No. 25-886

IN THE

Supreme Court of the United States

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

Petitioners,

v.

KEISY G.M.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL IMMIGRATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTEREST OF AMICUS CURIAE*

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a nonprofit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For more than 50 years, the National Immigration Project has been promoting justice and equality of treatment in all areas of immigration and citizenship law, the criminal legal system, and social policies related to immigration. The National Immigration Project has provided legal training to the bar and the bench on immigration law, including on the immigration consequences of criminal conduct, and has authored *Immigration Law and Crimes* (2020) and four other treatises published by Thomson Reuters. The National Immigration Project regularly litigates petitions for habeas corpus and other challenges to detention brought on behalf of noncitizens in the custody of U.S. Immigration and Customs Enforcement before federal district courts and courts of appeals, and conducts trainings nationally on issues arising in immigration detention. Further, the National Immigration Project has participated as *amicus* in several significant immigration-related cases before this Court, the courts of appeals, and the Board of Immigration

* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

Appeals. *See, e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020); *Jennings v. Rodriguez*, 583 U.S. 281 (2018); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case should be dismissed as moot. Any resolution of Petitioners' appeal short of summary dismissal would conflict with the basic jurisdictional limitations of Article III: because G.M.'s full and unconditional pardon eliminated the sole basis for his detention under 8 U.S.C. § 1226(c), no live controversy persists before this Court. But, if the Court declines to dismiss this case as moot, it should remand to the lower courts to address any statutory and constitutional issues presented by G.M.'s intervening pardon in the first instance.

The Court has long "adhere[d] to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring) (emphasis added). If this Court were to find this case not to be moot, due regard for judicial restraint would cause it to limit its analysis to the precise facts and legal questions implicated by G.M.'s as-applied constitutional challenge. That would necessitate refraining from opining in dicta on other, hypothetical scenarios that are not implicated by this specific case. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring) (explaining that judicial restraint requires a court "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (citations omitted)). Under this principle, at least two hypothetical situations should lie far beyond the scope of the Court's consideration.

First, notwithstanding the Government's passing references to the Laken Riley Act (which was enacted several years after G.M.'s removal proceedings), Pet. Br. 6, 34, the Court should refrain from addressing whether the Due Process Clause permits detention under § 1226(c), without access to a bond hearing, upon a mere accusation of a crime. G.M. was *convicted* of the offense for which he has now received a pardon, and thus his case does not raise, and has never raised, any issues regarding the Laken Riley Act.

Second, this is not a case about a delay between a noncitizen's release from criminal custody and a later § 1226(c) detention, because G.M. has not preserved any challenge based on such a delay—a constitutional issue the Court left open in *Nielsen v. Preap*. *See* 586 U.S. 392, 420–21 (2019) (Kavanaugh, J., concurring).

A pronouncement on either the Laken Riley issue or the delayed detention issue would run the risk of being advisory, since neither of those scenarios is presented by this case. *See Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (Article III calls "not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.”).

ARGUMENT

I. G.M.’s Intervening Pardon Renders His Case Moot.

G.M.’s pardon has eliminated any case or controversy in the case now before the Court. *See* Resp. Br. 19–20. His criminal history contains only a single offense. BIO 11, 32–33; *see also* Pet. App. 8a. That offense provided the sole basis for his detention under 8 U.S.C. § 1226(c). Pet. App. 54a. On August 28, 2026, New York Governor Kathy Hochul granted G.M. a full and unconditional pardon “of and from the offense.” Suppl. App. 3a.

The absence of any prospect of re-detention moots this case. Given the absence of any statutory basis for G.M.’s re-detention under § 1226(c), there is no likelihood of his “imminent” future injury sufficient to create a personal stake for him in the resolution of this dispute. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024); *see also Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 240 (2024) (“Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it. When that happens, a federal court must dismiss the case as moot.”). The Court should therefore dismiss this case as moot.

II. If the Court Does Not Dismiss This Case as Moot, It Should Remand for Further Consideration by the Lower Courts.

If the Court does not dismiss this case as moot in view of G.M.'s intervening pardon—which eliminated the sole statutory basis for his detention under § 1226(c)—and instead finds that some live dispute still exists, it should remand to permit a lower court to address that dispute in the first instance. Neither the district court nor the court of appeals has had an opportunity to consider any impact that G.M.'s pardon may have on the merits of his underlying constitutional claims. Consistent with this Court's status as "a court of final review and not first view," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (citation omitted), the Court, if it does not dismiss as moot, should remand this case to permit the lower courts to adjudicate whatever live issues might remain, given the significant change that has occurred since the initial grant of certiorari. *See Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606, 610 (2012) (remand warranted where "changed circumstances" have altered "the question before [the Court]").

III. The Laken Riley Act's expansion of Mandatory Detention Based on Mere Suspicion or Accusation of Criminal Conduct Raises a Distinct Due Process Question That This Case Does Not Present.

