No. 01-1752

In the Supreme Court of the United States

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BALTAZAR SOSA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the District Director of the Denver District of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the court of appeals (App., *infra*, 1a-3a) is unpublished, but is reported at 30 Fed. Appx. 919. The judgment (App., *infra*, 4a-5a) and memorandum order (App., *infra*, 6a-18a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226(c) of Title 8 of the United States Code provides:

> **Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or
>
> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> **(2) Release**
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. 1226(c) (footnote omitted).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens from the United States. The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are

inadmissible to or deportable from the United States because they have committed specified crimes. In the case of deportable aliens, Section 1226(c)(1) applies if the alien has been convicted of any of certain specified crimes, including an aggravated felony (as defined in INA § 101(a)(43), 8 U.S.C. 1101(a)(43)), two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment, a controlled-substance offense (other than simple possession of 30 grams or less of marijuana), a firearms offense, a specified immigration offense, espionage, sabotage, treason, or threatening the President, see 8 U.S.C. 1226(c)(1)(B) and (C), 1227(a)(2)(A)-(D), or if the alien has engaged in terrorist activities, see 8 U.S.C. 1226(c)(1)(D), 1227(a)(4)(B). Section 1226(c)(2) prohibits release of those aliens during the pendency of administrative proceedings instituted to remove them from the United States, except in very limited circumstances involving witness protection. 8 U.S.C. 1226(c)(2).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal proceedings.[1] Detention of an alien following entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a). In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted Section 1231(a) of Title 8 as limiting the duration of detention following a final removal order, in order to avoid constitutional concerns.

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[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See INA §§ 239, 240, 8 U.S.C. 1229, 1229a.

2. Respondent is a citizen of Mexico who entered the United States as a young child in 1981 and became a lawful permanent resident of the United States in 1992. See App., *infra*, 2a. In 1994, at the age of 16, respondent pleaded guilty in Colorado to charges of attempted second degree murder and unlawful possession of a handgun. Those charges arose out of an incident in which respondent shot another student. *Ibid.* Respondent was sentenced as an adult to 30 years' imprisonment. That sentence was suspended on the condition that respondent successfully complete six years in a youthful offender program. Respondent later was allowed to change his plea and to plead guilty to first degree assault and commission of a crime of violence with a deadly weapon. *Ibid.*

In 1999, respondent was released from state custody. The INS charged him with being removable as an aggravated felon based on his convictions (see 8 U.S.C. 1101(a)(43)(F), 1227(a)(2)(A)(iii)) and took him into custody under Section 1226(c). See App., *infra*, 2a.[2]

3. In March 2000, respondent filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the District of Colorado. Respondent argued that Section 1226(c) violates due process and is unconstitutional as applied to him. App., *infra*, 2a.

In June 2000, the district court held that Section 1226(c) violates substantive and procedural due process as applied to respondent, granted the habeas corpus

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[2] In an effort to avoid removal as an aggravated felon for having committed a crime of violence for which the term of imprisonment was at least one year, respondent filed a petition in state court to reduce his sentence to 364 days. See 8 U.S.C. 1101(a)(43)(F); see also App., *infra*, 3a. The state court did not grant that petition.

petition, and ordered the INS to provide respondent an individualized bond hearing to address respondent's flight risk and danger to society. App., *infra*, 6a-18a; see *id.* at 4a-5a.[3] After a hearing, respondent was released on $7000 bond. *Id.* at 3a, 8a.

4. The court of appeals affirmed. In a memorandum order that is not published in the Federal Reporter, the court of appeals adopted the "rationale and holdings" of *Hoang* v. *Comfort*, 282 F.3d 1247 (10th Cir. 2002), petition for cert. pending, No. 01-1616 (filed May 3, 2002), and ruled on that basis that Section 1226(c) violates substantive due process as applied to respondent. App., *infra*, 2a-3a. In *Hoang*, the court of appeals held that Section 1226(c) violates substantive due process as applied to lawful permanent resident aliens because it is not supported by "special justifications which outweigh the individual's constitutionally protected interest in avoiding physical restraint." 282 F.3d at 1259; see *id.* at 1255-1261.

