No. 25-886

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE NEW YORK FIELD OFFICE OF U.S. I.C.E., *ET AL.*,

Petitioners,

v.

CAROL WILLIAMS BLACK,

Respondent.

KENNETH GENALO, DIRECTOR OF THE NEW YORK FIELD OFFICE OF U.S. I.C.E., *ET AL.*,

Petitioners,

v.

KEISY G.M.,

Respondents.

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

BRIEF OF IOWA AND 26 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. 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.

2. 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.

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INTEREST OF AMICUS CURIAE

Amici curiae are the State of Iowa and 26 of its sister States in support of Petitioners. States have a vital interest in faithfully enforcing the immigration laws that Congress has enacted. And the States have a direct interest in the integrity of the detention scheme that Congress designed.

Indeed, while immigration enforcement is frequently a federal responsibility the States bear many of its consequences. *See Arizona v. United States*, 567 U.S. 387, 397 (2012) (recognizing that a State "bears many of the consequences of unlawful immigration").

When a criminal alien subject to mandatory detention under 8 U.S.C. § 1226(c) is released pending the conclusion of his removal proceedings, it is the amici States' communities that absorb the risk, the amici States' law-enforcement officers who must locate him if he absconds, the amici States' courts and jails that are taxed if he reoffends, and the amici States' residents who may become his victims. Those are real costs. Section 1226(c) reaches only aliens who have already been convicted of serious crimes—here, first-degree sexual abuse and second-degree assault.

The amici States also participate in enforcing immigration laws. Some enter into 287(g) agreements under 8 U.S.C. § 1357(g) that deputize state officers to assist federal authorities. States honor immigration detainers. And States share criminal-history information with the federal government. Iowa, like several amici States, has entered a task-force agreement under Section 1357(g) under which state officers are trained and authorized to support federal immigration enforcement. That cooperation depends on a federal detention regime that is stable, uniform, and administrable.

The decision below—which grafts an atextual judicially manufactured release requirement onto a statute that Congress wrote without—threatens each of those sovereign interests. The amici States thus have a substantial interest in the questions presented and in the reversal of the judgment below.

That is why the undersigned States file this amicus in support of Applicants seeking to stay the district court's decision.

SUMMARY OF ARGUMENT

The court of appeals held that 8 U.S.C. § 1226(c) becomes unconstitutional once an alien's detention grows "unreasonably prolonged," and that the Constitution then entitles him to a bond hearing at which the government must justify his continued detention by clear and convincing evidence. *Black v. Decker*, 103 F.4th 133, 138 (2d Cir. 2024). That holding is wrong three times over, and each error bears directly on the interests of the amici States.

I. *First*, Section 1226(c) embodies a deliberate legislative judgment—made after Congress confronted the failure of case-by-case release—that certain criminal aliens must be detained pending removal because individualized bond determinations cannot be trusted to identify who will abscond or reoffend.

Congress responded by "expressly prohibit[ing] release" except for narrow witness-protection purposes. *Jennings v. Rodriguez*, 583 U.S. 281, 304

(2018). The remedy the court below ordered—an individualized, government-burdened bond hearing—is precisely the discretionary regime Congress abolished. The amici States, which administer pretrial-release systems every day, can attest that Congress's skepticism of case-by-case prediction was well founded.

II. *Second*, whether to detain aliens pending removal is committed to the political branches, and the decision below is a judicial usurpation of that authority. This Court has long recognized detention during removal proceedings as "a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).

The panel reached the opposite conclusion by misusing the procedural-due-process calculus of *Mathews v. Eldridge* to manufacture what is in substance a right to release. *Black*, 103 F.4th at 138 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), inviting judges to re-weigh the costs and benefits of a policy the Constitution assigns to Congress. *Zadvydas v. Davis*, 533 U.S. 678 (2001), is not to the contrary; it confirms the error, because *Demore* already distinguished it. *See Demore*, 538 U.S. at 527–529.

III. Third, the "unreasonably prolonged" standard is unadministrable. *Black*, 103 F.4th at 138. It has no substantive content, it has already fractured the courts of appeals three ways, and it rewards the dilatory tactics that prolong detention—turning an alien's own delay into his ticket to release. The resulting patchwork disserves the uniformity that immigration law demands and falls hardest on the States, which must absorb each release and the enforcement burdens that follow. The judgment should be reversed.

