No. 25-886

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

KEISY G.M.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
JESSICA W. D'ARRIGO
JULIAN M. KURZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Under 8 U.S.C. 1226(c), certain criminal aliens are required to be detained pending a decision on whether they are to be removed from the United States. In *Jennings* v. *Rodriguez*, 583 U.S. 281 (2018), this Court held that Section 1226(c) prohibits the release of such aliens on bond. The Court reserved judgment on various constitutional issues on which it had ordered supplemental briefing, including whether the Due Process Clause requires bond hearings for certain Section 1226(c) detainees and, if so, what kind of bond hearing. Carol Williams Black and Keisy G.M. are two criminal aliens detained under Section 1226(c) for 7 and 21 months, respectively, pending their removal proceedings. The court of appeals held that each alien's detention had become "unreasonably prolonged," such that due process entitled each to a bond hearing with the burden placed on the government to justify the alien's continued detention by clear and convincing evidence. Pet. App. 5a. The questions presented are:

1. Whether G.M.'s case is now moot.

2. Whether there is a point at which an alien's detention under Section 1226(c), pending a decision on whether he is to be removed, becomes "unreasonably prolonged," such that due process requires a bond hearing.

3. If so, whether, in such a bond hearing, due process requires placing the burden on the government to justify the alien's continued detention by clear and convincing evidence.

PARTIES TO THE PROCEEDING

Petitioners (appellees below) are Kenneth Genalo, in his official capacity as Director of the New York Field Office of U.S. Immigration and Customs Enforcement; Todd Blanche, in his official capacity as Acting United States Attorney General; Markwayne Mullin, in his official capacity as Secretary of the U.S. Department of Homeland Security; and Daren K. Margolin, in his official capacity as Director of the Executive Office for Immigration Review.*

Respondent (appellant below) is Keisy G.M.

* Director Genalo, Acting Attorney General Blanche, Secretary Mullin, and Director Margolin are automatically substituted for their predecessors. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Miscellaneous: Page

In the Supreme Court of the United States

No. 25-886

KENNETH GENALO, DIRECTOR OF THE
NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

KEISY G.M.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 103 F.4th 133. The opinion of the district court (Pet. App. 49a-80a) is available at 2021 WL 5567670.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2024. A petition for rehearing was denied on October 24, 2025 (Pet. App. 105a-188a). The petition for a writ of certiorari was filed on January 22, 2026, and granted on June 15, 2026. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The pertinent statutory provision, 8 U.S.C. 1226, is reproduced in the appendix to this brief. App., *infra*, 1a-5a.

INTRODUCTION

The statute at issue in this case, 8 U.S.C. 1226(c), governs the detention of "criminal aliens" while their removal proceedings are pending. Before Congress enacted Section 1226(c), many criminal aliens could seek release from immigration detention on bond. But experience showed that bond hearings failed to prevent substantial numbers of criminal aliens from absconding or further endangering the public after their release. Congress therefore enacted Section 1226(c) to require the government to keep criminal aliens in detention while their removal proceedings are ongoing.

Although this Court rejected a due-process challenge to Section 1226(c) in *Demore* v. *Kim*, 538 U.S. 510 (2003), the court of appeals below held that when such mandatory detention reaches a certain duration (7 months and 21 months in the two cases it addressed), the Due Process Clause requires the very thing that gave Congress concern: a bond hearing. The court further held that, at that hearing, the government bears the burden of demonstrating by clear and convincing evidence that the alien presents a flight risk or a danger to the community.

Those holdings have no basis in the Constitution. Criminal aliens have no *procedural*-due-process right to a hearing on matters that are "not material" to the "statutory scheme." *Connecticut Dep't of Pub. Safety* v. *Doe*, 538 U.S. 1, 4 (2003). Nor do they have any *substantive*-

due-process right to such a hearing where, as here, mandatory detention is rationally related to the legitimate government interests that this Court identified in *Demore*—ensuring that criminal aliens do not "continue to engage in crime" or "fail to appear for their removal hearings." 538 U.S. at 513. Moreover, even if the Constitution required a statutorily unauthorized bond hearing, it would not entitle the alien to a presumption of release—let alone one that could be overcome only by clear and convincing evidence. The judgment below should be reversed.

STATEMENT

A. Legal Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the government can remove from the United States "aliens applying for admission if they are 'inadmissible,' and it can remove already admitted aliens if they are 'deportable.'" *Blanche* v. *Lau*, 146 S. Ct. 1981, 1986 (2026) (citation omitted); see 8 U.S.C. 1229a(e)(2). "The INA specifies the respective grounds of inadmissibility and deportability with which the Government can charge an alien." *Lau*, 146 S. Ct. at 1986; see 8 U.S.C. 1182(a), 1227(a). As applicable here, an already-admitted alien is "deportable" if he has been "convicted of an aggravated felony at any time after admission." 8 U.S.C. 1227(a)(2)(A)(iii).

Except where the INA otherwise specifies, a removal proceeding under 8 U.S.C. 1229a is the "sole and exclusive procedure" for determining whether an alien may be "removed from the United States." 8 U.S.C. 1229a(a)(3). Removal proceedings under Section 1229a generally include a hearing before an immigration judge (IJ) and can include an appeal to the Board of Immigration Appeals (Board). 8 U.S.C. 1229a; 8 C.F.R. 1003.1(d)(1). In removal proceedings, an alien may seek relief from removal, such as asylum or cancellation of removal. See, *e.g.*, 8 U.S.C. 1158, 1229b(a). An alien may also seek protection from removal to a particular country, such as deferral of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

2. The INA contains various provisions authorizing the detention of aliens in connection with their removal. One of those provisions is 8 U.S.C. 1226.

a. Section 1226 empowers the government to "arrest[]" and "detain[]" "an alien" "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1226(a) "sets out the general rule" for Section 1226 detainees. *Nielsen* v. *Preap*, 586 U.S. 392, 397 (2019).[1] Under Section 1226(a), an alien's continued detention is discretionary: The government "may continue to detain" the alien or "may release" him—either on "bond of at least $1,500" or on "conditional parole." 8 U.S.C. 1226(a)(1) and (2).

An officer of the Department of Homeland Security (DHS) initially decides whether to release an alien under Section 1226(a). 8 C.F.R. 236.1(c)(8). An alien dissatisfied with that decision may request a bond hearing before an IJ. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1), 1003.19(b).[2]

---

[1] This case does not present questions about the scope or constitutionality of 8 U.S.C. 1225(b)(2)(A), which mandates the detention of certain aliens who are "applicant[s] for admission." Such questions are presented in the government's pending petition for a writ of certiorari in *Raycraft* v. *Lopez-Campos*, No. 25-1415 (filed June 22, 2026).

[2] Although Section 1226 refers only to the Attorney General, authority under the provision is "shared" by the Attorney General and

Under applicable regulations and agency precedent, the alien bears the burden of justifying his release. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8); *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999).

In determining whether the alien has met that burden, the officer and the IJ consider the alien's dangerousness and flight risk. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8); *Matter of Martinez-Rodriguez*, 29 I. & N. Dec. 656, 657 (B.I.A. 2026). Dangerousness is the risk that, if released, the alien will commit crimes, threaten national security, or otherwise cause harm to persons or property. *Matter of Fatahi*, 26 I. & N. Dec. 791, 793-794 (B.I.A. 2016). Flight risk is the risk that he will not appear for his removal proceedings or, if ordered removed, will not surrender himself for removal. *Matter of C-M-M-*, 29 I. & N. Dec. 141, 144 (B.I.A. 2025).

b. For certain aliens—those "who have committed certain dangerous crimes" or "have connections to terrorism"—Congress concluded that Section 1226(a)'s general rule was "too risky." *Preap*, 586 U.S. at 396. It therefore prescribed a special rule for "criminal aliens" in Section 1226(c). Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, sec. 303(a), § 236(c), 110 Stat. 3009-585 (capitalization omitted). DHS "shall take into custody" such crim-

---

the Secretary of Homeland Security. *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003). Under the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135—which generally transferred the "administration and enforcement" of the INA to the Secretary, 8 U.S.C. 1103(a)(1)—DHS officers "make the initial determination whether an alien will remain in custody during removal proceedings," *D-J-*, 23 I. & N. Dec. at 574 n.3. The Attorney General, however, retains the authorities exercised by immigration courts, including the authority to prescribe bond. *Ibid.*; see 8 U.S.C. 1103(g)(1).

inal aliens, 8 U.S.C. 1226(c)(1), and "may release" them "only" for narrow, witness-protection purposes, 8 U.S.C. 1226(c)(4). Section 1226(c) thus "mandate[s]" their continued detention "without a chance to apply for release on bond or parole." *Preap*, 586 U.S. at 398.

