No. 00-38

In The

Supreme Court of the United States

JANET RENO, Attorney General, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The ACLU of Washington is the Washington State affiliate of the ACLU.

The ACLU believes, as this Court has recognized, that the Constitution forbids the government from imposing indefinite civil detention on an individual based solely on the government's assessment that the individual is dangerous. *See Foucha v. Louisiana*, 504 U.S. 71 (1992). This Court has explained that such detention "would . . . be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 83.

This case raises a constitutional issue that is of central importance to the ACLU: whether the Due Process Clause prohibits the Immigration and Naturalization Service (INS) from inflicting detention of potentially lifetime duration on a longtime resident alien who cannot be removed to his country of origin. The ACLU has represented detainees or provided legal assistance in virtually

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief are being lodged concurrently with the filing of this brief with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

every indefinite detention case across the country since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (IIRIRA), appearing as counsel or *amicus* in district courts and courts of appeals in the First, Third, Fifth, Ninth, and Tenth Circuits. In addition, in furtherance of its organizational view as to the constitutional limits on civil detention generally, the ACLU has often appeared before this Court in civil commitment cases. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992).

SUMMARY OF ARGUMENT

In this case, the INS defends a scheme that imposes potentially lifetime incarceration on longtime resident aliens who have been ordered deported, but who cannot be removed. INS detention decisions rest almost entirely on predictions of future dangerousness, which in turn are based on criminal convictions for which the detained aliens have already served their criminal sentences. Detainees are held in prison-like conditions (and in many cases, actual prisons), and bear the burden of proving their lack of danger to the INS in a non-adversarial release interview.

It is undisputed that the INS has a legitimate interest in detaining aliens ordered deported in order to effectuate their removal and to protect the public during that process. This Court has also held, however, that when detention is excessive to the government's legitimate regulatory purposes, it is unconstitutionally punitive. Aliens, even those with no right to remain in the United States, cannot be punished without a criminal trial. Thus, the

question before this Court is whether the kind of detention at issue here – indefinite, potentially lifelong incarceration of a deportable[2] alien based almost entirely on a prediction of future danger – constitutes unconstitutional punishment.

This brief does not address whether the INS continues to possess a legitimate interest in detention when removal is not reasonably foreseeable. Rather, in this brief, *amici* demonstrate that, even assuming that the INS continues to have a legitimate interest in detention under such circumstances, the INS's post-order detention scheme is unconstitutionally excessive in relation to that interest.

Amici will not repeat points already made in respondent's brief, namely, that even aliens who have been ordered deported have a liberty interest in freedom from physical restraint that is protected by the Due Process Clause; and that entry of a final order of deportation does not reduce a former lawful permanent resident alien to the same constitutional position as that of an alien at the border seeking initial entry. Instead, this brief makes three arguments. First, notwithstanding the government's contentions to the contrary, the INS's detention scheme authorizes potentially lifetime incarceration of deportable

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[2] *Amici* use the word "deportable" to refer to any alien who has been ordered removed after having effected an entry into the United States, as opposed to "excludable" aliens, who are ordered removed prior to having effected such an entry. Before the enactment of IIRIRA, "deportable" and "excludable" aliens were subject to removal from the United States through different proceedings – deportation proceedings and exclusion proceedings. Although IIRIRA replaced these two proceedings with one unified "removal" proceeding, the distinction between "deportable" and "excludable" aliens continues to have significance in terms of the degree of constitutional protection the two categories of aliens are afforded.

aliens who cannot be removed. Second, the INS's post-order detention scheme is more severe than any other civil detention scheme this Court has ever held to be constitutional. Third, the unprecedented severity of the INS's scheme is not excused by the fact that the detained individuals are aliens who have been ordered deported.

I. UNDER THE GOVERNMENT'S ARGUMENT, ALIENS WHO CANNOT BE DEPORTED CAN BE SUBJECTED TO A LIFE SENTENCE.

The government never admits to the consequence of its post-order detention scheme: potentially lifetime incarceration of aliens who cannot be deported. Instead, the government attempts to skirt the serious constitutional violation raised by the prospect of lifetime incarceration by claiming that the post-order detention of aliens like respondent is not "indefinite or permanent." Pet. Br. 49. The government relies on two factors to make its claim: the INS's continuing efforts to deport aliens like respondent, and the availability of periodic review procedures through which such aliens can seek possible release. *Id.* Neither of these factors, however, alters the fact that the "practical effect" of the INS's post-final-order detention scheme "may be to impose confinement for life." *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

The INS's implementing regulations do not recognize any limit on how long an individual can be detained. *See* Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281, 80,294 (Dec. 21, 2000) (to be codified at 8 C.F.R. 241.4). Nor do they limit the length of detention by conditioning continued detention on the foreseeability of

removal. *See id.* This means that the INS may indefinitely incarcerate aliens who have been ordered deported, *regardless* of how long it may take for them to be removed or whether removal is even possible. Neither an extended length of detention nor the remoteness of removal are sufficient, either separately or in combination, to prevent an alien's continued detention.

