

IN THE
Supreme Court of the United States

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

Petitioners,

—V.—

CAROL WILLIAMS BLACK, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- (1) Whether the court of appeals correctly determined that, on the factual record in these cases, the Due Process Clause required a bond hearing.
- (2) Whether the court of appeals correctly determined in Carol Williams Black's case that the government was required to justify continued detention by clear and convincing evidence.

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INTRODUCTION

Respondents Keisy G.M. and Carol Williams Black are both longtime lawful permanent residents who were detained by Immigration and Customs Enforcement (“ICE”) under 8 U.S.C. § 1226(c) for a prolonged period—twenty-one and seven months, respectively—without any individualized hearing to assess whether they posed a flight risk or danger such that they could not be released on bond or other conditions.

In the court of appeals, the government agreed that “a noncitizen has at least some degree of liberty interest in not being detained.” Brief for Respondents-Appellees at 24 n.7, *G.M. v. Neil*, No. 22-70 (2d Cir. July 25, 2022), Dkt. 3353898. The parties’ dispute below was over the procedures Respondents must be afforded to vindicate that interest.

Now, however, the government advances an extreme theory for the first time in this litigation: that “Respondents’ detention without a bond hearing during the pendency of their removal proceedings does not implicate *any* fundamental rights.” Pet. 24 (emphasis added). The government argues that Respondents have no cognizable liberty interest in physical freedom from detention, and therefore that even prolonged detention without any individualized custody hearing is subject only to rational basis review. *Id.* That theory was forfeited by concession below, is contrary to the position the government took before this Court in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), *see infra* Part I.A, and, to Respondents’ knowledge, has never been addressed by any federal

court. It is also contrary to this Court’s foundational due process precedents—and common sense. This Court should reject the invitation to be the first to consider the government’s novel and extreme position.

The Court also should not grant review on the questions actually decided below. In the court of appeals, the parties disputed “what process” Respondents were due. Pet. App. 24a. The court of appeals recognized that this is a fact-intensive question and therefore applied this Court’s well-established procedural due process test under *Mathews v. Eldridge*, 424 U.S. 319 (1976). It held that both Respondents were entitled to a custody hearing before an immigration judge and, in Mr. Black’s case only, that the government needed to justify continued detention by clear and convincing evidence.

There is nothing novel about that remedy: The government previously has acknowledged before this Court that in “outlier cases” where detention is “unjustifiably prolonged,” an “as-applied challenge to continued detention could be brought in an individual habeas action.” *See infra* Part II.A.1.

At most, the government points to a shallow split between two fact-bound applications of due process principles by the Second and Third Circuits, on the one hand, and a more categorical approach by the Eighth Circuit, on the other. Other courts of appeals have yet to weigh in and, given the fact-intensive inquiries in such cases—which the government has previously acknowledged may be appropriate in some circumstances, *see id.*—further percolation would be beneficial.

Finally, these cases are strikingly poor vehicles. The sole case raising the government’s second question presented—Mr. Black’s—is unquestionably moot. Since the court of appeals issued its decision, Mr. Black voluntarily left the United States and withdrew his appeal of his removal order. As for Mr. G.M., the government itself has asserted his case is moot because he was released from detention in 2022. On remand to the district court, the government stated that Mr. G.M. “remains free and at this point there is just nothing else for the Court to do. . . . [T]here is really no live case or controversy for this Court to weigh in on.” Conference Transcript at 2–4, *G.M. v. Decker*, No. 21-cv-4440 (S.D.N.Y. Dec. 9, 2025). It would be passing strange for this Court to entertain the government’s novel legal theory in a context where the government itself has previously described the stakes as purely academic.

The petition should be denied.

STATEMENT OF THE CASE

The government’s petition concerns two lawful permanent residents, Keisy G.M and Carol Williams Black, who were detained under Section 1226(c) without any individualized custody hearing.

A. Keisy G.M.

Mr. G.M., a native of the Dominican Republic, entered the United States as a lawful permanent resident in 2011. Pet. App. 8a. In 2015, Mr. G.M. pleaded guilty to one count of second-degree assault in New York state court. *Id.* at 52a–53a. He was sentenced to two years’ imprisonment and three years

of supervised release. *Id.* at 53a. After serving nineteen months, Mr. G.M. was released early for good behavior. *Id.* at 8a, 53a. He completed his sentence upon discharge from parole in late 2019. *Id.* at 53a.

Four years after his release, ICE arrested Mr. G.M. and charged him with removability as an aggravated felon based on the assault conviction. *Id.* at 54a; *see* 8 U.S.C. § 1227(a)(2)(A)(iii). Although Section 1226(a) provides ICE “may” arrest and detain a noncitizen pending removal proceedings, Section 1226(c) provides ICE “shall” detain certain noncitizens who are inadmissible or deportable on specific enumerated grounds and prohibits their release. 8 U.S.C. § 1226. ICE determined that Mr. G.M. was subject to mandatory detention. Pet. App. 228a; *see* 8 U.S.C. § 1226(c)(1)(B).¹

Five months later, an immigration judge ordered that Mr. G.M. be removed to the Dominican Republic, denying his request for relief under the Convention Against Torture. Pet. App. 56a. Mr. G.M. timely appealed that order to the Board of Immigration Appeals (BIA). *Id.* at 57a.

