

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.

CAROL WILLIAMS BLACK

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

v.

KEISY G.M.

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

REPLY BRIEF FOR THE PETITIONERS

D. JOHN SAUER
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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The petition for a writ of certiorari presents two questions about the extent of constitutional limits on the government's authority to detain criminal aliens under 8 U.S.C. 1226(c). Both have divided the circuits, were the subject of supplemental briefing in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and involve a lower court's invalidation of an Act of Congress. Contrary to respondents' contention, this Court's review is warranted.

I. THIS COURT SHOULD GRANT CERTIORARI ON THE FIRST QUESTION PRESENTED

The first question presented asks whether there is a point at which Section 1226(c) detention becomes “unreasonably prolonged,” such that due process requires a bond hearing. Respondents’ attempts to minimize the need for this Court’s review are unavailing.

A. The First Question Presented Warrants Further Review

1. Respondents do not dispute that the Second Circuit’s decision rests on constitutional grounds. But they contend that the decision is a narrow one, invalidating Section 1226(c)’s application only in “outlier cases.” Br. in Opp. 20 (capitalization omitted). That is incorrect. The Second Circuit declared the statute unconstitutional as applied to the entire category of aliens whose detention has become “unreasonably prolonged,” Pet. App. 5a—which it concluded may happen after only six or seven months of detention. See *id.* at 4a-5a, 29a (expressing “serious due process concerns” about any detention lasting longer than six months and invalidating the statute as applied to detention lasting only seven months).

The court of appeals’ reasoning confirms the breadth of its holding. Although it disclaimed imposing any “bright-line constitutional rule,” Pet. App. 29a, the court articulated an exceedingly broad understanding of when *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires a bond hearing. Thus, in analyzing the second *Mathews* factor, the court stated that “almost *any* additional procedural safeguards at some point in the detention would add value.” Pet. App. 35a-36a. And in analyzing the third *Mathews* factor, it stated 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.” *Id.*

at 36a (emphasis added). Those statements—which are not at all specific to the circumstances of respondents’ own cases, contra Br. in Opp. 20-22—could be invoked to require a bond hearing in nearly every due-process challenge to detention under Section 1226(c). Indeed, the decision below has already led district courts within the Second Circuit to declare the application of Section 1226(c) unconstitutional in numerous cases besides respondents’. See, e.g., *Cummings v. Freden*, No. 25-cv-6664 (W.D.N.Y. Feb. 1, 2026); *Charlemond v. Sukmanowski*, No. 25-cv-6295 (W.D.N.Y. Dec. 11, 2025); *J.M.P. v. Arteta*, 804 F. Supp. 3d 387, 392-395 (S.D.N.Y. 2025).

2. Respondents also do not dispute (Br. in Opp. 2, 24) that the circuits are divided on the first question presented. Respondents nevertheless contend (*id.* at 24) that “further percolation” is warranted because of the “highly fact-specific” nature of the *Mathews* inquiry. But the conflict does not concern the application of *Mathews* to “different factual scenarios.” *Ibid.* Rather, it concerns whether *Mathews* is applicable at all. Pet. 16-19. That is a purely legal question, which does not depend on “empirical data.” Br. in Opp. 24. Because multiple circuits have already reached conflicting conclusions, the Court should not delay in granting review.

3. Respondents further suggest (Br. in Opp. 22 n.3) that these cases present a different question from the one on which this Court ordered supplemental briefing in *Jennings*. But while the question in *Jennings* focused on “detention last[ing] six months,” 580 U.S. 1040 (2016), the underlying issue was the same: whether there is a point at which Section 1226(c) detention becomes “unreasonably prolonged” under the Due Process Clause, Pet. I; see Resp. Supp. Br. at 27, *Jennings*, *supra* (No. 15-1204) (arguing that “prolonged detention under Sec-

tion 1226(c) without individualized custody hearings violates the Due Process Clause”) (capitalization altered). The Court should therefore take this opportunity to resolve the constitutional issue that it reserved eight Terms ago, which has since become the subject of a circuit split.