Indeed, the INS's release procedures do not require any inquiry into either of these two factors. *See id.* at 80,295-96 (to be codified at 8 C.F.R. 241.4(f)) (containing no reference to either length of detention or foreseeability of removal as relevant factors that should be considered in release decisions). As long as an alien is considered a potential danger, or even merely a flight risk, the INS is prohibited from releasing the alien. *See id.* at 80,295-96 (to be codified at 8 C.F.R. 241.4(e) & (h)(1)).[3] Moreover, because INS regulations merely permit – but do not *require* – release of aliens who demonstrate lack of danger or flight risk, even those aliens who pose *no* danger or flight risk could be incarcerated for the rest of their lives at the INS's discretion. *See id.* at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)) (INS decisionmaker "*may* release an

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[3] This Court is not faced with the question of whether the INS could constitutionally detain undeportable aliens if INS regulations provided for rigorous release procedures that required consideration of the likelihood of removal and the length of detention served. *Amici* submit that such a regulation would go a long way toward solving the problem of undeportable aliens. Mr. Ma would likely be released under such a regulation, because of the time he spent in INS detention and the lack of foreseeability of his removal, and this Court would therefore not be faced with the constitutional question it considers in this case.

alien if the alien demonstrates" that release "will not pose" danger or "significant risk of flight") (emphasis added).

II. THE INS'S POST-FINAL-ORDER DETENTION SCHEME IS MORE SEVERE THAN ANY OTHER CIVIL DETENTION SCHEME THIS COURT HAS EVER UPHELD.

The extremity of the INS's post-final-order detention scheme is particularly apparent when it is compared with other civil detention schemes upheld by this Court. This Court has never held to be constitutional a civil detention scheme that permits potentially life-long detention of an adult, except in the limited context of civil commitment – and then only upon a finding of *both* mental abnormality and danger. In addition, this Court has never upheld a detention scheme that is so procedurally deficient, so broad in its application, and so disproportionate to the regulatory purpose it is intended to accomplish. The INS's custody review procedures are so lacking in basic safeguards that they offer no meaningful assurance that the detention scheme will be properly applied or that individuals will be able to successfully challenge their erroneous detention. The scheme is not limited to particularly dangerous aliens, such as repeat offenders or those convicted of the most serious crimes. Rather, it applies as well to first-time offenders, to those convicted of relatively minor and nonviolent offenses, and even to individuals with no criminal records at all. Finally, detainees are incarcerated in prison-like conditions (and in many cases, actual prisons), a restriction on liberty that is disproportionately harsh in relation to the INS's regulatory purpose.

A. This Court Has Never Upheld Civil Detention of Unlimited Duration Except in the Context of Civil Commitment Upon a Finding of Both Mental Abnormality and Danger.

With only one exception – civil commitment of those who are both dangerous and possess a medically-certified mental abnormality – this Court has never upheld the kind of prolonged, potentially lifelong civil incarceration at issue here.

This Court explained the rationale for requiring time limits on regulatory detention in *Foucha v. Louisiana*, 504 U.S. 71 (1992), which struck down a Louisiana statute that authorized the potentially indefinite detention of an insanity acquittee based solely on a prediction of dangerousness. This Court rejected the government's argument that, "because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may be held indefinitely." *Id.* at 82. As this Court explained, "[t]his rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill [but dangerous] . . . [and] would . . . be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 82-83.

Thus, it is only when an individual is *both* dangerous and has a mental illness or defect that would render him harmful to himself or the community that detention of indefinite duration has been found to meet the requirements of substantive due process. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness,

standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . . . [therefore] [w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a mental illness or mental abnormality.") (citations and quotations omitted).[4]

In all other contexts where this Court has upheld regulatory detention, the detention has been time-limited. For example, this Court has never upheld immigration detention of deportable aliens except as a temporary means to effectuate deportation. *See Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (emphasizing that "temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"). In *Carlson v. Landon*, 342 U.S. 524 (1952), this Court recognized the Attorney General's undisputed authority to detain aliens she determines to be dangerous *"during the pendency of deportation proceedings." Id.* at 538 (emphasis added). As this Court emphasized in a subsequent case, *Carlson* did not concern long-term detention, but only "whether an alien could be detained during the *customarily brief period* pending determination of deportability." *United States v. Witkovich*, 353 U.S. 194, 201 (1957) (emphasis added).

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[4] The governmental interest in the civil commitment context is two-fold: "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979).