While the BIA appeal was pending, Mr. G.M. filed a habeas action in federal district court. *Id.* at 59a. He alleged his detention was unreasonably prolonged in

¹ Section 1226(c) was recently amended through the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025), which added § 1226(c)(1)(E) and thus broadened the scope of § 1226(c) to subject people to mandatory detention based on mere accusations of certain crimes rather than criminal convictions. Respondents do not fall under § 1226(c)(1)(E), and this case does not present any issue regarding detention under that provision or any other aspect of the Laken Riley Act.

violation of the Due Process Clause and requested release in the absence of a constitutionally sufficient bond hearing to justify his continued detention. *Id.* at 226a.

In November 2021, the district court acknowledged that Mr. G.M. had been detained for over a year without a bond hearing but denied his habeas petition. *Id.* at 66a, 79a. The district court reasoned that because the government had not “unreasonably delay[ed]” the completion of Mr. G.M.’s removal proceedings, his continued detention under Section 1226(c) did not violate due process. *Id.* at 79a.

Mr. G.M. appealed to the Second Circuit.

B. Carol Black

Mr. Black was born in Jamaica and admitted to the United States as a lawful permanent resident in 1983. Pet. App. 5a. In 2005, he completed concurrent terms of five years’ probation for convictions of first-degree sexual abuse and endangering the welfare of a child under New York law. *Id.* at 6a, 82a.

Fourteen years later, ICE put Mr. Black in removal proceedings based on those convictions. *Id.* ICE determined that Mr. Black’s conviction for first-degree sexual abuse qualified as an aggravated felony and subjected him to mandatory detention under Section 1226(c)(1)(B). *Id.* at 289a. Mr. Black requested review of ICE’s custody determination at a *Joseph* hearing. *Id.* At *Joseph* hearings, the only issue is whether the detainee is properly subject to the mandatory detention statute. *See Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

The immigration judge rejected Mr. Black's *Joseph* challenge and held he was subject to mandatory detention under Section 1226(c). Pet. App. 283a–84a. The immigration judge therefore did not address dangerousness or flight risk. *Id.* at 282a. Subsequently, the immigration judge sustained the removability charges, and Mr. Black filed an application for asylum and withholding of removal. *Id.* at 6a–7a, 278a.

In June 2020, Mr. Black filed the operative amended petition for a writ of habeas corpus. Pet. App. 233a. He alleged both the conditions of his confinement during the COVID-19 pandemic and the prolonged nature of his confinement violated due process, and requested immediate release or, in the alternative, a constitutionally sufficient bond hearing. *Id.* at 94a–95a, 99a, 274a–75a. The district court denied his conditions-of-confinement claim but granted habeas relief on the prolonged-detention claim and ordered that the government “provide an individualized bond hearing to [Mr. Black] to determine whether his detention is justified.” *Id.* at 95a, 99a, 103a.

The immigration judge conducted the hearing as required and released Mr. Black on a \$15,000 bond. *Id.* at 7a. The government appealed the district court's order to the Second Circuit. During the pendency of the appeal, Mr. Black remained at liberty with his family in the United States, before recently making the difficult decision to leave the country permanently. *See* Suggestion of Mootness, App. A at 1a.

C. Procedural History

1. On appeal, the Second Circuit affirmed the district court in Mr. Black’s case and remanded Mr. G.M.’s case.

At the outset, the court of appeals held that Mr. G.M.’s appeal was not moot, even though ICE had released him in 2022—after detaining him for twenty-one months without a bond hearing—because of his medical vulnerability during the COVID-19 pandemic, in accordance with an injunction in *Frailhat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev’d and remanded*, 16 F.4th 613 (9th Cir. 2021). Pet. App. 4a n.1, 9a. The court held the case was still live because “ICE has not disclaimed its intent or the requirement to detain” Mr. G.M. *Id.* at 4a n.1.

On the merits, the court held that unreasonably prolonged detention implicates the Due Process Clause and that the familiar *Mathews* balancing test provides the appropriate framework for determining what protections are constitutionally required. Pet. App. 3a, 5a, 20a. In keeping with the majority of courts of appeal, and the government’s position below, the court of appeals held that this Court’s precedents “suggest strongly that due process places *some* limits on detention under section 1226(c),” and that *Demore v. Kim*, 538 U.S. 510 (2003), permits as-applied challenges like Respondents’. *Id.* at 13a. And so, consistent with this Court’s reminder in *Jennings v. Rodriguez* that “[d]ue process is flexible” and “calls for such procedural protections as the particular situation demands,” 583 U.S. 281, 314 (2018) (citation modified), the Second Circuit employed a “flexible due process analysis” that assessed each of the three

Mathews factors in light of Mr. G.M.'s and Mr. Black's individualized circumstances. Pet. App. 30a.

First, the court of appeals held that the private interest factor weighed heavily in favor of the Respondents. *Id.* at 31a–33a. Mr. G.M. and Mr. Black were deprived of their liberty for twenty-one and seven months, respectively. *Id.* at 32a. During that time, Mr. G.M.'s family was deprived of his presence and financial support. *Id.* His sick wife was deprived of her husband and primary caregiver, his three young children of their father, and his ailing mother of her son, and Mr. G.M. himself experienced dire health problems—all because of a civil detention that exceeded his nineteen-month criminal punishment. *Id.* Mr. Black's family endured serious financial difficulties with the loss of their sole income provider; these were compounded because Mr. Black had been the primary caregiver for his wife, who was experiencing ongoing health issues. *Id.*

Second, the court determined that the risk of erroneous deprivation of Respondents' liberty interests and the value of additional safeguards also weighed heavily in Respondents' favor. *Id.* at 33a–36a. The only procedural protection afforded to Respondents was a *Joseph* hearing, which assessed only whether Respondents' underlying convictions triggered mandatory detention under Section 1226(c). *Id.* at 33a. There was no procedural mechanism to determine whether detention was justified for Respondents, who had completed their sentences and had a long record living as productive, law-abiding residents with strong family and community ties. *Id.* at 34a & n.24, 35a (finding Mr. G.M. had been living

without incident in the community for four years after completing his criminal sentence and prior to his ICE detention, and Mr. Black for nearly twenty). Thus, the court of appeals reasoned that “almost *any* additional procedural safeguards at some point in the detention would add value,” with the “most obvious” being a bond hearing. *Id.* at 35a–36a.

