claims to relief from removal because of divergent circuit caselaw. Nina Bernstein, *Immigration Detention System Lapses Detailed*, N.Y. Times, Dec. 3, 2009, at A25. By subjecting immigrants to mandatory detention who have been living in the community for years, the Government contravenes Congress' intent to allow them to pursue their claims to relief.

A. *Detained individuals often lose the assistance of counsel or the ability of counsel to provide effective assistance.*

According to the Department of Justice, eighty-four percent of detained respondents in removal proceedings are unrepresented, compared to fifty-

eight percent of all respondents. Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 30 (2009) (citing Executive Office for Immigration Review, Department of Justice, *FY 2007 Statistical Yearbook* G1 (2008)), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf). The geography of immigration detention contributes to this disparity: immigration detention facilities within the Fifth Circuit receive more transferred detainees than facilities in any other circuit, and the Fifth Circuit has the lowest ratio of immigration attorneys to detained respondents. Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* 37–38 & tbl.11, 12 (2009) (hereinafter "*Locked Up*"), *available at* http://www.hrw.org/en/node/86789 (analyzing over 1.4 million ICE detainee transfer records obtained by FOIA). But the phenomenon obtains even among respondents in New York City immigration courts. Noel Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 625 (2009) (observing that, in New York City, nearly all non-detained immigrants are represented while nearly all detained immigrants are not); *see* Part III.B, *infra*.

Mr. Garcia's experience of losing counsel as a result of his detention and transfer (Appellee Br. 6–7) is not unusual. Peter Markowitz, *Barriers to*

Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 Fordham L. Rev. 541, 558 (2009) (noting the "significant disincentive for private and pro bono attorneys to take on detained clients in removal proceedings" due to high rate of detainee transfer and immigration courts' refusal to allow counsel to make telephonic appearances); *Locked Up*, *supra*, at 49–55 (discussing cases of detained respondents who lost counsel following transfer). Mr. Garcia was fortunate enough to re-acquire *pro bono* counsel when he was moved back to New York, although only an emergency injunction issued by Judge Baer in his habeas case prevented ICE from transferring him a second time. (J.A. 28–29) In general, motions to change venue, so that a client can be returned to the jurisdiction where he had previously obtained counsel, are frequently denied. *See Matter of Rahman*, 20 I. & N. Dec. 480, 485 (BIA 1992) (holding that distant location of attorney did not require immigration judge to grant motion for change of venue); Markowitz, *supra*, at 558 n.80 (collecting cases); *Locked Up*, *supra*, at 62 ("[C]ourts have consistently held that the location of a detainee's attorney . . . is insufficient cause for change of venue.").

Given the reality that the majority of ICE detainees are transferred after being taken into ICE custody, attorneys who attempt to represent

detained clients often have severe difficulties doing so effectively. *See* Transactional Records Access Clearinghouse ("TRAC"), Syracuse Univ., *Huge Increase in Transfers of ICE Detainees* (2009) (hereinafter "TRAC Report"), http://trac.syr.edu/immigration/reports/220/ (concluding, based on analysis of transfer records obtained by FOIA from DHS, that "[d]uring the first six months of FY 2008, the latest period for which complete data were available, the majority (52.4%) of detainees were transferred"); *Locked Up*, *supra*, at 2–3 (stating in summary that "[t]ransfers erect often insurmountable obstacles to detainees' access to counsel" and that "[t]ransfers of immigrant detainees severely disrupt the attorney-client relationship"); *id.* at 43–57 (detailing problems and collecting cases).

A recent internal ICE report stated that "[d]etainees who are represented by counsel should not be transferred outside the area unless there are exigent health or safety reasons." Dora Schriro, Department of Homeland Security, *Immigration Detention Overview and Recommendations* 24 (Oct. 2009), *available at* http://documents.nytimes.com/immigration-detention-overview-and-recommendations#p=1 (hereinafter "Schriro Report"). Nonetheless, a more recent audit of ICE transfer practices by the DHS Office of the Inspector General concluded that "[d]etention officers at five ICE field offices we visited do not consistently determine whether

detainees have legal representation or a scheduled court proceeding when transferring detainees." Office of Inspector General, U.S. Dep't of Homeland Security, OIG-10-13, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers* 2 (Nov. 2009) (hereinafter "OIG-10-13"), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf.