More recently, in *Reno v. Flores*, 507 U.S. 292 (1993), this Court considered the INS's policy of maintaining custody of alien juveniles during the relatively brief period pending deportation hearings in their cases. Although the case did not involve detention in the sense of locked or barred cells – the alien juveniles were confined in licensed juvenile care facilities – this Court nonetheless noted the strictly limited duration of INS custody. "The period of custody [was] inherently limited by the pending deportation hearing, which [was required to] be concluded with reasonable dispatch to avoid habeas corpus." *Id.* at 314 (citations and quotations omitted); *see also id.* ("It [was] expected that alien juveniles [would] remain in INS custody an average of only 30 days.").[5]

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[5] Despite the government's suggestion to the contrary (Pet. Br. 49-50), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), does not support the constitutionality of indefinite post-order detention of undeportable aliens. First, *Mezei* was decided before this Court developed its substantive due process case law in decisions like *United States v. Salerno*, 481 U.S. 739 (1987), *Flores*, and *Foucha*, which applied the excessiveness test enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to the context of civil detention. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 997 (1995) ("Since *Mezei* preceded *Mendoza-Martinez* and *Jackson* [*v. Indiana*, 406 U.S. 715 (1972)], the Supreme Court did not judge Mezei's detention by the reasonableness standard."); *see generally id.* at 991-97. Second, *Mezei* involved the exclusion of an alien based on "danger to the national security." *Mezei*, 345 U.S. at 216; *see also id.* at 210 (noting that "Congress expressly authorized the President to impose additional restrictions . . . during periods of international tension and strife" and that such authority "continues in effect during the present emergency"). Finally, the analysis in *Mezei* began with and centered around Mezei's status as "an alien on the threshold of initial entry" who "stands

Similarly, in the pretrial detention context considered in *United States v. Salerno*, 481 U.S. 739 (1987), this Court held that the Bail Reform Act did not violate substantive due process in part because "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747; *cf. Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring probable cause hearing before pre-trial detention under Fourth Amendment in part because of the "extended restraint of liberty" that even pre-trial detention constitutes). Likewise, the pre-trial juvenile detention statute considered in *Schall v. Martin*, 467 U.S. 253 (1984), passed constitutional muster because "the detention [was] strictly limited in time" (*id.* at 269); "the maximum possible detention" under the statute was "17 days." *Id.* at 270.[6]

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on a different footing" than "aliens who have once passed through our gates." *Id.* at 212; *see also id.* at 213 ("[n]either [Mezei's] harborage on Ellis Island nor his prior residence [in the United States] transform[ed] [that case] into something other than an exclusion proceeding."); *see generally* Brief of Law Professors as *Amici Curiae* Supporting Affirmance (citing to this Court's precedent concerning the long-standing distinction between excludable and deportable aliens, and distinguishing *Mezei* on this and other grounds).

Indeed, only four years after its decision in *Mezei*, this Court narrowly construed a statute placing conditions of supervision on deportable aliens who could not be removed, noting that "supervision of the undeportable alien may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards, even for an alien 'person' would fairly be raised on the Government's view of the statute." *Witkovich*, 353 U.S. at 201.

[6] Even in a case involving detention during time of insurrection – an exigent circumstance not presented by the present case – this Court observed that prolonged detention

More generally, this Court has recognized that the length of detention is necessarily related to the purposes of detention, and that detention that is initially justified by a regulatory purpose may become so lengthy as to be excessive, and hence unconstitutional. In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court considered whether a criminal defendant who could not stand trial because of his incompetency could be indefinitely detained. This Court held that substantive due process required that "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than *the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.*" *Id.* at 738 (emphasis added). After such a "reasonable" time period, "the State must either institute the customary civil commitment proceeding . . . or release the defendant." *Id.*[7]

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might raise a constitutional question. In *Moyer v. Peabody*, 212 U.S. 78 (1909), this Court held that civil detention by a state governor during time of insurrection did not constitute a constitutional violation, while specifically noting that "it may be that a case could be imagined in which the length of the imprisonment would raise a different question." *Id.* at 85; *cf. Ludecke v. Watkins*, 335 U.S. 160 (1948) (denying habeas corpus challenge to removal under the Alien Enemy Act during time of war, but not specifically addressing question of whether a constitutional question would be raised by prolonged detention).

[7] Although the *Jackson* "reasonableness" standard has not been uniformly applied in the lower courts, *Jackson* still stands for the position that detention that is initially constitutional may require additional justification when it becomes unreasonably prolonged. *See generally* 3 Michael J. Perlin, Mental Disability Law § 14.16 (1989 & 1999 Supp.) (surveying post-*Jackson* cases);

Likewise, in *Salerno*, this Court carefully noted that its decision upholding the facial validity of a pre-trial detention scheme of limited duration was entirely consistent with the principle that "detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Salerno*, 481 U.S. at 747 n.4. Recognizing the constitutional significance of that reservation, the lower federal courts have interpreted *Salerno* to mean that substantive due process necessarily places a limit on the length of pre-trial detention.[8]

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see also Weisselberg, *supra* note 5, at 996 n.329 (noting that subsequent to this Court's *Jackson* decision, a number of states, as well as Congress, enacted statutes incorporating the Court's standard, and that courts in some other states "strictly limited the periods of commitment").