IV. Fourth, the courts below lacked jurisdiction to entertain respondents' claims. As Justice O'Connor explained in *Demore*, joined by Justices Scalia and Thomas, 8 U.S.C. § 1226(e)—which commands that "[n]o court may set aside any action or decision" of the Executive "regarding the detention or release of any alien"—"unequivocally deprives federal courts of jurisdiction," including habeas jurisdiction, over challenges to the detention of criminal aliens under Section 1226(c). 538 U.S. at 533-534 (O'Connor, J., concurring in part and concurring in the judgment).

Respondents' habeas petitions sought—and the courts below granted—exactly what the statute forbids: orders setting aside their detention. Although the parties have not raised Section 1226(e), the defect is jurisdictional, and this Court has an independent obligation to consider it. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The judgment should be reversed or vacated with instructions to dismiss for want of jurisdiction.

ARGUMENT

I. SECTION 1226(C) REFLECTS A DELIBERATE CONGRESSIONAL JUDGMENT THAT CASE-BY-CASE BOND HEARINGS CANNOT BE TRUSTED TO PROTECT THE PUBLIC.

A. Congress enacted mandatory detention in response to the failure of discretionary, case-by-case release.

Before 1996, detaining aliens pending removal was largely discretionary. The Attorney General could release a criminal alien on bond if, in a case-specific assessment, the alien appeared not to pose a flight risk or a danger.

That regime failed. As this Court recounted in *Demore v. Kim*, Congress considered evidence that "deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." 538 U.S. 510, 513 (2003); *see id.* at 518-521. One in four released criminal aliens absconded; many reoffended while at large. *Id.* The problem was not that immigration judges were applying the wrong standard, but that the enterprise of predicting, alien by alien, who would flee or recidivate had proven unreliable in a population likely to do both.

Congress's response was to slam the discretion door shut. Congress enacted Section 303 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1226(c), which directed that the Secretary "shall take into custody" specified criminal aliens and which, as this Court has held, "expressly prohibits release" from that custody except for narrow witness-protection purposes. *Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018); *see Nielsen v. Preap*, 586 U.S. 392, 396-397 (2019).

Congress thus made a considered choice to replace individualized bond determinations with a bright-line rule of detention because, for this category of aliens, Congress concluded it could not "be trusted to reveal which deportable criminal aliens" would abscond or "continue to engage in crime." *Preap*, 586 U.S. at 412 (opinion of Alito, J.) (cleaned up).

B. The decision below resurrects the case-by-case regime Congress abolished.

The remedy the court of appeals ordered is the mirror image of the policy Congress rejected. The panel held that, once detention becomes "unreasonably prolonged," due process entitles the alien to "an individualized bond hearing at which an IJ can consider the noncitizen's dangerousness and risk of flight," with the government bearing the burden to justify continued detention by clear and convincing evidence. *Black*, 103 F.4th at 152-58; .

That is discretionary, case-by-case release—reintroduced by judicial decree, and on terms more favorable to release than the pre-1996 regime. How is it more favorable? Now, under the new judicially created rule, the burden rests on the government under a heightened standard of proof. The Constitution does not compel Congress to retain the very mechanism it deliberately discarded after finding it unequal to the task.

This Court has already upheld Section 1226(c)'s no-release command against constitutional challenge. *Demore* held that "[d]etention during removal proceedings is a constitutionally permissible part of that process," 538 U.S. at 531, and that Congress may require such detention without further individualized determination, *id.* at 524-525. The panel's contrary holding cannot be reconciled with *Demore*; it mandates the individualized determination *Demore* said the Constitution does not require.

C. The States' own experience administering pretrial release confirms the soundness of Congress's judgment.

The amici States are not disinterested observers when it comes to whether the judiciary overrules Congress's decision to replace case-by-case determination with a categorical rule. States operate pretrial-release and bail systems every day, and they know from hard experience that individualized risk prediction's failures are borne by the public.

Congress's skepticism that bond hearings could reliably sort dangerous criminal immigrants from the safe was not a slight on immigration judges. It reflected a realistic appraisal of what such hearings can and cannot accomplish for a population defined by its own criminal conduct.

And the population is defined by criminal conduct. Section 1226(c) reaches aliens convicted of the enumerated offenses—aggravated felonies and crimes like domestic violence, stalking, and child abuse. 8 U.S.C. §§ 1226(c)(1); 1227(a)(2).