Section 1226(c) applies to five categories of removable criminal aliens. The first three consist of aliens inadmissible or deportable by reason of having committed a covered offense, such as a crime involving moral turpitude or an aggravated felony. 8 U.S.C. 1226(c)(1)(A)-(C). The fourth category encompasses aliens inadmissible or deportable on grounds relating to terrorist activity. 8 U.S.C. 1226(c)(1)(D).[3] And the fifth category—recently added by the Laken Riley Act, Pub. L. No. 119-1, § 2(1)(C), 139 Stat. 3 (2025)—consists of aliens inadmissible on specified grounds who have been charged with, been arrested for, been convicted of, or admitted having committed certain offenses, including any crime resulting in death or serious bodily injury to another person. 8 U.S.C. 1226(c)(1)(E).

A detainee may challenge whether he falls within Section 1226(c) at a so-called *Joseph* hearing before an IJ. 8 C.F.R. 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I. & N. Dec. 799, 805-807 (B.I.A. 1999); *Matter of Kotliar*, 24 I. & N. Dec. 124, 126-127 (B.I.A. 2007). "At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that [DHS] is otherwise substan-

---

[3] Although some aliens who fall within the fourth category, such as "close relatives of terrorists and those who are thought likely to engage in terrorist activity," "may never have been charged with any crime in this country," this brief follows Congress's (and this Court's) lead in referring to all aliens covered by Section 1226(c) as "criminal aliens." *Preap*, 586 U.S. at 399.

tially unlikely to establish that he is in fact subject to mandatory detention." *Demore* v. *Kim*, 538 U.S. 510, 514 n.3 (2003). The alien or DHS may appeal an IJ's *Joseph*-hearing decision to the Board. 8 C.F.R. 236.1(d)(3), 1236.1(d)(3).

3. In *Demore*, this Court rejected a due-process challenge to Section 1226(c), holding that Congress "may require that persons such as [Kim]," a lawful permanent resident convicted of an aggravated felony, "be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513. Subsequently, in *Jennings* v. *Rodriguez*, the Court ordered supplemental briefing on "[w]hether the Constitution requires" that criminal aliens who are detained under Section 1226(c) "be afforded bond hearings" "if detention lasts six months." 580 U.S. 1040 (2016). But the Court ultimately did not resolve that constitutional issue, and it decided only that the statute itself does not authorize such bond hearings. *Jennings* v. *Rodriguez*, 583 U.S. 281, 303-306, 312 (2018).

B. Factual And Procedural Background

1. Keisy G.M. is a citizen of the Dominican Republic, where he was born in 1988. Pet. App. 49a, 193a. In 2011, G.M. was admitted to the United States as a lawful permanent resident. *Id.* at 52a. A year later, he was arrested in the Bronx for attacking a man with a belt and then robbing him. *Ibid.*; 22-70 C.A. App. 67. G.M. was charged with various New York offenses, including second-degree assault for intentionally causing physical injury to another person by means of a deadly weapon or a dangerous instrument. 22-70 C.A. App. 163; see *id.* at 161-166. After pleading guilty, G.M. was convicted and sentenced to two years of imprisonment. Pet. App. 53a. The judgment was affirmed in 2019. *Id.* at 53a n.6.

On October 5, 2020, DHS served G.M. with a notice to appear for removal proceedings under Section 1229a, charging that he was deportable because he had been convicted of an aggravated felony. 22-70 C.A. App. 169-170; see 8 U.S.C. 1227(a)(2)(A)(iii). DHS took G.M. into custody on that same date and informed him of its determination that he was "subject to mandatory detention" under Section 1226(c). Pet. App. 231a; see *id.* at 228a-232a; 8 U.S.C. 1226(c)(1)(B). G.M. did not request a *Joseph* hearing to challenge that determination. See Pet. App. 54a n.7, 231a.

On October 13, 2020—eight days after his arrest by DHS—G.M. appeared at his first removal hearing in immigration court. Pet. App. 54a. G.M. requested an adjournment, which the IJ granted. *Ibid.* After obtaining two more adjournments, G.M. moved to terminate, challenging the evidence of removability. *Id.* at 55a. In December 2020, the IJ denied the motion and found G.M. removable as charged. *Ibid.*; 22-70 C.A. App. 176-181. After another adjournment, G.M. applied for deferral of removal under the CAT, asserting that he would be tortured if he were returned to the Dominican Republic. Pet. App. 55a; 22-70 C.A. App. 186-190. In March 2021, after an evidentiary hearing, a different IJ denied G.M.'s application and ordered his removal to that country, finding insufficient evidence of a likelihood of torture. Pet. App. 56a; 22-70 C.A. App. 183-200. G.M. appealed to the Board. Pet. App. 57a.

In May 2021, while that appeal was pending, G.M. filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in federal district court. 22-70 C.A. App. 7-20. His amended petition, which he filed in June 2021, alleged that his detention under Section 1226(c) had become unreasonably prolonged, in violation of his procedural- and substantive-due-process rights under the Fifth Amendment. Pet. App. 212a-222a. G.M. argued that he was entitled to a bond hearing at which the government would bear the burden of justifying his continued detention by clear and convincing evidence. *Id.* at 225a.

In November 2021, the district court denied G.M.'s habeas petition. Pet. App. 49a-80a. The court noted that G.M. had "been detained for nearly fourteen months." *Id.* at 66a. But the court found "no unreasonable delay by the Government in completing [his] deportation proceeding" and no "reason to think that his continued detention is for any purpose other than to facilitate his deportation." *Id.* at 79a. The court therefore found no violation of G.M.'s due-process rights. *Id.* at 65a-79a.

2. A month later, in December 2021, the Board upheld G.M.'s removability but remanded to the IJ for further consideration of G.M.'s application for CAT protection. 22-70 C.A. Doc. 33-3, at 3-5 (Apr. 25, 2022). Meanwhile, G.M. appealed the district court's habeas denial to the Second Circuit.

In June 2022, while briefing in the Second Circuit was ongoing, the IJ again denied CAT protection. 22-70 Supp. C.A. App. 2. G.M. appealed that denial to the Board. *Id.* at 3. Then, on July 7, 2022, DHS released G.M. from custody pursuant to a nationwide injunction in *Fraihat* v. *ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), which required the release of certain detainees with COVID-19 risk factors. See 22-70 Supp. C.A. App. 4-9. After G.M. was released, the Ninth Circuit issued its mandate reversing the injunction. See *Fraihat* v. *ICE*, 16 F.4th 613, 651 (2021) (*Fraihat II*); C.A. Doc. 93 (July 14, 2022), *Fraihat II*, *supra* (No. 20-55634). Both G.M. and the government agreed that because DHS could "redetain [him] in the future," G.M.'s appeal of the district court's habeas denial was "not moot." 22-70 G.M. C.A. Reply Br. 1 n.1; see 22-70 Gov't C.A. Br. 13 n.4.[4]

3. The Second Circuit agreed to consider G.M.'s habeas case in tandem with that of another criminal alien, Carol Black. Pet. App. 3a. Like G.M., Black was a lawful permanent resident who had been convicted of an aggravated felony, placed in removal proceedings, and detained under Section 1226(c). *Id.* at 81a-83a, 285a-289a. After Black had been detained for approximately seven months, the district court granted his habeas petition challenging his detention on due-process grounds and ordered a bond hearing at which the government would bear the burden of demonstrating "by clear and convincing evidence that [he] poses a risk of flight or a danger to the community." *Id.* at 102a; see *id.* at 81a-104a. An IJ conducted the bond hearing and granted Black release on a $15,000 bond. *Id.* at 7a. The government appealed the district court's decision, and the Second Circuit heard argument in G.M.'s and Black's cases together.

