**No. 20-2274**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

DENG CHOL AYOM,

*Petitioner-Appellee*,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

*Respondents-Appellants*.

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ON APPEAL FROM FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

CASE NO. 19-CV-3143-DSD

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# BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF APPELLEE

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## CORPORATE DISCLOSURE UNDER FRAP STATEMENT 26.1

I, Katherine Melloy Goettel, attorney for *amici curiae*, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATE: May 27, 2021

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court relied on certain factual assumptions about immigration detention and removal to reject a facial constitutional challenge to mandatory detention under 8 U.S.C. § 1226(c). It is now beyond serious dispute that those factual assumptions were misplaced—or, at best, obsolete. Yet the government relies wholly on *Demore* to justify Appellee Deng Ayom's prolonged mandatory detention, simply ignoring the factual inaccuracies on which that decision depended. *See generally* Appellant Br. at 13-24. Intervening developments have cast the validity of *Demore* itself into serious doubt. But at a minimum, the Court should reject the government's invitation to extend the holding of *Demore* even further to endorse prolonged mandatory detention. Accordingly, *amici curiae* ask the Court to affirm the district court.

The Court in *Demore* assumed, based on information provided by the government, that noncitizens subject to Section 1226(c) detention would be confined for only a "brief" and "limited" period necessary for their removal proceedings, and thus held that this apparently minor deprivation of liberty was outweighed by the government's concerns with preventing flight and danger to the community. 538 U.S. at 513, 526. Yet in 2016, thirteen years after *Demore* was decided, the government filed a letter admitting that much of the information it gave the Court in *Demore* was wrong, and that the Court's opinion misinterpreted

other key data. Both the corrected data from the time of *Demore* and the overwhelming weight of evidence since that time shows that individuals held under Section 1226(c) often face substantially longer detention periods—and, hence, substantially greater deprivations of liberty—than the Court recognized in 2003.

In the intervening five years since the government corrected the record in *Demore*, the data has continued to show lengthy removal proceedings—not "brief" or "limited" ones. In addition, as the government's use of alternatives to detention have increased, mandatory detention has become increasingly unnecessary to address the safety and flight risks on which the government and the Supreme Court relied in *Demore*.

Despite itself acknowledging that government data on which the Court relied in *Demore* was wrong, the government nevertheless seeks to reap the benefit of that decision and expand its application in this case. Indeed, even if the data the government presented in *Demore* had been accurate, it in no way demonstrated that detaining people without individualized process was necessary to prevent flight or protect the public. Rather, the data showed that the government's interests in detaining people were attributable primarily to resource constraints, which have since been alleviated through increased appropriations.

Accordingly, *amici curiae* urge the Court to find that *Demore* should not be extended to encompass prolonged, mandatory detention that violates the Due

Process Clause, and the Court should affirm the district court's holding that mandatory detention under 8 U.S.C. § 1226(c) has constitutional limits. *See* JA518-24.

## II. INTERESTS OF *AMICI CURIAE*[1]

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. The Council has a substantial interest in ensuring that individuals are not prevented from seeking release from immigration detention.

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's members practice regularly before the Department of Homeland Security, Executive Office for Immigration Review, and the federal courts.

[1] Pursuant to Federal Rule of Appellate Procedure 29(e), counsel for neither part participated in authoring this brief in whole or in part; neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; and no other person contributed money to fund preparing or submitting this brief.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIPNLG provides legal training to the bar and the bench on removal defense and the immigration consequences of criminal convictions. It is also the author of Immigration Law and Crimes (2013 2 ed.) and three other treatises published by Thomson-West. NIPNLG has participated as amicus in several significant immigration related cases before the U.S. Supreme Court, the courts of appeals, and the Board of Immigration Appeals. *See, e.g.*, *United States v. Palomar-Santiago*, No. 20-437 (U.S. May 24, 2021); *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); Mathis v. United States, 136 S. Ct. 2243 (2016); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001). Through its membership work and its litigation, NIPNLG is acutely aware of and interested in the realities and problems of immigration detention.