Respondent Black was detained after his conviction for first-degree sexual abuse, an aggravated felony. Respondent G.M. was detained after his conviction for second-degree assault. *Black*, 103 F.4th at 138-40. When an alien in that category is released pending removal, the consequences land on the States: state and local police must locate him if he absconds, state courts and jails must respond if he reoffends, and state residents bear the risk of re-offense while the criminal is out on the loose.

Amici States participate in federal enforcement—through Section 287(g) agreements, detainers, and information-sharing, among other cooperation—precisely to keep criminal aliens from disappearing into their communities. The decision below works against that cooperative scheme by countermanding the Congressional scheme determining that certain aliens are subject to categorical detention.

II. THE DETENTION OF CRIMINAL ALIENS PENDING REMOVAL IS COMMITTED TO THE POLITICAL BRANCHES, AND THE DECISION BELOW IS A JUDICIAL USURPATION OF THAT AUTHORITY.

A. Immigration policy relating to detention of aliens pending removal is the province of Congress and the Executive.

Any policy relating to federal alien detention is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Mathews v. Diaz*, 426 U.S. 67, 81 & n.17 (1976) (cleaned up). Formulating those policies "is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954); *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Trump v. Hawaii*, 585 U.S. 667, 702-704 (2018). Because immigration choices "must be defined in the light of changing political and economic circumstances," this Court has prescribed "a narrow standard of review of decisions made by the Congress or the President in the area of immigration." *Diaz*, 426 U.S. at 81-82.

Detention pending removal is integral to that political-branch authority. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Demore*, 538 U.S. at 521 (citing *Diaz*, 426 U.S. at 79-80). And "detention during deportation proceedings" is a "constitutionally valid aspect of the deportation process." *Id.* at 523.

This Court so held more than a century ago, *see Wong Wing v. United States*, 163 U.S. 228, 235 (1896), and reaffirmed it in holding that aliens have no constitutional entitlement to release on bond, *see Carlson v. Landon*, 342 U.S. 524, 537-542 (1952). The power to detain pending removal is the power to make detention effective; it does not evaporate when proceedings take time.

B. The panel substituted its own policy judgment for Congress's by misapplying a procedural-due-process framework to a substantive question.

Rather than ask the question substantive due process actually poses, the court of appeals applied the *Mathews v. Eldridge*, 424 U.S. 319 (1976), three-factor balancing test, weighed the private interest against the government's, and concluded that "almost *any* additional procedural safeguards" would "add value." *Black*, 103 F.4th at 153.

But the right the panel recognized is a right to be released, which no extra process can supply. The proper inquiry is whether the detention "bears a reasonable relation to the purpose for which the individual was committed." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (cleaned up); *see Reno v. Flores*, 507 U.S. 292, 306 (1993) (substantive due process is satisfied where detention is "meet[s] the (unexacting) standard of rationally advancing some legitimate governmental purpose”). Detention under Section 1226(c) easily clears that bar: it serves Congress’s legitimate purposes of “preventing deportable criminal aliens from fleeing” and stopping them from “continu[ing] to engage in crime” while removal is pending. *Demore*, 538 U.S. at 513, 528.

History confirms that conclusion. An asserted right to a bond hearing pending removal proceedings is not “objectively, deeply rooted in this Nation’s history and tradition.” *Department of State v. Muñoz*, 602 U.S. 899, 910 (2024) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997)). To the contrary, “prior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings.” *Demore*, 538 U.S. at 523 n.7. A right unknown to the first century of federal immigration regulation cannot be constitutionally required today.

Nor can the decision below be defended on its own procedural terms. Litigants “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.” *Connecticut Dep’t of Public Safety v. Doe*, 538 U.S. 1, 8 (2003).

Section 1226(c) makes an individualized determination about flight risk and dangerousness irrelevant. Congress answered those questions categorically for aliens convicted of the enumerated offenses. A bond hearing convened to litigate facts the statute renders immaterial serves no purpose, and the demand for one is simply a substantive quarrel with the statute “recast in ‘procedural due process’ terms.” *Id.* (quoting *Flores*, 507 U.S. at 308).

Nor is the respondents' asserted interest—release on bond from lawful, congressionally mandated detention—the kind of core private right the Clause secures. *Cf. Mullin v. Doe*, 146 S. Ct. 2121, 2143 (2026) (Thomas, J., concurring) ("The Due Process Clause protects rights, not privileges," and a discretionary immigration status is "a government-created privilege, not a core private right") (internal quotation marks omitted).