[8] *See, e.g., United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) (post-*Salerno* holding that "[i]n determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision[ ] . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future"); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (holding that "we do not believe that due process can tolerate any further pretrial detention in this case."); *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1987) ("[T]he due process limit on the length of pretrial detention requires assessment on a case-by-case basis."); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly."); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986) ("In some cases, the evidence admitted at the initial detention hearing, evaluated against the background of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention.").

B. The INS's Custody Review Procedures Lack the Minimal Procedural Safeguards Necessary to Prevent Erroneous Detention Decisions.[9]

Whenever this Court has upheld civil detention, it has been in the context of a scheme that contains rigorous procedural protections, including: placement of the burden of proof on the government to show that an individual should be detained; an impartial decisionmaker; and a full-blown adversarial hearing. By contrast, the INS's post-order scheme puts the burden of proof on the detainee to show that he should be released; places the release decision in the hands of INS officials rather than an impartial adjudicator independent of the INS; and provides for only a non-adversarial release interview rather than a full-blown hearing. Taken in combination, these procedural flaws often make it impossible for detainees to show that they qualify for release, even under the INS's standards.[10] *See generally* Brief of the *Amici Curiae* Catholic Legal Immigration Network, Inc., Florida Immigrant Advocacy Center, the National Association of Criminal Defense Lawyers, and the Asian Law Caucus in Support of the Judgment Below.

Unlike the INS's detention scheme, the adult pre-trial detention statute upheld in *Salerno* contained "a number

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[9] Because the district court and court of appeals did not rule on procedural due process grounds (*see* Pet. Br. 11 n.5), a procedural due process challenge is not before this Court. However, as in other substantive due process cases, the custody review procedures are relevant to determining whether the detention is excessive in relation to the governmental justifications.

[10] The flaws described in this section are present in the recently promulgated regulations as well as the prior release procedures under which Mr. Ma's custody was reviewed.

of procedural safeguards." *Salerno*, 481 U.S. at 742. Among other things, the detainee in *Salerno* could "request the presence of counsel at the detention hearing" before an impartial adjudicator (a federal judge); "testify and present witnesses in his behalf, as well as proffer evidence;" and "cross-examine other witnesses appearing at the hearing." *Id.* This Court specifically noted in its substantive due process analysis that the government was required to demonstrate by clear and convincing evidence that "no conditions of pretrial release can reasonably assure the safety of the community or any other person." *Id.* at 750.

As in the adult pre-trial detention context, in *Schall*, this Court upheld a statute which provided for civil confinement of juveniles and which contained rigorous release procedures. The statute in *Schall* imposed the burden of proving that detention was necessary on the state; required appointed counsel for the detainee; and envisioned a full-blown adversarial hearing within a maximum of three days after the initial detention. *See Schall*, 467 U.S. at 275-77. In addition, the detention decision was made by an impartial family court judge. *See id.* at 270. Likewise, in *Flores* – which concerned INS custody of alien juveniles pending deportation proceedings – the detention scheme provided for a custody hearing before an immigration judge. *See Flores*, 507 U.S. at 308 (noting opportunity to request hearing before an immigration judge, "a quasi-judicial officer in the Executive Office for Immigration Review").

In the civil commitment context as well, this Court has upheld detention when the review procedures are strong, and struck down detention when the procedures are weak. In ruling that the detention statute in *Hendricks*

was constitutional, for instance, this Court began its analysis by reviewing in detail the procedures that the government was required to follow to place an individual in civil commitment. *See generally Hendricks*, 521 U.S. at 352-53. These procedures included a full-blown trial before a state judge "to determine beyond a reasonable doubt whether the individual was a sexually violent predator." *Id.* at 353. As the Court observed, "[i]n addition to placing the burden of proof upon the State, the [civil commitment] Act afforded the individual a number of other procedural safeguards," including access to the assistance of counsel at public expense and "the right to present and cross-examine witnesses." *Id.*

In contrast, when this Court in *Foucha* struck down the continued detention of an insanity acquittee who was no longer mentally ill but still dangerous, it specifically referenced the procedural flaws of the detention scheme. The Court observed that the scheme was "not carefully limited," in part because "Foucha [was] not . . . entitled to an adversary hearing" and because "the State need prove nothing to justify continued detention . . . for the statute places the burden on the detainee to prove that he is not dangerous." *Foucha*, 504 U.S. at 81-82; *cf. Addington v. Texas*, 441 U.S. 418 (1979) (rejecting civil commitment statute on procedural due process grounds because statute only required a preponderance of the evidence standard of proof, and holding that due process requires a clear and convincing evidence standard).

