No. 22-58

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

THE STATE OF TEXAS AND THE STATE OF LOUISIANA,
Respondents.

On Writ of Certiorari Before Judgment to the
United States Court of Appeals
for the Fifth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN GATEWAYS, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, AND THE TAHIRIH JUSTICE CENTER IN SUPPORT OF PETITIONERS

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September 19, 2022

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The ***National Immigrant Justice Center*** (NIJC) is a nonprofit organization. NIJC represents numerous detained and nondetained noncitizens in removal proceedings, including noncitizens subject to mandatory detention. NIJC clients seek and sometimes obtain a positive exercise of prosecutorial discretion from the Department of Homeland Security (DHS). This was true before Secretary Mayorkas issued the "Guidelines for the Enforcement of Civil Immigration Law" (hereinafter the Guidelines), during the brief period when the Guidelines were in effect, and in the months since the Guidelines were vacated.[1]

American Gateways serves the indigent immigrant population in central Texas, through legal representation and advocacy for thousands of indigent and low-income immigrants who are both detained and non-detained before the Department of Homeland Security and the Immigration Courts. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict and human trafficking through exceptional immigration legal services at no or low cost, education, and advocacy. American Gateways has sought and continues to seek and, at times, obtain the positive exercise of prosecutorial discretion on behalf of its clients from the Department of Homeland Security.

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[1] Under Supreme Court Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici and their counsel made a monetary contribution to its preparation or submission. The parties consented to this filing.

The ***Asian Pacific Institute on Gender-Based Violence*** is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence impacting Asian and Pacific Islander and immigrant communities. The Institute supports a national network of advocates and community-based service and advocacy programs that work with Asian and Pacific Islander and immigrant and refugee survivors of domestic violence, sexual assault, human trafficking, and other forms of gender-based violence, and provides analysis and consultation on critical issues facing victims of gender-based violence in the Asian, Native Hawaiian, Pacific Islander, and immigrant and refugee communities, including training and technical assistance on implementation of legal protections in the Violence Against Women Act and the Trafficking Victims Protection Act for immigrant and refugee survivors. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research. As co-chair of the Alliance for Immigrant Survivors, the Institute works to inform public policy in order to decrease the harm cause when sexual and domestic violence abusers leverage laws and policies to further inflict harm against survivors.

The ***Tahirih Justice Center*** is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to women, girls, and other immigrants fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital mutilation/cutting ("FGM/C"). Since its

beginning in 1997, Tahirih has provided free legal assistance to more than 31,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant survivors and promotes a world where they can live in safety and dignity.

SUMMARY OF THE AMICI ARGUMENT

This brief addresses one portion of the decisions below: the holding that prosecutorial discretion to bring or execute removal proceedings was limited—and in some cases foreclosed—by mandatory detention statutes. The lower courts reasoned that two statutes mandating detention while removal efforts are *ongoing* also required that such proceedings *be initiated*. In this, the lower courts fundamentally misapprehended how detention statutes function in relation to removal matters. Both 8 U.S.C. § 1226(c) and § 1231(a) mandate detention only during the removal process. The lower courts overlooked this limitation on mandatory detention. Thus, when lower courts deduced a prosecution mandate from a detention mandate, they built upon a flawed edifice.

First, as to § 1226(c), both the text of the statute and this Court's case law make plain that mandatory detention applies only where removal proceedings are ongoing. Texas does not directly dispute these holdings; but its argument that mandatory detention is triggered earlier, and without regard to removal proceedings, cannot be squared with the text or this Court's holdings. Texas' approach is inconsistent with

the structure of the immigration statutes. Severing detention authority from removal proceedings would also leave that authority without strong constitutional support.

Similarly, § 1231(a) detention authority is not untethered from the agency's duties, but exists in service of the agency's task of executing removal orders. Congress did not authorize that task unbounded. The agency is barred from executing removal orders where persecution would be likely, and the agency is authorized to "decide" not to execute other removal orders. Language directing removal or directing detention during the removal period is not absolute.

The district court vacated the Mayorkas Guidelines based on putative inconsistency with these detention mandates. Even if there were a conflict, cases involving mandatory detention are a small subset of the cases to which the Guidelines apply, and they are the cases least likely to receive a positive exercise of prosecutorial discretion. Broadly precluding prosecutorial discretion for everyone based on a putative impropriety to a subset is exactly the kind of "gotcha" litigation which the Court has rejected in other contexts.

