UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CITY OF PHILADELPHIA

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States, in his official capacity,

Defendant.

Civ. Action No. 17-3894
Hon. Michael M. Baylson

AMICI CURIAE BRIEF OF IMMIGRATION LAW SCHOLARS IN SUPPORT OF PLAINTIFF THE CITY OF PHILADELPHIA

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PRELIMINARY STATEMENT

This case concerns the limits on the federal executive branch's authority to commandeer state and local jurisdictions into carrying out federal immigration statutes and regulations. *Amici*, who are listed in Appendix A, are scholars of immigration law. They have an interest in the proper construction and interpretation of immigration statutes and regulations, including those at issue in this litigation. While the parties focus in their post-hearing submissions on broader issues of federal spending power and city funding, *amici* offer this brief to provide additional information to the Court regarding the text and legislative history of the federal mandatory detention statute, and to raise concerns about the use of the term "criminal alien."

As set forth below and in the City's Post-Trial Brief (Dkt. 212), Section 1226(c)(1) of Title 8 of the U.S. Code bears no textual or historical relationship to state and local jurisdictions. Congress crafted section 1226(c)(1) to give direction to the *federal* government—and only the federal government—as to certain classes of noncitizens that may be mandatorily detained. Section 1226(c)(1) is broadly written, and includes noncitizens without a criminal conviction. The use of "criminal alien" in this litigation is problematic because the term does not have a legal definition, and it has been inconsistently applied in the public discourse and by the federal government broadly enough to include those with no criminal history.

ARGUMENT

I. Section 1226(c) Is Irrelevant To This Litigation

Section 1226(c)(1) authorizes the *Attorney General* to take into federal immigration custody noncitizens who are covered by various sections of the Immigration and Nationality Act (INA). By its plain language, the mandatory detention statute applies *only* to the Attorney General and includes no text about states or localities. Section 1226(c)'s instruction that

individuals may be detained only "when . . . released"—including on parole, supervised release or probation—is directed only to the Attorney General; there is no mention of states or localities. For this reason alone, section 1226(c)(1) has no relevance to this case. By contrast, other sections of the INA do include language about states and localities. For example, Section 1373 of Title 8 includes language about information sharing between states and localities and the federal government. Section 1373 explicitly includes state and localities and directs generally that no person or entity may prohibit a government entity from sending to or receiving from the Department of Homeland Security (DHS) information about an individual's immigration or citizenship status. Section 1373 imposes no affirmative obligation on states and localities. In 1996, Congress crafted both section 1226(c) and section 1373, and in so doing was intentional about the inclusion or exclusion of language pertaining to states and localities.

Immigration law scholars, including several *amici,* have written extensively on section 1226(c)'s mandatory detention provision. *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42 (2010); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 Harv. Civil Rights-Civil Liberties L. Rev. 601 (2010); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367 (2006). *Amici* also teach the mandatory detention statute in their immigration law courses and over the years have amassed deep knowledge about the legislative history, text and application of section 1226(c). While the literature and teaching experiences of *amici* on mandatory detention is rich, nowhere do we read or interpret section 1226(c) as imposing an obligation on states and localities to assist with carrying out the federal mandatory detention statute.

Several *amici* have represented immigrants subject to mandatory detention under section 1226(c)(1) and are familiar with how the statute operates on the ground. As a practical matter, noncitizens who are placed into mandatory detention are given an initial custody determination by the Immigration and Customs Enforcement (ICE) agents responsible for their placement in detention. Custodial determinations made by ICE under section 1226(c) can be challenged in what is commonly referred to as a *Joseph* hearing. *See e.g.,* Julie Dona, *Making Sense of 'Substantially Unlikely': An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Georgetown Immigration L. J. 65 (2011); Heeren, *Pulling Teeth*, *supra* at 2. It would be impracticable for any state or locality to handle initial determinations as to whether an individual is subject to mandatory detention under 1226(c). States and localities lack the training to make an initial determination about who is subject to mandatory detention and who is not, and they are outside the administrative apparatus that governs challenges to the mandatory detention classification.

