

U.S. Immigration and Customs Enforcement (ICE) detains tens of thousands of people each day while they undergo civil immigration proceedings, including recently arrived asylum seekers and community members defending against deportation. **For those detained, ICE detention is indistinct from incarceration — a system comprised of county jails and private prisons under contract with ICE.**

Basic due process protections are unavailable to most in this system, raising serious constitutional concerns. ICE considers *more than half* of those detained to be subject to mandatory detention, with no access to a bond hearing at any time during their immigration court or appellate proceedings.¹ Those who are able to seek release on bond from an immigration judge face an often insurmountable evidentiary burden. Additionally, exorbitant bond amounts mean many remain detained even if granted bond, simply because they are unable to pay.²

The economic and human consequences of immigration detention are stark, including a deleterious impact on physical and mental health.³ As is the case with pre-trial criminal detention,⁴ immigration detention has a negative impact on immigration case outcomes as the stress of detention causes people to abandon their claims to relief. One recent study found people in immigration detention were at least 20% more likely to be deported than someone who was never detained.⁵ Immigration detention also separates community members from their families and loved ones, resulting in community disruption and housing and food insecurity.⁶

Many states are implementing bail reform policies in the criminal legal system in response to data showing pretrial jailing to be costly, racially disparate in impact, and ineffective toward the government's purported goals of ensuring public safety and court appearances.⁷ Indeed, people who are permitted to be in their home while pending trial on a criminal charge have been shown *less likely* to commit new crimes in the future than those who are similarly situated but detained pre-trial.⁸ This is likely due to the destabilizing impact pre-trial detention has on families and communities, a reality equally present in the immigration detention system.

Access to a *fair* hearing to assess the possibility of release is integral to the wellness of those detained, their families and broader communities. Executive action to ameliorate the due process crisis in immigration detention through bond reform is long overdue.

Recommendations to the Department of Homeland Security (DHS) and the Department of Justice (DOJ):

1. DHS and DOJ should take executive action to ensure that people facing prolonged mandatory detention have access to bond proceedings.
2. DHS and DOJ should take executive action to shift the burden to the government in bond proceedings and require the judge to consider a person's ability to pay.

This policy brief outlines five primary due process deficiencies in ICE's current bond system: no-bond detention; unfair and onerous evidentiary burdens; high bonds resulting in detention due to inability to pay; unconstitutionally prolonged detention; and racially disparate outcomes. The brief also presents recommendations to the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to mitigate the ensuing harms.

A due process vacuum: The realities of ICE detention

A patchwork of federal statutes, regulations and jurisprudence operate in tandem to determine who has access to bond hearings while detained by ICE and how those bond hearings operate. The system is arbitrary and harmful in many ways, including: 1) most people in detention have no access to administrative or judicial review of their continued detention; 2) those who can access bond hearings face an unfairly high evidentiary burden; 3) many people remain detained simply because of an inability to pay high bonds; 4) immigration detention often becomes unconstitutionally prolonged; and 5) the harms caused by these failures disproportionately harm Black immigrants.

1. The majority of people in ICE detention never get a bond hearing.

ICE considers nearly 60% of people in its custody — more than 15,000 on any given day as of April 2023 — to be subject to “mandatory detention.”⁹ In practice, these individuals will be held in ICE detention for the duration of their immigration court proceedings, including appeals, without ever having a bond hearing. Because immigration proceedings are often protracted, mandatory detention often means months or years of detention with no definite end date.

ICE considers detention to be mandatory for most recently arrived asylum seekers¹⁰ and most people facing charges of removability arising from a prior criminal conviction.¹¹ The crime-based grounds for mandatory custody (at 8 U.S.C. § 1226(c)) are extremely broad, capturing even long-time green card holders facing deportation charges on the basis, for example, of one marijuana-related conviction.¹²

There is no other area of American law where people can be incarcerated or detained for prolonged periods without an individualized determination of the necessity of such detention. In the criminal legal system, all people are entitled to individualized bail hearings despite the seriousness of the charge.¹³ The very concept of mandatory detention is at odds with constitutional due process protections. In habeas litigation many courts have found that at a certain point mandatory immigration detention becomes presumptively unreasonable and therefore unconstitutional absent an individualized custody determination.¹⁴