Amici use real-life examples to illustrate how the detention statutes operate relative to immigration enforcement generally. Amici also tell real-life stories to illustrate how prosecutorial discretion operates in the immigration space, whether or not the Guidelines are applied. As noted above, the vast majority of cases in which the Guidelines are applicable involve decisions where detention is irrelevant. Prosecutorial discretion serves crucial functions in the system. For example, prosecutorial discretion allows DHS to focus overburdened court resources by empowering the agency to

dismiss low-priority cases. Prosecutorial discretion also allows DHS to serve compelling humanitarian needs unforeseen by statute, and recognize service to the United States or to the community. Prosecutorial discretion serves the goal of efficiency by channeling some cases away from the immigration courts, when they may be resolved by other immigration agencies. The lower courts failed to acknowledge these important functions of prosecutorial discretion.

Ensuring prudent enforcement of the immigration statutes is not disrespectful to the law. When prosecutors seek to exercise their broad power in ways that accomplish justice and serve the purposes of the statute, that fosters not only fair results in those cases, but it engenders a greater respect for the law. The Court should reverse the decision of the District Court.

ARGUMENT

I. THE LOWER COURTS MISUNDERSTOOD THE RELATION OF MANDATORY DETENTION STATUTES TO THE REMOVAL PROCESS.

The Mayorkas Guidelines at the center of this case principally address enforcement decisions antecedent and often unrelated to detention: DHS's decisions (a) to initiate removal proceedings and/or (b) to continue to pursue removal. These issues are enforcement decisions that the immigration statutes and this Court's case law leave to the discretion of DHS. *See generally* 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (hereinafter *AADC*); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761

(2005). Because challenges to the exercise of prosecutorial discretion "invade a special province of the Executive" this Court has set a "standard [that] is particularly demanding" to rebut "the presumption that a prosecutor has acted lawfully." *AADC*, at 489 (quoting *United States v. Armstrong*, 517 U.S. 456, 463-465 (1996)).

This brief uses real-life examples to illustrate how the immigration court system functions, and to explain how the circuit and district courts misread the mandatory detention statute to be a mandatory prosecution statute.[2] It then illustrates how and when prosecutorial discretion is used, including under the Mayorkas Guidelines, noting in particular that only a small minority of affected cases involve criminal inadmissibility or deportability.

A. Section 1226(c) mandatory detention is only triggered if DHS decides to pursue removal proceedings.

The district and circuit courts fundamentally misapprehended the nature of 8 U.S.C. § 1226(c), focusing almost entirely on a red herring: whether mandatory detention under that provision is in fact mandatory. See App. 20a-26a, App. 81a-101a. The question in this case is not whether such detention is mandatory; rather the question is whether that mandate applies to individuals not in removal proceedings, or whether removal proceedings must be ongoing as a prerequisite to detention. Neither the Fifth Circuit nor the district

[2] All individuals discussed in the brief whose names are denoted with an asterisk are described using pseudonyms; descriptions of their stories are on file with the authors.

court engaged with this fundamental question. By bypassing this question, those courts misunderstood the structure of § 1226 and the sequence of DHS enforcement decisions. Indeed, the decision below cannot be squared with the Court's explanation of the structure of § 1226. *See Nielsen v. Preap*, 139 S. Ct. 954, 958-60, 966 (2019), and *Jennings v. Rodriguez*, 138 S. Ct. 830, 837, 846 (2018).

The mandatory detention language of § 1226 applies to noncitizens arrested and detained "[o]n a warrant issued by the Attorney General… *pending a decision on whether the alien is to be removed from the United States*." 8 U.S.C. § 1226(a) (emphasis added). Congress plainly intended the mandate to apply to individuals whom the agency was seeking to remove, i.e., individuals in removal proceedings. By statute, it is the institution of removal proceedings that triggers mandatory detention, not the other way round. *Jennings*, 138 S. Ct. at 846 (detention under § 1226 is only authorized "pending removal proceedings."). Just as the start of removal proceedings triggers § 1226(c) detention, "the conclusion of removal proceedings…marks the end of the Government's detention authority under § 1226(c)." *Id*. In *Preap* this Court concluded that the detention authority in § 1226(c) "springs from" the arrest authority outlined in § 1226(a), and noted that "subsection (c) is simply a limit on the authority conferred by subsection (a)," which in turn is limited to detention during pending removal proceedings. *Preap*, 139 S. Ct. at 966.