C. The Court Of Appeals' Decision

1. After one member of the panel that heard argument passed away, Pet. App. 2a n.†, the two remaining judges affirmed in *Black* and reversed in *G.M.*, *id.* at 1a-48a.

a. As a threshold matter, the court of appeals held that because Black and G.M. "each remain[ed] subject to possible detention," neither appeal was "moot." Pet. App. 3a. The court acknowledged that G.M. had been

---

[4] G.M.'s appeal is still pending before the Board. Because G.M. has not been in DHS custody since 2022, his proceedings have not received the priority given to cases involving detained aliens. See Executive Office for Immigration Review, U.S. Dep't of Justice, *Policy Memorandum 25-47: Case Priorities and Immigration Court Performance Measures* 2 (Sept. 12, 2025), perma.cc/6cm8-vx9f (noting history of prioritizing "all cases involving individuals in detention").

released from DHS custody pursuant to a nationwide injunction "related to the COVID-19 public health emergency." *Id.* at 4a n.1. But the court noted that the injunction had since been reversed, so the government was "no longer barred by that injunction from detaining G.M." *Ibid.* And the court concluded that "because [the government] has not disclaimed its intent" to "detain him," "G.M. remains 'threatened with an actual injury'" giving rise to "a live controversy under Article III." *Ibid.* (brackets and citation omitted).

b. Turning to the merits, the court of appeals held that Section 1226(c) is unconstitutional as applied to aliens whose detention has become "unreasonably prolonged." Pet. App. 5a. The court stated that when an alien's detention reaches that point, the Due Process Clause requires that the alien be afforded a bond hearing to determine whether he poses a flight risk or a danger to the community. *Id.* at 15a-20a. In the court's view, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), "supplies the proper framework for determining when" an alien is entitled to a bond hearing. Pet. App. 5a; see *id.* at 20a-31a. The court explained that *Mathews* requires a balancing of three factors:

> (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 23a-24a (quoting *Mathews*, 424 U.S. at 335).

Applying those factors, the court of appeals concluded that both aliens' detention under Section 1226(c)—for

7 months in Black's case, and for 21 months in G.M.'s—had become "unreasonably prolonged," such that they could not be further detained without a bond hearing. Pet. App. 39a; see *id.* at 4a. In the court's view, all three *Mathews* factors supported that conclusion. *Id.* at 31a-39a. With respect to the first factor, the court characterized the private interest at stake as "the most significant liberty interest there is—the interest in being free from imprisonment." *Id.* at 31a (citation omitted). With respect to the second *Mathews* factor, it concluded that "almost *any* additional procedural safeguards at some point in the detention would add value," and it described "an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight" as "[t]he most obvious" safeguard. *Id.* at 35a-36a. Finally, with respect to the third *Mathews* factor, the court expressed the view that "additional procedural safeguards" would "do nothing to undercut" the government's interests in "ensuring the noncitizen's appearance at proceedings" and "protecting the community from noncitizens who have been involved in crimes" because, "[a]t any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger." *Id.* at 36a.

c. The court of appeals further held that, in bond hearings for Section 1226(c) detainees whose detention becomes prolonged, due process requires placing the burden on the government to justify the alien's continued detention by clear and convincing evidence. Pet. App. 39a-45a. The court regarded its "analysis above of the first and third [*Mathews*] factors" as applying "with equal force" to its conclusion that the government must bear the burden of persuasion by a heightened standard. *Id.* at 40a. And in "elaborat[ing]" on "the second *Mathews* factor," *ibid.*, the court stated that requiring detainees to "prove that they are *not* a danger and *not* a flight risk" would "present[] too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged," *id.* at 42a-43a.

2. The government petitioned for rehearing en banc, which was denied by the court of appeals. Pet. App. 105a-188a. Judge Nardini, joined by Chief Judge Livingston and Judges Sullivan, Park, and Menashi, dissented from the denial, expressing the view that the panel had erred in requiring the government to justify a Section 1226(c) detainee's continued detention by clear and convincing evidence. *Id.* at 111a-112a. Judge Menashi also filed a dissenting opinion, joined by Chief Judge Livingston and Judges Sullivan and Park, expressing the view that the panel had "provided no persuasive justification for invalidating the congressional policy reflected in § 1226(c)." *Id.* at 130a.

D. This Court's Grant Of Certiorari

The government petitioned for certiorari, seeking review of the court of appeals' due-process holdings. Pet. I. When the government filed its petition, Black's removal proceedings were pending before the Board, where Black had appealed an IJ's decision denying his applications for asylum and withholding of removal and ordering his removal to Jamaica. Pet. App. 7a.

In response to the government's petition, however, Black stated that he had left the United States after the court of appeals' decision, with "no intention of returning," 5/6/26 Letter, Ex. 1, ¶¶ 2, 5; that he was "residing permanently abroad, living in Trinidad part of the time and in Jamaica the remainder," *id.* ¶ 4; and that he had withdrawn his appeal before the Board, Br. in Opp. 30. Black argued that those intervening developments rendered his habeas case moot, *id.* at 30-31, and the government agreed, Cert. Reply Br. 7.

This Court granted the petition for a writ of certiorari as to G.M.'s case only. 2026 WL 1718025, at *1. It also directed the parties to address "[w]hether G.M.'s case is now moot," in "addition to the questions presented by the petition." *Ibid.*

SUMMARY OF ARGUMENT

I. The court of appeals correctly determined that G.M.'s case is not moot. Although G.M. was released from DHS custody pursuant to an injunction entered in a different case, that injunction has since been reversed. The injunction therefore does not bar the government from redetaining G.M. under 8 U.S.C. 1226(c), and there remains a live controversy over the extent to which the Due Process Clause limits the government's authority to do so. Both parties have an ongoing interest in that dispute: While G.M. wishes to avoid redetention, the government wishes to be able to redetain him without having to justify his further detention by clear and convincing evidence at a bond hearing.

II. The court of appeals erred in holding that the Due Process Clause entitles G.M. to a bond hearing.

A. G.M. has no procedural-due-process right to a bond hearing. Under Section 1226(c)(1), G.M.'s further detention rests solely on the determination that he is a criminal alien. G.M. does not challenge the procedures for making that determination. Instead, he contends that due process prohibits his further detention absent a different determination—a determination that he does not present a risk of flight or danger. But G.M. has no procedural-due-process right to a hearing on something different from the determination that the statute requires. See, *e.g.*, *Connecticut Dep't of Pub. Safety* v. *Doe*, 538 U.S. 1, 8 (2003). Because any claim to such a hearing must be analyzed in terms of substantive, not procedural, due process, the decision below erred in analyzing G.M.'s claim under the procedural-due-process framework of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

B. G.M. also has no substantive-due-process right to a bond hearing. In rejecting a substantive-due-process challenge to Section 1226(c) in *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court declined to apply heightened scrutiny, for good reason: Section 1226(c) does not implicate any fundamental rights. Accordingly, rational-basis review applies.

Demore makes clear that Section 1226(c) is rationally related to two legitimate government interests: (1) ensuring that criminal aliens appear for their removal proceedings and, if ordered removed, for their removal; and (2) ensuring that criminal aliens do not continue to engage in crime while their removal proceedings are pending. 538 U.S. at 513. In Congress's view, permitting release on bond would unduly undermine those interests. Experience showed that bond hearings produced a substantial number of false negatives—*i.e.*, releases of criminal aliens on bond based on erroneous predictions that they would not abscond or commit more crimes. Given that experience, Congress rationally determined that permitting release on bond was too risky in cases involving criminal aliens.

Contrary to the court of appeals' conclusion, Section 1226(c) does not become unconstitutional when detention reaches a certain duration. Neither the legitimacy of the government's interests, nor the relationship between those interests and mandatory detention, diminishes over time. Even so, detention under Section 1226(c) is not unlimited. The statute itself specifies a definite termination point: the conclusion of removal proceedings. Moreover, this Court has cautioned that an alien's detention would "no longer bear[] a reasonable relation to the purpose for which [he] was [detained]" if his removal were "no longer practically attainable." *Demore*, 538 U.S. at 527 (citation omitted). Here, however, G.M.'s removal remains practically attainable, so the application of Section 1226(c) is rationally related to the legitimate government interests identified in *Demore*.

III. Even if the Due Process Clause required a bond hearing for a criminal alien detained under Section 1226(c), the court of appeals erred in holding that the government must bear the burden of justifying continued detention by clear and convincing evidence. There is no historical or other basis for reading such a presumption of release into the Constitution. Nor is there any justification for making the presumption rebuttable only by clear and convincing evidence, which would substantially increase the risk of false negatives—the very concern that led Congress to enact Section 1226(c) in the first place.

ARGUMENT

I. G.M.'S CASE IS NOT MOOT

The government and G.M. dispute the extent to which the Due Process Clause limits the government's authority to detain him under 8 U.S.C. 1226(c). That dispute presented a live controversy at the outset of the case, and it "continues to present a live controversy" to this day. Pet. App. 4a n.1. Accordingly, G.M.'s case is not moot.