Compared to the civil commitment procedures considered by this Court in *Hendricks*, or the detailed protections of the Bail Reform Act in *Salerno*, the INS's post-order custody procedures are clearly deficient. The custody reviews are conducted by INS officials rather than

an independent impartial adjudicator like the federal judge in *Salerno* or the state judge in *Hendricks* or even the immigration judge in *Flores*. Moreover, the custody review interview is non-adversarial, taking place solely between the detainee and the INS interviewers, and provides only for submission of written evidence. The detained alien does not have the right to appointed counsel at no cost, only the right to request the presence of counsel that he has retained himself. And, the burden is on the detainee to demonstrate that he poses no danger or flight risk and should therefore be released. Such a requirement stands in stark contrast to the Bail Reform Act or civil commitment statutes, both of which require the government to bear the burden of proof.[11] As a practical matter, the obstacles to meeting this burden are tremendous, especially because most INS detainees are incarcerated in facilities that provide no educational or rehabilitative services. *See infra* pp. 22-23. It is difficult to imagine how an individual who has been deemed dangerous by virtue of his past criminal record could ever

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[11] *See generally Addington*, 441 U.S. at 431-32 (outlining standards of proof of most states' civil commitment statutes). In only one context, the detention of insanity acquittees, is the burden placed on the detainee to show that he qualifies for release. This is so because an insanity acquittal "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." *Foucha*, 504 U.S. at 76 (citations and quotations omitted). "From these two facts, it [can] properly be inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." *Id.* As this Court observed in *Jones v. United States*, 463 U.S. 354 (1983), "insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Id.* at 370.

prove to the INS's satisfaction that he presents no risk of future danger.

C. The INS's Post-Order Detention Scheme Does Not Limit Detention to Only the Most Dangerous Aliens.

Unlike other civil detention schemes, the INS's post-order detention scheme is not limited to a small category of the most dangerous individuals. Rather, it applies to a wide range of deportable aliens, from the most serious recidivist and violent criminals, to first-time offenders and others convicted of relatively minor and nonviolent crimes.

By contrast, in upholding the constitutionality of other civil detention schemes which authorized detention based on a finding of dangerousness, this Court has relied in part on the fact that the schemes permitted the detention of only a small group of individuals. In the pre-trial detention context, for instance, this Court in *Salerno* held that "the incidents of pretrial detention [were not] excessive in relation to the regulatory goal Congress sought to achieve" because "[t]he Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Salerno*, 481 U.S. at 747. The Court cited to 18 U.S.C. 3142(f) (1982 & Supp. III), the provision of the Bail Reform Act which limited pre-trial detention to cases involving "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.* The Bail Reform Act further limits detention to only a subset of even these cases; to order detention, a judge is required to find, by clear and convincing evidence, that

no reasonable alternatives to detention would serve the governmental interests. *See* 18 U.S.C. 3142(e) (2000).

Similarly, in *Hendricks*, the civil commitment statute at issue was addressed to a "*small but extremely dangerous group* of sexually violent predators." *Hendricks*, 521 U.S. at 351 (citing and quoting Kan. Stat. Ann. 59-29a01 (1994)) (emphasis added). In fact, the petitioner in *Hendricks* had committed predatory sexual acts against several young girls and boys over the course of almost twenty years, and testified that "the only sure way that he could keep from sexually abusing children in the future was 'to die.' " *Id.* at 355 (citing and quoting record). In upholding the constitutionality of the Kansas statute, this Court specifically referenced the narrow group – sexually violent predators with mental defects – who could be detained under the statute: "[i]t . . . cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Id.* at 357 (citations omitted).

Far from being limited to a "small but extremely dangerous group" of deportable aliens, the INS's post-order detention scheme applies to individuals with a wide range of criminal convictions. The statute that governs post-order detention, 8 U.S.C. 1231(a)(6) (Supp. IV 1998), allows the INS to detain aliens who are removable under the enumerated provisions of 8 U.S.C. 1227(a)(1)(C), (a)(2), or (a)(4) (Supp. IV 1998). These provisions include individuals whose removal is based on: drug possession (8 U.S.C. 1227(a)(2)(B)(i) (Supp. IV 1998)); receipt of stolen property (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(G) (Supp. IV 1998)); fraud (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(M)(i) (Supp. IV 1998)); tax evasion (8 U.S.C.

1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(M)(ii) (Supp. IV 1998)); and offenses relating to counterfeiting (8 U.S.C. 1227(a)(2)(A)(iii) & 8 U.S.C. 1101(a)(43)(R) (Supp. IV 1998)).

Although the INS could have adopted a construction of the statute limiting its indefinite detention authority to only the most dangerous felons, it has not done so. *See* 65 Fed. Reg. at 80,294 (to be codified at 8 C.F.R. 241.4(a)); *also* Brief of American Association of Jews from the Former USSR et al. as *Amici Curiae*, Supporting Affirmance. The INS's post-order detention scheme thus permits the indefinite detention of undeportable aliens ranging from the most serious recidivist and violent criminals, to first-time offenders such as respondent who were sentenced to relatively short times in jail, to individuals convicted of non-violent offenses.[12]

The regulations also adopt an expansive view of danger, preventing the release not only of aliens who "pose a danger to the community or to the safety of other persons," but also of those who pose a danger merely "to property." 65 Fed. Reg. at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)); *see also* id. at 80, 296 (to be codified at 8 C.F.R. 241.4(f)(8)(iv) (requiring consideration of information probative of whether alien is "likely to . . . [p]ose a danger . . . to property").[13] Such a scheme stands in sharp

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[12] This problem would evaporate if, as *amici* believe, the circuit court correctly interpreted the statute as authorizing detention beyond the removal period for only a reasonable period of time, and thus not applying to individuals such as the respondent who cannot be deported within the reasonably foreseeable future.