Mathews v. Eldridge balancing is the wrong test for another reason: it invites judges to redo the cost-benefit analysis that led to Section 1226(c)'s categorical approach. That is exactly what the plenary-power and political-question doctrines forbid in this field. *See Diaz*, 426 U.S. at 81-82.

Judges should not second-guess the political branches' immigration judgments by substituting their own assessment of how the equities net out. The panel's approach—under which "almost any" additional safeguard "would add value," *Black*, 103 F.4th at 153—proves too much, for it would justify judicial revision of any detention scheme Congress enacts.

This Court's two most recent immigration decisions drive the point home. In *Mullin v. Al Otro Lado*, 146 S. Ct. 2079, 2095 (2026), the Court enforced the INA's inspection-and-asylum provisions as Congress wrote them, holding that asserted equities "cannot defeat the best reading of the text" and confirming the political branches' authority over the admission process from the threshold onward.

And in *Mullin v. Doe*, 146 S. Ct. at 2138, the Court gave full effect to Congress's bar on judicial review of TPS determinations and emphasized that, even in evaluating constitutional claims, "the immigration context is an important factor." The judicial role in this field is to enforce the scheme Congress enacted—not to engage in judicial improvements upon it through *Mathews* balancing.

C. Zadvydas does not support the decision below; it confirms the error.

The court of appeals leaned on *Zadvydas v. Davis*, which read a presumptive six-month limit into the post-removal-order detention statute, 8 U.S.C. § 1231(a)(6). But *Zadvydas* turned on a feature absent here: the detention there could be indefinite *and* potentially permanent, because the alien had already been ordered removed and yet "removal [was] no longer reasonably foreseeable." 533 U.S. at 699. Detention without the possibility of removal was thus construed to be improper. *Id.* at 690-691, 699-701.

Section 1226(c) detention is categorically different, as *Demore* expressly held in distinguishing *Zadvydas*. It imposes detention during ongoing removal proceedings; it has "a definite termination point"—the conclusion of those proceedings; and it serves its purpose at every moment until then. *Demore*, 538 U.S. at 527-529.

"[T]he detention here is of a much shorter duration" and, unlike in *Zadvydas*, "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings." *Id.* at 528. The panel's importation of a *Zadvydas*-style imposition run headlong into *Demore*'s holding as to Section 1226(c). It ignores the distinction this Court drew. The Constitution does not forbid what *Demore* held Congress may do.

III. THE "UNREASONABLY PROLONGED" STANDARD IS UNADMINISTRABLE AND PRODUCES AN UNSTABLE PATCHWORK THAT DISSERVES THE STATES.

A. The standard has no determinate content.

Even if the Constitution permitted a judge-made reasonableness limit, the one the court below adopted is not administrable.

The panel announced that "any immigration detention exceeding six months without a bond hearing raises serious due process concerns," *Black*, 103 F.4th at 150, yet it deemed even respondent Black's seven-month detention "unreasonably prolonged"—a period that exceeded by a single month the detention this Court upheld in *Demore*.

There is no principled line here, only a sliding scale. Courts applying the standard have resorted to open-ended, multi-factor inquiries—weighing the length of detention, the foreseeability of removal, the conditions of confinement, and which party is responsible for delay. *See, e.g., German Santos v. Warden, Pike County Correctional Facility*, 965 F.3d 203, 210-213 (3d Cir. 2020). Such tests supply no rule of decision. That is precisely the regime of unbounded discretion that Section 1226(c) was enacted to displace.

B. The standard has already fractured the courts of appeals, making liberty turn on geography.

The decision below is now one decision in a three-way split over interpreting the same federal statute. The Second Circuit holds that detention of roughly six to seven months can require a government-burdened bond hearing. *Black*, 103 F.4th at 150, 154. The Eighth Circuit holds the opposite: "Due process imposes no time limit on detention pending deportation" under Section 1226(c). *Banyee v. Garland*, 115 F.4th 928, 931-934 (8th Cir. 2024). The Third Circuit charts a middle course, applying its own multi-factor reasonableness test. *German Santos*, 965 F.3d at 210-213; *see Banyee*, 115 F.4th at 932 n.3. The same alien, detained under the same statute, may be entitled to release in New York, ineligible for any hearing in Minnesota, and subject to a fact-intensive balancing exercise in Pennsylvania.