A. The Court Of Appeals Correctly Held That G.M.'s Case Is Not Moot

The Constitution grants federal courts jurisdiction to decide "Cases" or "Controversies." U.S. Const. Art. III,

§ 2. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

As the court of appeals correctly recognized, G.M.'s case is not moot. Pet. App. 4a n.1. Although G.M. was released from DHS custody for COVID-related reasons pursuant to a nationwide injunction in a different case, that injunction has since been reversed by the Ninth Circuit. See *ibid.*; p. 9, *supra*. Because the government is "no longer barred by that injunction from detaining G.M.," Pet. App. 4a n.1, the parties' dispute over the extent to which due process limits the government's authority to detain G.M. remains live. G.M. has an ongoing interest in that dispute because he wishes to avoid redetention. See 22-70 G.M. C.A. Reply Br. 1 n.1. And the government has an ongoing interest in the dispute because it wishes to be able to redetain G.M. without having to justify his further detention by clear and convincing evidence at a bond hearing. See Pet. App. 4a n.1 (noting that the government "has not disclaimed its intent" to "detain him"). Thus, the government has "vigorously defend[ed]" its authority under Section 1226(c) to detain G.M. without a bond hearing. *West Virginia* v. *EPA*, 597 U.S. 697, 720 (2022) (citation omitted). If this Court were to rule in the government's favor, the government "would likely" redetain G.M. under Section 1226(c), while his removal proceedings remain ongoing. *Mullin* v. *Al Otro Lado*, 146 S. Ct. 2079, 2090 n.7 (2026) (citation omitted).

The Court exercised jurisdiction under similar circumstances in *Nielsen* v. *Preap*, 586 U.S. 392 (2019). That case, like this one, involved aliens who filed habeas petitions to challenge their mandatory detention under Section 1226(c). *Id.* at 400. While their cases were pending in district court, the aliens obtained "release on bond" pursuant to a "preliminary injunction in a separate case." *Id.* at 403 (plurality opinion). But because that injunction was later "dissolved," the aliens "faced the threat of re-arrest and mandatory detention." *Ibid.* The plurality therefore concluded that the dispute over the legality of the aliens' further detention was not moot. *Ibid.* Because G.M. faces a similar "threat of re-arrest and mandatory detention," *ibid.*, the dispute over the legality of his further detention is likewise not moot.

The Court's decision in *Al Otro Lado* reinforces that conclusion. In *Al Otro Lado*, the government sought review of a declaratory judgment "bar[ring]" it from "metering" the inspection of aliens at ports of entry "to help deal with border surges." 146 S. Ct. at 2090 n.7. "Although the Government ha[d] rescinded the metering policy," it was not "'absolutely clear' that the Government would not 'reimpose' metering if it could." *Ibid.* (citation omitted). "To the contrary," the government had represented that it "'would likely resume the use'" of metering "'as soon as changed border conditions warranted.'" *Ibid.* (citation omitted). The Court concluded that "[t]he controversy remain[ed] live because a ruling for the Government" would "give the Government 'effectual relief'" by clearing the way for it to reimpose metering. *Ibid.* (citation omitted). Likewise here, a ruling for the government would give the government "effectual relief" by clearing the way for it to redetain G.M. without having to justify his further detention by clear and convincing evidence at a bond hearing. *Ibid.* (citation omitted). As in *Al Otro Lado*, "[t]he controversy remains live." *Ibid.*

B. Since The Court Of Appeals' Decision, Nothing Has Changed

Unlike in Black's case, there have been no intervening developments that could render G.M.'s case moot. In fact, further proceedings in the district court underscored the continuing existence of a live controversy.

After the court of appeals remanded G.M.'s case to the district court, the parties filed letter briefs addressing whether there was anything left for the district court to do. G.M. argued that the court of appeals' decision entitles him to notice and a hearing *before* the government redetains him under Section 1226(c), and that the district court should enter an order to that effect. See D. Ct. Doc. 58, at 4-9 (Jan. 16, 2026). In contrast, the government argued that the court of appeals' decision entitles G.M. to a bond hearing only *after* he is redetained, and that no further district-court action was necessary. See D. Ct. Doc. 59, at 2-4 (Jan. 16, 2026); D. Ct. Doc. 52, at 2 (Nov. 24, 2025).

In disputing the implications of the court of appeals' decision and the extent to which due process limits the government's authority, both parties recognized that this case continues to present a live controversy. In his letter brief, G.M. explained that because the government "will not disavow redetaining" him, he "remains at risk of redetention" under Section 1226(c). D. Ct. Doc. 58, at 3. Relying on the plurality's reasoning in *Preap*, G.M. maintained that the threat of redetention "suffices to present a live controversy." *Ibid.* G.M. thus informed the district court that "[u]ntil and unless the government disclaims its intent to detain [him] under § 1226(c), this case is not moot." *Ibid.*

In its own letter brief, the government agreed that "[t]his case 'continues to present a live controversy.'" D. Ct. Doc. 59, at 2 (citation omitted). The government acknowledged that it had previously suggested at a status conference before the district court that "this case may be moot at least in some respects." *Id.* at 2 n.1. But the government explained that "on further review," it "ha[d] determined there remains a live case." *Ibid.* Moreover, the government's main point at that status conference was simply that, given the issues the court of appeals had already decided, "there [wa]s nothing left for [the district court] to do." 21-cv-4440 12/9/25 Conference Tr. 2; see *id.* at 3-5. The government never suggested that those issues were moot or that this Court would lack jurisdiction to review them. *Id.* at 2-3, 19-20.

C. If This Court Concludes That G.M.'s Case Is Moot, It Should Vacate The Judgment Below

If this Court concludes that G.M.'s case is moot, then the case was also moot at the time of the court of appeals' decision, and that court lacked jurisdiction to adjudicate the merits of his case. Accordingly, if this Court concludes that G.M.'s case is moot, it should vacate the court of appeals' judgment in his case. See *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 394 (2018).[5]

---

[5] The court of appeals entered a separate judgment in Black's case. 20-3224 C.A. Doc. 227-1 (Oct. 31, 2025). Although Black's case otherwise would have warranted this Court's review, it became moot as the result of the voluntary action of the party who prevailed below. See pp. 13-14, *supra*. The Court should follow its "established practice" in such circumstances and "vacate the judgment" in Black's case. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see *Azar* v. *Garza*, 584 U.S. 726, 729 (2018) (per curiam).

II. G.M. IS NOT ENTITLED TO A BOND HEARING UNDER THE DUE PROCESS CLAUSE

With one exception not relevant here, Section 1226(c) mandates the continued detention of certain criminal aliens while their removal proceedings are pending. *Jennings* v. *Rodriguez*, 583 U.S. 281, 303-304 (2018). By its terms, Section 1226(c) prohibits the release of such aliens on bond. *Id.* at 304. According to G.M., that prohibition is unconstitutional as applied to him and other aliens who have been detained under Section 1226(c) for a "prolonged" period. Pet. App. 4a. The court of appeals agreed, holding that the Due Process Clause entitles such aliens to bond hearings that could result in their release within the United States. *Id.* at 5a. But such aliens have no procedural- or substantive-due-process right to bond hearings.

A. G.M. Has No Procedural-Due-Process Right To A Bond Hearing

Section 1226(c) mandates the continued detention of certain aliens based on a particular determination—namely, that they fall within one of Section 1226(c)(1)'s categories of removable criminal aliens. See p. 6, *supra*. G.M. does not challenge the procedures for making that determination. Instead, he contends that the Due Process Clause prohibits his further detention absent a different determination—an individualized determination that he presents a risk of flight or danger. Pet. App. 208a, 225a. Because that determination is substantively different from the one the statute requires, his challenge sounds in substantive, not procedural, due process. G.M. thus fails to state a procedural-due-process claim at all, and the court of appeals erred in analyzing his challenge under a procedural-due-process framework. *Id.* at 5a, 20a-39a.

1. G.M. fails to state a procedural-due-process claim

The Constitution prohibits any government in this country from "depriv[ing]" a "person" of "life, liberty, or property, without due process of law." U.S. Const. Amend. V; see *id.* Amend. XIV, § 1. This Court has recognized two types of due-process claims. See *Washington* v. *Harper*, 494 U.S. 210, 219-220 (1990). A *procedural*-due-process claim takes as given the substantive determination that would justify a deprivation of life, liberty, or property, but challenges the "adequacy of the[] procedures" for making that determination. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). In contrast, a *substantive*-due-process claim challenges the substance of the determination itself, alleging that it is inadequate to justify the deprivation "*at all*." *Reno* v. *Flores*, 507 U.S. 292, 302, 306 (1993); see *Harper*, 494 U.S. at 220.

The deprivation at issue here consists in G.M.'s further detention pending the conclusion of his removal proceedings. Section 1226(c) specifies the substantive determination that Congress deemed adequate to justify that deprivation: a determination that G.M. falls within one of Section 1226(c)(1)'s categories of criminal aliens. 8 U.S.C. 1226(c)(1). Although Section 1226(c)(4) permits release from detention for narrow, witness-protection purposes, that exception is not applicable to G.M. 8 U.S.C. 1226(c)(4). Accordingly, his further detention rests solely on the determination that he is a criminal alien under Section 1226(c)(1).