In 1996, Congress crafted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to address a perceived failure by the *federal* government to remove noncitizens who commit crimes in the United States. *See e.g*., Peter H. Schuck and John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 Harv. J. L. & Pub. Pol'y 367, 369 (1999); *see also Demore v. Kim*, 538 U.S. 510, 519 (2003).

Also in 1996, Congress required the former federal Immigration and Naturalization Service (INS) to cooperate with certain federal agencies. *See, e.g.*, Public Law 104-208 Sec. 107(b), 110 Stat. 3009-557 (directing the Attorney General, Secretary of Defense and Secretary of State to cooperate with the Comptroller General of the United States in connection with a report on border strategy); *id.* Sec. 109(a), 110 Stat. 3009-558 (directing the Attorney General,

Secretary of State, Secretary of Agriculture, Secretary of Treasury and representatives of the air transport industry to develop plan for data collection at points of entry).

In contrast, Congress contemplated state and locality involvement in immigration enforcement explicitly in other, limited circumstances. *See e.g.*, 8 U.S.C. §§ 1373, 1357(g), 1226(d). For example, Congress created a section that enables qualified state and local law enforcement to *voluntarily* enter into agreements with the Attorney General and DHS to investigate, apprehend, and detain noncitizens in the United States or otherwise choose to cooperate with federal immigration enforcement, while making it clear that no state or local entity is required to enter into such an agreement. *See* 8 U.S.C. § 1357(g). The statute also requires that the Attorney General and DHS allocate at least 10 full time active DHS agents to each State "to ensure the effective enforcement of this Act," demonstrating Congress' understanding of the federal responsibility to enforce federal immigration law and enforcement priorities. *See* 8 U.S.C. § 1103(f). Similarly, Congress directed the Attorney General and DHS to make resources available to states and localities for the identification of persons convicted of aggravated felonies and to train federal officers to serve as liaisons to states and localities. *See* 8 U.S.C. § 1226(d). That Congress chose to address the role of states and localities in section 1226(d) but remained silent about the same in section 1226(c) underscores the point that when Congress intends to address the coordination between federal and state entities, it does so explicitly and without placing any burden on the state or locality.

For these reasons, *amici* have never read section 1226(c)(1) to impose obligations on states and localities, and for good reason—it defies logic and is impracticable. Finally, interpreting section 1226(c)(1) to require state and localities to place noncitizens into mandatory

detention would raise serious Tenth Amendment concerns. *See Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014).

II. Section 1226(c) Exceeds The Expertise And Capacity Of States And Localities

Even if section 1226(c) were relevant to this case, the statutory language is broad enough to target people who have never been convicted of crime or who even have no criminal history, and would require states and localities to make immigration decisions that transcend their expertise. Congress created one list of offenses for pre-admission conduct, known as "inadmissibility" grounds, and a separate list of offenses for post-entry conduct, known as "deportability" grounds. Both lists are referenced in the mandatory detention statute. The language of 1226(c)(1) subjects to mandatory detention any individual who:

> (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),
>
> (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1). To illustrate the statute's breadth, section 1226(c)(1)(A) cross references inadmissibility grounds for those "convicted of, or who admit[] having committed, or who admit[] committing acts which constitute the essential elements of" a "crime involving moral turpitude" and violations of any law relating to controlled substances. This means a noncitizen can be placed into mandatory detention under section 1226(c)(1) even if she was never convicted of a crime. Thus, even if there were a legal basis for reading section 1226(c) as a tool for states

and localities to make detention decisions, evaluating whether to detain noncitizens would exceed the expertise and capacity of local law enforcement.

III. There Is No Single Definition Of "Criminal Alien"

Just as the term "sanctuary" has no fixed legal definition, the term "criminal alien" is similarly undefined in federal law and policy. William A. Kandel, *Interior Immigration Enforcement: Criminal Alien Programs*, Congressional Research Service, at 2 (2016), *available at* https://fas.org/sgp/crs/homesec/R44627.pdf ("[T]he term 'criminal alien' is not specifically defined in immigration law or regulation, and people use it to refer to several different types of noncitizen offenders."). Restricting cooperation between local law enforcement and federal immigration authorities to cases involving "criminal aliens" would therefore be meaningless. Although the term appears in the headings of 8 U.S.C. §§ 1226(c) and (d), it is not defined in that statute or any other. In fact, the uses of "criminal alien" in those sections highlight its uneven application. Section 1226(c) is titled "Detention of Criminal Aliens" and encompasses a wide range of categories of individuals. By contrast, section 1226(d), titled "Identification of Criminal Aliens," is limited to noncitizens arrested for or convicted of "aggravated felonies" or others subject to "pending criminal prosecution."