Third, while the court acknowledged the significance of the government’s two asserted interests—ensuring that noncitizens appear at their proceedings and do not reoffend—it held that an individualized bond hearing, which encompassed an assessment of dangerousness and flight risk, would not “undercut” either. *Id.* at 36a.

Ultimately, the court concluded the “balance of interests shifts as the noncitizen’s detention is prolonged without any particularized assessment of need.” *Id.* at 37a. Detaining Mr. G.M. and Mr. Black without a hearing did not serve either valid public interest, but it did harm them and their families in uniquely acute ways. *Id.* at 37a–38a.

After holding that each Respondent was entitled to a bond hearing, the court of appeals issued case-specific remedies. As to Mr. G.M., the district court had “never reached the issue of what procedural requirements would follow,” so the court of appeals remanded for further proceedings. *Id.* at 39a–40a n.27. As to Mr. Black, the court of appeals affirmed the district court’s determination that the government must justify his continued detention at a bond hearing by clear and convincing evidence. *Id.* at 39a–47a.

The government sought rehearing en banc, which the court denied. *Id.* at 105a–08a.

Following the court of appeals’ decision, on June 13, 2025, Mr. Black sold his home and his business and permanently left the United States. *See* Suggestion of Mootness, App. A at ¶ 8. His departure effectuated an automatic withdrawal of his BIA appeal, and his counsel also submitted a formal motion to withdraw the appeal, which the BIA granted on March 30, 2026. *Id.* ¶ 9. As a result, Mr. Black has a final order of removal preventing him from returning to the United States and he is no longer involved in any proceedings in the United States. *Id.* ¶ 10. His habeas case in the Southern District of New York remains closed.

Mr. G.M. also remains free from immigration custody. Although the Ninth Circuit vacated the injunction that had prompted Mr. G.M.’s release, ICE took no steps to re-detain him. On remand from the court of appeals, the government argued in the district court that Mr. G.M.’s habeas case “should be closed” because “[t]here is no present case or controversy.” Conference Transcript at 2, *G.M. v. Decker*, No. 21-cv-4440 (S.D.N.Y. Dec. 9, 2025). In the government’s view, Mr. G.M.’s release in 2022 “created a break in detention,” and the government did not have any “current plan for future detention.” *Id.* at 3, 5. Accordingly, per the government, Mr. G.M. “remains free and at this point there is just nothing else for the Court to do.” *Id.* at 2–3. Mr. G.M. took the position that his habeas case was not moot because the government would not make any commitment not to re-detain him. *Id.* at 6.

In a subsequent letter brief to the district court, the government changed its position. Letter Brief at 1, *G.M. v. Decker*, No. 21-cv-4440 (S.D.N.Y. Jan. 16, 2026), Dkt. 59. The government acknowledged that it previously had “suggested” that “this case may be moot” but now argued the “threat of re-detention” kept the case live. *Id.* at 2 & n.1. The government did not, however, state that it intended to re-detain Mr. G.M. in the future.

Mr. G.M. has since filed a pardon application in New York for his second-degree assault conviction. Since that conviction is Mr. G.M.’s only criminal offense, a pardon would remove him from Section 1226(c)’s scope entirely and dissolve the basis for his removal.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD REJECT THE GOVERNMENT’S INVITATION TO BE THE FIRST COURT TO CONSIDER ITS ARGUMENT THAT THERE IS NO LIBERTY INTEREST IN BEING FREE FROM DETENTION.

A. The Government Forfeited This Argument Below.

For the first time in this litigation, the government argues that civil detention under 8 U.S.C. § 1226(c) “does not implicate *any* fundamental rights” and so the Due Process Clause affords Respondents *no* protections—substantive or procedural. Pet. 24 (emphasis added). The government never questioned the bedrock principle that detention implicates a

liberty interest when it was previously ordered to brief constitutional issues relating to Section 1226(c) in *Jennings v. Rodriguez*. See Brief for Petitioners, *Jennings v. Rodriguez*, 2016 WL 5404637 (U.S. Aug. 26, 2016) (No. 15-1204); Suppl. Reply Brief for Petitioners, *Jennings v. Rodriguez*, 2017 WL 727754 (U.S. Feb. 21, 2017) (No. 15-1204). And here, the government did not merely forfeit this argument; it took the contrary position below, which the court of appeals then adopted. See *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015) (arguments “never presented to any lower court” are “forfeited”).