[13] The scheme appears to authorize the indefinite detention of non-criminal aliens as well, given that both the post-order

contrast to the narrow civil detention schemes in *Salerno* and *Hendricks*, which were directed at a small set of particularly dangerous individuals.

D. The INS's Detention Scheme Imposes a Restriction on Liberty That Is Disproportionate to the Government's Legitimate Regulatory Purposes.

Post-order INS detainees are incarcerated in conditions that are often worse than those faced by convicted prisoners, even though restrictions on liberty far less severe than incarceration would better reflect the INS's regulatory goals. In upholding other detention statutes and schemes, by contrast, this Court specifically noted the fact that the restriction on liberty closely reflected the regulatory purpose involved.

For example, in the juvenile pre-trial detention scheme considered in *Schall*, this Court gave careful consideration to whether the conditions of detention were tailored to the governmental interest in protecting society, as well as to its *parens patriae* interest in protecting children.[14] Similarly, in *Salerno*, which concerned adult pre-

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detention statute and the INS's regulations apply to aliens who are removable for violating their non-immigrant visa status (*see* 8 U.S.C. 1227(a)(1)(C) (Supp. IV 1998)), and any other alien "who has been determined by the Attorney General to be a risk to the community or [a flight risk]." 8 U.S.C. 1231(a)(6) (Supp. IV 1998); *see also* 65 Fed. Reg. at 80,294 (to be codified at 8 C.F.R. 241.4(a)(2)).

[14] A detained juvenile could not, "absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals." *Schall*, 467 U.S. at 270. Instead, the detained child was placed "in either nonsecure or secure detention facilities." *Id.* at 271. "Nonsecure detention involve[d] an open facility in the community . . . without locks, bars, or

trial detention under the Bail Reform Act, this Court relied on the fact that pre-trial civil detainees were required to be "housed in a 'facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.' " *Salerno*, 481 U.S. at 748 (quoting and citing 18 U.S.C. 3142(i)(2) (1982 & Supp. III)).

Civil commitment cases provide another context in which the detention schemes upheld by this Court have provided for conditions of confinement that reflect the government's regulatory purpose. In *Hendricks*, this Court upheld a statute which required that detainees be "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals." *Hendricks*, 521 U.S. at 368. The statute also provided for treatment when appropriate. *Id*; *see also Jones v. United States*, 463 U.S. 354, 354 (1983) (civil commitment statute required commitment to a state-run mental institution).

Similarly, in *Reno v. Flores*, 507 U.S. 292 (1993), which concerned the custody of alien juveniles pending deportation proceedings, this Court gave careful consideration to whether the conditions of confinement reflected the government's regulatory purpose. The Court noted that the juveniles were not confined "in the sense of shackles, chains, or barred cells," *id.* at 302, but rather were placed

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security officers where the child receives schooling and counseling and has access to recreational facilities." *Id.* Even in "secure detention," moreover, children "[wore] street clothes provided by the institution and [partook] in educational and recreational programs and counseling sessions run by trained social workers." *Id.*

in licensed juvenile care facilities. *Id.* at 298 (noting that these facilities were "not correctional institutions").[15]

In contrast with other civil detention schemes, under the INS's post-order scheme, detainees are incarcerated in conditions that are often far worse than those they faced when serving their criminal sentences. The majority of detainees are housed in facilities that were not intended for long-term civil detainees, such as state and county jails or prisons.[16] These facilities are not required to provide educational or rehabilitative services of any kind.[17]

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[15] These facilities provided "an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure time activities, family reunification services, and access to religious services, visitors, and legal assistance." *Flores*, 507 U.S. at 298.

[16] *See* Julie Sullivan, *Illegal Immigrants Are Dumped Into a Secretive Prison Network*, The Oregonian, Dec. 10, 2000, at A1 (describing the INS's "haphazard network" of public and private prisons with "conditions considered severe even by prison standards.").