Angela is a beloved member of her Chicago community, a trusted employee at a family-owned business, and mother to three boys. After nearly 20 years of residence in the United States, Angela was arrested and detained by ICE in 2021 on the basis of one fraud-related conviction for which she had received a sentence of one day. ICE held Angela in mandatory detention in county jails for ten months without a bond hearing. These long months away from her children were agonizing, especially because Angela's youngest son has complex medical needs. ICE finally released Angela after tremendous pressure from her community and congressional intervention. Angela is still healing from the mental and physical health consequences of her time in detention. “The only thing I want,” Angela says, “is to be with my kids. I just want to have a normal life, be able to walk with my children without worrying that I am going to be picked up again.”

2. Those who can access bond hearings face an unfairly high burden of proof.

Federal immigration law does not specify how the burden of proof should be allocated in bond proceedings; under current practice, however, the burden is placed entirely on the immigrant to prove they do not pose a danger to the community or pose a flight risk.¹⁵ In other words, ICE assumes the

person should remain detained unless they can prove otherwise. The evidentiary burden requires immigrants to prove a negative — that they do *not* pose a safety or flight risk.

This burden is at odds with common practice in the criminal legal system¹⁶ and is particularly onerous for asylum seekers and immigrants in remote detention facilities who are usually unrepresented¹⁷ and face tremendous obstacles to obtaining evidence in support of their release. Making matters worse, in bond hearings ICE attorneys often claim detention is justified on the basis of unadjudicated allegations in notoriously unreliable documents such as police reports and Interpol red notices, and immigration judges largely accept these allegations as true.¹⁸ Regardless of the veracity of the claims made against them, immigrants are often unable to marshal a defense to these prejudicial allegations sufficient to overcome the evidentiary presumption that detention is necessary. It is common for immigration judges to deny bond to people who were just released on their own recognizance by a criminal court judge.

*The unfair burden of proof in immigration bond proceedings had life altering consequences for Alma and her young daughter. Alma had lived in the United States for 18 years when she was arrested in connection with drugs found in her home. Alma explained to the police that the drugs belonged to her daughter's father, who had a history of abuse. **The criminal court judge found that Alma did not pose a danger to the community and ordered her released from jail. But upon release, ICE officers immediately detained her and started deportation proceedings.***

*At her bond hearing before an immigration judge, Alma submitted voluminous evidence of her community ties and family support, but the immigration judge — reaching exactly the opposite conclusion of the criminal court judge — denied bond. With the deck stacked against Alma, the immigration judge accepted the allegations of fact in the police report leading to her criminal arrest as true. Stuck in immigration detention, Alma was unable to appear in her criminal court proceedings. Her daughter's father was also charged and disappeared, **leaving their nine-year-old daughter to suffer a sudden loss of both parents.***

Many immigrants have successfully argued that constitutional due process protections require the government rather than the immigrant to prove dangerousness or flight risk in order to permit continued ICE detention.¹⁹ Indeed, the vast majority of district courts that have ruled on the matter and one circuit court of appeals have found due process to require the government to bear the burden of proof in bond proceedings; another circuit court has reached the same conclusion in the context of prolonged detention; two have found to the contrary; and others have not addressed the issue.²⁰

3. Many people remain in ICE detention because they cannot afford bond.

When immigration judges do consider and set bond, the amount is often prohibitively high. ICE reports the average bond amount to be \$5,760 as of April 2023.²¹ The National Immigration Detention Bond Fund operated by the non-profit organization Freedom for Immigrants has documented immigration bonds ranging from \$1,500 to \$250,000, and finds that “many families cannot afford the high bond amounts set by ICE or immigration judges.”²²

