

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**

**Brief of *Amici Curiae*
Republican Former Senior Government
Officials, Lawyers, Members of Congress,
a Former Federal Judge, and Members of the
Society for the Rule of Law
in Support of Respondent**

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INTEREST OF *AMICI CURIAE*¹

Amici comprise former White House and Department of Justice lawyers, former senior government officials, a former federal judge, and former members of Congress who were appointed or nominated by Republican Presidents, or who were elected as Republicans, and members of the Society for the Rule of Law. *Amici* include senior officials who served in one or more of the administrations of Presidents Ronald Reagan, George H.W. Bush, George W. Bush, and Donald Trump, including as Department of Justice leaders, Executive Branch agency heads and senior appointees, and independent agency officials. *Amici* also include a retired federal judge appointed by a Republican President, as well as former members of Congress elected as Republicans.

Collectively, *amici* have decades of government experience, spanning the last fifty years. Their interest in this case lies in preserving the principles of due process and the rule of law, which *amici* sought to advance throughout their government service.

The full list of *amici* is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); accord *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). Due process is as

¹ No counsel for a party to this case authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

old as the Magna Carta, *Kerry v. Din*, 576 U.S. 86, 91 (2015), and applies to citizens and noncitizens alike. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The Government’s arguments in this case disregard both this age-old principle and this Court’s precedents, which have consistently held that excessively prolonged detention requires an individualized hearing.

The extreme arguments that the Government now makes cannot be squared with the position it has previously taken before this Court, including in the first Trump administration. For two decades, the Government itself has defended 8 U.S.C. § 1226(c) against facial challenges before this Court by conceding that an individual subjected to prolonged detention without an individual bond hearing can challenge the constitutionality of that detention. See *infra* Section I.E (documenting the Government’s positions in *Demore v. Kim*, 538 U.S. 510 (2003), and *Jennings v. Rodriguez*, 583 U.S. 281 (2018), that prolonged detention without an individualized bond hearing can support an as-applied challenge). But now that an as-applied challenge is before the Court, the Government reverses course, insisting that such challenges are nearly entirely precluded, and that “the length of an alien’s detention does not affect” the denial of a bond hearing under Section 1226(c). Pet’rs’ Br. at 38. The Government offers no justification for this about-face because there is none.

The Government now asserts unprecedented authority to detain noncitizens in the United States for years, or even the rest of their lives, without a court ever reviewing whether that detained noncitizen is a flight risk or a danger to the community: the sole purposes for which Congress authorized detention. On

the Government’s account, even endless detention under Section 1226(c) constitutes “due process of law,” unless the removal proceedings have degenerated into a “sham.” Pet’rs’ Br. at 40. That purported standard is meaningless and is fundamentally contrary to the Due Process Clause.

This Court has long held that noncitizens detained in the United States in removal proceedings have a fundamental due-process liberty interest. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that “once an alien enters the country,” the Due Process Clause limits the Government’s power to confine him, “for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903). The Government’s position here—that no process at all is ever due to aliens held under Section 1226(c), even after prolonged detention—is thus untenable. The Government’s proposed alternative, that alien detainees can always choose to self-deport rather than face protracted, potentially indefinite, detention, is not grounded in any constitutional doctrine. And the claim of several of the Government’s *amici*, that no federal court has jurisdiction to hear as-applied challenges to prolonged detention, directly contradicts this Court’s precedents interpreting Section 1226(e).

In their prior government roles, *amici* have defended exercises of executive authority and have argued for justified and lawful restraints on liberty under appropriate circumstances. But they themselves never asserted, nor ever heard the Government argue to this Court, that a noncitizen detained in the

United States under 8 U.S.C. § 1226(c) has no fundamental liberty interest whatsoever. *See* Pet’rs’ Br. at 30, 45. Nor have *amici* heard the Executive claim that, even outside of the context of national security, its officials may categorically detain such persons for any length of time without ever providing an individualized hearing to determine whether that person’s continuing detention still serves the purposes for which Congress authorized it. *See id.* at 38–40.

This Court has held that mandatory detention under Section 1226(c) is permissible for a “brief period.” *Demore*, 538 U.S. at 513. But it has never suggested that the Government can detain noncitizens for an indeterminate number of years, and even permanently until the detainee’s death, without an individualized hearing. The Government’s assertion of nearly limitless authority to detain without an individualized review of whether continued detention remains justified strikes at one of the most fundamental rights the Constitution guarantees to all persons present in this country. And if due process on such a fundamental matter can be so cavalierly denied to aliens, it risks eroding our commitment to fundamental rights more generally. As Thomas Jefferson warned: “[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow.” *Resolutions Relative to the Alien and Sedition Acts* (Nov. 10, 1798), <https://press-pubs.uchicago.edu/founders/documents/v1ch8s41.html> (*Resolutions Relative to the Alien and Sedition Acts*).