[17] The INS recently published a Detention Operations Manual that outlines various modifications to the conditions of confinement for all INS detainees. Even under the new standards, INS detainees continue to be incarcerated in prisons or prison-like conditions. In addition, although the new standards require that INS detainees not be excluded from any work programs that are available at the facilities where they are held, the standards do not require that any such programs be provided in the first instance. Moreover, the standards do not provide for any other kinds of rehabilitative services, including educational programs. Finally, the standards will not even apply to most state or local jails – where the overwhelming number of undeportable aliens are confined – for another two to three years. And, because the INS refused to issue the standards as regulations, it remains unclear to what extent they will be enforceable. *See generally* Detention Operations Manual

As a result, it is difficult for detainees to make the showing of rehabilitation that is often necessary for them to obtain release. *See* 65 Fed. Reg. at 80,295-96 (to be codified at 8 C.F.R. 241.4(f) & (f)(4)) (stating that, in making release decision, INS official "should . . . weigh[ ]" "[e]vidence of rehabilitation . . . where available"); *see also id.* at 80,295 (to be codified at 8 C.F.R. 241.4(d)(1)) (detained alien must "demonstrate[ ] to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or a significant risk of flight").

Restrictions far less severe than incarceration would better reflect the INS's stated regulatory goals of ensuring availability for removal and protecting society pending that process. Section 1231(a), the statute governing the detention and release of aliens with final removal orders, specifically provides for release of undeportable aliens under conditions of supervision – an alternative that more closely reflects the governmental justifications in this case while taking into consideration the liberty interest of aliens who cannot be removed. *See* 8 U.S.C. 1231(a)(3) (Supp. IV 1998) (authorizing continued supervision of aliens who "do[ ] not leave or [are] not removed within the removal period," and directing the Attorney General to promulgate regulations requiring, *inter alia*, periodic appearances before an immigration officer, submission to psychiatric evaluations, and other reasonable restrictions on conduct that the Attorney General prescribes); *see also* 8 C.F.R. 241.5 (2000) (implementing statutory mandate, and enumerating possible restrictions on release).

(Detention Standards) (2000), *available at* http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm.

Congress has also expressly provided for criminal penalties when an alien violates his conditions of supervised release, and when a released individual refuses to appear for removal, fails to make timely application for travel documents, or otherwise engages in conduct that obstructs removal. *See* 8 U.S.C. 1253(b) (Supp. IV 1998) (authorizing imprisonment of up to one year); 8 U.S.C. 1253(a)(1) (Supp. IV 1998) (authorizing imprisonment of up to four or ten years, depending on whether the alien is an aggravated felon).[18]

III. THE SEVERITY OF THE INS'S DETENTION SCHEME IS NOT JUSTIFIED BY THE FACT THAT THE DETAINED INDIVIDUALS ARE ALIENS WHO HAVE BEEN ORDERED DEPORTED.

The government excuses the harshness of the INS's scheme by pointing out that this case involves aliens who have been ordered deported, and by referencing the plenary power of Congress to enact immigration statutes and restrictions. However, regardless of whether this case involves aliens, due process prohibits civil detention when it is excessive in relation to the government's regulatory purpose. Neither of the two interests offered by the government – effectuating removal and protecting society

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[18] In addition, the criminal justice system of the states and the federal government are designed to implement the police power of protecting society, and apply equally to aliens and citizens. *Cf. Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

from dangerous aliens – is sufficient to justify a civil detention scheme so much harsher than any previously sanctioned by this Court.

The government incorrectly contends that, despite the harshness of the scheme, it passes constitutional muster because this Court must review it under a deferential standard due to the plenary power doctrine. While Congress's plenary power in the immigration sphere has been noted by this Court, it is not, as this Court has also recognized, without constitutional limit. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 35 (1982) (subjecting INS's procedures to due process scrutiny); *Wong Wing v. United States*, 163 U.S. 228 (1896) (finding plenary power doctrine not applicable to INS detention that was not for the purpose of effectuating removal). Here, because the likelihood of removal is so attenuated, the government's principal interest in continued detention is protecting the public against danger, an interest that is outside the realm of Congress's plenary immigration power.

A. The Government's Interests in Protecting Society and Effectuating Removal Do Not Justify Detention of Potentially Indefinite Duration.

Examination of each of the INS's justifications for post-final-order immigration detention – protecting society and ensuring removal – reveals that, contrary to the government's argument, neither of these purposes justifies a detention scheme so much harsher than any previously sanctioned by this Court. As discussed earlier, there is only one other context in which this Court has held that detention of indefinite duration passed due process scrutiny: the civil commitment context. *See supra* pp. 7-8. However, the governmental interest that has been found

to justify indefinite detention in the civil commitment context – the heightened police power interest that derives from the link between danger and the existence of a "mental illness" or "mental abnormality" (*see Kansas v. Hendricks*, 521 U.S. 346, 357 (1997)) – is wholly absent in the context of post-final-order immigration detention.

The first governmental interest put forth to justify post-final-order immigration detention – protecting society from dangerous individuals – is essentially the same in the civil commitment and post-final-order immigration contexts. From the perspective of the government exercising its police power to protect society, an individual is equally dangerous to society regardless of whether he is an alien or a citizen. Indeed, the government has never suggested that aliens with criminal convictions who have been ordered deported are any more dangerous than citizens with similar criminal convictions who are at liberty after completing their criminal sentences.