REASONS FOR GRANTING THE PETITION

The question in this case is whether the mandatory detention provisions of 8 U.S.C. 1226(c) satisfy the requirements of due process as applied to a criminal alien who is a lawful permanent resident of the United States. A petition presenting the same question is pending before the Court in *DeMore* v. *Kim*, No. 01-1491 (filed Apr. 9, 2002), a case that arises from the Ninth Circuit. The question of whether Section 1226(c) satisfies due process requirements as applied to an alien

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[3] The district court denied respondent's motion for certification of a class of detainees and for class-wide injunctive relief against the enforcement of Section 1226(c). See App., *infra*, 15a-17a. In May 2000, the district court had entered a temporary restraining order requiring a bond hearing. See *id.* at 2a-3a, 8a.

who entered the United States unlawfully, without inspection, is pending before the Court in *Elwood* v. *Radoncic*, No. 01-1459 (filed Apr. 4, 2002), which arises from the Third Circuit. The Solicitor General has suggested that the petitions in both *Kim* and *Elwood* should be granted and the cases should be set for oral argument in tandem with each other, or consolidated for argument. See *Kim* Pet. 19. In addition, the Solicitor General has filed a petition for certiorari to review the Tenth Circuit's decision in *Hoang* v. *Comfort*, 282 F.3d 1247 (2002), and has asked the Court to hold that petition pending disposition of the petitions in *Kim* and *Radoncic*. See *Comfort* v. *Hoang*, No. 01-1616 (filed May 3, 2002).

As the petitions in *Radoncic* (at 19-22) and *Kim* (at 19) explain, the government has sought review in both cases for two reasons. *First*, granting certiorari in a case that involves a lawful permanent resident as well as in a case that involves an alien unlawfully present in the United States—who is entitled to lesser due process protection in this context[4]—will enable the Court to address the constitutionality of Section 1226(c) in a wider range of applications and therefore reduce the likelihood of future disagreements in the lower courts about the constitutionality of applying Section 1226(c) to particular classes of aliens. *Second*, granting review in two cases, rather than just one, is appropriate in light of the unusual potential for mootness in habeas corpus

[4] See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[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."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

challenges to Section 1226(c). See *Radoncic* Pet. 20-21.[5] Because the Ninth Circuit's decision in *Kim* presents a live case that also involves a lawful permanent resident, however, we do not recommend hearing oral argument in this case, as well as in *Kim*. The petition in this case therefore should be held pending the Court's disposition of *Kim* and *Radoncic* and disposed of in accordance with the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions in *DeMore* v. *Kim*, petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002), and *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002), and then should be disposed of as appropriate in light of the final dispositions of those cases.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2002

[5] This case is not moot. Respondent's administrative removal proceeding is pending before an immigration judge, and respondent is not subject to a final order of removal at this time.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-1339

BALTAZAR SOSA, PETITIONER-APPELLEE

v.

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DENVER, COLORADO, RESPONDENT-APPELLANT

CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, AMICUS CURIAE

March 5, 2002

Before: BRISCOE, BALDOCK, Circuit Judges, and ALLEY, District Judge.[1]

ORDER AND JUDGMENT [2]

MARY BECK BRISCOE, Circuit Judge.

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[1] The Honorable Wayne E. Alley, United States District Court for the Western District of Oklahoma, sitting by designation.

[2] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The United States Immigration and Naturalization Service (INS) appeals the district court's ruling that § 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), (INA) is unconstitutional as violative of both substantive and procedural due process. Section 236(c) of the INA requires mandatory detention of criminal aliens pending administrative removal proceedings. We agree that the mandatory detention provision found in Section 236(c) of the INA, as applied to petitioner Baltazar Sosa, violates his substantive due process rights. We adopt our rationale and holdings in *Hoang et al. v. Greene*, Nos. 01-1136, 01-1180, 01-1343, and affirm.

I.

Sosa came to the United States from Mexico in 1981 at the age of three. He has been a lawful permanent resident since 1992. In 1994 at the age of 16, he pled guilty to attempted second degree murder, commission of a crime of violence (serious bodily injury), and unlawful possession of a handgun by a juvenile in connection with an incident where he shot and wounded another student following an altercation. His plea was later changed to first degree assault and crime of violence with a deadly weapon.

Sosa was sentenced as an adult to a thirty-year suspended sentence and a six-year term in Colorado's Youthful Offender Service Program. He completed the Program in December of 1999, and was immediately detained by the INS, who filed charges of deportability with the immigration court.