The government repeatedly conceded both in briefing and oral argument before the Second Circuit that “there is no dispute that a noncitizen has at least some degree of liberty interest in not being detained.” Brief for Respondents-Appellees at 24 n.7, *G.M. v. Neil*, No. 22-70 (2d Cir. July 25, 2022), Dkt. 3353898; see also Oral Argument at 2:14-2:26, *G.M. v. Neil*, No. 22-70 (2d Cir. Jan. 5, 2023) (“The government acknowledges . . . that detention under this statute is subject to constitutional constraints.”); *id.* at 6:33 (“[T]he government acknowledges that as time goes on and the duration grows, so would the due process scrutiny.”). In response to Mr. G.M.’s substantive due process arguments below, the government urged the court of appeals to consider the “dispute about what process [Mr. G.M.] is entitled to . . . under the rubric of procedural due process.” *Id.*; see also Pet. for Reh’g en banc at 10, *G.M. v. Neil*, No. 22-70 (2d Cir. Nov. 21, 2024), Dkt. 3637440 (government conceding “that noncitizens may bring as-applied due process challenges to their detention under § 1226(c)”). The

court of appeals did exactly that. *See* Pet. App. 14a n.12 (declining to “separately address substantive due process concerns”).

The government now does an about-face, insisting that Respondents’ claims “must ultimately be analyzed in terms of substantive, not procedural, due process.” Pet. 23 (internal quotation marks omitted). Casting its own concessions aside, it criticizes the court of appeals for accepting the basic premise that detention implicates a liberty interest and for applying the very “procedural-due-process framework” the government itself proposed. Pet. 14.

This Court routinely declines to entertain arguments “neither pressed nor passed upon below.” *Babcock v. Kijakazi*, 595 U.S. 77, 82 n.3 (2022); *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (“Ours is a court of final review and not first view.” (citation modified)). That rule is especially firm when the federal government, with “its ample resources,” chooses not to present an argument below. *Ohio v. EPA*, 603 U.S. 279, 298 (2024); *see Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016).

There is no reason to depart from that practice here. The government’s forfeiture of the principal argument it seeks to press before this Court is reason enough to deny the petition.

B. There Is No Circuit Split on this Question.

Since no court to Respondents’ knowledge has ever addressed this radical new theory in a Section

1226(c) case, this Court is “without the benefit of” *any* “lower court opinions to guide [its] analysis of the merits” of the government’s position. *Zivotofsky*, 566 U.S. at 201. When a petitioner presents an argument “that was not clearly pressed or passed on below, that was not the subject of a known circuit split, and that, in fact, no court in the country had squarely addressed before,” this Court ordinarily “decline[s] to ‘be the first court in the Nation’ to decide the petitioner’s novel legal question.” *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 190 (2022) (Thomas, J., dissenting) (quoting *Yee v. Escondido*, 503 U.S. 519, 538 (1992)). There is no reason to depart from that rule here.

No court has questioned the basic premise that, as the Second Circuit put it, “the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment.” Pet. App. 31a (quoting *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020)). Indeed, all three circuits that have reached the constitutionality of prolonged detention under Section 1226(c) start with that premise. In *German Santos v. Warden Pike County Correctional Facilities*, 965 F.3d 203 (3d Cir. 2020), the Third Circuit recognized that “an alien lawfully present but detained under § 1226(c) can still challenge his detention under the Due Process Clause,” *id.* at 210, and that due process holds the government to a particularly heavy burden “when a party stands to lose his liberty, even temporarily,” *id.* at 214. And in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), although the Eighth Circuit rejected “a multi-factor

‘reasonableness’ test,” it did not question that an individual has a liberty interest; instead, the court opined that this Court has “already done whatever balancing is necessary” of the individual’s and government’s interests. *Id.* at 933 (citing *Zadvydas v. Davis*, 533 U.S. 678, 682, 701 (2001); *Demore*, 538 U.S. at 528). Indeed, the government noted in its brief opposing rehearing en banc that the panel “did not hold that due process imposes no constraints on prolonged mandatory detention.” Brief for Respondents-Appellants at 8, *Banyee v. Garland*, No. 22-2252 (8th Cir. Jan. 23, 2025), Dkt. 5477813 (citation modified).

The government’s new theory of due process—that immigration detention does not implicate any individual liberty interest whatsoever—is thus not the subject of any circuit split, as it has never even been addressed by any court considering the constitutionality of detention under Section 1226(c). That, too, is reason to deny the petition.

C. The Government’s New Theory Defies this Court’s Precedents and Common Sense.

Further counseling against certiorari, the government’s new theory is meritless. Immigration detention is civil detention. *Zadvydas*, 533 U.S. at 690. And this Court’s civil detention precedents establish that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause[.]” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). It is axiomatic that detention implicates that core liberty interest, and due process rights therefore

attach. *See Zadvydas*, 533 U.S. at 690 (“Freedom from imprisonment . . . lies at the heart of the liberty that Clause protects.”). The contention that indefinite immigration detention “does not implicate any fundamental rights,” Pet. 24, is thus contrary to well-settled principles of due process. All persons, including lawful permanent residents facing removal proceedings like Respondents, have an interest in not being locked up by the government. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (regardless of citizenship or immigration status, everyone in this country is covered by the Fifth Amendment’s protections against “deprivation of life, liberty, or property without due process of law”); U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty or property, without due process of law[.]”).

The government’s new argument is contrary to the most basic concept of liberty. The *paradigmatic* “liberty” interest protected by the Due Process Clause is freedom from physical restraint. *Kerry v. Din*, 576 U.S. 86, 92 (2015) (“personal liberty of individuals” protected by Due Process Clause “consist[ed] in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint”) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 130 (1769)). And this Court’s decisions have long mirrored that understanding. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (describing “the interest in being free from physical detention” as “the most elemental of liberty interests”); *Foucha*, 504 U.S. at 86 (describing

the “[f]reedom from physical restraint” as “a fundamental right”).