Immigration judges are not currently required to consider a person’s ability to pay when setting bond amounts. The Ninth Circuit Court of Appeals has determined that due process does require immigration judges to consider the financial circumstances of an individual seeking release on bond, as well as possible alternative release conditions.²³ Apart from constitutional considerations, the federal circuit court also noted that consideration of financial circumstances and alternative release conditions aligns with the government’s interests: “Since the government’s purpose in conditioning release on the posting of a bond in a certain amount is to ‘provide enough incentive’ for released detainees to appear in the future,” the decision reads, “we cannot understand why it would ever

refuse to consider financial circumstances: the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person's appearance."²⁴

4. Detention regularly becomes unconstitutionally prolonged without meaningful remedy.

Many people endure extremely prolonged periods of immigrant detention.²⁵ The average length of stay for a person currently in ICE custody is 44.6 days.²⁶ This average, however, fails to reflect the extreme duration of detention for those on the upper-end of the length spectrum: as of this writing there are more than 1,000 people who have been detained by ICE for longer than six months, including 245 people detained for *longer than two years*.²⁷ Particularly in the context of mandatory detention, prolonged detention raises serious constitutional concerns.²⁸ Numerous federal courts have held that “[c]onstitutional difficulties arise ... when detention under § 1226(c) [the mandatory custody provision] ceases to be ‘brief.’”²⁹

Those enduring prolonged immigration detention have very little legal recourse. While it is possible to file a petition for a writ of habeas corpus arguing the unconstitutionally prolonged nature of one's detention, filing and litigating a successful habeas petition in federal court poses insurmountable barriers to many, especially unrepresented individuals who do not speak English. A recent study conducted by Tulane University Law School of nearly 500 immigrant habeas cases in the Western District of Louisiana found that detention has already become extremely prolonged before most people can even make a habeas claim — more than one year on average.³⁰ In most cases, habeas litigation itself becomes protracted, delaying relief and frustrating the ability of many pro se individuals to continue pursuing their case. On average, the Tulane study found, habeas petitions take approximately six months from the date of filing until termination.³¹

5. Due process deprivations are heightened for Black immigrants in ICE detention.

The dearth of due process protections in ICE detention is magnified for Black immigrants. Black immigrants are detained for longer than non-Black immigrants on average, are less likely to be released on bond or parole, and are forced to pay much higher bonds.³² The Refugee and Immigrant Center for Education and Legal Services (RAICES) documented through its own bond program from 2018 through 2020, for example, that bonds paid for Haitian immigrants averaged 54% higher than for other immigrants.³³ Because of structural racism in policing,³⁴ it is inevitable that Black immigrants will be disparately impacted by the imposition of mandatory detention for those with past criminal convictions.

Immigration detention causes disparate harm to Black immigrants in many other ways, too. Of nearly 17,000 calls placed to the Freedom for Immigrants National Immigration Detention Hotline from 2016 through 2021, 28 percent of abuse-related reports came from Black migrants and more than half of the most emergent life-threatening cases where Freedom for Immigrants was compelled to intervene were on behalf of Black immigrants.³⁵

Recommendations

In the absence of congressional action, DHS and DOJ should take immediate steps to address the due process failings, disparate racial impact, and arbitrariness of the immigration bond system.

1. DHS and DOJ should take executive action to shift the burden to the government in bond proceedings and require the judge to consider a person's ability to pay.

DHS and DOJ should revise the federal regulations governing custody determinations and bond proceedings³⁶ to mandate release for people detained under ICE's discretionary authority (8 U.S.C. § 1226(a)) unless the government meets its burden to demonstrate by clear and convincing evidence that the person presents a specific, real and present threat to another identifiable person, or that the person presents a high likelihood of willful flight.

Rulemaking should clarify that immigration judges must consider an individual's ability to pay during bond proceedings, as well as alternative conditions of release.

Alternatively or additionally, the Attorney General should utilize his authority to certify immigration appellate decisions to himself to reverse previous decisions placing the burden on the immigrant in bond hearings³⁷ and affirmatively shift the burden to the government to prove the necessity of continued detention under the standard articulated above. Similarly, the Attorney General should issue a new decision requiring immigration judges to consider ability to pay and alternatives to bond when setting conditions of release.