Further, multiple government and independent studies have confirmed that ICE's compliance with internal standards requiring that attorneys be notified of client transfers is virtually non-existent. Schriro Report, *supra*, at 23–24; Office of Inspector General, U.S. Dep't of Homeland Security, OIG-09-41, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees* 7 (2009) (hereinafter "OIG-09-41") (finding that ICE staff did not properly complete transfer notification paperwork in more than ninety-nine percent of transfers in the sample monitored by inspectors); *Locked Up*, *supra*, at 44–45 ("In nearly every case documented by Human Rights Watch, attorneys learned of the transfers not from ICE, but rather from the detainee or his family. . . . [M]any attorneys reported to Human Rights Watch that they had to resort to calling detention centers around the country to try to find their clients.").

Finally, communicating with a detained client, even when his whereabouts are known, is not easy. Attorneys report difficulty contacting their clients by mail and visiting them in detention for pre-hearing consultations. Schriro Report, *supra*, at 23; *see Locked Up*, *supra*, at 46–49 (discussing cases demonstrating that "immigration attorneys struggle to represent their clients after transfer"); OIG-10-13, *supra*, at 4 ("Transferred detainees have had difficulty . . . arranging for legal representation, particularly when they require pro bono representation."). Thus, even where detention does not prevent an individual from securing counsel, it may substantially affect the quality of the representation that counsel is able to provide.

B. *Detained individuals are often transferred to facilities far from their homes and families, making it difficult to gather and present evidence relevant to their cases.*

Recently released reports analyzing ten years of detention data obtained from DHS through FOIA document a stark increase in the number of detainees who are transferred once taken into custody by ICE. *See* TRAC Report, *supra*; *Locked Up*, *supra*, at 5 (finding, based on the data analyzed by TRAC, that more than 50% of the roughly 1.4 million detainee transfers since FY 1999 have occurred in the last three years). As the detained population has doubled since FY 1999,

> the agency—at least until recently—has not sought to balance where it located new detention beds with where the individuals were apprehended. Instead, ICE has adopted a freewheeling transfer policy to deal with the resulting imbalances. Under this policy, ICE transports detainees from their point of initial ICE detention to many different locations—often over long distances and frequently to remote locations.

TRAC Report, *supra*; *see also* OIG-09-41, *supra*, at 8 ("Detainees may be transferred anywhere in the United States, depending on a facility's space availability."). ICE acknowledges that "significant detention shortages exist in California and the Mid-Atlantic and Northeast states. When this occurs, arrestees are transferred to areas where there are surplus beds." Schriro Report, *supra*, at 6. Most of these transferred detainees "are sent from eastern, western and northern state detention facilities to locations in the southern and southwestern United States." OIG-10-13, *supra*, at 1.

The TRAC data document that this phenomenon particularly affects residents of the Second Circuit. The Varick Street facility in Manhattan, for example, ranks twelfth among the 1,582 facilities analyzed in the number of detainees transferred to other facilities. *Locked Up*, *supra*¸ at 34 tbl.8. Ninety percent of the facility's detained population was arrested locally and brought to Varick Street as the first situs of ICE detention; in the past twelve months, seventy-nine percent of detainees held there were transferred to other facilities. TRAC, "Transfers of ICE Detainees from the Varick Street

Service Processing Center (2009), http://trac.syr.edu/immigration/detention/200803/VRK/tran. Of those transferred, seventy-two percent were sent to detention locations outside the region, compared to a national average of forty-one percent. *Id.*