Nevertheless, ignoring this bedrock law and without support from other authorities, the government asserts that “detention without a bond hearing during the pendency of [] removal proceedings does not implicate any fundamental rights.” Pet. 24. In short, the government contends that the Due Process Clause imposes no limit whatsoever on its power to detain someone for immigration purposes—regardless of the length of detention or whether detention is necessary for effectuating removal. Pet. 22.

That position has no footing in this Court’s precedents. In *Demore v. Kim*, this Court rejected a facial challenge to Section 1226(c) only on the ground that a “brief” period of detention without a hearing, where deportability was conceded, did not violate due process. 538 U.S. at 513. In essence, *Demore* upheld Congress’s categorical presumption of flight risk and dangerousness under those limited circumstances. *Id.* 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[.]”). But the Court did not endorse detention without an individualized custody hearing under other circumstances, and it certainly did not hold that Section 1226(c) detention implicates no liberty interest.

The government’s reliance on *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), falls even flatter. *Glucksberg* supplies a test for determining

when courts may recognize new rights *beyond* “the specific freedoms protected by the Bill of Rights.” *Id.* at 720. That test recognizes that “[t]he Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes *more than* the absence of physical restraint,” *id.* at 719 (emphasis added). But the “absence of physical restraint” is the *core* “liberty” protected by the Due Process Clause. It is as old as the Clause itself.

The government’s other citations are similarly inapplicable because they also concern asserted liberty interests other than bodily freedom from detention. *See Dep’t of State v. Muñoz*, 602 U.S. 899, 912 (2024) (rejecting right to bring noncitizen spouse into the country); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (same for noncitizen child’s right to be released to a willing-and-able private custodian); *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (same for visitation right by biological father).

The government is also mistaken in citing *Connecticut Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003), for the proposition that “Section 1226(c) detainees have no *procedural-due-process* right to a bond hearing on matters that are ‘not material’ to the ‘statutory scheme.’” Pet. 3. *Doe* is inapposite because the asserted liberty interest arose from a statute, and not directly from the Constitution. *See Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 56–57 (2d Cir. 2001), *rev’d sub. nom. Connecticut Dep’t of Public Safety v. Doe*, 538 U.S. 1 (2003). For such rights conferred by statute or regulation, courts must look at the relevant statutory or regulatory scheme to determine whether it gives rise to a cognizable liberty interest and, if so,

the nature and scope of that interest. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

In contrast, where the asserted liberty interest arises directly from the Constitution, no further inquiry is needed. Procedural due process protections simply attach. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (termination of parental rights implicates “fundamental liberty interest protected by the Fourteenth Amendment”); *Schall v. Martin*, 467 U.S. 253, 265, 274 (1984) (juvenile detention); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (confinement for medical treatment). When the relevant liberty interest is grounded in the Constitution itself, the government cannot refute its existence, nor cabin its scope, by reference to the statute it uses to effectuate a deprivation; otherwise, the Due Process Clause “would be reduced to a mere tautology.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). “The right to due process is conferred, not by legislative grace, but by constitutional guarantee.” *Id.* (citation modified).

At bottom, under these precedents and the text of the Due Process Clause, the government cannot erase Respondents’ core liberty interest in their bodily freedom from detention. This Court should decline the government’s invitation to grant certiorari in order to be the first court to consider its extraordinary, unprecedented, and forfeited assertion to the contrary.

II. THE COURT OF APPEALS' FACT-BOUND APPLICATION OF *MATHEWS V. ELDRIDGE* DOES NOT WARRANT REVIEW.

Certiorari also is not warranted on the issues the government *did* press below. In the court of appeals, the government agreed that Respondents had a cognizable liberty interest, but disputed what process was due. Pet. App. 14a. The court of appeals adjudicated that dispute by applying the *Mathews v. Eldridge* test on the particular facts of the case and concluded Respondents were entitled to a bond hearing before an immigration judge. *Id.* 39a. In Mr. Black's case only, it additionally determined the government should have the burden of showing by clear and convincing evidence that further detention was necessary to effectuate removal. *Id.* 40a.

The court of appeals' fact-bound application of *Mathews* to Respondents' particular circumstances does not warrant this Court's review. And its conclusion about the evidentiary burden the government must carry in any bond hearing awarded as a remedy under that fact-bound inquiry (*i.e.*, the government's second Question Presented) is even less fit for certiorari, as there is no live case raising it. *See infra* Part III.

A. The Court of Appeals' Fact-Specific Application of the *Mathews* Framework to These Outlier Cases Was Correct and Is Unworthy of Review.

1. In *Jennings v. Rodriguez*, the government recognized that "outlier cases could arise in which the

[removal] proceedings, and accompanying detention, become unjustifiably prolonged.” Suppl. Reply Brief for Petitioners, 2017 WL 727754 at *17. “In that event, an as-applied challenge to continued detention could be brought in an individual habeas action.” *Id.* The government also acknowledged in *Jennings* that “because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely.” Brief for Petitioners, 2016 WL 5404637 at *47.