That patchwork is intolerable in a field where uniformity is constitutionally prescribed and practically essential. The immigration laws form "a comprehensive and unified system," and "an alien may be detained in one State and removed from another." *Arizona v. United States*, 567 U.S. 387, 394-395 (2012). The public's safety should not turn on the district of confinement. Only this Court can restore the uniform rule that Congress wrote, and that the amici States rely upon in structuring their cooperation with federal enforcement.

C. The standard rewards delay and shifts the resulting burdens onto the States.

A reasonableness clock that runs against the government creates a perverse incentive: the longer an alien can make his proceedings last, the stronger his claim to release becomes. The standard thus rewards the dilatory tactics, like serial continuances, successive appeals, and collateral filings, that prolong detention in the first place. This Court flagged that problem in *Demore*, where the alien's own request for a continuance had extended his detention. 538 U.S. at 530-531 & n.14. A rule under which an alien can manufacture his own release by manufacturing delay is self-defeating, and it perversely advantages those most determined to resist removal.

The burdens of that regime fall on the amici States. Each release returns a convicted criminal alien to a State pending removal. Each failure to appear becomes a problem for State and local law enforcement to solve. And each round of reasonableness litigation consumes resources and breeds uncertainty about who will be detained and who will not.

Amici States have ordered their own enforcement efforts—their Section 287(g) agreements, their detainer practices, their information-sharing—around the categorical detention command that Congress enacted and that *Demore* upheld. The decision below replaces that administrable rule with a standardless inquiry that no sovereign can plan around. The bright-line rule Congress wrote is workable; the panel's balancing is not. That contrast is itself a powerful reason to reverse.

IV. THE COURTS BELOW LACKED JURISDICTION: SECTION 1226(E) BARS ANY COURT FROM SETTING ASIDE THE EXECUTIVE'S DETENTION OF CRIMINAL ALIENS UNDER SECTION 1226(C).

A. Although the parties have not raised Section 1226(e), this Court must assure itself of jurisdiction.

Petitioners seek reversal on the merits, and neither party has briefed Section 1226(e). That is no obstacle. "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), and so "must raise and decide jurisdictional questions that the parties either overlook or elect not to press," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Nor may a court set the question to one side in favor of an easier merits disposition: "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

Section 1226(e) strips jurisdiction from district courts. It is addressed to courts, not parties—"[n]o court may set aside" the covered actions—and Justice O'Connor recognized it as a provision that "deprives federal courts of jurisdiction." *Demore*, 538 U.S. at 533 (O'Connor, J., concurring in part and concurring in the judgment). This Court can thus reach the question even though the parties have not, and it should. The answer disposes of the case by revealing the district court lacked jurisdiction altogether.

B. Section 1226(e) precludes all review—including habeas review—of the Executive's detention of criminal aliens under Section 1226(c).

Congress spoke directly to district courts' role in cases like this one: "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." 8 U.S.C. § 1226(e); *see Preap*, 586 U.S. at 397 n.2 (the Secretary of Homeland Security now exercises the relevant detention functions). The first sentence insulates the Executive's discretionary judgments from review. The second sentence sweeps more broadly: no court—district or circuit—may "set aside any action or decision" regarding the detention or release of any alien held under the section. *Preap*, 486 U.S. at 961–62.

Justice O'Connor, joined by Justices Scalia and Thomas, read that text the only way it can be read: as "unequivocally depriv[ing] federal courts of jurisdiction to set aside 'any action or decision' by the Attorney General in detaining criminal aliens under 1226(c) while removal proceedings are ongoing." *Demore*, 538 U.S. at 533 (O'Connor, J., concurring in part and concurring in the judgment).

"[T]he signal sent by Congress in enacting § 1226(e) could not be clearer," and "[t]here is simply no reasonable way to read this language other than as precluding all review, including habeas review, of the Attorney General's actions or decisions to detain criminal aliens pursuant to § 1226(c)." *Id.* at 534. "It cannot seriously be maintained," she explained, "that the second sentence employs a term of art such that 'no court' does not really mean 'no court.'" *Id.* at 535.