In addition to making it difficult if not impossible to obtain counsel, detention far from home also impedes the ability of immigrants to try on their own to gather and present evidence in order to secure relief from removal. Immigration judges considering applications for relief weigh the hardship deportation will cause an immigrant's family, his service to the community, and evidence of property and business ties, among other factors. *See* Part II.B, *supra*. It is substantially more difficult for an individual to produce documents and witnesses to demonstrate the presence of these factors when she is detained thousands of miles from her home state, where these documents and witnesses are likely to be located. *See* OIG Report OIG-10-13, *supra*, at 4 ("Access to personal records, evidence, and witnesses to support . . . relief, or appeal proceedings can also be problematic in [transfer] cases."); *Locked Up*, *supra*, at 66 ("[T]ransfer can impede a detainee's defense. Immigration detainees often rely on family members, friends, and their relationships in churches and communities of

origin to defend against deportation."); *see also id.* at 66–71 (discussing individual examples).

C. *Detained individuals are often transferred to facilities in other circuits, materially affecting the relief available to them.*

As noted above, many immigrants brought into ICE custody in the Second Circuit are transferred to detention facilities in other circuits, most notably the Fifth Circuit. *See* OIG-10-13, *supra*, at 1 (noting general pattern of transfer from northern and eastern to southwestern and southern states); *Locked Up*, *supra*, at 6 (finding that "the three states most likely to receive transfers are Texas, California, and Louisiana"; noting that "[w]hile it is impossible to determine conclusively based on our data whether there is a net inflow of transfers to the Fifth Circuit . . . the data show a large disparity of transfers received in . . . and originating from . . . the Fifth Circuit state of Louisiana"); *id.* at 37 tbl.11 (finding that Fifth Circuit ranks first among transfers received; Second Circuit ranks ninth among transfers originated but 11th among transfers received, above only the D.C. Circuit).

Since immigration courts and the BIA apply the substantive law of the circuit in which the IJ sits, *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (BIA 1989), and circuits are split on many key issues in criminal immigration law, a transfer between circuits may determine whether an individual will be

deported. "On multiple occasions documented by Human Rights Watch, ICE's decision to transfer a detainee away from the jurisdiction of his or her arrest has resulted in the application of substantive legal standards that are significantly less beneficial to the alien's application for relief from deportation than the law would have been had the alien not been transferred." *Locked Up*, *supra*, at 72; *see id.* at 72–78 (collecting examples). Wrongfully subjecting an immigrant who would otherwise qualify for bond to mandatory detention, which may entail a transfer to another circuit, thus affects not only her short-term liberty interest, but also her ability "to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

For example, the Fifth Circuit, where many mandatorily detained Second Circuit residents are sent, is alone among the circuits in failing to recognize that convictions vacated for constitutional or legal defects are not convictions for immigration purposes. *See Renteria-Gonzalez v. INS*, 322 F.3d 804, 820–21 (5th Cir. 2002) (Benavides, J., specially concurring). The Fifth Circuit persists in this view despite the BIA's decision in *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), holding that such vacated convictions do not constitute convictions in the immigration context.

Compare Garcia-Maldonado v. Gonzales, 491 F.3d 284, 291 (5th Cir. 2007) (noting that *Pickering* "may be the stance of our sister circuits, but is not the law in this circuit") *with Saleh v. Gonzales*, 495 F.3d 17 (2d. Cir. 2007) (applying *Pickering*). Thus, an immigrant taken into custody pursuant to *Saysana* whose earlier deportable conviction was vacated because of a violation of her constitutional rights will either be deported or have her proceedings terminated, depending on the fortuity of whether she is transferred to the Fifth Circuit.