## III. ARGUMENT

### DEVELOPMENTS SINCE *DEMORE* CONFIRM THAT PROLONGED, MANDATORY DETENTION CANNOT BE JUSTIFIED

The Court's reasoning in *Demore* upholding the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) has been sharply undermined by intervening events, and this Court should therefore construe its holding narrowly. Data that has come to light in the years since *Demore* shows that the Court vastly underestimated the length of detention under Section 1226(c) in cases where the either party appeals; as a result, many noncitizens have been detained for months or years. *Demore* also failed to consider that many of these individuals are likely to win their cases and thus be entitled to remain lawfully in the United States. Perversely, an extended period of detention may be *more* likely for those with a *better* defense to removal, because those noncitizens are the most likely to appeal their cases to the Board of Immigration Appeals (BIA) and the circuit courts of appeals. Accordingly, the noncitizens' liberty interest under the Due Process Clause is much weightier when prolonged detention is at issue, which strongly counsels against the government's expansive reading of *Demore* as applied to this case.

The government's interests in detaining noncitizens, by contrast, has only diminished. Alternatives to detention, such as in-person or telephonic check-ins, check-ins by smart phone app, and community-based case management programs,

help ensure attendance at immigration proceedings. The expansion of Immigration and Customs Enforcement's (ICE) alternative-to-detention programs has significantly attenuated any interest the government had in blanket mandatory detention, without any individualized review, of everyone subject to § 1226(c). Given this new context, this Court should decline the government's invitation to extend *Demore*'s holding beyond what the facts of that case allow.

### A. Mandatory Detention Is Significantly Longer Than Statistics Relied Upon by the Supreme Court in *Demore*

Central to the Supreme Court's holding in *Demore* that § 1226(c) withstands due process scrutiny was the faulty premise that noncitizens are only detained under § 1226(c) for a "brief period*." Id.* at 513, 529-30. The Court observed that detentions under § 1226(c) "last roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. Based on those numbers, the Court found that individuals subject to mandatory detention were detained only for the "brief" and "limited" period necessary for removal proceedings. *Id.*; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) ("We deal here with prolonged detention, not the short-term detention at issue in *Demore*. Hence *Demore*, itself a deviation from the history and tradition of bail and alien detention, cannot help the Government."); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020) ("[T]he Supreme Court rejected a facial challenge to the

statute's requirement of detention without a bond hearing . . . because it understood that the detention would last only for a 'very limited time.'") (quoting *Demore*, 538 U.S. at 531.)