The court of appeals below did exactly that. These cases are outliers. The vast majority of immigration detentions comport with the factual predicates in *Demore*, with removal proceedings that conclude, as Congress intended, after a relatively brief period. According to data provided by the Executive Office for Immigration Review, only 5% of people arrested from 2025 to 2026 in the Second Circuit on immigration grounds were detained for more than six months—beyond the length of detention in *Demore*. *Cf. Demore*, 538 U.S. at 531. Of these, a small fraction have qualifying convictions that allow for mandatory detention “pending their removal proceedings.” *Id.* at 527–28.²

Thus, the government’s assertion that the Second Circuit “invalidated the application of a federal statute,” Pet. 14, is false. The court of appeals merely

² Data on file with Respondents’ counsel.

recognized that, in certain unusual circumstances like Mr. Black’s and Mr. G.M.’s, prolonged detention under Section 1226(c) without a bond hearing to assess flight risk and danger will be unconstitutional as-applied.

In an effort to make it seem that the court of appeals did something more sweeping, the government seizes upon the court’s comment that prolonged detention beyond six months raises “serious due process concerns.” Pet. 16. But in the very next sentence, the court of appeals *rejected* “a bright-line rule as a matter of constitutional law,” citing “the Supreme Court’s pronouncements in this context.” Pet. App. 30a. Instead, the court of appeals applied a “flexible due process analysis” under which claims of prolonged detention must be evaluated “case by case,” *id.*, which it did by looking to record evidence not just about Respondents’ length of detention, but also about the harms their detention had inflicted on their health and their family members, *id.* at 31a–39a. By charting this context-driven course, the court of appeals recognized it was joining the other circuits that had “reject[ed] a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention—in the context of a Congressional mandate, in the immigration context, to detain.” *Id.* at 29a.³

³ This case therefore is not a vehicle for taking up the constitutional question reserved in *Jennings*, as the government suggests. Pet. 19.

2. In these circumstances, the court of appeals’ decision to apply *Mathews* was correct. That familiar due process balancing test is consistently “embraced . . . to evaluate the sufficiency of particular procedures.” *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); see *Nelson v. Colorado*, 581 U.S. 128, 134 (2017) (discussing the “familiar procedural due process inspection instructed by” *Mathews*). The government “offers no alternative framework,” Pet. App. 28a, nor does it point to any reason *Mathews* should not apply in the immigration context. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (*Mathews* governs “sufficiency of procedures” in exclusion hearings).

And, as evidenced by the government’s own prior acknowledgments that some cases call for more process than Section 1226(c) provides, *Demore* does not forbid such fact-intensive inquiry. Its holding hinged only on the “brief period necessary” for removal proceedings—mostly, 90 days or less. 538 U.S. at 513, 523. Reflecting that limited holding, fifteen years later, when it faced prolonged detention head on, this Court in *Jennings* did not foreclose a prolonged detention claim by invoking *Demore*. Instead, it remanded for consideration of “respondents’ constitutional arguments,” confirming that due process challenges to prolonged detention remain viable post-*Demore*. *Jennings*, 583 U.S. at 312.

3. The government says review is warranted because two other circuits have not applied the *Mathews* balancing test. But the existence of what it characterizes as a three-circuit split calls for more percolation, not review in this case.

Although the Third Circuit has not applied *Mathews v. Eldridge*, it has also conducted a “highly fact-specific inquiry” to determine that a custody hearing is warranted. *German Santos*, 965 F.3d at 210-13 (conducting the “‘highly fact-specific’ inquiry”). Both the Second and Third Circuits have taken into account factors like length of detention and reasons for the delay in removal. *See id.*; Pet. App. 31a–39a. Little wonder, then, that the authors of the decision below characterized their opinion as bringing the Second Circuit “into alignment with the Third Circuit’s decision in *German Santos*.” Pet. App. 169a (statement of Chin, J., and Carney, J., in support of the denial of rehearing).

Only the Eighth Circuit has sidestepped that fact-bound inquiry, instead holding in a brief opinion that this Court’s precedents “have already done whatever balancing is necessary.” *Banyee*, 115 F.4th at 933. But no other circuit has taken that position, and further percolation in these highly fact-specific habeas cases would help to develop a body of empirical data that will shed light on the procedural due process analysis and a body of caselaw applying due process precedents in different factual scenarios.

B. The Court of Appeals’ Specific Remedies Are Even Less Certworthy.

The results of the Second Circuit’s application of *Mathews* to Mr. Black’s and Mr. G.M.’s facts are also not worthy of review. The remedy it ordered, a bond hearing, resulted from a straightforward, context-specific application of precedent. And the follow-on issue of what evidentiary rules should apply in such a

bond hearing, now packaged as the government's second question presented, is even less certworthy.

1. Review is not warranted on whether bond is a proper remedy under *Mathews v. Eldridge*.

The court of appeals correctly applied the *Mathews* test to Respondents' particular circumstances and ordered a modest remedy that follows ineluctably from this Court's precedents. In the immigration context, "[t]he *Mathews* calculus . . . contemplates a judicious balancing" of three factors: (1) the noncitizen's liberty interest—which increases as the length of detention increases—(2) the risk of erroneous deprivation and the value of any "additional or substitute procedural safeguards," and (3) the government's "asserted interest[s]" in immigration enforcement and safety. See *Hamdi*, 542 U.S. at 529 (quotation marks omitted). The inquiry is fact-intensive: It recognizes that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334.