To take another common example, the Second Circuit declines to automatically treat a second state conviction for simple possession of a controlled substance as a "drug trafficking crime" aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). *Alsol v. Mukasey*, 548 F.3d 207, 208 (2d. Cir. 2008). The Fifth Circuit, in contrast, finds a second simple possession offense to automatically constitute an aggravated felony barring virtually every form of relief from removal. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed*, No. 09-60 (July 15, 2009). As a result, an individual with two pre-1998 New York drug offenses on his record has not, in the view of this Court, been convicted of an aggravated felony, and assuming he met other relevant criteria, he would be able to seek relief from removal under § 240A(a). He would also,

however, be an immigrant "who is deportable by reason of having committed any offense covered in section 237(a)(2) . . . (B)," and would therefore be subject to mandatory detention on the Government's view if, after October 8, 1998, he were arrested for even the most trivial offense, such as being in a park after closing, *see* City of New York Parks and Recreation R. 1-03(a)(3), and even if such a charge was later dismissed. Such an immigrant, if transferred to the Fifth Circuit, would be ineligible for virtually any relief from removal—even if he lived in, was arrested in, and pleaded guilty in a circuit in which his convictions would have left him eligible to seek relief from removal while free from ICE custody on bond.

Marxall Campos is a New Yorker caught in this predicament. Mr. Campos had resided in New York State for twenty years and had two drug possession convictions there. Upon release from custody for the second offense, he was taken into ICE detention and shipped to Chaparral, New Mexico, in the Tenth Circuit. DHS filed his Notice to Appear in El Paso, in the Fifth Circuit, where his second conviction constitutes an aggravated felony. The immigration judge thus pretermitted his application for cancellation of removal, a decision which was upheld by the BIA. See *Matter of Marxall R. Campos*, No. A041 743 290 (BIA Oct. 8, 2009). *See also* Bernstein, *supra*, at A25 (discussing case of detained LPR transferred to

Texas, where his two New York possessory drug offenses rendered him ineligible for relief, resulting in his deportation).

CONCLUSION

For all of the reasons stated above, *amicus* respectfully requests that this Court affirm the decision of the District Court.

Dated: New York, NY
December 11, 2009

Respectfully submitted,

/s/ Manuel D. Vargas
MANUEL D. VARGAS, ESQ.
Senior Counsel
Immigrant Defense Project
3 West 29th St. # 803
New York, NY 10001
Tel.: (212) 725-6485

Certificate of Compliance

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B) because it contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 37(a)(7)(B)(iii) .

Dated: New York, NY
December 11, 2009

Respectfully submitted,

/s/ Manuel D. Vargas

MANUEL D. VARGAS, ESQ.
Senior Counsel
Immigrant Defense Project
3 West 29th St. # 803
New York, NY 10001
Tel.: (212) 725-6485

Attorney for amicus curiae
Immigrant Defense Project

Certificate of Service

I, Isaac Wheeler, staff attorney at the Immigrant Defense Project, hereby declare under penalty of perjury that on December 11, 2009, I caused two (2) copies of the Brief of Amicus Curiae Immigrant Defense Project, dated December 11, 2009, to be served on the Attorneys for Petitioner-Appellee and Respondents-Appellants by placing the same in first-class mail addressed to:

Alina Das, Esq.
Meredith Fortin, Legal Intern
Jorge M. Castillo, Legal Intern
Washington Square Legal Services, Inc.
245 Sullivan St., 5th Floor
New York, NY 10012

Natasha Oeltjen, Esq.
U.S. Department of Just8ice
United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

Dated: New York, NY
December 11, 2009

/s/ Isaac Wheeler

ISAAC WHEELER, ESQ.
Litigation Staff Attorney
Immigrant Defense Project
3 West 29th St. # 803
New York, NY 10001
Tel.: (212) 725-6421

ANTI-VIRUS CERTIFICATION

Case Name: Garcia v. Shanahan, et al.

Docket Number: 09-2951-cv

I, Nadia R. Oswald, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **agencycases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/11/2009) and found to be VIRUS FREE.

/s/ Nadia R. Oswald-Hamid
Nadia R. Oswald-Hamid
Record Press, Inc.

Dated: December 11, 2009