B. This Petition Is A Suitable Vehicle For Resolving The First Question Presented

As the petition explains (at 19-20), this petition is also a suitable vehicle for resolving the first question presented. Respondents’ attempts to conjure a vehicle problem fail.

1. The government’s position that Section 1226(c) does not implicate fundamental rights is not new

Throughout these cases, the government has maintained that although respondents have a liberty interest in avoiding detention, that interest does not rise to the level of a fundamental right. See 22-70 Gov’t C.A. Br. 24 n.7. If it did, the application of Section 1226(c) would be subject to strict scrutiny. See *Department of State v. Muñoz*, 602 U.S. 899, 910 (2024). And the government has never argued that strict scrutiny applies to Section 1226(c). Instead, the government has argued that detention under Section 1226(c) is constitutionally permissible as long as it is rationally related to legitimate government interests. See 22-70 Gov’t C.A. Br. 14, 22-24.

The petition simply reiterates (at 24) that position. Yet respondents characterize the government’s position that Section 1226(c) detention does not implicate any fundamental rights as a “new” one. Br. in Opp. 13. And they contend that the government conceded below that Section 1226(c) implicates fundamental rights by acknowledging that respondents have “at least some de-

gree of liberty interest in not being detained.” *Id.* at 12 (quoting 22-70 Gov’t C.A. Br. 24 n.7).

Respondents, however, conflate two distinct issues: (1) whether respondents have a liberty interest in avoiding detention, and (2) whether that liberty interest rises to the level of a fundamental right, triggering strict scrutiny. A liberty interest can be cognizable under the Due Process Clause without being a fundamental right. See *Washington v. Glucksberg*, 521 U.S. 702, 729 (1997). Indeed, that distinction runs throughout this Court’s precedents. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305 (1993) (distinguishing “fundamental rights” from “lesser interest[s],” which “demand[] no more than a ‘reasonable fit’ between the governmental purpose” and “the means chosen to advance that purpose”).

The government’s acknowledgment that Section 1226(c) implicates a liberty interest was therefore not a concession that Section 1226(c) implicates a fundamental right. Only those liberty interests that are “deeply rooted in this Nation’s history and tradition” are considered fundamental. *Muñoz*, 602 U.S. at 910 (citation omitted). And the government has never argued that respondents’ liberty interests fit that description. To the contrary, the government below characterized respondents’ liberty interests as “lessened.” 22-70 Gov’t C.A. Br. 28. And respondents themselves did not argue that their liberty interests triggered strict scrutiny. See, e.g., 22-70 G.M. C.A. Br. 43 (describing the applicable substantive-due-process inquiry as whether an alien’s detention is “‘reasonably related’ to the government’s interests”) (citation omitted); 20-3224 Black C.A. Br. 15-17. Respondents therefore err in characterizing (Br. in Opp. 12) the argument that Section 1226(c) does not implicate funda-

mental rights as either “forfeit[ed]” or “contrary” to the government’s position below.

Respondents likewise err in characterizing (Br. in Opp. 11-12) the argument as contrary to the government’s position in *Jennings*. The government in *Jennings* never argued that Section 1226(c) implicates fundamental rights. To the contrary, the government contended that the “liberty interests” of Section 1226(c) detainees are “substantially decreased.” Gov’t Supp. Br. at 5, *Jennings*, *supra* (No. 15-1204); see *id.* at 35-36. In misconstruing the government’s position in *Jennings*, respondents again conflate the existence of a liberty interest with a fundamental right.

Respondents’ discussion (Br. in Opp. 15-19) of this Court’s precedents reflects the same mistake. Respondents observe (*id.* at 17) that the Court in *Demore v. Kim*, 538 U.S. 510 (2003), “did not hold that Section 1226(c) detention implicates no liberty interest.” But the Court also did not hold that Section 1226(c) implicates any fundamental right. Rather, the Court observed that “prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings.” *Id.* at 523 n.7. And it 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. The notion that Section 1226(c) implicates fundamental rights cannot be squared with that holding.

Respondents also contend (Br. in Opp. 14) that “all three circuits that have reached the constitutionality of prolonged detention under Section 1226(c)” “start[ed] with th[e] premise” that Section 1226(c) implicates certain liberty interests. But that is different from the premise that Section 1226(c) implicates fundamental rights.