Based on that flexible, fact-intensive inquiry, the court of appeals here did not order Mr. Black's release; the only remedy it required was a bond hearing. And, of course, it could not have ordered Mr. G.M.'s release, as he had already been released nearly two years earlier. Instead, the Second Circuit remanded his case to the district court to consider "the issue of what procedural requirements would follow" in the event a hearing became necessary. Pet. App. 40a n.27; see also Conference Transcript at 2, *G.M. v. Decker*, No. 21-cv-

4440 (S.D.N.Y. Dec. 9, 2025) (government noting “the Court deferred to this Court on I think burden and additional considerations”).⁴

To reach these results, the court of appeals applied this Court’s longstanding precedents holding that due process requires individualized hearings to justify civil detention. *See, e.g., United States v. Salerno*, 481 U.S. 739, 751–52 (1987); *Foucha*, 504 U.S. at 81; *Schall*, 467 U.S. at 277–78. And those precedents make sense: Individualized hearings are among the Due Process Clause’s most essential protections. To impose civil detention, the government must affirmatively establish that an individual’s circumstances fall within a “carefully limited exception” to our society’s “norm” of liberty. *Salerno*, 481 U.S. at 755. Individualized hearings give the government a mechanism to demonstrate a “sufficiently strong special justification” exists to warrant continued detention. *Zadvydas*, 533 U.S. at 690; *cf. Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (civil detention scheme passes muster where “proper procedures and evidentiary standards,” including periodic individualized review, test the justification for detention). There is no need for this Court to grant certiorari to review the Second Circuit’s precedent-driven conclusion that, on these facts, *Mathews* demands a bond hearing just like it does in other civil detention contexts.

⁴ The district court has had no occasion to decide those issues because Mr. G.M. has not been re-detained.

2. The Court cannot grant review on the burden issue.

As for how Respondents' bond hearings ought to unfold, the Second Circuit upheld the district court's equally fact-driven determination—made only in Mr. Black's case—that the government must “bear the burden” of justifying ongoing detention through clear and convincing evidence. Pet. App. 40a. But this Court lacks jurisdiction to grant certiorari on that issue. In all events, it is even less cert-worthy.⁵

As a threshold matter, Mr. Black's case is unquestionably moot and therefore the petition does not present a live controversy on this issue. *See infra* Part III; Suggestion of Mootness at 1.

Regardless, the court of appeals' ruling on the burden of proof merely applied analogous precedents holding that “[w]here an individual's liberty is at stake,” the government is required to justify continued detention under a clear and convincing evidence standard. Pet. App. 45a (citing *United States v. Comstock*, 560 U.S. 126, 129–31 (2010); *Foucha*, 504 U.S. at 75–76; *Salerno*, 481 U.S. at 751); *see also Addington v. Texas*, 441 U.S. 418, 423 (1979); *Zadvydas*, 533 U.S. at 701 (“[F]or detention to remain reasonable,” greater justification is needed “as the period of . . . confinement grows.”).

Perhaps that weight of binding authority explains why the government cannot point to a split on this

⁵ The Second Circuit did not address this question for Mr. G.M., as the district court had not reached it prior to his release from detention on unrelated grounds. Pet. App. 39a n.27.

question in the courts of appeals. *Cf. German Santos*, 965 F.3d at 213–14 (adopting the same standard in a Section 1226(c) case with similar facts). To try to give the appearance of a split, the government relies on cases involving detention under 8 U.S.C. § 1226(a). *See* Pet. 27–28. But Section 1226(a) presents different due process considerations because it does not authorize detention without an individualized hearing on flight risk and danger. People detained under Section 1226(a) have multiple opportunities by regulation to seek their release on bond or conditions, *see Miranda v. Garland*, 34 F.4th 338, 346 (4th Cir. 2022), while those detained under Section 1226(c) have none. Thus, the procedural due process inquiry is entirely different. *See id.* at 362; *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1202 (9th Cir. 2022) (noting “§ 1226(a) stands out from the other immigration detention provisions” because of its “extensive procedural protections . . . including several layers of review”); *see also Hernandez-Lara v. Lyons*, 10 F.4th 19, 32 (1st Cir. 2021) (disagreeing with the government’s argument that the “three levels of independent review” provide adequate protection).⁶

⁶ In the decision below, the Second Circuit referred to an earlier decision in which it applied the *Mathews* test in the Section 1226(a) context. *See* Pet. App. 44a (citing *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020)). But *Velasco Lopez* was a very unusual Section 1226(a) case because the petitioner filed a habeas petition after he had exhausted all procedures available by regulation and yet had been detained for fourteen months. *Velasco Lopez*, 978 F.3d at 846. Because of the prolonged nature of his detention—which had “lasted almost ten times longer” than most Section 1226(c) detentions, *id.* at 852—the Second Circuit held that the detainee was entitled to an additional bond

All of these cases address the constitutionality of the *initial* “procedures the government affords in § 1226(a) bond hearings” at the outset of detention. *Miranda*, 34 F.4th at 358; *Rodriguez Diaz*, 53 F.4th at 1203 (noting petitioner seemed to raise a “facial challenge”); *Hernandez-Lara*, 10 F.4th at 23. Those procedures are not relevant to the Section 1226(c) context, so the government’s asserted split among Section 1226(a) cases would not be resolved by granting certiorari on government’s second question presented here.⁷

In any event, the court of appeals was correct to place the burden on the government to prove that continued detention under Section 1226(c) is justified by clear and convincing evidence. Assigning the burden to the government reflects the reality that the government will essentially always be able to readily

hearing with the burden of proof shifted to the government. *Velasco Lopez* is therefore distinguishable from mine-run Section 1226(a) cases like those cited by the government, which address only the procedures guaranteed by regulation.