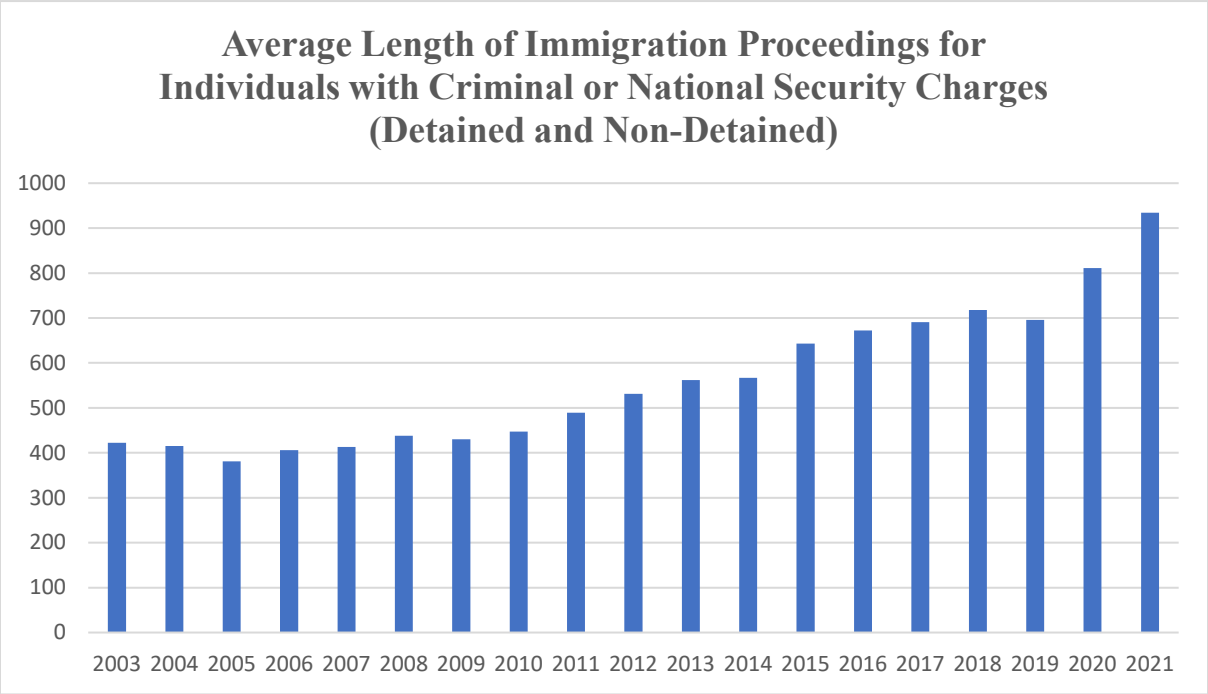
But since *Demore* was decided, the government has admitted that it was based on erroneous information—*provided by the government*—that greatly understated the deprivation of liberty. In 2016, the government corrected the record, admitting that *Demore*'s five-month figure was incorrect. *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court at 3 (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) ("*Demore* Gov. Letter") *available at* https://trac.syr.edu/immigration/reports/580/include/01-1491%20-%20Demore%20Letter%20-%20Signed%20Complete.pdf (the Court's five-month calculation "was incorrect on the basis of [Executive Office for Immigration Review (EOIR)]'s statistics at the time"). The government admitted that, at the time of *Demore*, the average length of detention in appealed cases actually exceeded twelve months, more than double *Demore*'s estimate. *See id.* ("The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal.").

In the intervening years since *Demore*, there has almost certainly been an increase in the average length of detention, even taking into account the

government's corrected statistics. While neither ICE nor EOIR releases comprehensive data on the length of detention for an individual detained under 8 U.S.C. § 1226(c), EOIR publishes statistics on the length of immigration proceedings for individuals with a criminal or national security charge, which are the cases in which § 1226(c) detention is most likely.[2] By Fiscal Year 2020, the average length of immigration court proceedings for those cases (both detained and non-detained) had risen to 811 days from a little over 400 days in 2003. *See* TRAC Immigration, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 17, 2021). For the first half of Fiscal Year 2021, that number has climbed to 934 days. *Id.*

Indeed, the average pending length of immigration court proceedings for individuals with criminal or national security charges, both detained and non-detained, has steadily climbed since 2003:

[2] One can infer that a case involving a criminal or national security charge would likely be subject to mandatory detention. *See* 8 U.S.C. § 1226(c) (requiring detention of individuals inadmissible or deportable due to criminal convictions or ties to terrorist activities).




*See* TRAC Immigration, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 23, 2021) (select "average days," "Criminal/Nat. Sec./Terror.," "Entire U.S.," "All States," "All Nationalities"). These statistics represent a troubling trend of lengthening immigration court proceedings for individuals with criminal charges.

An underlying assumption in *Demore* was the belief that very few, if any, cases that lasted past five months. "[D]etention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore*, 538 U.S. at 530. That is not the case in 2021. For the second quarter of Fiscal Year 2021, 1,006 cases were not completed within six months. EOIR,

*Adjudications Statistics, Percentage of DHS-Detained Cases Completed within Six Months* (April 19, 2021), https://www.justice.gov/eoir/page/file/1163631/download. EOIR reported similar statistics in 2016. From 2003 to 2015, 32,654 people were detained for more than six months, 10,027 people were detained for more than a year, and 2,123 people were detained for two or more years. EOIR, *Certain Criminal Charge Completion Statistics* (2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf. That data further reveals that the average detention time in appealed cases has remained more than double the five-month estimate the Court relied on in *Demore*. *Id.* (336 days in 2001; 313 days in 2015).[3] These statistics debunk the Court's assumption that detention lasting more than five months is extremely rare. *See Demore*, 538 U.S. at 530.