The second governmental interest put forth to justify post-final-order detention – effectuating removal of deportable aliens – is of an entirely different character than the governmental interest in civil commitment of a dangerous individual with a mental illness or mental abnormality. Central to this Court's holding that a mental illness or mental abnormality provides a sufficient basis for indefinite commitment when combined with dangerousness was the fact that a mental illness or mental abnormality "makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* at 357. Thus, the police power is doubly implicated in such cases: a civilly committed individual is both dangerous and has an illness which makes him unable to control his dangerous behavior. In contrast, there is nothing about a

final order of deportation that makes an alien less able to control his behavior, and hence more dangerous, than any other individual who has completed his criminal sentence.[19]

B. The Governmental Interests in the Detention of Undeportable Aliens Are Not of the Kind That Implicate Its Plenary Power Over Immigration.

The government's contention that the plenary power doctrine requires this Court to exercise only deferential review of its post-order detention scheme fails to address the critical issue: the nature of the government's interest in the continued detention of an undeportable alien. *Amici* submit that, although the government's initial purpose in detention is the immigration purpose of effectuating removal, when removal is not reasonably foreseeable, the government's interest takes on a different character. At that point, the government derives its detention authority not from its immigration purpose but from the general law enforcement power of the federal government to protect the public against danger.[20] Because

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[19] If the government believes that an undeportable alien is mentally ill and dangerous, the government may always institute civil commitment proceedings. *See Hendricks*, 521 U.S. at 358; *Jackson*, 406 U.S. at 738.

[20] While the INS has the authority to detain dangerous aliens pending the removal process, this authority does not exist separately and apart from its immigration power to effectuate removal. The government misses the point when it states that the INS has a "distinct interest in protecting the community from aliens who are likely to cause harm if released." Pet. Br. 23. The fact that this interest may be "distinct" does not mean that it survives absent an interest in removal. Moreover, the government's citation to *Carlson v. Landon*, 342 U.S. 524 (1952),

detention for law enforcement – as opposed to immigration – purposes falls outside the sphere of plenary immigration power, it is not entitled to deferential judicial review.

This Court recognized the limits on the plenary power doctrine in *Wong Wing v. United States*, 163 U.S. 228 (1896), which held that Congress cannot enact an immigration statute that punishes aliens, even those with no right to reside in the United States, without a criminal trial. Congress has plenary authority to exclude and expel "undesirable aliens" and to impose "temporary confinement, as part of the means necessary to give effect to [deportation]." *Id.* at 235. However, "to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." *Id.* at 238. The challenged provision in *Wong Wing* – which imposed confinement at hard labor for up to one year on aliens who had been ordered deported – was part of an immigration statute, the purpose of which was to promote Congress's policy of deterring and expelling certain classes of aliens.[21] Nonetheless, the Court held that there

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to support its point is misplaced. This Court made clear in *Carlson* that it was upholding the detention of dangerous aliens "pending deportation hearings." *Id.* at 544; *see also United States v. Witkovich*, 353 U.S. 194, 201 (1957) (noting that *Carlson* concerned "whether an alien could be detained during the customarily brief period *pending determination of deportability.*") (emphasis added).

[21] *See* H.R. Rep. No. 52-255, 52d Cong., 1st Sess. (1892), at 3-4 (noting that provision authorizing imprisonment at hard labor was intended to deter violations of the immigration law).

were limits on how Congress could accomplish its immigration policies.

Thus, when detention becomes too removed from the government's legitimate immigration purpose of effectuating removal, such detention passes out of the sphere of plenary immigration power and is entitled to no more deference than civil detention involving citizens. As this Court has recognized on numerous occasions, even aliens who are not lawfully present in this country are entitled to the protections of the Fifth and Fourteenth Amendments. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (equal protection guarantee of Fourteenth Amendment protects undocumented immigrant children); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (non-resident aliens are entitled to protection from unlawful takings under the Fifth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (equal protection guarantee of the Fourteenth Amendment extends to aliens). The INS's post-order detention scheme must therefore be carefully examined to determine whether it passes Constitutional scrutiny.[22]

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[22] Given that Congress did not expressly authorize in Section 1231(a)(6) the detention of aliens whose removal is not reasonably foreseeable, the INS's decision to authorize such detention in order to protect the public from danger may well exceed its delegated immigration power. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (striking down Civil Service Commission regulation which barred resident aliens from employment in the federal competitive civil service on the grounds that the Commission unconstitutionally assumed the authority that was not "properly the concern of that agency"); *see also Gegiow v. Uhl*, 238 U.S. 3 (1915) (Commission of Immigration exceeded his immigration power in refusing entry to aliens based on his assessment of the labor market of the city where the aliens may have planned to reside).

CONCLUSION

For all of the reasons set forth above, *amici* urge that this Court affirm the circuit court's ruling.

Respectfully submitted,

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