None of the three circuits suggested that Section 1226(c) warrants strict scrutiny. See Pet. App. 14a n.12; *German Santos v. Warden, Pike County Corr. Facility*, 965 F.3d 203, 208-212 (3d Cir. 2020); *Banyee v. Garland*, 115 F.4th 928, 931-934 (8th Cir. 2024), reh’g en banc denied, 131 F.4th 823 (2025).

Of course, if this Court grants certiorari, respondents would be free to argue that their liberty interests should be regarded as fundamental rights, triggering strict scrutiny. But there is no merit to their assertion that the government has changed position on the issue.

2. G.M.’s case presents a live controversy

a. One of the two respondents, Carol Williams Black, contends (Br. in Opp. 30-31) that his case is now moot, and the government agrees. But because the other respondent’s case (G.M.’s) presents a live controversy, this Court has jurisdiction to review the decision below. See *Biden v. Nebraska*, 600 U.S. 477, 489 (2023); *Honig v. Doe*, 484 U.S. 305, 318 (1988).

There is no dispute that G.M.’s case presents a live controversy. The Second Circuit held that it did, Pet. App. 4a n.1, and nothing has changed since then. Indeed, the parties recently filed letter briefs in the district court agreeing that G.M.’s case remains live. See D. Ct. Doc. 58, at 3-4 (Jan. 16, 2026); D. Ct. Doc. 59, at 2 (Jan. 16, 2026). The government has a live interest in ensuring that it may redetain G.M. without having to justify his detention by clear and convincing evidence at a bond hearing. See D. Ct. Doc. 59, at 2. And the briefs agree that as long as the government “will not disavow redetaining” him, G.M. “remains at risk of redetention” under Section 1226(c). D. Ct. Doc. 58, at 3; see D. Ct. Doc. 59, at 2. As G.M.’s brief correctly observes, the habeas petitioners in *Nielsen v. Preap*, 586 U.S. 392 (2019),

faced a similar threat of redetention under Section 1226(c) after having been released from immigration custody under an injunction that was later dissolved. D. Ct. Doc. 58, at 3. And the plurality opinion in *Nielsen* determined that “the threat of re-arrest and mandatory detention” under Section 1226(c) prevented the parties’ dispute over the legality of that detention from becoming moot. 586 U.S. at 403. There is no basis for a different conclusion here.

Although G.M. recognizes that his case presents a live controversy, he asserts (Br. in Opp. 31) that the government took a contrary position during a December 2025 status conference in the district court. But that conference occurred before the government filed its letter brief, which expressed the government’s definitive position that “there remains a live case.” D. Ct. Doc. 59, at 2 n.1. In any event, the point that the government sought to convey at that conference was merely that, given the Second Circuit’s resolution of G.M.’s constitutional challenge to Section 1226(c), “there [wa]s nothing left for [the district court] to do.” 21-cv-4440 Conference Tr. 2 (Dec. 9, 2025). The government did not suggest that the issue of Section 1226(c)’s constitutionality was itself moot or rule out the possibility of seeking this Court’s review. *Id.* at 2-3, 19-20.

G.M. also contends (Br. in Opp. 32) that his case could become moot “if the State of New York grants his pending application for a pardon of his criminal conviction for assault.” But whether the State will do so is purely speculative. In the meantime, G.M.’s dispute with the government about detention pending his removal remains live.

To the extent this Court has concerns, however, it may wish to add the mootness issue as a question presented.

See, e.g., *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County*, No. 25-170, 2026 WL 490537 (Feb. 23, 2026). If the Court ultimately concludes that G.M.’s case is moot (and that Black’s case has become moot), the proper course would be to vacate the decision below.

b. Because G.M.’s case presents a live controversy, the Court should simply grant the petition for a writ of certiorari. The Court should not deny the petition with respect to Black.