There are, of course, circumstances in which the Government may lawfully detain individuals without an initial hearing. But there can be no question that the longer the detention, the greater the deprivation of the liberty interest. When detention becomes

notably prolonged, the Constitution requires at least *some* process to ensure that continued confinement still serves the interests—such as preventing flight or danger—that justified it in the first place. “At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The mere fact of detention does not extinguish the detained individual’s fundamental liberty interest protected by the Due Process Clause. Due process of law does not permit detention, even though it may have been initially permissible, to devolve into years and years of confinement without an individualized hearing.

In *amici*’s judgment, the Government’s extreme position is irreconcilable with the Due Process Clause’s original meaning and would unconstitutionally deny any liberty interest at all to noncitizens in the United States without requisite legal justification. James Madison, the author of the Bill of Rights, squarely rejected that view, declaring that aliens had “rights under the constitution” and enjoyed “all the common privileges” of the law. James Madison, *Report of 1800* (Jan. 7, 1800), <https://founders.archives.gov/documents/Madison/01-17-02-0202> (Report of 1800). Nor can the Government defend that position as a mere exercise of the detention authority Congress conferred: constitutional history establishes that the due-process guarantee constrains the government even when the legislature and Executive act together. *Amici* write to emphasize the historical roots of this basic due-process principle and the Constitution’s limits on prolonged detention without a hearing.

ARGUMENT

I. Freedom from Prolonged and Arbitrary Detention Is a Foundational Liberty Interest

Freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Foucha*, 504 U.S. at 80; *accord Hendricks*, 521 U.S. at 356. The Due Process Clause “has its origin in Magna Carta,” which assured that no person would be “taken,” “imprisoned,” or “disseised of his . . . liberties” except “by the law of the land.” *Kerry*, 576 U.S. at 91. When the Fifth Amendment was ratified, “due process of law” carried that same meaning to the U.S. Constitution. *Id.* (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856)); *see also Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 141–42 (2020) (Thomas, J., concurring) (describing habeas corpus’s close association with Magna Carta’s “law of the land” provision).

The Clause forbids today what it forbade then: detention without fair process.

A. From this Nation’s Founding, the Due Process Clause Proscribed Prolonged Detention Without a Hearing

The due-process guarantee was forged in resistance to the English Crown’s claim that it could imprison individuals without adequate process. That claim came before the King’s Bench in *Darnel’s Case*, where the Crown defended the imprisonment of five knights by asserting that “the Crown’s interest in protecting the realm justified imprisonment” outside of “the ordinary process of accusation and trial.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting). The knights’ counsel objected that the

arbitrary detention violated “due process of law.” *Darnel’s Case*, 3 How. St. Tr. 1, 18 (K.B. 1627) (argument of Selden); *see also Hamdi*, 542 U.S. at 557 (Scalia, J., dissenting). The King’s Bench accepted the Crown’s defense and, treating the detentions as sanctioned by precedent, refused to grant bail. 3 How. St. Tr. at 57 (opinion of Hyde, Lord C.J.). The parliamentary outrage that followed led to the Petition of Right, which declared that the King could not imprison a subject without showing lawful cause. *Hamdi*, 542 U.S. at 557–58 (Scalia, J., dissenting). Parliament subsequently reinforced that guarantee by enacting the Habeas Corpus Act of 1679, *id.*, enabling a person “unjustly detained in Custody” to test his confinement and “procure [his] Liberty.” Henry Care, *English Liberties, or the Free-Born Subject’s Inheritance* 185 (W.N. ed., 5th ed., Bos., J. Franklin 1721).

Prolonged detention raised particularly grave liberty concerns. Speaking in the Parliament that would pass the Petition of Right, Lord Chief Justice Edward Coke specifically objected to the “Indefiniteness of Time” of the King’s power of detention; such confinement was a “kind of hell.” 3 How. St. Tr. at 130. The Habeas Corpus Act targeted the “great Delays” that jailers had used to frustrate habeas relief and sought “more speedy Releife” for persons who might otherwise be “long detained in Prison” even though the law entitled them to bail. Habeas Corpus Act of 1679, 31 Car. 2, ch. 2. To guard against such indeterminate detention, the Act imposed mandatory time limits for responses by jailers presented with habeas petitions and authorized courts, with limited exception, to release individuals on bail. The Act reflected the deeply held view that prolonged confinement poses a distinctive threat to liberty—even if release may

theoretically be available at some unspecified future date.