On March 27, 2000, after three months in detention, Sosa filed a petition for a writ of habeas corpus arguing that § 236(c), as applied, was unconstitutional. On May

12, 2000, he was granted temporary relief when the district court ordered the INS to conduct a bond hearing. After a hearing, he was released on a $7,000 bond. The district court, addressing Sosa's habeas petition, found that § 236(c), as applied, violated both substantive and procedural due process, and converted the preliminary injunction into a permanent injunction.

Sosa is currently pursuing post-conviction relief in Colorado state court to change his sentence to one [*sic*] which would render him eligible for discretionary relief from deportation. Specifically, he is petitioning the state court to resentence him to 364 days. *See* 8 U.S.C. § 1226(c)(1)(C). He also alleges that the new prosecutorial discretion guidelines issued by the INS may provide another potential avenue for relief by giving INS the discretion not to pursue his deportation.

II.

The issues raised in this case are addressed and decided in this court's opinion in *Hoang et al. v. Greene*, Nos. 01-1136, 01-1180, 01-1343. We adopt the rationale and holdings expressed therein as the rationale and holdings in the present case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-WM-640

BALTAZAR SOSA, PETITIONER

v.

JOSEPH GREENE, DISTRICT DIRECTOR,
UNITED STATES IMMIGRATION AND NATURALIZATION
SERVICE, DENVER, COLORADO, RESPONDENT

July 3, 2000

JUDGMENT AND PERMANENT INJUNCTION

Pursuant to and in accordance with the Order entered on June 28, 2000, by Judge Walker D. Miller, Incorporated herein by reference,

IT IS ORDERED that:

1. Petitioner Baltazar Sosa's application pursuant to 28 U.S.C. § 2441 for writ of habeas corpus is granted and the Court declares that the mandatory detention provision of 8 U.S.C. § 1226(c), as applied to the petitioner, violates his substantive and procedural due process rights as guaranteed by the Fifth Amendment of the United States Constitution.

2. The preliminary injunction is converted to a permanent injunction directing respondent Joseph Greene, District Director, United States Immigration and Naturalization Service, Denver, Colorado, to provide individualized bond determinations for petitioner Baltazar Sosa based on whether petitioner's release on bond would pose a flight risk or a danger to society.

3. Petitioner Baltazar Sosa may have his costs.

IT IS FURTHER ORDERED that judgment is entered in favor of the petitioner Baltazar Sosa and against respondent Joseph Greene, District Director, United States Immigration and Naturalization Service, Denver, Colorado.

IT IS FURTHER ORDERED that petitioner Baltazar Sosa shall have his costs against respondent Joseph Greene, District Director, United States Immigration and Naturalization Service, Denver, Colorado, by the filing of a Bill of Costs with the Clerk of this Court within ten (10) days of entry of judgment.

DATED at Denver, Colorado, this 30th day of June, 2000.

FOR THE COURT:

James R. Manspeaker, Clerk

By: /s/ STEPHERD P. EHRLICH
STEPHERD P. EHRLICH
Chief Deputy Clerk

APPROVED:

/s/ WALKER D. MILLER
WALKER D. MILLER, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 00-WM-444

SCARLETT MARIA KRUGER, PETITIONER

v.

JOSEPH GREENE, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DENVER, COLORADO, RESPONDENT

Civil Action No. 00-WM-640

BALTAZAR SOSA, PETITIONER

v.

JOSEPH GREENE, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DENVER, COLORADO, RESPONDENT

[June 28, 2000]

ORDER

Miller, J.

Introduction

In these related actions, the two petitioners, Scarlett Maria Kruger and Baltazar Sosa, petition for writ of habeas corpus pursuant to 28 U.S.C. 2241 to contest the

constitutionality of the Immigration and Nationality Act ("INA") § 236(c) as applied to them (codified at 8 U.S.C. § 1226(c)). Specifically, the petitioners seek class-wide declaratory and injunctive relief to prevent mandatory detention of aliens convicted of agravated felonies prior to final orders of removal. Upon review of the petition, briefs and oral arguments, I conclude that the mandatory detention provision of 8 U.S.C. § 1226(c) violates the substantive and procedural due process rights of the petitioners under the Fifth Amendment of the United States Constitution, but I deny the petitioners' motion for class certification.