2. DHS and DOJ should take executive action to ensure that people facing prolonged mandatory detention have access to bond proceedings.

DOJ should publish a new rule in the Federal Register requiring the Executive Office for Immigration Review to schedule individuals for an automatic assessment before an immigration judge when their detention under a mandatory custody provision reaches 90 days. At this assessment, the immigration judge will determine whether detention has become or will likely become unreasonably prolonged, such that due process requires an individualized bond hearing.

Where the immigration judge determines that a bond hearing is required, the government should bear the burden at the bond hearing to show by clear and convincing evidence that the person's continued detention is justified by a risk of willful flight or danger and should be required to consider ability to pay.

Alternatively or additionally, the Attorney General should narrow the scope of those subject to the mandatory custody provision at Section 1226(c) by issuing a new appellate decision clarifying that a person is eligible for a bond hearing if they have grounds to defend against the crime-based charge of removability brought against them or seek relief from removal. Currently, the government considers section 1226(c) to compel mandatory detention so long as immigration prosecutors have some colorable claim for removal.³⁸ But this reading is not prescribed by statute or Supreme Court jurisprudence. The Attorney General should therefore rescind this overly narrow interpretation and issue a new decision clarifying that those with a colorable challenge to the charge of removability brought against them or a colorable claim to relief from removal do not fall within section 1226(c). This decision should place the burden on the government to establish that a person is properly categorized under 1226(c).³⁹

Contact: Heidi Altman, NIJC director of policy, haltman@heartlandalliance.org

ENDNOTES

¹ ICE posts information about the detained population monthly at <https://www.ice.gov/detain/detention-management>. As of March 2023, 59% of those in ICE custody are categorized by ICE as subject to mandatory detention. 8 U.S.C. § 1226(a)(2)(A).

² Federal law provides that at bond hearings for people subject to discretionary detention, immigration judges have the authority to release individuals on conditional parole or on a minimum bond of \$1,500. No additional guidance or scales are provided to immigration judges to guide their bond determinations.

³ M. Von Werthern *et al.*, “The impact of immigration detention on mental health: a systematic review,” *BMC Psychiatry* (2018): 14, <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y>.

⁴ People who are detained pre-trial while facing criminal charges are more likely to be convicted on at least one charge, a disparity attributable to the coercive nature of detention resulting in more guilty pleas among those who would otherwise have been acquitted or had the charges against them dismissed. See, e.g., Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review* 108, no. 2 (2018): 225, <https://www.aeaweb.org/articles?id=10.1257/aer.20161503>; Megan T. Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *The Journal of Law, Economics, and Organization* 34, No. 4 (Nov. 2018): 512, <https://academic.oup.com/jleo/article/34/4/511/5100740>.

⁵ Alyssa Snider, “Unequal Justice Under Law: Effects of Immigration Detention on Removal Case Outcomes,” *Georgetown Law Digital Repository* (2020), <https://repository.library.georgetown.edu/handle/10822/1059579>. See also Ingrid Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, No. 1 (2015): 49, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

⁶ Regina Day Langhout *et al.*, “Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities,” *American Journal of Community Psychology* 62 (July 2018), <https://onlinelibrary.wiley.com/doi/10.1002/ajcp.12256>.

⁷ Laura Bennett, et al., “Bail Reform: What to Know and Where to Go for More,” *Center for Just Journalism* (2023), <https://justjournalism.org/page/bail-reform>.

⁸ *Id.*; Paul Heaton, Sandra Mayson and Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review* 69 (Mar. 2017): 759, <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.

⁹ See n. i, *supra*.

¹⁰ 8 U.S.C. § 1225(b).

¹¹ 8 U.S.C. § 1226(c)(1) requires mandatory custody for people who are inadmissible or deportable on the basis of an enumerated list of most of the crime-based grounds of removability included in sections 1227 and 1182 of Title 8. The crime-based grounds of removability are punishingly overbroad and vague in definition. See Allegra McLeod, “The U.S. Criminal-Immigration Convergence and its Possible Undoing,” *American Criminal Law Review* 105 (2012), <https://scholarship.law.georgetown.edu/facpub/1277>.

