**Constitutionality of Prolonged Mandatory Detention Under § 1226(c) Where Detainee Has Substantial Challenge to Removability**

Petitioner’s prolonged mandatory detention also violates due process because it is unreasonable to impose an irrebuttable presumption of flight risk and danger onto a noncitizen who, like Petitioner, has a substantial challenge to removability. In *Demore*, the Supreme Court upheld the mandatory detention of “a criminal alien who ha[d] conceded that he [was] deportable, for the limited period of his removal proceedings.” 538 U.S. at 511. The Court held that mandatory detention of “deportable criminal aliens” was permissible to address the heightened flight risk and risk to public safety. *Id.* at 518 (emphasizing the government’s “near total inability to remove deportable criminal aliens” and that “deportable criminal aliens who remained in the United States often committed more crimes before being removed”). However, *Demore* left open the question of whether mandatory detention of a noncitizen violates due process if he has a substantial challenge to his removability.

Immigrants who raise substantial challenges to removability are, unlike Mr. Kim in *Demore*, neither “already subject to deportation,” *id.*, nor at risk of “fail[ing] to appear for their removal hearings,” *id.* at 519. On the contrary, they have strong incentives to appear at their proceedings and litigate those defenses. *See Zadvydas*, 533 U.S. at 690 (calling the “justification” of “preventing flight” “weak or nonexistent where removal seems a remote possibility at best”). Nor is the mandatory detention of individuals with substantial challenges to removability reasonably related to Congress’s goal of “protecting the public from dangerous criminal aliens.” *Demore*, 538 U.S. at 515. By enacting statutory forms of relief such as cancellation and adjustment, Congress allowed qualified individuals convicted of less serious offenses the opportunity to reside permanently in the United States.[[1]](#footnote-2) If Congress had viewed those individuals as presenting such as heightened danger to the public as to require their mandatory detention, it would not have made them eligible for permanent relief from removal. See, e.g., *Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778, at \*5 (N.D. Ill. May 03, 2012) (holding that the mandatory detention of a lawful permanent resident to whom the immigration judge had granted new adjustment of status and thereby allowed to remain lawfully in the United States violated due process). Therefore, in contrast to the detention in *Demore*,[[2]](#footnote-3) it is unreasonable to impose an irrebuttable presumption that noncitizens with substantial arguments against deportability categorically present a heightened flight risk or threat to public safety such that they require mandatory detention without an opportunity for bond. *See Tijani v. Willis*, 430 F.3d 1241, 1244–47 (9th Cir. 2005) (Tashima, J., concurring); *Gonzalez v. O’Connell*, 355 F.3d 1010, 1019–21 (7th Cir. 2004); *see also Demore*, 538 U.S. at 578 (Breyer, J., dissenting) (arguing that the “substantial question of law or fact” standard found in the federal bail statute, 18 U.S.C. § 3143(b)(1)(B), should be applied in the immigration context, as it would effectively balance the “special governmental interest in detention” while protecting “a detained alien’s liberty interest”); Gayle v. Johnson, 4 F.Supp.3d 692, 721 (D.N.J. 2014). As Magistrate Judge Brisbois recognized in *Muse*, “It is inconceivable . . . that those doubts [about the constitutionality of indefinite detention in *Zadvydas*] would somehow be less where the individual being detained has actually been granted relief from removal but is still being detained in the absence of an order of removal.” Report & Recommendation, *Muse v. Sessions*, No. 18-cv-0054-PJS-LIB, at \*11 (D. Minn. Apr. 12, 2018), ECF No. 9.

As discussed above, IJ Wood granted Petitioner relief, and the only obstacle to that relief becoming final is an appeal premised upon a theory that the BIA has already squarely rejected. With a substantial challenge to removability, Petitioner has every incentive to appear at his proceedings and to remain law-abiding. Indeed, when IJ Wood granted his application for the waiver, allowing Petitioner to readjust his status, the government conceded that he would not be a danger to the community. At the very least, ICE should be required to make an individualized determination of Petitioner’s flight risk before subjecting him to continued prolonged detention.

1. For example, eligibility for cancellation of removal is predicated on factors such as the absence of an aggravated felony conviction and the length of ties to the community—both of which are factors that correspondingly decrease the risks of flight and danger. See 8 U.S.C. § 1229b(b)(1)(A), (C). Similarly, cancellation for immigrants who are not lawful permanent residents requires a showing of “good moral character,” *id.* § 1229b(b)(1)(B), making it unlikely that an immigrant who qualifies for such relief could present a heightened danger to the public. [↑](#footnote-ref-2)
2. The *Demore* Court notably took it for granted that individuals subject to § 1226(c) would be removed eventually, or at least lose their case. *See, e.g.*, 538 U.S. at 528 (“Such detention necessarily serves the purpose of preventing *deportable* criminal aliens from fleeing prior to or during their removal proceedings.”) (emphasis added); *id.* at 529 (“In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals . . . .”); *id.* at 531 (Kennedy, J., concurring) (“[T]he ultimate purpose behind the detention is premised upon the alien’s deportability.”). [↑](#footnote-ref-3)