Background

The petitioners, Scarlett Maria Kruger and Baltazar Sosa, are lawful resident aliens—one on a "permanent" basis and one on a temporary basis. As a result of criminal convictions for "aggravated felonies," both petitioners were arrested by the Immigration and Naturalization Service ("INS") and placed in mandatory detention pursuant to 8 U.S.C. § 1226(c), which provides no discretion for release of detainees based on an individualized determination of flight risk or danger to society. The respondent is Joseph Greene, District Director for the INS, Denver, Colorado, who is responsible for implementing and enforcing the Immigration and Nationality Act. 8 U.S.C. §§ 1101 - 1537.

Despite their ineligibility for bond under 8 U.S.C. 1226(c), both petitioners seek relief from removal, either by vacating plea agreements reached in state court or obtaining citizenship status. Thus, both petitioners have a possibility of remaining in the United States.

In connection with this case, Judge Zita L. Weinshienk granted the petitioners temporary relief, directing the Immigration Court to hold individualized bond hearings to determine risk of flight or danger to society. Subsequently, both petitioners received bond. On June 2, 2000. I converted the temporary relief into preliminary injunction.

Until issuance of a final order of removal, the INA provides for mandatory detention of criminal aliens convicted of aggravated felonies, subject to a limited exception for the witness protection program (which does not apply in this case).[1] 8 U.S.C. § 1226(c). Thus,

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[1] Section 8 U.S.C. § 1226(c) states:

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [FN1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

lawful resident aliens who are convicted of aggravated felonies, such as the petitioners, have no right to individualized bond determinations of risk of flight or danger to society. Instead, their detention is mandated until the issuance of a final order of removal or voluntary return to their country of origin, which might take up to as much as a year and a half if appealed.[2] In addition, the INA contains a section that bars class-wide injunctive relief, except in application to the Supreme Court.[3] 8 U.S.C. § 1252(f).

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(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

[2] As related by counsel during oral argument.

[3] Section 1252(f) states:

Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such

Jurisdiction

This court has jurisdiction to entertain a petition for a writ of habeas corpus on grounds that the execution of a federal sentence is unconstitutional.[4] 28 U.S.C. § 2241(c)(3). Likewise, 8 U.S.C. § 1252(g) does not bar subject matter jurisdiction of a habeas petition with respect to the constitutionality of an immigration statute. *Parra* v. *Perryman*, 172 F.3d 954, 957 (7th Cir. 1999. Thus, this court has jurisdiction to entertain a habeas petition claiming that 8 U.S.C. § 1226(c) is unconstitutional.

Standard of Review

In considering this challenge, a federal statute is presumed to be constitutional. *Martinez* v. *Greene*, 28 F. Supp. 2d 1275, 1281 (D. Colo 1998). Thus, to prevail on a facial challenge, the petitioners must show that no set of circumstances exist under which the statute would be valid. *United States* v. *Salerno*, 481 U.S. 739 745 (1987). To prevail on an "applied" challenge, the petitioners must only show that the show that the status as applied to them is invalid. In a due process challenge to an immigration statute, there is a debate as to whether to apply a "deferential" standard or a

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provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

[4] Neither party contests jurisdiction.

"heightened" standard of review to determine whether an immigration law passes constitutional muster. See *Avramenkov* v. *Immigration and Naturalization Service*, ____ F. Supp. ____, 2000 WL 719724 (D. Conn. 2000) (applying both standards).

Discussion

The petitioners contend that mandatory detention pursuant to 8 U.S.C. § 1226(c) violates the due process clause of the Fifth Amendment.[5] The due process clause includes both substantive and procedural components. See *United States* v. *Salerno*, 481 U.S. 739, 746 (1987). The substantive due process component prevents Congress from enacting laws that "shock the conscience" or interfere with rights "implicit in the concept of ordered liberty." *Id.* at 746. The procedural due process component prevents Congress from passing laws that deprive person of life, liberty, or property in an unfair manner. See *Mathews* v. *Eldrige*, 424 U.S. 319, 335 (1976).

Substantive due process analysis begins with a "careful description of the asserted right," namely the right to freedom from arbitrary detention. See *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). In fact, even illegal aliens have "a substantive due process right to be free of arbitrary confinement pending deportation proceeding." *Doherty* v. *Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991). Therefore, legal resident

[5] The due process clause of the Fifth Amendment provides that; "No person shall . . . be deprived of life, liberty or property, without due process of law."

aliens, such as the petitioners, must also have a substantive due process right to be free of arbitrary confinement pending a final order of removal.