G.M. does not challenge the adequacy of the procedures for making that determination. He has never even requested a *Joseph* hearing, and he does not dispute that his prior conviction makes him such a criminal alien. See 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(iii); Pet. App. 60a-61a, 190a; pp. 6-8, *supra*.

Instead, G.M. contends that the determination that he is a criminal alien is inadequate to justify his further detention. Pet. App. 4a. In G.M.'s view, further detention can be justified only by a substantively different kind of determination—an individualized determination that he presents a risk of flight or danger. *Id.* at 208a, 225a. To be sure, G.M. contends that additional *procedures* in the form of a bond hearing are necessary. *Id.* at 225a. But that hearing is merely the proposed means of making the *substantive* determination about flight risk and dangerousness that G.M. views as constitutionally required.

G.M. therefore fails to state any procedural-due-process claim at all. G.M. is not challenging the adequacy of the procedures for making the criminal-alien determination called for by the statute. Rather, he is challenging the substance of the determination itself, arguing that his criminal-alien status is inadequate to justify his further detention. G.M.'s claim thus sounds in substantive, not procedural, due process, and he can prevail on his claim only if he can establish a substantive-due-process violation.

2. This Court's precedents confirm that G.M. fails to state a procedural-due-process claim

This Court's decisions make clear that G.M.'s claim sounds in substantive, not procedural, due process. The Court has repeatedly recognized that a person has no procedural-due-process right to a hearing on a "different set of determinations than those set forth in the" challenged law. *Harper*, 494 U.S. at 220.

Connecticut Department of Public Safety v. *Doe*, 538 U.S. 1 (2003), for example, involved a statute requiring sex offenders to register with the State so that their information could be published on a sex-offender registry. *Id.* at 4-5. The statute required someone to register based solely on a determination that he had been previously convicted of a covered offense. *Id.* at 4. Doe did not challenge the procedures for making that determination. Instead, he claimed that the statute violated his procedural-due-process rights by requiring him to register without any "hearing to determine whether" he was "'currently dangerous.'" *Ibid.* (citation omitted); see *id.* at 8.

This Court rejected that claim. *Doe*, 538 U.S. at 7. The Court held that "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Id.* at 8; see *id.* at 4 ("[D]ue process does not require the opportunity to prove a fact that is not material to the State's statutory scheme."). But what Doe sought to establish—that he was "not currently dangerous"—was "of no consequence" under the statute, which required him to register based on his prior conviction alone. *Id.* at 7. Because "any hearing on current dangerousness" would be "a bootless exercise" under the statute's "*substantive* rule of law," the Court held that Doe's *procedural*-due-process claim failed: Any claim to a hearing "'must ultimately be analyzed' in terms of substantive, not procedural, due process." *Id.* at 7-8 (citation omitted); see *id.* at 8-9 (Scalia, J., concurring) (explaining that if a statute provides that "no one under the age of 16 may operate a motor vehicle," "a 15-year-old" has no "right to 'process' enabling him to establish that he is a safe driver").

This Court reached a similar conclusion in *Reno* v. *Flores*, *supra*. That case involved a statute that granted the Attorney General "broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing." *Flores*, 507 U.S. at 294-295. In exercising that discretion, the Attorney General promulgated a regulation governing the "detention and release of juvenile aliens." *Id.* at 297 (citation omitted). That regulation provided that juvenile aliens should be released to certain approved custodians (such as a parent, legal guardian, or adult relative) or otherwise placed in a government-operated or government-selected child-care facility. *Id.* at 297-298. A class of juvenile aliens who lacked approved custodians challenged the regulation, claiming that each of them had a "'procedural due process'" right to an individualized hearing on something else: whether "release to some other 'responsible adult'" would be in the juvenile's "best interests." *Id.* at 300; see *id.* at 296, 303. The Court rejected that challenge, explaining that it was "just [a] 'substantive due process' argument recast in 'procedural due process' terms." *Id.* at 308.

The Court rejected a similar procedural-due-process challenge in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989). The statute in that case established a conclusive presumption that "a child born to a married woman living with her husband" is "a child of the marriage." *Id.* at 113 (plurality opinion); see *id.* at 117-118. Claiming to be the father of "a child born to the wife of another man," *id.* at 113, Michael H. challenged the statute on "procedural due process" grounds, arguing that it deprived him of a relationship with his child "without affording him an opportunity to demonstrate his paternity in an evidentiary hearing," *id.* at 119. A majority of the Court concluded that Michael H. had no "procedural due process" right to such a hearing. *Id.* at 121; see *id.* at 132-133 (Stevens, J., concurring in the judgment) (agreeing with the plurality that "the Federal Constitution imposes no obligation upon a State to 'declare facts unless some legal consequence hinges upon the requested declaration'") (citation omitted). The plurality recognized that the statute was "phrased in terms of a presumption," but it explained that the presumption was "the implementation of a substantive rule of law"—namely, that the State had made it "*irrelevant* for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him." *Id.* at 119 (plurality opinion). The plurality therefore concluded that Michael H.'s challenge to the statute "must ultimately be analyzed" in terms of "substantive," not "procedural," due process. *Id.* at 121.

The same is true here. G.M. contends that he has a procedural-due-process right to a bond hearing assessing whether he is a flight risk or danger. But under the statute's text, the only fact that matters is his prior conviction for an aggravated felony, which makes him a removable criminal alien subject to mandatory detention. See 8 U.S.C. 1226(c)(1)(B), 1227(a)(2)(A)(iii). As in *Doe*, *Flores*, and *Michael H.*, any claim that G.M. is entitled to a hearing about something else must be analyzed in terms of substantive, not procedural, due process.

3. The court of appeals erred in analyzing G.M.'s claim under **Mathews**

Because G.M.'s claim sounds in substantive, not procedural, due process, the court of appeals erred in applying *Mathews* v. *Eldridge*, *supra*, to his claim. Pet. App. 24a-26a. *Mathews* articulates a three-pronged balancing test for analyzing certain "[p]rocedural due process" claims. 424 U.S. at 332; see *Nelson* v. *Colorado*, 581 U.S. 128, 134 (2017); *Schall* v. *Martin*, 467 U.S. 253, 264, 274 (1984). But that test has no application in the realm of substantive due process. After all, *Mathews* takes as given the "nature of the relevant inquiry," 424 U.S. at 343, and asks only whether the "procedures" for conducting that inquiry are adequate, *id.* at 335. *Mathews* has no application where, as here, a party seeks a different inquiry altogether.

Mathews itself illustrates the point. The statute there provided Social Security benefits to workers during periods in which they were "disabled." *Mathews*, 424 U.S. at 323. Those benefits would terminate upon a determination that a worker was no longer "disabled." *Id.* at 336. The issue before the Court was the adequacy of the procedures for making that determination—specifically, whether the Due Process Clause required that, "prior to the termination" of benefits, the worker "be afforded an opportunity for an evidentiary hearing" on whether he was no longer disabled. *Id.* at 323. *Mathews* did not involve any challenge to the disability-based standard for terminating benefits, and the three-pronged test that the Court articulated was not meant to address such a substantive challenge. After all, the second prong calls for an assessment of "the risk of an erroneous deprivation * * * through the procedures used," and assessing that risk assumes the availability of a substantive standard for what counts as "erroneous." *Id.* at 335. The second prong thus takes as given the substantive standard in the challenged law—as *Mathews*' own application of the second prong shows. See *id.* at 343-347 (using the statute's standard for determining whether a worker is no longer "disabled").

Here, however, G.M. does not take as given the substantive standard for justifying his further detention under Section 1226(c). Instead, G.M. contends that the Due Process Clause requires a determination about his flight risk or dangerousness—a determination substantively different from the one the statute specifies. Because that is a substantive, rather than procedural, due-process challenge to what Congress enacted, the court of appeals erred in treating *Mathews* as the applicable test.[6]

B. G.M. Has No Substantive-Due-Process Right To A Bond Hearing

When analyzed in terms of substantive due process, G.M.'s challenge to Section 1226(c) fails. In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court considered a "substantive due process" challenge to the same statute. *Id.* at 515. Kim made the same argument that G.M. makes here: "that his detention under § 1226(c) violated due process because the [government] had made no determination that he posed either a danger to society or a flight risk." *Id.* at 514. The Court rejected that argument and upheld the application of Section 1226(c) to "persons such as [Kim]" during "the brief period necessary for their removal proceedings." *Id.* at 513; see *id.* at 531. The Court should likewise uphold the application of Section 1226(c) here.