This structure of § 1226 is confirmed by longstanding detention regulations. ICE is permitted to detain someone only if it has previously issued or concurrently issues a "Notice to Appear." 8 C.F.R. § 236.1(b)

("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest."); 8 C.F.R. § 239.2(e) ("When a notice to appear is canceled or proceedings are terminated under this section any outstanding warrant of arrest is canceled."). Similarly, if an individual was arrested without a warrant, the regulations require that DHS first make a decision on whether to pursue removal proceedings before detention under § 1226 is triggered. *See* 8 C.F.R. § 287.3.

To the extent that the lower courts found that § 1226(c)'s mandate applies to individuals not in removal proceedings, that is directly contrary to the statute. The Fifth Circuit twice noted that under this Court's case law, § 1226(c) applies "during removal proceedings." App. 21a, 23a. But it then ignored this qualification, holding that "[t]here is one, and only one, qualification to this mandatory provision," pointing to the limited release authority of § 1226(c)(2). App. 21a. The District Court similarly overlooked the need for pending removal proceedings to justify detention. See App. 82a, 89a (twice quoting the statutory requirement of pending removal proceedings, but then overlooking this limitation).

Texas strenuously avoids engaging with this part of the statutory text, Resp. Opp. 35-36 & n.5. Texas points to language applying mandatory detention rules "when the alien is released" from criminal custody. Resp. Opp. 35 (citing 8 U.S.C. § 1226(c)(1)(D)). But treating the when-released language as the sole trigger for mandatory detention would render surplusage other language applying it only in the context of

pending removal proceedings. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (superfluity canon). Moreover, § 1226(c) simply cannot properly function without the requirement for ongoing removal proceedings. Among other problems, eliminating the requirement of ongoing removal proceedings would leave no mechanism for release from detention when a noncitizen is granted discretionary relief in removal proceedings.[3]

Yet Texas cannot concede this textual limitation on § 1226(c) without unraveling its entire statutory theory. The Fifth Circuit did not explicitly find removal proceedings unnecessary to trigger mandatory detention; neither did it disclaim the possibility. It simply ignored this limitation on § 1226(c), and went on to extrapolate from the putatively limitless mandatory detention provision to find that Congress ousted prose-

[3] Mandatory detention under § 1226(c) applies not only to people convicted of aggravated felonies, but also to permanent residents with low-level criminal convictions that do not bar discretionary relief. *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (turpitude offenses and controlled substance offenses); 8 U.S.C. § 1229b(a) (cancellation of removal discretionary remedy). A noncitizen who seeks cancellation of removal to avoid criminal removability would be detained during their proceedings under § 1226(c)(1); if granted statutory relief, no removal order would be entered. But under the Court of Appeals' reading, 8 U.S.C. § 1226(c)(2) is the "one, and only one" limit on mandatory detention. App. 21a. A person granted cancellation would not qualify for release under § 1226(c)(2) (release for individuals cooperating in prosecutions). Texas points to no other authority allowing release of a noncitizen subject to detention under § 1226(c) who is granted Cancellation of Removal. The answer to the conundrum, of course, is that mandatory detention applies only to individuals in ongoing removal proceedings—as the Court has repeatedly found.

cutorial discretion. App. 20a-25a. The Court of Appeals seemed to believe that if detention was mandatory, Congress must have required the agency to institute removal proceedings as well, "[t]o effectuate § 1226(c)'s arrest and detention mandate." App. 21a.

It has long been held that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Texas offers no suggestion that Congress revoked prosecutorial discretion in any of the statutory provisions that actually involve criminal removability or removal proceedings. See 8 U.S.C. § 1227(a)(2); 8 U.S.C. § 1229; 8 U.S.C. § 1229a. It has long been recognized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials. … Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona v. United States*, 567 U.S. 387, 396 (2012). And that discretion persists throughout; "the Executive has discretion to abandon" removal at any stage. *AADC*, 525 U.S. at 483. If Congress wanted to end that "principal feature" of the system, i.e., discretion to bring removal proceedings, one would expect Congress to say so plainly in the pertinent statutory sections. The claim that Congress ended prosecutorial discretion by mandating detention of certain individuals while removal proceedings are pending fails the elephants-in-mouseholes canon.