The Government describes § 1226(c) as applying to five categories of removable persons: those inadmissible for committing specified offenses; those deportable for committing specified offenses; those deportable for multiple crimes involving moral turpitude; those inadmissible or deportable on anti-terrorism related grounds; and, under the Laken Riley Act enacted in 2025, certain inadmissible persons who have been charged with, arrested for, convicted of, or admitted committing specified offenses. Pet. Br. 6 (citing 8 U.S.C. § 1226(c)(1)(A)–(E)).

By characterizing these five categories together, the Government elides a constitutionally significant distinction: the fifth category permits mandatory detention based on mere arrest, charge, or admission as to certain offenses, whereas all other crime-based categories require an underlying *conviction*. Whether mandatory detention is constitutionally permissible prior to conviction should be resolved in a case that squarely presents that question. The Government's mention of the Laken Riley Act in its brief, Pet. Br. 6, 35, should not lead the Court to opine on a subject that lies outside this case and could not have been litigated below. *See Citizens United*, 558 U.S. at 373 (explaining that judicial restraint requires courts not to formulate constitutional rules broader than the facts require); *Mattis*, 431 U.S. at 172 (distinguishing adjudication of present rights from an advisory opinion based on hypothetical facts). Mandatory detention based upon mere accusation was not at issue in *Demore v. Kim*, which only upheld a brief detention pending deportation for a noncitizen who did not contest removability, and whose removability rested on a prior criminal *conviction*, a very different predicate. 538 U.S. at 510, 513–14, 531 (2003).

G.M.'s § 1226(c) detention similarly arose in connection with removal proceedings following a conviction. G.M. pleaded guilty to second-degree assault in 2015 and served a two-year sentence after the conviction. Because those events differ from the circumstances described in, and predated enactment of, the Laken Riley Act, this case presents no occasion to decide what process the new non-conviction-based grounds introduced by that Act require. The Court should refrain from addressing that issue.

A. This Court has not decided whether mandatory detention under § 1226(c) in the absence of a criminal conviction violates due process.

The Laken Riley Act transformed § 1226(c), which had previously required detention on grounds tied to criminal convictions, by additionally mandating detention based on specified arrests, charges, or admissions that do not involve criminal convictions. *Compare* 8 U.S.C. § 1226(c)(1)(B)–(C) (citing 8 U.S.C. § 1227(a)(2)(A)(i) ("convicted of a crime involving moral turpitude" within five years of admission), § 1227(a)(2)(A)(iii) ("convicted of an aggravated felony"), § 1227(a)(2)(B)(i) (conviction "relating to a controlled substance"), § 1227(a)(2)(C) ("convicted" of "[c]ertain firearm offenses")) *with* § 1226(c)(1)(E)(ii) ("is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements" of various crimes).

Demore upheld the detention of a noncitizen who was removable because he had already been convicted of specified offenses. That premise shaped the Court's constitutional analysis. The Court identified interests in ensuring appearance at removal proceedings and protecting the public from further crime. *Demore*, 538 U.S. at 518–21. It also stressed that the respondent's convictions "were obtained following the full procedural protections our criminal justice system offers." *Id.* at 513.

The Laken Riley Act presents a different question because detention under that section may rest on a mere arrest, charge, or admission rather than on a conviction. A conviction generally follows either a guilty plea or a trial at which the government must prove every fact necessary to constitute the charged offense beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 364 (1970), whereas an arrest or charge only requires probable cause, *see Beck v. Ohio*, 379 U.S. 89, 91 (1964). The premise *Demore* treated as significant—that criminal conduct had been established through "full procedural protections" of the criminal justice system, culminating in judgment—is therefore absent in non-conviction-based detentions under the Laken Riley Act. *See Demore*, 538 U.S. at 513, 518. Extending *Demore* to such detentions would treat a mere arrest or charge as constitutionally equivalent to a conviction, despite the materially different protections afforded at different stages of the criminal process.

B. The Laken Riley Act raises distinct due process concerns, the resolution of which should await an appropriate case.

The Laken Riley Act was only recently enacted, and lower courts are just beginning to address the constitutional questions raised by its expansion of § 1226(c) mandatory detention. Those questions should be allowed to develop or percolate through cases that squarely present them, rather than resolved in a case, such as this one, where that Act does not and could not apply.

The lower courts' early decisions thus far illustrate why further development of the due process issue in the lower courts is warranted before this Court addresses the issue. Courts applying the Laken Riley Act have declined to extend § 1226(c)'s mandatory-detention scheme to noncitizens lacking a qualifying conviction. In *Doe v. Moniz*, detention under § 1226(c)(1)(E) rested on a shoplifting arrest that produced neither a charge nor a conviction. 800 F. Supp. 3d 203, 207–09 (D. Mass. 2025). Distinguishing *Demore* because it involved convictions obtained with criminal-process protections, the *Moniz* court held that detention under the facts in that case without a bond hearing violated due process. *Id.* at 216–17.