¹² 8 U.S.C. §1226(c) (incorporating by reference most of the crime-based grounds of deportability and inadmissibility, including the drug-related grounds of deportability at 8 U.S.C. § 1227(a)(2)(B)).

¹³ See Charles Doyle, “Bail: An Overview of Federal Criminal Law,” *Congressional Research Service* (July 2017): 6-12, <https://sgp.fas.org/crs/misc/R40221.pdf>.

¹⁴ See, e.g., *Muse v. Sessions*, 409 F. Supp. 3d 707, 713 (D. Minn. 2018); *Vargas v. Beth*, 378 F. Supp. 3d 716, 726, 727 (E.D. Wis. 2019) (“Courts in this circuit and across the country regularly grant habeas relief to alien detainees whose mandatory detention without bond pending removal is unconstitutional as applied to them”); *Duncan v. Kavanagh*, 439 F. Supp. 3d 576, 588 (D. Md. 2020) (“Post-Jennings, many courts continue to hold that in order to satisfy due process, § 1226(c) detention must not be unreasonably prolonged.”); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018); *Baez-Sanchez v. Kolitwenzew*, 360 F. Supp. 3d 808, 815-16 (C.D. Ill. 2018).

¹⁵ 8 U.S.C. § 1226, the statute providing DHS the authority to detain immigrants facing removal proceedings, is silent as to the allocation of burden of proof in a bond hearing under section 1226(a). Federal regulations place the burden on the immigrant to prove they are not a danger to property or persons or a flight risk, but only in the context of decision-making by a Department of Homeland Security officer. 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8). The Board of Immigration Appeals has interpreted this regulation to mean that the same allocation of burden should apply in immigration judge bond

proceedings. See *Matter of Adeniji*, 22 I.&N. Dec. 1102 (BIA 1999); *Matter of Guerra*, 24 I.&N. Dec. 37 (BIA 2006) and successive decisions. That reading, however, is not compelled by the statute. See *Hernandez-Lara v. Lyons*, 10 F.4th 19, 49-53 (1st Cir. 2021).

¹⁶ National Conference of State Legislatures, *Legal Presumptions to Guide Courts Making Pretrial Determinations*, updated June 2020, <https://www.ncsl.org/civil-and-criminal-justice/legal-presumptions-to-guide-courts-making-pretrial-determinations>.

¹⁷ As of February 2022, 53% of all people with pending cases in immigration court were not represented. Among those in detention, 73% were unrepresented. TRAC, *Syracuse University, State and County Details on Deportation Proceedings in Immigration Court*, <https://trac.syr.edu/phptools/immigration/ntahist/> (last accessed July 23, 2022).

¹⁸ Jesse Franzblau, National Immigrant Justice Center, *Caught in the Web: the Role of Transnational Data Sharing in the U.S. Immigration System* (2022), <https://immigrantjustice.org/research-items/policy-brief-caught-web-role-transnational-data-sharing-us-immigration-system>; Nayna Gupta, National Immigrant Justice Center, *Prejudicial and Unreliable: the Role of Police Reports in U.S. Immigration Detention and Deportation Decisions* (2022), <https://immigrantjustice.org/research-items/policy-brief-prejudicial-and-unreliable-role-police-reports-us-immigration-detention>.

¹⁹ See, e.g., *Roberto M.D. v. Garland*, No. 21-cv-1343, 2021 WL 7161831, at 10 (D. Minnesota Dec. 29, 2021) (“In conclusion, the Court finds...that there was constitutional error in placing the burden of proof on Petitioner at his bond hearing before the [immigration judge], and that due process requires the Government prove by clear and convincing evidence that his detention is necessary to justify his confinement under Section 1226(a).”; *Pensamiento v. McDonald*, 315 F.Supp.3d 684, 693 (D. Mass, May 21, 2018); *Quintanilla v. Decker*, No. 21 CIV. 417 (GBD), 2021 WL 707062, at 3-4 (S.D.N.Y. Feb. 22, 2021).