Reading the statute to enact this sort of limitation on prosecutorial discretion would have immense effects. This brief discusses in section II *infra* some of the myriad ways in which prosecutorial discretion is

crucial to the effective functioning of the system. Amici would add one additional note for why this authority is appropriate in the § 1226(c) context.

Take, for example, Claudia,* who obtained prosecutorial discretion despite a criminal conviction for simple possession of cocaine, which falls in the ambit of 8 U.S.C. § 1226(c). Claudia lived in the United States as a lawful permanent resident since age 13, but she became deportable after being convicted of drug possession while in the car of an abusive boyfriend who—unbeknownst to her—had drugs in the car. Claudia, a single mother, was pregnant with her fourth child when she was arrested and placed in removal proceedings.

DHS initiated removal proceedings, and detained Claudia, as was required under § 1226(c). See 8 U.S.C. §§ 1226(c)(1); 8 U.S.C. § 1227(a)(2)(B)(i) (all drug removability triggers mandatory detention). Once apprised more fully of the family situation, however, DHS decided to dismiss removal proceedings, choosing instead to dismiss the prosecution and return Claudia to permanent resident status. This decision was based on Claudia's long history in the United States, her extensive family ties to this country, and the minimal nature of her exposure to the criminal justice system. For example, at the time that DHS commenced removal proceedings, Claudia's three U.S. citizen children, all under age 10, were in the care of her mother, who had various significant medical conditions. In addition, Claudia's oldest daughter was suffering from an incurable disease requiring use of a feeding tube and continuous medical care. Once DHS exercised its discretion to end these removal proceedings, Claudia

was no longer covered by § 1226; she was released from detention and reunited with her family.

Similarly, consider the case of Pedro.* Pedro fled Guatemala as a child after being subjected to violence. After fleeing, Pedro was subjected to labor trafficking by a cartel that began in Mexico and continued into the United States. Pedro's traffickers used force, including threats at gunpoint, to force him to carry backpacks across the border. Pedro suffers from lingering head trauma from being beat by his traffickers with the butt of their guns. Pedro entered the United States, was placed in removal proceedings as an unaccompanied minor, and applied for asylum before USCIS. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, § 235(d)(7) (providing that USCIS shall have initial jurisdiction over asylum applications filed by unaccompanied minors). He reported the crimes against him to law enforcement and subsequently applied for a T visa application, again before USCIS.

While Pedro's removal proceedings were pending, he was convicted of a driving infraction and possession of marijuana offense. Based on this conviction, DHS detained him pursuant to § 1226(c). Due to his pending applications before USCIS, DHS eventually agreed to exercise prosecutorial discretion to dismiss proceedings. Because proceedings were no longer ongoing, Pedro was released from custody to the care of his community and to continue to pursue his asylum and T visa applications.

In summary, nothing in § 1226 mandates that DHS pursue removal proceedings against any individual or class of individuals. Congress left those enforcement decisions—the enforcement decisions that the DHS

Secretary's Guidelines principally addresses—to the discretion of DHS. Absent DHS's discretionary decisions to pursue removal proceedings, § 1226(c)'s mandatory obligations are never triggered. It follows that § 1226(c) does not authorize a district court to "invade a special province of the Executive—its prosecutorial discretion"—by exerting judicial control to test the wisdom of the ways in which the executive is exercising that discretion. *AADC*, 525 U.S. at 489.

B. Detention under Section 1231(a) must be tied to removal efforts just as detention under Section 1226(c) is tied to removal proceedings.

Texas' arguments fare no better with regard to 8 U.S.C. § 1231. Texas makes much of putatively mandatory language requiring that the federal government effectuate removal promptly, and requiring that certain classes of noncitizens be detained while the removal process is ongoing. 8 U.S.C. §§ 1231(a)(1)(A); 1231(a)(2). Again, Texas misapprehends the statute. Detention under § 1231(a) is tied to ongoing removal efforts. Section 1231(a) itself authorizes the agency to decide not to physically deport every noncitizen who has been ordered removed; and other statutory provisions both within and outside of § 1231 also support this point. Thus, provisions in § 1231 purporting to mandate prompt removal are subject to numerous exceptions and thus not absolute in the way understood by the courts below.