There are several reasons to believe that EOIR data continues to understate the length of detention for individuals detained under § 1226(c). First, EOIR does not count the time an individual is detained between initial arrest and the government's filing in Immigration Court of a Notice to Appear, which formally commences removal proceedings. The government admits this length of detention can be a "significant period." *See Demore* Gov. Letter, EOIR Attached Data Charts

[3] The government has not released data on the length of detention for individuals with certain criminal charges since Fiscal Year 2015.

at 1, n.1 & 2, n.2 ("In some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR.").

Second, EOIR does not count the time while a detained individual appeals a removal order to a federal court of appeals or any remand proceedings before the agency—proceedings that can take months or even years. *See, e.g.,* Sirine Shebaya & Robert Koulish, ACLU of Maryland, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants*, 9 (2016), https://www.aclu-md.org/sites/default/files/field_documents/mandatory_detention_report_2016_0.pdf (detention time for individuals detained under § 1226(c) who file a petition for review "runs closer to a year or longer, in some cases lasting up to two years or more"); *Sopo v. U.S. Attorney Gen.,* 825 F.3d 1199, 1205-07 (11th Cir. 2016) (describing two remands from the BIA to the immigration court, as well as a petition for review to the 11th Circuit Court of Appeals); *Diop v. ICE/ Homeland Sec.*, 656 F.3d 221, 224-226 (3d Cir. 2011) (detailing Mr. Diop's three years of detention, which included three remands to the immigration judge for errors before he was granted protection from removal).

Third, and relatedly, the EOIR data does not accurately reflect that individuals who have significant defenses to removal or meritorious claims for relief—like Mr. Ayom—are detained much longer than those who do not challenge

their removal at all. More probative and accurate data has emerged through Freedom of Information Act requests and litigation. In *Jennings v. Rodriguez,* the record showed that 460 members of a subclass of Section 1226(c) detainees were detained for an average of 427 days (over fourteen months) with some individual detention periods exceeding four years. *Rodriguez v. Robbins*, 804 F.3d 1060, 1079 (9th Cir. 2015), *rev'd sub. nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *see also* JA 520-21 (citing successful habeas petitions where detention lasted 9, 10, 12.5, and 13.5 months); *Clarke v. Doll*, No. 3:20-CV-00031, 2020 WL 4983215, at *4 (M.D. Pa. June 3, 2020), *report and recommendation adopted*, 481 F. Supp. 3d 394 (M.D. Pa. 2020), *appeal dismissed sub nom. Clarke v. Warden York Cty. Prison*, No. 20-3162, 2021 WL 1740271 (3d Cir. Jan. 13, 2021) (listing successful habeas petitions granted for detention lasting 14, 16, 17, 18, and 19 months); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 963 (N.D. Cal. 2019), *appeal dismissed sub nom. Ambriz v. Barr*, No. 19-17559, 2020 WL 3429471 (9th Cir. Mar. 25, 2020) (citing multiple § 1226(c) habeas corpus cases where individuals were detained for 12, 13, 14, 15, 17, and 21 months). Importantly, it is those noncitizens who have substantial challenges to or claims for relief from removal who are most likely to endure lengthy detention, as they assert their arguments before the agency, a federal appeals court, and through one or more agency remands. *See, e.g.*, *Diop*, 656 F.3d at 226 (ultimately receiving withholding of

removal after three remands to the immigration court and nearly three years of detention). This is a significant distinction from Mr. Ayom's case and *Demore*, where the Court relied heavily on its impression that Mr. Kim "conced[ed] that he was deportable." 538 U.S. at 514.

In sum, given the limits of EOIR's data and the faulty factual premise in *Demore*, *amici* urge the Court to affirm the district court and reject the government's expansive application of *Demore* beyond its limited facts.