When a case that would have otherwise warranted plenary review becomes moot, this Court’s “established practice” is not to deny certiorari, but to “vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019); see also, e.g., *Tennessee v. Kennedy*, No. 25-162 (Jan. 20, 2026); *Payne v. Biden*, 144 S. Ct. 480 (2023) (No. 22-1225); *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (No. 20-1738); *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212). That is especially so in cases—such as Black’s—where mootness arises from the voluntary action of the party who prevailed in the decision that cannot be reviewed. See *Azar v. Garza*, 584 U.S. 726, 729 (2018) (per curiam); *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 22 (2023) (Jackson, J., concurring in the judgment).

If G.M.’s case were also to become moot while it was before this Court, the intervening mootness of both respondents’ cases will have deprived the government of an opportunity for the Court’s review of the decision below. Granting the petition now would enable the Court to review the decision below, while still allowing the

government to seek vacatur of the judgments in both respondents' cases if G.M.'s case becomes moot during further proceedings. In the alternative, the Court could vacate, under *Munsingwear*, the court of appeals' separate judgment in favor of Black, while granting review of the decision below as it bears on G.M.

C. The Court Of Appeals' Decision On The First Question Presented Is Incorrect

On the merits, respondents characterize (Br. in Opp. 11) the government as arguing that "the Due Process Clause affords [Section 1226(c) detainees] *no* protections—substantive or procedural." That characterization is incorrect.

A Section 1226(c) detainee could bring a procedural-due-process challenge to the adequacy of the procedures for determining "the facts" that "are relevant under the statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). But the facts that respondents contend should be litigated in a bond hearing here—*i.e.*, flight risk and dangerousness—are irrelevant under Section 1226(c). Respondents' procedural-due-process challenges therefore fail, and the Second Circuit erred in applying *Mathews*. Contrary to respondents' contention (Br. in Opp. 13, 23), the government below objected to the application of "the *Mathews* framework," Pet. App. 26a, and argued that respondents' claims should instead be analyzed under the principles articulated in *Demore*, see 22-70 Gov't C.A. Br. 16-24 & n.7.

Under those principles, which sound in substantive due process, "a Section 1226(c) detainee could bring an as-applied challenge to his detention on the ground that his removal proceedings had become a 'sham.'" Pet. 25 (citation omitted). But respondents do not dispute that

they cannot make that showing here. Their substantive-due-process challenges therefore fail as well.

II. THIS COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESTION PRESENTED

As the petition explains (at 26-28), the Court should also grant certiorari on a second question, which was likewise the subject of supplemental briefing in *Jennings* and is now the subject of a circuit split: whether, if due process does entitle a Section 1226(c) detainee to a bond hearing, it requires placing the burden on the government to justify continued detention by clear and convincing evidence.

Respondents observe (Br. in Opp. 27-29) that the decisions on the other side of the conflict are decisions involving detainees under 8 U.S.C. 1226(a), not Section 1226(c). But if nothing in the Due Process Clause requires the government to shoulder a clear-and-convincing-evidence burden in a Section 1226(a) case, then nothing in the Clause requires the government to shoulder such a burden in a Section 1226(c) case either. After all, Congress found that Section 1226(c) detainees, as a class, pose risks of flight risk and dangerousness. *Demore*, 538 U.S. at 513. All the more reason, then, that the burden should fall on them to rebut that congressional finding. The Second Circuit erred in concluding otherwise.

Respondents contend (Br. in Opp. 27) that because Black's case is moot, and because the Second Circuit reached the second question presented only in Black's case, this Court would lack jurisdiction to consider that question in G.M.'s case. But the second question is simply a follow-on to the first, and G.M.'s case presents a live controversy with respect to both questions presented. See 22-70 G.M. C.A. Br. 56-58. Moreover, the pressed-or-passed-upon rule is not jurisdictional in cases from

federal court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). The second question was at least pressed, if not passed upon, in G.M.'s case. See 22-70 G.M. C.A. Br. 56-58. And although the Second Circuit did not formally decide the question in G.M.'s case, it recognized that his case was bound by the same "principles." Pet. App. 40a n.27. In these circumstances, it would be appropriate for this Court to consider both questions presented in G.M.'s case.

In any event, any concern about the second question presented should not stand in the way of granting certiorari on the first. The first question is the logically antecedent question and is worthy of certiorari on its own. At a minimum, then, the Court should grant review with respect to the first question presented.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MAY 2026