Similarly, *Vega v. Arnott* held that prolonged detention without a bond hearing of a person who had not been convicted of a crime likely violated due process where the government failed to justify detention based on flight risk or dangerousness. No. 26-CV-3097, 2026 WL 482906 (W.D. Mo. Feb. 20, 2026). Applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), the *Vega* court ordered that petitioner be provided an individualized hearing at which the Government bore the burden of justifying detention without bond. *Id.* at *4–7.

Decisions such as these confirm that the Laken Riley Act has generated a distinct constitutional question that remains unresolved by this Court, all while being irrelevant to this case. Because G.M.'s detention arose from a conviction and predated that Act, the Court should leave that question for a case that squarely presents it.

IV. The Court Has Not Addressed, and Should Not Now Decide, Whether Due Process Requires a Bond Hearing Following a Substantial Delay Between Release From Criminal Custody and Immigration Detention Under § 1226(c).

The principles of judicial restraint also preclude consideration of constitutional questions concerning delayed immigration detentions under § 1226(c). G.M. does not rest his arguments on any delay preceding his § 1226(c) detention, nor does he ask the Court to consider whether such a delay alone affects the applicable due process analysis. Consistent with principles of judicial restraint, the Court should avoid addressing a constitutional question not presented by the facts and arguments in this case. Courts should "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise it." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Indeed, when this question was presented previously in a case directly involving delayed detention, this Court expressly declined to resolve the constitutional question. In *Nielsen v. Preap*, the Court considered whether a noncitizen otherwise covered by § 1226(c)(1) may be mandatorily detained when immigration officials do not take the person into custody immediately upon that person's release from criminal custody. 586 U.S. 392, 396–97, 403–04 (2019). Every respondent in that case had been convicted of an offense enumerated in §§ 1226(c)(1)(A)–(D), and none had been arrested immediately upon release from custody. *Id.* at 399. The Court held that the statute allows such delayed detention, reasoning that § 1226(c)'s coverage turns on the grounds Congress specified in the statute, not on when the arrest occurs. *Id.* at 407–08.

Critically, *Preap* resolved that question as a matter of statutory interpretation alone and not as a constitutional issue. The *Preap* respondents' arguments "ha[d] all been statutory." *Id.* at 419–20. They invoked constitutional concerns only to reinforce their preferred reading of the text. The *Preap* Court declined to apply constitutional avoidance because the statute was unambiguous. *Id.* *Preap* thus decided no constitutional question, either facial or as-applied: "While respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose *as-applied challenges*—that is, constitutional challenges to applications of the statute as we have now read it." *Id.* at 420 (emphasis added). Justice Kavanaugh underscored the point, explaining that because "[t]he sole question before us is narrow" and "entirely statutory," "[n]o constitutional issue is presented." *Id.* at 421 (Kavanaugh, J., concurring). Consistent with that narrow approach, the Court in the present case should not reach here the issue that *Preap* left open and that G.M. did not raise.

The significance of that open constitutional question underscores the need for judicial restraint in the present case. An extended § 1226(c) detention that starts long after the detainee's previous release from criminal custody can disrupt family and community ties that have developed during the interval and risk "splitting up families that are long established in a community," which raises serious due process concerns. *Id*. at 440 (Breyer, J., dissenting). The Court has repeatedly recognized that immigration detention may raise serious due process concerns warranting individualized review, particularly where detention threatens to become indefinite or arbitrary. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (recognizing that indefinite immigration detention raises serious due process concerns because freedom from physical restraint lies at the core of the liberty protected by the Fifth Amendment); *Jennings v. Rodriguez*, 583 U.S. 281, 312 (2018) (rejecting a statutory bond-hearing requirement but remanding constitutional questions for further consideration); *Demore*, 538 U.S. at 529 (upholding mandatory detention on the understanding that "detention ha[s] a definite termination point").

Preap did not decide whether an individual arrested and detained years after release from criminal custody may press a due process claim through an as-applied challenge. Whether such a challenge would succeed, and whether due process would require a bond hearing or other relief, would be for a future court to determine on the record in that case. As Respondent argues, these "highly fact-specific" inquiries warrant individualized adjudication on a developed factual record. Resp. Br. 22–24. Because the present case does not raise the delayed detention issue, the Court should avoid resolving it here: again, "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs*, 597 U.S. at 357 (Roberts, C.J., concurring) (emphasis added). Any ruling in this case should therefore leave the delayed detention question for future litigation, consistent with the Court's practice "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Citizens United*, 558 U.S. at 373 (Roberts, C.J., concurring) (citations omitted).

CONCLUSION

The Court should dismiss Petitioners' appeal as moot. In the alternative, the Court should remand for consideration of the statutory and constitutional impact of G.M.'s intervening pardon in the first instance. In any case, the Court should confine its analysis to the facts presented, declining to opine on such collateral issues as whether due process requires a bond hearing in the case of either (1) detention based on mere suspicion of criminal conduct pursuant to the Laken Riley Act or (2) detention following a substantial delay after release from criminal custody.

Respectfully submitted,

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