1. Rational-basis review applies to G.M.'s substantive-due-process challenge

When the Court considers whether a statute deprives someone of "liberty" in violation of substantive due process, the Court usually applies rational-basis review. *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997). Only when the "liberty" at issue rises to the level of a "fundamental" right is it entitled to "heightened protection" in the form of strict scrutiny. *Id.* at 720, 722; see *Department of State* v. *Muñoz*, 602 U.S. 899, 910 (2024);

---

[6] The court of appeals' analysis of the *Mathews* factors—which drove both of its due-process holdings, Pet. App. 40a—also fails on its own terms. See pp. 45-46, *infra*.

Flores, 507 U.S. at 305. Under strict scrutiny, a statute faces a presumption of unconstitutionality, and the government can overcome that presumption only by showing that the statute is the "least restrictive means" of achieving a "compelling" government interest. *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 607 (2021) (citation omitted).

Demore forecloses any suggestion that strict scrutiny applies here. In rejecting a substantive-due-process challenge to Section 1226(c), the Court in *Demore* did not apply any form of "heightened, substantive due process scrutiny." 538 U.S. at 549 (Souter, J., concurring in part and dissenting in part) (citation omitted). To the contrary, the Court held that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.* at 528 (majority opinion). The Court also did not apply any presumption of unconstitutionality. Instead, the Court emphasized Congress's "broad power over naturalization and immigration," *id.* at 521 (citation omitted), and reiterated the Court's longstanding view that "detention during deportation proceedings" is "a constitutionally valid aspect of the deportation process," *id.* at 523; see *id.* at 523-529 (discussing decisions from 1896, 1952, 1993, and 2001).

The Court in *Demore* declined to apply strict scrutiny for good reason: Section 1226(c) does not implicate any fundamental rights. In determining whether a liberty interest ranks as fundamental, the Court conducts a "two-step inquiry." *Muñoz*, 602 U.S. at 910. The first step insists on "a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it is] asked to break new ground in this field.'" *Flores*, 507 U.S. at 302 (brackets and citation omitted). The second step asks whether the asserted right is "objectively, deeply rooted in this Nation's history and tradition." *Muñoz*, 602 U.S. at 910 (citation omitted). Only if the right meets that test does its deprivation trigger strict scrutiny.

Here, a suitably careful description of the asserted right requires identifying both *who* is asserting the right and *what* he is asserting. With respect to *who*, the asserted right is one that purportedly belongs to aliens who have been found to be "inadmissible" or "deportable" by DHS, 8 U.S.C. 1226(c)(1)(A)-(E), and who have been detained pending a decision on their removal. With respect to *what*, the right being asserted is not *a right to be free from detention*, for aliens in removal proceedings can achieve that freedom on their own, by simply withdrawing their objections to removal to another country. See Pet. App. 139a (Menashi, J., dissenting) (explaining that a Section 1226(c) detainee "has the keys in his pocket" and can "end his detention immediately" by withdrawing any objections to removal) (citation omitted); *Banyee* v. *Garland*, 115 F.4th 928, 933 (8th Cir. 2024) (same); *Richardson* v. *Reno*, 180 F.3d 1311, 1317 (11th Cir. 1999) (similar), cert. denied, 529 U.S. 1036 (2000); *Parra* v. *Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (same). Nor is it *a right to be at liberty in the United States*, for there is no dispute that an alien in removal proceedings could be deprived of that liberty upon a determination, at a bond hearing, that he presents a flight risk or danger. Instead, the asserted right is the right of an inadmissible or deportable alien, detained pending a decision on removal, to a bond hearing—followed by his release into the United States if there is no determination that he presents a flight risk or danger. Cf. *Flores*, 507 U.S. at 303 (describing an asserted "right to an individualized hearing on whether private placement would be in the child's 'best interests'—followed by private placement if the answer is in the affirmative").

That asserted right to a bond hearing is manifestly not one that is "objectively, deeply rooted in this Nation's history and tradition." *Muñoz*, 602 U.S. at 910 (citation omitted). Congress enacted its first immigration-detention statutes in 1798. See Alien Friends Act of 1798, ch. 58, § 2, 1 Stat. 571 (authorizing certain aliens "to be arrested and sent out of the United States"); Alien Enemies Act of 1798, ch. 66, §§ 1, 2, 1 Stat. 577-578 (authorizing "alien enemies" to be "apprehended, restrained, secured and removed"). After a period of "relatively open borders," *Muñoz*, 602 U.S. at 912, Congress enacted a series of additional immigration-detention statutes.[7]

As the Court in *Demore* observed, it was not until 1907 that Congress enacted a provision expressly allowing the release of certain aliens on "bond" during the pendency of their deportation proceedings. Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 905; see *Demore*, 538

[7] See, *e.g.*, Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 479 (authorizing "any Chinese person" "found unlawfully in the United States" to be "arrested" and "removed"); Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (authorizing "the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of th[e] law, to cause such immigrant * * * to be taken into custody and returned to the country from whence he came"); Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1085 (authorizing alien immigrants arriving by water to be "detain[ed]" "until a thorough inspection is made"); Act of Mar. 3, 1893, ch. 206, § 5, 27 Stat. 570 (authorizing inspectors to "detain for a special inquiry" every arriving alien "who may not appear" to "be clearly and beyond doubt entitled to admission"); Act of Mar. 3, 1903, ch. 1012, § 21, 32 Stat. 1218 (authorizing an alien who "has been found in the United States in violation of this Act" to "be taken into custody and returned to the country whence he came").

U.S. at 523 n.7. Some of the earlier provisions had expressly prohibited releasing aliens on bond. See Act of May 5, 1892, ch. 60, § 5, 27 Stat. 25 (providing that "no bail shall be allowed" to certain Chinese persons); Act of Nov. 3, 1893, ch. 14, § 2, 28 Stat. 8 (similar). Others had been silent on the matter. See, *e.g.*, Act of May 5, 1892, § 6, 27 Stat. 25-26. Although some courts construed such silence as implicitly authorizing release on bond, see, *e.g.*, *Chin Wah* v. *Colwell*, 187 F. 592, 594-595 (9th Cir. 1911), there was little or no doubt that Congress could eliminate that authority. As one court of appeals put it, "one in custody charged with being an alien, and with violation of the Immigration Act," "has no primary or inherent right to bail" "pending and during" his deportation proceedings, and "whatever right in this regard may accrue to him, must be granted to him by Congress." *Prentis* v. *Manoogian*, 16 F.2d 422, 423 (6th Cir. 1926) (per curiam).

The existence of any right to a bond hearing was thus "a matter of legislative grace rather than fundamental right." *Muñoz*, 602 U.S. at 916 (citation omitted). And especially because such grace was sometimes withheld, the right cannot be said to be so "deeply rooted in this Nation's history and tradition" as to trigger strict scrutiny. *Id.* at 910 (citation omitted). Indeed, this Court long ago declared it "clear that detention, or temporary confinement," was "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896). When that history is added to the Court's longstanding recognition that "the field of immigration" is "an area unsuited to rigorous judicial oversight," it would be "remarkable" if an immigration-detention statute like

Section 1226(c) had to satisfy "the most demanding test in constitutional law." *Muñoz*, 602 U.S. at 911.

The Court in *Demore* therefore correctly declined to apply heightened, substantive-due-process scrutiny to Section 1226(c). Because the statute does not implicate any fundamental rights, rational-basis review applies.

2. **Demore** ***establishes that detention under Section 1226(c) satisfies rational-basis review***

Under rational-basis review, a "statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) (brackets and citations omitted). Moreover, the Court may not reject "a legislature's generalizations" simply because "there is an imperfect fit between means and ends." *Id.* at 321. Rather, the statute must be upheld if it is "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. As *Demore* demonstrates, Section 1226(c) is rationally related to two legitimate government interests. 538 U.S. at 513.

a. First, Section 1226(c) is rationally related to ensuring that inadmissible and deportable criminal aliens "appear for their removal hearings" and, if ordered removed, appear for the removals themselves. *Demore*, 538 U.S. at 513. Ensuring the appearance of such aliens is a legitimate government interest. After all, their failure to appear can delay, or even preclude, their removal. See *id.* at 519; S. Rep. No. 48, 104th Cong., 1st Sess. 23 (1995) (Senate Report) ("Although some aliens are ordered deported in absentia, deportation cannot be effectuated until the alien is apprehended.") (footnote omitted). And the prompt removal of criminal aliens was a national priority when Section 1226(c) was enacted in 1996, see Senate Report 1—and remains a national priority to this day, see Laken Riley Act, § 2(1)(C), 139 Stat. 3. As evidence at the time of Section 1226(c)'s enactment showed, criminal aliens "often commit[] more crimes before being removed." *Demore*, 538 U.S. at 518. They cost criminal-justice systems hundreds of millions of dollars annually. *Ibid.* They take "immigration opportunities" away from others. *Ibid.* (citation omitted). And their continued, unlawful presence violates the United States' sovereign prerogative to "expel or exclude aliens." *Muñoz*, 602 U.S. at 911 (citation omitted).