Thus, for these petitioners, the right at stake is the right to be free from arbitrary physical detention "in the sense of shackles, chains, or a barred cell." *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993). Nevertheless, some courts have summarily dismissed substantive due process challenges to mandatory detention pursuant to 8 U.S.C. § 1226(c), casting criminal aliens as having "little to no hope" of relief from removal. See *Parra* v. *Perryman*, 172 F.3d 954, 957 (7th Cir. 1999); see also *Avramenkov* v. *Immigration and Naturalization Service*, ____ F. Supp. _____, 2000 WL 719724 (D. Conn. 2000). Such a conclusion is inconsistent with the actual experience of the petitioners in *Martinez* v. *Greene*, 28 F. Supp.2d 1275, 1281 (D. Colo. 1998), related to the court by their counsel during oral argument in this case. In *Martinez*, four petitioners sought relief from mandatory detention. Out of the four petitioners, three petitioners subsequently obtained relief from removal. In fact, one petitioner turned out to be a United States citizen (Respondent does not contest their present status.).

As noted, the petitioners are presently seeking relief from removal, either by obtaining citizenship or by obtaining state court relief from prior convictions and the question thus becomes whether they have a right to be free from arbitrary detention because their legal right to remain in the United States has not yet come to an end. In other words, the issue is whether Congress has the power to compel the INS to detain lawful resident aliens convicted of aggravated felonies without

any possibility of release who might prove to be no danger to society or at no risk of flight.

In analyzing this issue, there is a distinction between the substantive plenary powers of Congress over immigration, which are subject to deferential review, and the implementation of those powers, which is subject to the heightened test of *Salerno*. Mandatory detention pursuant to 8 U.S.C. § 1226(c) is not simply a policy decision of Congress over matters of immigration. See *Martinez* v. *Greene*, 28 F. Supp.2d 1275, 1284 (D. Colo. 1998). Instead, 8 U.S.C. § 1226(c) "relates to the treatment of aliens in the course of enforcing or implementing [immigration] laws," not Congress' plenary power over immigration. *Danh* v. *Demore*, 59 F. Supp.2d 994, 1002 (1999). Therefore, because mandatory detention pursuant to 8 U.S.C. § 1226(c) is ancillary to the immigration powers of Congress, the heightened standard of *Salerno* applies to these petitioners.

Under this standard, "'due process of law'" . . . forbids the government to infringe [upon] certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993); *United States* v. *Salerno*, 481 U.S. 739, 746 (1987). Thus, for pre-removal detention, I must determine whether the statute is "narrowly tailored to serve a compelling government interest . . . by evaluating whether the infringement on liberty: 1) is impermissible punishment or permissible regulation; and 2) is excessive in relation to the regulatory goal Congress sought to

achieve." *Martinez* v. *Greene*, 28 F. Supp. 2d 1275, 1281 (D. Colo. 1998).

Pre-removal detention, "notwithstanding the extreme hardship it imposes on those subject to it, is clearly regulatory in nature and not punishment." *Id.* at 1282. Likewise, the regulatory goals of Congress "to prevent criminal aliens . . . from absconding or committing further criminal acts" are legitimate. *Id.* at 1282.

Nevertheless, mandatory detention is excessive in relation to these goals, as shown by the fact that both petitioners secured bond by demonstrating that they are not at risk of flight or a danger to society. See also *Martinez* v. *Greene*, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998). Therefore, 8 U.S.C. § 1226(c) violates the petitioners' substantive due process rights to be free from arbitrary physical restraint.

Likewise, the petitioners are entitled to procedural due process. *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Martinez* v. *Greene*, 28 F. Supp.2d 1275, 1282 (D. Colo. 1998). The process that is due is determined by consideration of three factors: 1) the private interest affected by the statute; 2) the risk of an erroneous deprivation of that interest and the value of additional or substitute procedural safeguards; and 3) the government's interest, including fiscal and administrative burdens that additional or substitute procedures would impose. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

Mandatory detention without the possibility of bond cannot suffice to pass constitutional muster. First, the private interest at stake is fundamental—the right to be free from arbitrary physical restraint. Second, the risk of erroneous deprivation is substantial because mandatory detention provides no procedure at all to protect against erroneous deprivation of liberty. Likewise, the value of additional procedural safeguards, such as individualized bond determinations, greatly eliminates the risk of erroneous deprivation of liberty. Third, the familiar and traditional requirements of providing individualized bond determinations impose minimal fiscal and administrative burdens in light of the fact that the Immigration Court routinely holds bond hearings for other immigration matters.[6] Thus, the government can easily avoid the risk of an erroneous deprivation of liberty by providing for individualized bond determinations. Because 8 U.S.C. § 1226(c) provides no opportunity to be heard, it violates the petitioners' procedural due process rights.