### B. Once the facts are properly considered, immigration detainees' liberty interests deserve far greater weight, and the government's interests far less weight, than the Court believed in *Demore*

The Court's mistaken belief in the brevity of mandatory detention was essential to its ruling that a noncitizen's liberty interest in avoiding detention deserved slight regard in the due process analysis. *See Demore*, 538 U.S. at 513, 526, 530. But the facts as now revealed show that individuals who spend months or years in detention challenging their removal have a much stronger liberty interest than the Court previously thought. Accordingly, every circuit that has addressed the issue has concluded that prolonged mandatory detention under Section 1226(c) raises serious concerns under the Due Process Clause. *See, e.g., Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011) ("We do not believe that Congress intended to authorize prolonged, unreasonable[ ] detention without a bond hearing."); *German Santos*, 965 F.3d at 210 (affirming the viability of an as-

applied constitutional challenge: "even after *Jennings*, [a noncitizen] lawfully present but detained under § 1226(c) can still challenge his detention under the Due Process Clause"). *Amici* ask this Court, too, to find that, in light of intervening events, a noncitizen may challenge the constitutionality of his prolonged, mandatory detention, and reject the government's expansive reading of *Demore*.

The Court's assumption that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," *Demore*, 538 U.S. at 520, has also been undermined. The Court relied on data suggesting "that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings." *Id.* There are several reasons to be skeptical of these figures.

A recent report analyzing EOIR data shows that 83% of non-detained[4] noncitizens with completed or pending removal cases attended all their hearings from 2008 to 2018. *See* Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 4 (Jan. 28, 2021), https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court. That rate jumped to 96% when the noncitizen had an attorney. *Id.* Individuals enrolled in ICE's alternative-to-detention program have a 99% attendance rate for all EOIR hearings and a 95% attendance rate at their final

[4] The authors' data set included both individuals who had never been detained and individuals like Mr. Ayom who were detained and then released custody.

hearings. *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017); *see also infra* Part III.C.1.

Moreover, the government's interest in subjecting noncitizens to detention without any individualized process diminishes sharply as to individuals who have colorable claims to avoid removal. *See German Santos*, 965 F.3d at 211 ("When the alien's removal proceedings are unlikely to end soon, this suggests that continued detention without a bond hearing is unreasonable."); *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016) ("As the likelihood of an imminent removal order diminishes, so too does the government's interest in detention without a bond hearing.").

### C. The Government's Interest In Mandatory Detention Is Also Significantly Lower Due To Changes In Detention And Removal Procedures

The government's interest in mandatory detention is also significantly less forceful than it was at the time *Demore* because procedures have since been adopted that provide alternatives to § 1226(c)'s blanket detention regime, compelling a narrow reading of *Demore*.

#### 1. Alternatives to detention

For nearly two decades, the government has implemented alternative-to-detention programs that allow detainees to be released on bond and other conditions of supervision, which have significantly reduced the risk that they will

fail to appear at immigration proceedings. When ICE releases an individual from detention, the agency has multiple options to ensure that the individual complies with his or her immigration obligations. *See* ICE, Detention Management, https://www.ice.gov/detain/detention-management (last visited May 22, 2021) (hereinafter "ICE Detention Management"). The government's primary alternative-to-detention program for individuals in removal proceedings is the Intensive Supervision Appearance Program ("ISAP"), which ICE launched in 2004. *See* News Release, ICE, ICE Unveils New Alternative to Detention, Pilot project to be introduced in eight cities (June 17, 2004), https://www.aila.org/infonet/ice-announces-alternative-detention-program. It includes, among other things, "global positioning system (GPS) tracking devices," "telephonic reporting (TR), or a smartphone application (SmartLINK)," as well as "case management levels, which include frequency of office or home visits." *See* ICE Detention Management.

The government has found ISAP to be effective at ensuring that individuals in removal proceedings do not abscond. *See* U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention* 10-11 (2014), http://www.gao.gov/assets/670/666911.pdf. Indeed, ISAP has "resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings." *Hernandez*, 872 F.3d at 991. ICE leadership has lauded the program as "an

effective flight risk mitigation tool" that "has demonstrated great success in improving compliance rates for those aliens assigned to the program." Deposition Testimony of ICE ATD Unit Chief Eric Carbonneau, *quoted in Ramirez v. U.S. Immigration & Customs Enf't*, 471 F. Supp. 3d 88, 104 (D.D.C. 2020).