Several textual clues strongly suggest that § 1231 does not bind the federal government as understood by lower courts. First, the command of § 1231(a)(1)(A) applies "[e]xcept as otherwise provided in this section." 8 U.S.C. § 1231(a)(1)(A). Elsewhere within § 1231,

Congress authorized the agency to stay removal whenever "the Attorney General decides that—(i) immediate removal is not practicable or proper." 8 U.S.C. § 1231(c)(2)(A). It would be a strange "mandate" to simultaneously command the agency to remove everyone within 90 days and authorize it to "decide[]" not to do so. Moreover, Texas' approach effectively reads the exception at the front of § 1231 out of the statute, an approach that is contrary to fundamental canons of construction. *TRW Inc.*, 534 U.S. at 31. In other words, while the purportedly mandatory language in § 1231 acts as a baseline, Congress manifestly authorized an exception to that baseline.[4] If Congress wished § 1231 to tie the hands of the federal government, it would not have framed the statute in this way.

The key to understanding the statute is a longstanding rule: civil immigration detention is permissible only so long as it "bears a reasonable relation to the purpose for which the individual was committed." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (emphasizing the link between the Agency's obligation in "pursuing and completing deportation proceedings" as the justification for detention). Under § 1231, the "purpose for which the individual is committed" relates directly to completion of the removal process and is not justified when the Agency, in its discretion has decided against removal.

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[4] It is also worth noting that § 1231 authorizes reimbursement to state governments for detaining certain "undocumented criminal aliens," as defined in statute. 8 U.S.C. § 1231(i). When Congress intended to afford a remedy for state government costs related to immigration, it clearly knew how to do so.

If § 1231 functioned as Texas posits, it would be absurd in some cases and harmful in others. Texas' theory would require detention that is disconnected from any permissible purpose. Take for example, the situation of Roberta.* Roberta* was put into removal proceedings due to a conviction for identity theft after she provided a false name to get emergency medical services. An immigration judge found that her offense involved moral turpitude and thus triggered mandatory detention. It happened that Roberta had cooperated years earlier with the prosecution of a child molester who had sexually abused her daughter. The local police certified that she had been helpful in securing a conviction, making her eligible to apply for a "U visa" under 8 U.S.C. § 1184(p). However, the U visa is adjudicated by USCIS, not an immigration judge. *See L.D.G. v. Holder*, 744 F.3d 1022, 1024-26 (7th Cir. 2014). While USCIS considered her application, she remained detained, and her removal proceedings continued. She had been ordered removed by the time USCIS reviewed her case. USCIS found her eligible for a U visa, and placed her into "deferred action," protecting her from removal. 8 C.F.R. § 214.14(d)(2).[5] She was then released from detention, approximately 45 days after the final removal order. Under Texas' reading of § 1231(a), the statute required DHS to detain her for another 45 days, even though it had decided not to execute the removal order. That result cannot be correct.

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[5] Deferred action, originally known as nonpriority status, "means that, for … humanitarian reasons [], no action will thereafter be taken to proceed against an apparently deportable alien." *AADC,* 525 U.S. at 484.

Carlos's* case also illustrates how DHS can and should exercise its authority as it relates to individuals detained under § 1231. Carlos was detained by DHS after a prior removal order was reinstated. Carlos expressed a fear of return and is applying for withholding of removal and relief under the Convention against Torture, remedies that remains available to him despite the prior removal order. 8 C.F.R. § 1208.2(c)(2).

Carlos lives with several mental health conditions, including post-traumatic stress disorder, psychotic disorder, and schizoaffective disorder. Carlos suffered a mental health crisis while detained, resulting in his placement in segregation. After this event, DHS agreed to release Carlos on Alternatives to Detention and to the care of his family, which includes his U.S. citizen wife and child. His release allowed him to address his urgent mental health needs and pursue relief from outside of detention.

In addition to cases like Roberta's and Carlos' the § 1231 of Texas' legal imagination would create absurdity as to noncitizens granted withholding of removal under 8 U.S.C. § 1231(b). Withholding of removal implements the United States' treaty obligations against nonrefoulment of refugees. *See generally INS v. Stevic*, 467 U.S. 407, 414-28 (1984) (explaining history of withholding provision). By Texas' reasoning, a noncitizen granted withholding of removal must be detained, even if DHS is not actively seeking to remove them.