As a final note, after filing their petitions, the petitioners filed a combined motion for certification of a class action pursuant to Fed. R. Civ. P. 23(a) and

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[6] The fact that the burden on the government is light is demonstrated by the inexplicable statutory paradox that criminal aliens who have received a final order of removal but have not been removed within ninety days of that order may eligible for discretionary release pursuant to 8 U.S.C. § 1231(a)(6). Thus detention is clearly not seen by Congress as necessary to prevent all criminal aliens from absconding or committing further crimes. See *Martinez* v. *Greene*, 28 F. Supp.2d 1275, 1283-84 (D.Colo. 1998). This contradiction suggests that even under deferential review the statute might violate the petitioners' substantive due process rights to be free from arbitrary physical restraint for lack of a rational basis.

23(b)(1)(A). The petitioners describe the class as all-non citizen persons (lawful and unlawful aliens) who are subject to mandatory detention pursuant to § 1226(c). Nevertheless, 8 U.S.C. § 1252(f) precludes this court from granting class-wide injunctive relief. Although the petitioners attempt to rewrite their petitions as petitions for declaratory relief, the petitioners plainly seek classwide injunctive relief to grant the class individualized bond determination. As such, the prohibition of 8 U.S.C. § 1252(f) plainly applies.

In support of this conclusion, I note that Justice Scalia, albeit in dicta, has stated that 8 U.S.C. § 1252(f) is "nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231." *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999). Thus, 8 U.S.C. § 1252(f) prohibits class-wide injunctive relief by this court, which is exactly what the petitioners desire.

Moreover, this conclusion is solidified by the observation that the remedial bar of 8 U.S.C. § 1252(f) does not suspend habeas review and relief pursuant to individual petitions—a right which is mentioned by the Constitution. U.S. Const. Art. I, §9, cl. 2; see *Parra* v. *Perryman*, 172 F.3d 954, 957 (7th Cir. 1999); see also *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1145-47 (10th Cir. 1999). In contrast, the right to proceed on the basis of a class action is a statutory and equitable creation which can therefore be subject to constriction by Congress without offending the Constitution or the mandate of *Jurado-Gutierrez*.

Finally, I note that the Tenth Circuit has offered dicta stating the "[8 U.S.C.] § 1252(f) forecloses juris-

diction to grant class-wide injunctive relief to restrain operation of [8 U.S.C.] §§ 1221-31 by any court other than the Supreme Court." *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999). As the class-wide injunctive relief requested here would clearly interfere with operation of 8 U.S.C. § 1226(c), 8 U.S.C. § 1252(f) prohibits this court from granting classwide injunctive relief, but this ban does not prohibit injunctive relief for the individual petitioners. See *Catholic Social Services, Inc.* v. *Immigration and Naturalization Service*, 182 F.3d 1053, 1061-62 (9th Cir. 1999). Accordingly, I conclude that certification of a class action for the purpose of obtaining injunctive relief is barred by 8 U.S.C. § 1252(f).[7]

Conclusion

Accordingly, it is ordered:

1. The petitioners' application pursuant to 28 U.S.C. § 2441 for writ of habeas corpus is granted and I declare that the mandatory detention provision of 8 U.S.C. § 1226(c), as applied to the petitioners, violates their substantive and procedural due process rights as guaranteed by the Fifth Amendment of the United States Constitution.

2. The preliminary injunction is converted to a permanent injunction directing the respondent to provide individualized bond determinations for the peti-

[7] Alternatively, the motion for certification of a class that includes unlawful aliens as well as lawful aliens may be too broad to meet the requirements of the Fed. R. Civ. P. 23(a) because the claims of lawful aliens may not be typical of the claims of unlawful aliens who have not developed legal ties to the United States.

tioners based on whether the petitioners' release on bond would pose a flight risk or a danger to society.

3. The petitioners' motion for certification of a class action is denied.

4. The petitioners may have their costs.

DATED: June 28th, 2000.

BY THE COURT:

/s/
WALKER D. MILLER
Judge