Since the enactment of 8 U.S.C. § 1226, the term "criminal alien" has been used by federal administrations to include an ever-expanding and nebulous group of individuals with widely varying backgrounds. Enforcement programs designed to target "criminal aliens" such as Secure Communities, introduced in 2008, eventually expanded to include traffic offenses and "significant misdemeanors," a new category of crimes created by the Obama administration. *See* Angelica Chazaro, *Challenging the 'Criminal Alien' Paradigm*, 63 UCLA L. Rev. 594, 602-605 (2016). Data collected by the Office of Immigration Statistics within DHS under the heading

"Criminal Alien Removals" between 2000 and 2010 included thousands of individuals whose most serious contact with the criminal justice system was a traffic offense. In fact, traffic offenses accounted for the *majority* of the increase in "Criminal Alien" removals in that period. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1218, n.425 (2013). No provision of section 1226(c) addresses traffic offenses, and presumably many individuals accounted for in the DHS data would not have fallen under the mandatory detention provisions. The Office of Immigration Statistic's own website includes a "Definition of Terms" page listing the definition of over a hundred common terms, but "criminal alien" is not included. *See* Department of Homeland Security, Office of Immigration Statistics, Definition of Terms, *available at* https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms.

The uneven use of the term has continued under the current administration. Although the term "criminal alien" is used several times in President Trump's January 25, 2017 Executive Order on immigration enforcement, it is not defined within that Order nor is any citation provided to an existing definition. Exec. Order 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 25, 2017) (the "Order"). The Order does not reference any provision of section 1226. To further complicate matters, the Order instructs the Secretary of Homeland Security to prioritize for removal individuals who fall under a long list of subsections of the federal removal statutes, persons who have been convicted of *any* criminal offense, as well as those who "[h]ave committed acts that constitute a chargeable criminal offense," which would appear to include persons who have not had any contact with the criminal legal system whatsoever. Both within the Order and more broadly, the inconsistent use of the term by the current administration must also be read in the context of racially motivated statements equating

immigration, particularly from Mexico and Central America, with criminality. *See* Annie Lai and Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 Santa Clara L. Rev. 539, 549 (2017) (discussing the racially coded language used by the administration to imply that immigrants are inherently prone to criminal acts).

Finally, in practice, there is no demonstrated correlation between any definition of "criminal alien" and the issuance of immigration detainers or notification requests. More than forty percent of the immigration detainers issued to local law enforcement agencies between 2002 and 2015 were directed to individuals with no criminal convictions. *See* Transactional Records Access Clearinghouse, Tracking Immigration and Customs Enforcement Detainers, *available at* http://trac.syr.edu/phptools/immigration/detainhistory/.[1] As observed by the Court in its May 3, 2018 letter to the parties, the ICE detainer form (I-247A) does not specify any particular removal ground or require ICE officers to provide any evidence of criminal convictions. *See* Dkt. 192. The lack of any consistent definition of "criminal alien," in the federal immigration law or otherwise, makes the term meaningless for any purpose related to this litigation.

CONCLUSION

This brief provides a short description of the text and history of section 1226(c) in order to distinguish it from the roles and responsibilities of states and localities. Congress has never commanded or directed states and localities to help enforce the mandatory detention statute. Further, the term "criminal alien" lacks a legal definition or even application in the statute or the

[1] Data from this website, which track detainers through Freedom of Information Act requests, shows that of the 1,888,490 detainers obtained by TRAC from 2002 – 2015, 839,908 were issued to individuals with no criminal conviction.

public discourse. For these reasons, the Court should deem both section 1226(c) and the term "criminal alien" unrelated to the issues raised in this case.

Dated: June 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ira Neil Richards, hereby certify that on June 5, 2018, I electronically filed the foregoing *Amici Curiae* brief of Immigration Law Scholars using the CM/ECF system, which will send notification of such filing to all parties of record.

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