That is because when someone is granted withholding of removal, a removal order is entered and DHS has authority to pursue removal to a third country where the noncitizen would not be persecuted. However, unless the individual is a dual national, removal

to a third country is both resource-intensive and exceedingly rare. Eric Gibble, *AIC-NIJC_Fact-Sheet_Withholding-of-Removal_October-* (Oct. 6, 2020), https://bit.ly/3DpENtz (in FY 2017 "just 21 people in total granted withholding of removal were deported to a third country. That is just 1.6 percent of the 1,274 people granted withholding of removal that year."). Texas offers no reason to believe that Congress meant to require the agency to expend scarce resources to detain people whom the agency cannot remove.

The Texas reading of § 1231 would require ongoing detention of someone like John.* John is a Burmese refugee who entered the United States in 2007 after living in a refugee camp for nearly 11 years. After entering the United States alone at the age of nineteen, he struggled with substance abuse, which in turn led to his arrest and conviction for several non-violent offenses. He was detained and placed in removal proceedings, where he submitted applications for withholding of removal and relief under the Convention against Torture based on the past persecution he suffered in Burma and his fear of future persecution. His application for withholding of removal was granted by an immigration judge, triggering detention under § 1231. However, since John could not be removed to Burma or to any other country, his continued detention no longer served a purpose under the statute. DHS exercised discretion to release John prior to the 90-day removal period, allowing him to seek substance-abuse treatment at a long term care facility.

Congress granted DHS authority over when and how to effectuate removal orders. The above cases, and thousands of cases like them, illustrate how the

agency may use its authority. They also illustrate that the lower court's reading of § 1231 is fundamentally misguided.

II. THE LOWER COURTS VACATED THE MAYORKAS GUIDELINES ON THE BASIS OF DETENTION STATUTES INAPPLICABLE TO THE VAST MAJORITY OF AFFECTED INDIVIDUALS.

As shown above, the lower courts vacated the Mayorkas Guidelines based on an egregious misreading of § 1226(c) and § 1231(a). To make matters worse, those provisions are relevant only in a small subset of the cases that the Guidelines were intended to address.

In vacating the memo on the basis of putative violations of detention statutes that apply to only a small percentage of affected noncitizens, the District Court allowed "the tail [to] wag the dog." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020) (plurality). This turns litigation into "a game of gotcha against [the agency], where litigants can ride a discrete … flaw in a [rule] to take down the whole." *Id.* The District Court did not even acknowledge that it was vacating the Mayorkas Guidelines on the basis of statutes that only pertained to a small percentage of this population.

A. Criminal-related removal proceedings are a small percentage of immigration matters and of prosecutorial discretion grants.

As noted above, even if the District Court's view of § 1226(c) and § 1231(a) held water, that would be irrelevant for most noncitizens in removal proceedings.

In Fiscal Year 2021, DHS filed more than 300,000 Notices to Appear in immigration court, but less than 9,000 of those cases involved criminal inadmissibility or deportability charges. *See* TRAC Immigration, *Fewer Immigrants Face Deportation Based on Criminal-Related Charges in Immigration Court* (Jul. 28, 2022), https://bit.ly/3qEbRqc. Thus, criminal-based removability accounted for less than 3% of newly filed removal proceedings.[6]

Moreover, DHS generally requires a criminal background check before even considering the exercise of prosecutorial discretion. *See* U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, https://bit.ly/3QIE21V (last visited Sept. 16, 2022). In

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[6] Criminal removability under 8 U.S.C. §§ 1182(a)(2) and 1227(a)(2) is a fairly accurate proxy for detention under 8 U.S.C. § 1226(c). Section 1226(c) applies to all § 1182(a)(2) subparagraphs, and to most § 1227(a)(2) subparagraphs. The match is not exact, but the overall point remains: most people who are placed in removal proceedings are not subject to a criminal ground of deportability or inadmissibility. While the percentage of cases annually that involve a criminal ground of removability can fluctuate, in the past decade, the percentage has never been above 15%. *See* TRAC Immigration, New Deportation Proceedings Filed in Immigration Court, https://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited Sept. 16, 2022).

These numbers do not count individuals subjected to expedited removal under 8 U.S.C. § 1225(b), nor those subject to reinstatement of removal at 8 U.S.C. § 1231(a)(5). Including such individuals would, if anything, increase the percentage of noncitizens with no criminal history, since expedited removal in particular can only be used for noncriminal grounds. 8 U.S.C. § 1225(b)(1)(A)(i).