The relationship between mandating the detention of removable criminal aliens and ensuring their appearance for hearings and removal is plainly a rational one. As the Court in *Demore* explained, Section 1226(c) "governs detention of deportable criminal aliens *pending their removal proceedings*." 538 U.S. at 527-528. "Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528.

In Congress's view, permitting release on bond would unduly undermine that purpose. Before the enactment of Section 1226(c), the government "had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society." *Demore*, 538 U.S. at 519 (citing 8 U.S.C. 1252(a) (1982)). But experience showed that "such individualized hearings could not be trusted to reveal which 'deportable criminal aliens who are not detained' might 'continue to engage in crime or fail to appear for their removal hearings.'" *Preap*, 586 U.S. at 412 (plurality opinion) (brackets and citation omitted); see Senate Report 32 (noting "the high rate of no-shows for those criminal aliens released on bond"); H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 119 (1996) (noting that "some" criminal aliens "released on bond" "do not appear for their deportation hearings"). One study found that, "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Demore*, 538 U.S. at 519. Another study found an even higher rate of flight—that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings." *Id.* at 520. Congress was justifiably "concern[ed] that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Ibid.*

Some rate of error is inherent in any system of bond hearings. No decisionmaker can know for sure whether a criminal alien who is released on bond will flee or commit more crimes. The most that can be said with any "degree of confidence" is that a particular alien will "*probably*" not do those things. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Thus, any system of bond hearings will produce false negatives—*i.e.*, releases of criminal aliens on bond based on erroneous predictions that they will not flee or commit more crimes.

Given the system's previous experience with such erroneous predictions, which occurred at a frequency that Congress deemed unacceptable, Congress rationally determined that continuing to permit discretionary bond hearings was "too risky" in the subset of cases involving "aliens who have committed certain dangerous crimes and those who have connections to terrorism." *Preap*, 586

U.S. at 396. To be sure, some bond hearings could well be correct in predicting that some criminal aliens, if released, would not in fact flee. "But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Ibid.* It rationally decided that "the best way to ensure their successful removal from this country" was to require the government to "detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521.

b. Second, Section 1226(c) is rationally related to ensuring that inadmissible and deportable criminal aliens do not "continue to engage in crime" while their removal proceedings are pending. *Demore*, 538 U.S. at 513. Evidence before Congress showed that "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Id.* at 518. According to one study, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Ibid.* Congress was "justifiably concerned that deportable criminal aliens who are not detained" will "continue to engage in crime." *Id.* at 513; see *id.* at 525 n.9. Section 1226(c) rationally addressed that concern by keeping those criminal aliens in detention.

Of course, some of those aliens might not commit more crimes if they were released on bond. But as explained above, due process does not require Congress "to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. Congress understood that any system of bond hearings would result in *some* false negatives with respect to dangerousness—just as it would with respect to flight risk. See pp. 34-36, *supra*. Congress viewed the rate of false negatives from bond hearings as unacceptably high. And Congress rationally decided that it was unwilling to risk further harm to the public from the actions of criminal aliens whom DHS has found to be inadmissible or deportable. Rather than relying on bond hearings "to reveal" which criminal aliens "might" (or might not) "'continue to engage in crime,'" *Preap*, 586 U.S. at 412 (plurality opinion) (citation omitted), Congress sensibly determined that a regime of mandatory detention would better protect the public.

3. The court of appeals erred in concluding that detention under Section 1226(c) becomes unconstitutional when it reaches a certain length

The court of appeals did not dispute that detention without a bond hearing under Section 1226(c) is constitutional at the outset. But in the court's view, the statute's mandate becomes unconstitutional at a certain point, when detention becomes "unreasonably prolonged." Pet. App. 5a. That view is incorrect.

a. The court of appeals erred in concluding that Section 1226(c) becomes unconstitutional when detention reaches a certain duration. The statute is constitutional as long as it is "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. The statute satisfies that test throughout the duration of an alien's removal proceedings.

After all, the legitimacy of the government's interests does not diminish over time. Ensuring that a criminal alien appears for his fifth removal hearing is as legitimate as ensuring that he appears for his first. And preventing a criminal alien from further endangering the public remains legitimate, no matter how long his removal proceedings have lasted.

Nor does the relationship between the alien's detention and the government's interests diminish over time. As the Court observed in *Demore*, the "detention of deportable criminal aliens pending their removal proceedings * * * *necessarily* serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-528 (emphasis altered). Such detention necessarily serves the purpose of preventing them from further endangering the public as well.

Nothing about the increasing length of an alien's detention makes a bond hearing less "risky." *Preap*, 586 U.S. at 396. As explained above, Congress deemed bond hearings for this subset of aliens "too risky" because experience had shown that they had resulted in too many false negatives—cases in which predictions about flight risk or dangerousness were proved wrong. *Ibid.*; see pp. 34-37, *supra*. That risk of error does not diminish over time. In fact, Congress's concerns about false negatives would only be exacerbated by the court of appeals' additional requirement that, at the later hearing, the government bears the burden of demonstrating flight risk or dangerousness by a heightened standard. See pp. 43-45, *infra*.

b. Although the length of an alien's detention does not affect the constitutionality of Section 1226(c)'s application, there are two important limits on detention under that provision—one statutory, the other constitutional.

The statutory limit is that Section 1226(c) detention may continue only "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). Section 1226(c) detention thus "has 'a definite termination point': the conclusion of removal proceedings." *Jennings*, 583 U.S. at 304 (quoting *Demore*, 538 U.S. at 529). The Board and IJs prioritize the removal proceedings of aliens who are detained. See p. 10 n.4, *supra*. At any time, an alien himself can end his removal proceedings—and thus end his detention—by withdrawing any objection to removal. See p. 30, *supra*; Senate Report 19 (noting that criminal aliens often "do not contest their deportation and in many cases even wish to be deported"); cf. p. 13, *supra* (noting Carol Black's voluntary decision to withdraw his appeal before the Board).

Section 1226(c)'s definite termination point distinguishes the provision from 8 U.S.C. 1231(a)(6), which authorizes the detention of certain aliens who have been "ordered removed" but have not actually been removed within a 90-day " 'removal period.' " 8 U.S.C. 1231(a)(1)(A). Section 1231(a)(6) provides that those aliens "may be detained beyond the removal period," 8 U.S.C. 1231(a)(6), without specifying any "obvious termination point," *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001). In *Zadvydas*, the Court considered whether Section 1231(a)(6) "authorizes the [government] to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal." *Id.* at 682. The Court adopted the latter interpretation after concluding that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690; see *id.* at 699. But Section 1226(c) limits "the length of detention" to "the conclusion of removal proceedings." *Jen-*

nings, 583 U.S. at 304; see *Demore*, 538 U.S. at 529-531 (illustrating the "limited period" of Section 1226(c) detention by referencing various statistics concerning its length). Because it does not permit indefinite detention, the constitutional concern that led the Court to read a durational limit into Section 1231(a)(6) is inapplicable. See *Zadvydas*, 533 U.S. at 697 (distinguishing the two statutes); *Demore*, 538 U.S. at 528-529 (same).

The Constitution does, however, impose an additional limit: An alien's detention under Section 1226(c) would "no longer bear[] a reasonable relation to the purpose for which [he] was [detained]" if his removal were "no longer practically attainable." *Demore*, 538 U.S. at 527 (citation omitted). While an alien's removal proceedings are ongoing, that would be true only in the extraordinary circumstance in which the proceedings ceased to be a means of effectuating the alien's removal and became a "ruse" to keep the alien in detention. *Banyee*, 115 F.4th at 934. In that circumstance, an alien could bring an as-applied challenge to his Section 1226(c) detention on the ground that his removal proceedings had become a "sham." Pet. App. 141a (Menashi, J., dissenting).

G.M. has not alleged, nor is there any evidence to suggest, that his ongoing removal proceedings are a sham. Pet. App. 141a, 144a (Menashi, J., dissenting). To the contrary, an IJ has ordered G.M.'s removal, and his removal proceedings remain pending only because he has filed an appeal with the Board and because that appeal lost its priority once he was released from detention. See pp. 8-10 & n.4, *supra*. Removal remains practically attainable, so the application of Section 1226(c) continues to be rationally related to the legitimate government interests identified in *Demore*. Section 1226(c) is therefore constitutional as applied to G.M.