²⁰ *Id.* The First and Second Circuit Courts of Appeals have found that due process requires the government to bear the burden in 1226(a) bond proceedings. See *Hernandez-Lara*, 10 F.4th at 41; *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020). The Fourth and Ninth Circuit Courts of Appeals have reached the contrary conclusion. *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1212 (9th Cir. 2022); *Miranda v. Garland*, 34 F.4th 338, 365-66 (4th Cir. 2022).

²¹ ICE posts information about the detained population including bond amounts at <https://www.ice.gov/detain/detention-management>.

²² Freedom for Immigrants, *Freedom for Immigrants’ National Immigration Detention Bond Fund*, <https://www.freedomforimmigrants.org/national-bond-fund> (last accessed July 23, 2022).

²³ *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017). The Fourth Circuit reached the opposite conclusion in *Miranda v. Garland*, 34 F.4th 338, 366 (4th Cir. 2022).

²⁴ *Hernandez*, 872 F.3d at 991.

²⁵ See, e.g., *Rajnish v. Jennings*, No. 3:20-CV-07819-WHO, 2020 WL 7626414, at 9 (N.D. Cal. Dec. 22, 2020) (“The current procedures ... are crucially lacking any mechanism by which, after a reasonably lengthy period of time, a noncitizen’s eligibility for release on bond is reexamined. The closest procedure the respondents can point to is the ability to request reexamination based on changed circumstances. That request can be quickly dismissed and is far from a full hearing. Further, in making that request, the noncitizen bears the burden of convincing an IJ that circumstances have changed.”).

²⁶ ICE posts information about the detained population including in-custody length of stay at <https://www.ice.gov/detain/detention-management>.

²⁷ *Id.*

²⁸ Though the Supreme Court upheld ongoing detention as a statutory matter in *Jennings v. Rodriguez*, the Court explicitly left open the possibility that prolonged detention might violate the constitution. *Jennings v. Rodriguez*, 138 S.Ct. 830, 851 (2018); see also *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (“Our decision today on the meaning of [section 1226(c)] does not foreclose as-applied challenges — that is, constitutional challenges to applications of the statute as we have now read it.”).

²⁹ See n. xiv, *supra*.

³⁰ Laila Hlass, Mary Yanik, et al., Tulane University Law School, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana* (May 2021): 8, <https://law.tulane.edu/sites/default/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf>.

³¹ *Id.* at p. 14.

³² Black Alliance for Justice Immigration et al., *Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD)* 107th Session (Aug. 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/09/US-Coalition-anti-Black-Discrimination-in-Immigration-CERD-Report-072222.pdf>; Refugee and Immigrant Center for

Education and Legal Services (RAICES), *Black Immigrant Lives are Under Attack*, <https://www.raicetexas.org/2020/07/22/black-immigrant-lives-are-under-attack/>.

³³ *Id.*

³⁴ Stanford Open Policing Project, Findings, <https://openpolicing.stanford.edu/findings/>.

³⁵ Black Alliance for Just Immigration, *et al.*, *Uncovering the Truth: Violence and Abuse against Black Migrants in Immigration Detention* (Oct. 2022), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/6358c4c94b39565ec808f049/1666761932698/Uncovering+the+Truth.pdf>.

³⁶ 8 C.F.R. § 1236.1(c)(8); 8 C.F.R. § 236.1(c)(8).

³⁷ *See* n. xv *supra*.

³⁸ *Matter of Joseph*, 22 I. & N. Dec. 799 (1999).

³⁹ This theory has also been raised through litigation. *See, e.g., Tijani, v. Willis*, 430 F.3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J., concurring) (stating that 1226(c) should “apply mandatory detention in a more narrow fashion” only to immigrants who do not have a “substantial” argument against their removability, including threshold challenges and claims to relief). The question of whether a colorable claim to relief from removal is sufficient to remove a person from the scope of section 1226(c) has not been directly addressed by the Supreme Court, but was raised as an open question by the dissenting voices in *Demore v. Kim*, who made the important point that the government has limited interest in detaining a person who will ultimately successfully defend against their deportation. 538 U.S. 510 (2003).