Further, ATD programs are less expensive than adult detention. ICE's ATD program costs about $4.43 per day, while it costs the government on average $126.06 per day to detain a noncitizen in adult detention. ICE FY 2021 Congressional Budget Justification, at 7, 171, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf (last visited Feb. 9, 2021). In light of the program's efficacy and cost savings, ICE has increased the number of participants by 70% between Fiscal Year 2016 and Fiscal Year 2018. *Id.* at 173.

ICE also recently re-started community support programs to ensure humanitarian release while preserving the government's interests. Known as "Extended Case Management Services," these programs employ case managers who provide intensive community support to migrants with extra vulnerabilities. *See id*. at 171-72. This includes people who have "suffered significant trauma or who have direct dependents in need." *Id.* at 171. The Extended Case Management Services program was formerly the "Family Case Management Program," which achieved a 99% success compliance rate with ICE check-ins and immigration court

appearances. *See id.* at 172; Women's Refugee Commission, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, 5 (2019), https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf. But unlike the Family Case Management Program, which only served five cities, the new program is in 54 locations and far less expensive. *See* ICE FY 2021 Congressional Budget Justification, at 171.

In light of the expansion and success of ICE's alternatives-to-detention programs, detention is far from the only way to ensure that a noncitizen appears for his or her removal proceedings.

**2. Increased detention space**

In *Demore*, the Court credited Congress's concern that "criminal aliens" were released from detention not based on whether they "present[ed] an excessive flight risk or threat to society," but rather based on "severe limitations on funding and detention space." 538 U.S. at 519; *see also id.* at 563 (Souter, J., dissenting) (limited detention space "meant that the INS often could not detain even the aliens who posed serious flight risks" and "had led the INS to set bonds too low"); *id.* at 563-564 (flight "rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities"). Congress noted that "the INS had only 3,500 detention beds for criminal aliens in

the entire country." *Id.* at 563 (citing S. Rep. No. 104-48, at 23 (1995)). That issue no longer exists. Immigration detention bed space has steadily risen over the past 20 years, and Congress appropriated funds for 34,000 beds in Fiscal Year 2021, with the actual capacity for immigration bed space at more than 50,000. *See* Consolidated Appropriations Act, 2021, Pub. L. 114-113; Jessica Campisi, THE HILL, "More Than 52,000 Migrants Detained by ICE Marks All-Time High" (May 21, 2019).

Once again, the reasoning in *Demore* is outdated based on changes in immigration detention funding and policy. Accordingly, these changes should compel the Court to cabin *Demore* to the narrow facts on which it was decided.

## CONCLUSION

*Demore* rested on the Court's understanding that detention under § 1226(c) would be "brief" and "limited." That understanding was undisputedly wrong: the factual representations the government made to the Court were incorrect when the government made them and have become even more divorced from reality over time. EOIR's new data and the facts of Mr. Ayom's case show that Mr. Ayom's liberty interests are far stronger and the government's countervailing interest far weaker than the Supreme Court previously believed. For these reasons, this Court should decline the government's invitation to expand *Demore*'s holding beyond

the dubious facts of that case. Accordingly, *amici curiae* ask this Court to affirm the judgment of the district court.

Date: May 27, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 because the brief contains 4,052 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, in 14-point Times New Roman.

Pursuant to 8th Cir. R. 25, I certify that the brief has been scanned for viruses and is virus free.

DATED: May 27, 2021

*/s/ Katherine E. Melloy Goettel*
Katherine E. Melloy Goettel

## CERTIFICATE OF CONSENT

I hereby certify, pursuant to Federal Rule of Appellate Procedure 29(a)(2), that counsel for Appellant and counsel for Appellee consented to *amici curiae* filing a brief in this matter.

DATED: May 27, 2021

*/s/ Katherine E. Melloy Goettel*
Katherine E. Melloy Goettel

## CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

DATED: May 27, 2021

*/s/ Katherine E. Melloy Goettel*
Katherine E. Melloy Goettel