III. IF THE DUE PROCESS CLAUSE REQUIRED A BOND HEARING, IT WOULD NOT REQUIRE THE GOVERNMENT TO JUSTIFY CONTINUED DETENTION BY CLEAR AND CONVINCING EVIDENCE

The court of appeals further held that, when due process requires a bond hearing for a Section 1226(c) detainee, the government must bear the burden, at that hearing, of justifying the alien's continued detention by clear and convincing evidence. Pet. App. 39a-45a. That holding is incorrect. Even if the Constitution required a bond hearing, it would not entitle the alien to a presumption of release—let alone one that would be rebuttable only by clear and convincing evidence.

A. The Constitution Imposes No Presumption Of Release

In the civil context, the "ordinary default rule" is that the burden of persuasion falls on "the party seeking relief." *Schaffer* v. *Weast*, 546 U.S. 49, 56, 58 (2005). That rule governs initial bond hearings under Section 1226(a), where the burden lies with the detainee to justify his release. See p. 5, *supra*. And "outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Schaffer*, 546 U.S. at 58 (brackets and citation omitted). Nothing justifies reading the Constitution to displace the ordinary default rule here.

Just as there is no historical basis for recognizing a fundamental right to a bond hearing in this context, see pp. 31-33, *supra*, there is also no historical basis for imposing a presumption of release—as placing the burden of persuasion on the government would effectively do. To the extent that federal immigration-detention statutes have authorized release on bond at all, they have generally committed such determinations to the government's discretion. See, *e.g.*, 8 U.S.C. 1226(a); *Chin Wah*, 187 F. at 594-595. Indeed, after one circuit adopted a contrary construction of a 1917 statute, Congress reaffirmed the "discretion of the Attorney General" and "eliminated any presumption of release" in the statute. *Flores*, 507 U.S. at 306; see *Carlson* v. *Landon*, 342 U.S. 524, 538-540 (1952). There is accordingly no historical basis for reading such a presumption into the Due Process Clause.

Nor is there any practical justification for placing the burden of persuasion on the government. An alien's flight risk and dangerousness are matters that "lie peculiarly in the knowledge of" the alien. *Smith* v. *United States*, 568 U.S. 106, 112 (2013). "For example, aliens should know as much or more than the government about their own criminal history, and they should know more than the government about any mitigating evidence related to that history." *Miranda* v. *Garland*, 34 F.4th 338, 362 (4th Cir. 2022). "They should also know more than the government about family or employment information, which could bear on their risk of flight and any danger they pose." *Ibid.* The alien is therefore the party "best situated to bear the burden of proof." *Smith*, 568 U.S. at 112. And placing the burden on him gives him "the incentive to produce all the evidence in [his] possession," creating a "more complete picture." *Medina* v. *California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring in the judgment).

Moreover, for an alien who falls within Section 1226(c)'s scope, Congress has deemed his criminal or terrorist activities or connections sufficiently concerning to warrant mandatory detention in the first place. See *Demore*, 538 U.S. at 513, 525 n.9; pp. 33-37, *supra*. There is nothing impractical or unfair about placing the burden on the alien to overcome that finding, by showing that he is nonetheless deserving of release.

Contrary to the decision below, the length of the alien's detention does not affect the analysis. Pet. App. 40a. How long an alien has been detained has no bearing on whether he would flee or endanger the public if he were released. "Prolonged" or not, the length of an alien's detention provides no reason to presume that he is not a flight risk or a danger—and thus no reason to place an affirmative burden on the government to justify his continued detention.

B. Even If There Were A Constitutional Presumption Of Release, The Court Of Appeals Erred In Making It Rebuttable Only By Clear And Convincing Evidence

The court of appeals held not only that the government must bear the burden of justifying an alien's continued detention, but also that the government must do so by clear and convincing evidence. Pet. App. 45a. Outside the criminal context, however, the "default standard of proof" is the "preponderance-of-the-evidence standard." *E.M.D. Sales, Inc.* v. *Carrera*, 604 U.S. 45, 50 (2025). The Constitution requires no heightened standard here.

For any decision, there is a risk of error, which can result in either a false negative or a false positive. See *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring). "The standard of proof influences the relative frequency of these two types of erroneous outcomes." *Ibid.*; see *Santosky* v. *Kramer*, 455 U.S. 745, 765-766 (1982). "If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons" (*i.e.*, false negatives), "but a far greater risk of factual errors that result in convicting the innocent" (*i.e.*, false positives). *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring). The Constitution, however, embodies the "fundamental value determination" that "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372. Thus, to minimize the risk of false positives in criminal cases, the Constitution requires proof beyond a reasonable doubt. *Ibid.*; see *id.* at 363-364 (majority opinion).

The question at an immigration bond hearing is whether an alien will flee or commit more crimes if he is released. Congress enacted Section 1226(c) on the view that a false negative is far worse than a false positive in cases involving criminal aliens. See pp. 34-37, *supra*. The court of appeals' imposition of a clear-and-convincing-evidence standard reverses Congress's judgment. The court's decision reflects the view that it is much worse to detain a criminal alien who would not have fled or committed additional crimes than it is to release a criminal alien who goes on to flee or further endanger the community. But that "value determination" has no basis in the Constitution. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring). Even if the Constitution required bond hearings for aliens like G.M., it could not be read to "express[]" such a heavy "preference" for the aliens' "interests" over those of the government and the public. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 (1983).

This Court's decisions concerning involuntary commitment to mental institutions are not to the contrary. Those decisions hold that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington* v. *Texas*, 441 U.S. 418, 427 (1979). But that is because the balance of interests in that context requires reducing the risk of "inappropriate commitments." *Ibid.* Here, detention under Section 1226(c) involves criminal aliens who have been found to be "inadmissible" or "deportable" by DHS and who are being held pending their removal proceedings. 8 U.S.C. 1226(c)(1)(A)-(E). "[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 522. Unlike involuntary commitment, moreover, Section 1226(c) detention has a "definite termination point," *id.* at 529—and can be voluntarily terminated by the alien himself, see p. 30, *supra*. The Constitution therefore does not require that the risk of error in this context be disproportionately allocated to the government and the public.

C. The Court Of Appeals Misapplied *Mathews*

In reaching a contrary conclusion, the court of appeals applied *Mathews*' three-pronged test. Pet. App. 39a-45a. But faithful application of that test undermines, rather than supports, the court's holding.

First, the court of appeals characterized the alien's interest as "the most significant liberty interest there is." Pet. App. 31a (citation omitted); see *id.* at 40a. But Section 1226(c) applies to aliens whom DHS has found to be "inadmissible" or "deportable." 8 U.S.C. 1226(c)(1)(A)-(E). And "a removable alien does not have a 'significant liberty interest' to be released into the United States while removal proceedings are pending." Pet. App. 131a (Menashi, J., dissenting).

Second, the court of appeals suggested that placing the burden of persuasion on the alien would "present[] too great a risk of an erroneous deprivation of liberty." Pet. App. 42a-43a. To the contrary, placing the burden on the alien would lead to a more complete picture of his flight risk and dangerousness by giving the party most knowledgeable about those matters the incentive to produce relevant information. See p. 42, *supra*. In contrast, requiring the government to bear the burden—especially by clear and convincing evidence—would have the perverse effect of rewarding the alien for not sharing information.

Third and finally, the court of appeals reasoned that its decision would "do nothing to undercut" the government's interests because, "[a]t any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger." Pet. App. 36a; see *id.* at 40a. But Congress enacted Section 1226(c) "precisely out of concern that such individualized hearings could not be trusted to reveal which 'deportable criminal aliens who are not detained' might 'continue to engage in crime or fail to appear for their removal hearings.'" *Preap*, 586 U.S. at 412 (plurality opinion) (brackets and citation omitted). And by disproportionately allocating to the government the risk of error at such hearings, the court's decision would only make matters worse, by substantially increasing the frequency of false negatives. See pp. 43-45, *supra*. The balance of interests therefore weighs against the court's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
JESSICA W. D'ARRIGO
JULIAN M. KURZ
Attorneys

JULY 2026

APPENDIX

TABLE OF CONTENTS

APPENDIX

8 U.S.C. 1226, as amended by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025), provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year,

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or

(E)(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and

(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or

---

[1] So in original. Probably should be “sentenced”.

probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Definition

For purposes of paragraph (1)(E), the terms "burglary", "theft", "larceny", "shoplifting", "assault of a law enforcement officer", and "serious bodily injury" have the meanings given such terms in the jurisdiction in which the acts occurred.

(3) Detainer

The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien.

(4) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens un-

lawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

(f) Enforcement by Attorney General of a State

The attorney general of a State, or other authorized State officer, alleging an action or decision by the Attorney General or Secretary of Homeland Security under this section to release any alien or grant bond or parole to any alien that harms such State or its residents shall have standing to bring an action against the Attorney General or Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable. For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.