That reading respects the presumption of judicial review and the rule that Congress must speak clearly before habeas jurisdiction will be deemed repealed. *Mullin v. Doe*, 146 S. Ct. at 2134. And unlike final orders of exclusion and deportation, which were historically tested by habeas petition, "there is no analogous history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings." *Demore*, 538 U.S. at 536 (O'Connor, J., concurring in part and concurring in the judgment). The language here is as clear as what the Court recently recognized in *Mullin*.

A majority in *Demore*, borrowing a distinction from *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999), read Section 1226(e) to leave room for challenges to "the statutory framework" itself, 538 U.S. at 517. But Justice O'Connor saw "no basis for importing" that judge-made distinction "into the plain language of the statute," 538 U.S. at 536 (O'Connor, J.), and this Court's more recent decisions confirm that the INA's review bars must be enforced according to their terms, without artificial carve-outs. *See Patel v. Garland*, 596 U.S. 328, 338-339, 346-347 (2022) (8 U.S.C. § 1252(a)(2)(B)(i) bars review of "any judgment regarding the granting of relief," including the factual findings underlying it); *Mullin v. Doe*, 146 S. Ct. at

2134 (giving full effect to Congress's preclusion of review of temporary protected status determinations); *see also Jennings*, 583 U.S. at 313-314 (Thomas, J., concurring in part and concurring in the judgment) (concluding that 8 U.S.C. § 1252(b)(9) independently deprived the courts of jurisdiction over these detention challenges).

C. Respondents' case-specific claims are barred under any reading of Section 1226(e).

The Court need not even revisit *Demore*'s jurisdictional analysis to resolve this case, because respondents' claims are barred even on the majority's own terms. What *Demore* preserved was review of a challenge to "the statutory framework" as such—there, a claim that Section 1226(c) was unconstitutional from the start because it dispensed with individualized hearings altogether. 538 U.S. at 517.

Respondents' theory is not that. Indeed, they accept that the statute validly authorized their detention when it began. Instead, they contend that continued detention became unconstitutional at some indeterminate—but already passed—point. After seven months for respondent Black, twenty-one for respondent G.M. *Black*, 103 F.4th at 137–38.

The "unreasonably prolonged" inquiry is individualized. *Black*, 103 F.4th at 155. The question turns on the length of the alien's detention, the causes of delay in his proceedings, and his prospects of removal. And the remedy it yields is an order directing the Executive to justify, or else end, that alien's detention. A claim that turns on the facts of one alien's custody, and that seeks to set that custody aside, is a request that a court "set aside any action or decision . . . regarding the detention or release of any alien." 8 U.S.C. § 1226(e).

The feature that makes the panel's standard unadministrable is what places it at the core of what Congress withdrew from judicial cognizance.

D. Enforcing Section 1226(e) as written raises no Suspension Clause problem.

Justice O'Connor confronted the remaining question about her interpretation of Section 1226(e): whether reading Section 1226(e) to mean what it says would unconstitutionally suspend the writ of habeas corpus. U.S. Const. Art. I, § 9, cl. 2. Her answer—that "any argument that § 1226(e) violates the Suspension Clause is likely unavailing," has gained force with time. *Demore*, 538 U.S. at 537 (O'Connor, J., concurring in part and concurring in the judgment).

The Suspension Clause protects the writ, "at the absolute minimum. . . 'as it existed in 1789.'" *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); *see Felker v. Turpin*, 518 U.S. 651, 663-64 (1996); *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 116-117 (2020).

And as Justice O'Connor's historical survey showed, though this Court long entertained habeas challenges to final exclusion and deportation decisions, "in no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing." *Demore*, 538 U.S. at 539 (O'Connor, J., concurring in part and concurring in the judgment). "All in all, it appears that in 1789, and thereafter until very recently, the writ was not generally available to aliens to challenge their detention while removal proceedings were ongoing." *Id.*

That conclusion marches together with the history recounted above: until 1907, no statute even permitted bail for aliens pending deportation proceedings. *See Demore*, 538 U.S. at 523 n.7. The same absence of historical practice that defeats respondents' due-process claim forecloses any Suspension Clause objection. Congress validly withdrew jurisdiction over claims like respondents'; the courts below therefore had no power to act; and their judgments cannot stand.

CONCLUSION

For the above reasons, and the reasons stated by Petitioners, this Court should reverse the judgment of the Court of Appeals. Or, if the Court concludes that Section 1226(e) deprives the courts below of jurisdiction, this Court should vacate and remand with instructions to dismiss respondents' habeas petitions.

Respectfully submitted,

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