Amici's experience, agency actors applying the Guidelines treated any kind of "serious criminal conduct" as presumptively making that individual a priority for enforcement. App. 138a-139a.

B. DHS can, and should, focus court resources by identifying low-priority cases for dismissal.

The backlog of cases in immigration court has continued to increase; it rose to 1.92 million cases in FY21. TRAC Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Sept. 16, 2022). That number does not count the 94,748 cases pending at the Board of Immigration Appeals. EOIR, Adjudication Statistics, https://www.justice.gov/eoir/page/file/1248506/download (last visited Sept. 16, 2022). The natural effect of such a large backlog is to slow case adjudication. In recent years, DHS has often dismissed low-priority prosecutions in partial response to this problem.

For instance, Holly* was trying to reopen a removal proceeding where her abusive ex-spouse had caused her to miss her hearing, and to be ordered removed *in absentia*. USCIS had already approved Harriett's "self-petition" under the Violence Against Women Act (VAWA), after finding that she had suffered domestic violence in a bona fide marriage with a U.S. citizen. When DHS decided to exercise prosecutorial discretion, rather than agreeing to simply reopen the removal proceedings, DHS moved to reopen and dismiss the prosecution. Part of DHS's calculus is whether there is some possibility that the noncitizen could obtain legal status from USCIS and thus obviate the need for removal proceedings in the case. Removing cases like Holly's from the immigration court docket

not only protects her from entry of a removal order, it also allows other cases to move more quickly.

C. Prosecutorial discretion is necessary to address compelling humanitarian circumstances.

Occasionally, cases present unique and compelling circumstances sufficient to convince immigration agents and prosecutors that removal is inappropriate in that particular case. Where removal would not serve the purposes of the law, that is a textbook case for use of prosecutorial discretion.

For instance, William's* father was killed when he was seven years old. He eventually came to the United States to be reunited with his mother, Maria.* William qualified for Special Immigrant Juvenile Status (SIJS) due to abuse by his father. Maria would not be eligible for legal status through William's SIJS petition. However, her sister is a U.S. citizen and was able to file a family visa petition on Maria's behalf. Given the situation, DHS agreed to refrain from filing William's NTA and to dismiss Maria's removal proceedings even though sibling petitions have a 15-year backlog. U.S. Department of State, September 2022 Visa Bulletin, p.2 (current "priority date" for fourth preference visas is Mar. 22, 2007). That exercise of prosecutorial discretion helped preserve family unity and avoid further traumatizing the child.

The case of Carlos and Rafael Robles was another circumstance where removal would have been a humanitarian tragedy. Prior to the institution of the Deferred Action for Childhood Arrivals (DACA) program, *see Dept. of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020), Carlos and Rafael Robles were

put into removal proceedings. See Daily Herald, *Palatine brothers' deportation put on hold* (June 21, 2011). They had come to the United States from Mexico with their parents when they were 13 and 14. They were honor roll students and captains of their tennis team in suburban Chicago. They were arrested by DHS agents in March 2010 while traveling on an Amtrak train through upstate New York, on a trip from Chicago to visit a friend at Harvard University. Immigration prosecutors ultimately decided not to pursue removal. The brothers were granted deferred action and allowed to remain in the United States. They were eventually able to obtain DACA benefits. Though their case long predates the Mayorkas Guidelines, the principles that allowed DHS to pursue a humanitarian remedy for them reflect the heartland of why prosecutorial discretion is an integral part of the U.S.'s immigration system.

The case of Juanita* and her family serves as another example of how DHS exercises its discretionary authority to serve humanitarian needs. Juanita, her spouse, and their two children, all from Honduras, were apprehended at the border and placed in removal proceedings. Juanita's youngest daughter, Julia,* suffers from serious medical conditions for which medical care in Honduras was inadequate. Inside the United States, Julia is able to access lifesaving medical care. DHS agreed to dismiss prosecution, recognizing the necessity of continuity of care for Julia and the risk continued proceedings posed to her health and safety if the family was ordered removed.

It is impossible for any statute, particularly in an area as complex as immigration, to foresee every even-

tuality. The presence of inherent background prosecutorial discretion authority gives the agency a tool to seek to do justice in individual cases.

D. Prosecutorial discretion is used to recognize service to country or to community.

A third common basis for prosecutorial discretion is past service to the United States or to law enforcement.