⁷ Judge Nardini’s dissent from the denial of rehearing additionally points to the Bail Reform Act, which places the burden of proof on the government in most cases but reverses the burden and creates a rebuttable presumption of flight risk and dangerousness in a subcategory of cases in which the defendant has certain prior criminal convictions or the court finds probable cause to believe the defendant committed certain enumerated crimes with a threshold sentencing exposure. Pet. App. 119a-121a (citing 18 U.S.C. § 3142(e)(2)). But pretrial detention for that subset of criminal defendants raises different due process considerations from those presented here because, among other things, Sixth Amendment and statutory speedy trial protections provide a separate safeguard against the kind of prolonged detention at issue in the instant habeas cases.

present information related to the detained person’s criminal history, which will bear on flight risk and dangerousness. *See* Pet. App. 38a (noting “ICE may readily access the records of other law enforcement agencies”). With all the resources of federal law enforcement, the government is also likely usually in a position to rebut the evidence the individual advances in support of release, such as their record of rehabilitation in that time or their family and business ties in the United States. Given these dynamics, allocating the burden of proof to the party best-positioned to adduce the relevant evidence makes sense—and, regardless, is unlikely to affect either the production of evidence or the outcome in most cases.

**III. THIS CASE IS A POOR VEHICLE
BECAUSE ANY MERITS DECISION
WOULD HAVE NO EFFECT ON
RESPONDENTS.**

Even if the petition presented any certworthy issue, it still should be denied because any decision on the merits would have no practical effect on either Respondent.

1. A merits decision would have no effect on Mr. Black because his case is unquestionably moot. The immigration court entered an order of removal on June 20, 2023, and Mr. Black’s counsel formally withdrew his appeal to the Board of Immigration Appeals on February 5, 2026. Pet. App. 7a; Suggestion of Mootness, App. A at ¶ 9. He voluntarily moved out of the United States and now resides with his wife in Trinidad. *Id.* Mr. Black does not plan to return to the United States and he has no pending legal proceedings in the United States. *Id.* ¶¶ 8–9. He will

never “be redetained,” Pet. 20, and he faces no continuing or prospective “concrete injuries-in-fact attributable to his” prolonged detention, *Spencer v. Kemna*, 523 U.S. 1, 14 (1998).⁸ Any opinion from this Court as to whether he was properly afforded a bond hearing and whether the government must bear the burden of justifying continued detention by clear and convincing evidence (a question teed up only by Mr. Black’s case), would therefore be purely advisory.

2. Any decision on the merits also would have only remote and speculative effect in Mr. G.M.’s case for two independent reasons. *First*, the government has taken inconsistent positions on whether there is Article III jurisdiction: In the petition, the government argues that Mr. G.M.’s case is not moot because he can be re-detained, but as recently as last December, the government argued in the district court that “[t]here is no present case or controversy” because Mr. G.M. was not in custody and the government had no “present plan” to re-detain him. *See* Conference Transcript at 2, *G.M. v. Decker*, No. 21-cv-4440 (S.D.N.Y. Dec. 9, 2025); *see also id.* at 4 (arguing that “there is really no live case or controversy for [the district court] to weigh in on” anymore). *But see* Pet. 20. In short, the government has created a state of limbo in which the federal courts’ Article III jurisdiction would turn on whatever suits the

⁸ Even if Mr. Black were to return to the United States—despite having no intention of ever doing so—because he is subject to a final removal order, he would not even be subject to renewed detention under Section 1226(c), but detained instead under the different detention provision for noncitizens who have been ordered removed, 8 U.S.C. § 1231(a).

government's current purposes—and Mr. G.M. and his family are left in a state of uncertainty as to whether he will be thrown back into ICE custody.

In any event, however this Court would come down on the mootness question, Mr. G.M.'s case is a poor vehicle because any merits ruling will have no practical effect. Mr. G.M. was released from ICE custody in 2020 during the COVID pandemic because of his medical vulnerability pursuant to an injunction in a different case that was later vacated on appeal. *See* Pet. App. 4a n.1. As a result, Mr. G.M. has not been in immigration custody for years and he never received a bond hearing pursuant to the decision below. Two Members of this Court have previously “question[ed],” in cases arising in a virtually identical posture, whether the “future contingency” of potential re-detention “[i]s sufficiently imminent to support Article III jurisdiction.” *Nielsen v. Preap*, 586 U.S. 392, 426 (2019) (Thomas, J., concurring in part and concurring in the judgment).

Second, Mr. G.M.'s case would certainly become moot if the State of New York grants his pending application for a pardon of his criminal conviction for assault. That conviction is his only encounter with the criminal legal system, and it is the only basis for the removal charge and his detention, *see* Pet. App. 8a. After completing his sentence and spending twenty-one months in immigration detention, *see* Pet. App. 8a, 32a, 35a—and with several U.S.-citizen children and other family members who depend on him financially and emotionally, *see* Pet. App. 32a, 35a, 37a–38a—Mr. G.M. has applied for a pardon from the Governor of New York. If that pending application is

granted, he will no longer be removable (or detainable) at all. *See* 8 U.S.C. § 1227(a)(2)(A)(vi) (specifying that the aggravated felony removability ground in § 1227(a)(2)(A)(iii) “shall not apply . . . if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon . . . by the Governor of any of the several States”).

Because any merits decision will have no practical effect on either Respondent, this case is a poor vehicle. If the Court is interested in the questions presented, it would be better served by granting certiorari in a case where it can be sure of its Article III jurisdiction.

CONCLUSION

The petition should be denied.

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