For instance, retired Sgt. 1st Class Bob Crawford, an Army Ranger, married a Honduran woman named Elia. She had entered the United States after a hurricane caused massive destruction in her home country. During repeated deployments abroad, Elia took care of the couple's two children. Longstanding ICE policy creates a special discretionary option for active-duty members of the U.S. military and their families: parole-in-place. *See* USCIS PM-602-0114, *Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees* (Nov. 23, 2016). But that policy only applies to family members who are not in current removal proceedings; and Elia was in removal proceedings, which DHS initially refused to dismiss. After media reported on the case, DHS agreed to dismiss removal proceedings, thus allowing Elia to move into parole status. Tara Copp, *DHS offers to drop deportation case against wife of 7th Special Forces Group vet*, Military Times (Mar. 1, 2018).

While U.S. servicemembers and their families occupy a unique position under the immigration law, similar considerations underline DHS's treatment of

other individuals who contribute positively to U.S. society. See *supra* at 15 (noncitizen aided arrest and conviction of individual for sexual abuse of minor).

E. Prosecutorial discretion is used for efficiency where a noncitizen is eligible for relief outside of removal proceedings.

Another common use of for prosecutorial discretion occurs when a noncitizen is eligible for some form of relief that can only be pursued outside of removal proceedings. The immigration system is bifurcated in various respects. In some cases, the immigration courts may afford one form of relief, while others must proceed forward with USCIS. *See*, *e.g.*, *Matter of Sanchez Sosa*, 25 I. & N. Dec. 807, 811-15 (BIA 2012).

For instance, consider the case of Sarah* and her daughter. Nine years ago, Sarah, her then-spouse, and her then five-year-old daughter fled their home country, presented themselves at a port of entry, and requested asylum. They were subsequently placed in removal proceedings. After entering the United States, Sarah's relationship with her then-spouse turned violent and abusive. Sarah reported the abuse to law enforcement, secured a divorce, and was allocated parental responsibilities. She cooperated and provided assistance to law enforcement. Based on her cooperation, Sarah filed an application for a U visa with USCIS on behalf of herself and her daughter. Unfortunately, while these applications were pending, Sarah and her daughter moved and missed a hearing, triggering entry of an *in absentia* removal order against them. After Sarah and her daughter realized the problem, they filed a motion to reopen that DHS—rather than immediately detaining them, as putatively required by §

1231(a)—agreed not to oppose reopening. The immigration judge reopened proceedings, allowing Sarah and her daughter to seek administrative closure to allow the applications pending before USCIS to be adjudicated.

Similarly, survivors of human trafficking may apply for visas specific to that situation ("T visas"), but those applications may only be considered by USCIS. Sarah* was forced into sex work by physical violence as well as threats to call immigration. Before she could escape her trafficker, Sarah was twice convicted of prostitution, which triggers inadmissibility under § 1182(a)(2), and thus mandatory detention. 8 U.S.C. § 1182(a)(2)(D)(i). When USCIS approved her T visa, DHS agreed to reopen and dismiss removal proceedings.

Juan's* case further illustrates the important functions of DHS's discretionary authority in this context. From a young age, Juan was trapped and transported against his will by a Mexican cartel into involuntary servitude and debt bondage. Juan's traffickers employed force and coercion, including beatings, torture, rape and attempted shootings, against their victims. The traffickers forced him to guide migrants across the U.S.-Mexico border. At the age of seventeen, Juan reported these crimes to both Mexican and United States immigration officials. DHS agreed to refrain from filing Juan's NTA in the immigration court, an exercise of discretion that allowed Juan to avoid further traumatization and preserved both court and agency resources. USCIS later granted his T visa as a survivor of human trafficking.

* * *

As these case stories exhibit, prosecutorial discretion plays an important role in the efficient and just functioning of the immigration removal system. It is almost invariably used in cases that have nothing to do with the two mandatory detention statutes that animated the decisions below. The decisions below thus represent not only a legal error, but a grievous overreach in applying that flawed reasoning to vacate the Guidelines. The Guidelines, issued by the nation's political leaders, provide permissible guidance and direction to DHS officials who exercise discretion in the name of the Secretary and the President. They were vacated in error.

CONCLUSION

The Court should reverse the decision of the District Court.

Respectfully submitted,

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September 19, 2022