Yet while Englishmen cherished these limits upon detention, the Crown denied them to the colonists, who cited this denial as part of the case for independence. Following Blackstone, the colonists understood the habeas statute as a “second *magna carta*,” part of the process due to a person who had been deprived of liberty. See Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949, 1973–74 (2016). “Over time, the denial of the protections of the Habeas Corpus Act to the colonists became a major source of complaint regarding British rule.” Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 Calif. L. Rev. 635, 647 (2015). In 1774, the Continental Congress condemned the denial of habeas as part of the case against British rule, declaring that colonists, “when imprisoned,” could not claim “that great bulwark and palladium of English liberty.” John Jay, Address to the People of Great Britain (Oct. 21, 1774), *available at* <https://founders.archives.gov/documents/Jay/01-01-02-0071> (1774 Address).

The colonists objected to the denial of these protections regardless of whether the denial was by Parliament or the Crown. Colonists recognized that the British legislature acted in concert with the Crown to expand power over the colonies, and they condemned such acts as violations of Parliament’s constitutional authority over them. See Michael McConnell & Nathan Chapman, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1703–05 (2012). For example, when Parliament altered the terms of the Massachusetts Charter to vest greater control in

the Crown, the First Continental Congress denounced this joint legislative-executive action as a violation of liberty inconsistent with the law of the land. *See* 1774 Address. Neither Parliament nor the Crown, the colonists argued, had “the power to unilaterally alter their charter rights without the application of law in the course of a fair hearing.” McConnell & Chapman, *supra*, at 1703. Indeed, in recounting their grievances in the Declaration of Independence, the Founders condemned the King for “combin[ing] with others to subject us to a jurisdiction foreign to our constitution” and for “giving his Assent to their Acts of pretended Legislation.” Declaration of Independence ¶ 15. They declared independence necessary, outraged by “attempts by [Britain’s] legislature to extend an unwarrantable jurisdiction over us.” *Id.* at ¶ 31.

Thus, the colonists built upon a tradition establishing that neither King nor Parliament could deny due process through arbitrary detention. *Dr. Bonham’s Case*, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610), illustrates this point. There, Lord Chief Justice Coke refused to allow the Royal College of Physicians to imprison a physician without due process for practicing without a license, even though the College claimed to act pursuant to an Act of Parliament. *Id.* at 646–47. “[T]he common law,” Coke reasoned, would “control Acts of Parliament” and even “adjudge them to be utterly void” when they were “against common right and reason, or repugnant.” *Id.* at 652. Coke thus construed the Act of Parliament in a manner that preserved fundamental due-process protections. These episodes confirm that due process was understood to constrain governmental power even when the legislature and executive acted together.

Against this backdrop, the Framers constructed a Constitution ensuring that in the United States, “liberty is the norm, and detention”—except while serving a lawful sentence—“the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). Indeed, the Due Process Clause of the Fifth Amendment is just one manifestation of the precept of limited and divided power embedded throughout the Constitution, in which the government’s power to deprive individuals of their fundamental liberty interest is subject to individualized judicial review. *See, e.g.*, U.S. Const. art. I, § 9, cl. 2 (prohibiting the suspension of habeas corpus except “in Cases of Rebellion or Invasion”); *id.* § 9, cl. 3 (prohibiting bills of attainder); *id.* amend. VI (requiring a “speedy” trial). Having endured “the practice of arbitrary imprisonments” under the British rule, the Framers set limits to prevent such abuses and preserve individual liberty. The Federalist No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And in doing so, as James Madison observed, they “except[ed] out” of the Government’s “grant of power those cases in which the government ought not to act, or to act only in a particular mode.” James Madison, Speech to the House of Representatives (June 8, 1789), *available at* Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-12-02-0126>.

Nor is this a situation in which Congress has established a system of individualized review that would make habeas unnecessary or duplicative. *See* McConnell & Chapman, *supra*, at 1781–82 (“The basic idea of due process . . . at the Founding . . . required [the judiciary] to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of *equivalent fairness*.”

(emphasis added)); *Boumediene v. Bush*, 553 U.S. 723, 814 (2008) (Roberts, C.J., dissenting) (“[I]f [a detention regime] provides a means for vindicating [detainees’] rights,” then it is “an adequate substitute for habeas corpus” sufficient to satisfy due process.). But here, there is no “adequate substitute,” because the Government makes no attempt to suggest that its interpretation of Section 1226(c) would provide a means for “vindicating” individual due process rights.

The Government relies on the Alien Friends Act of 1798 to argue that detained noncitizens do not enjoy the fundamental liberty interest enshrined in the Due Process Clause. *See* Pet’rs’ Br. at 31. That reliance is misplaced. As an initial matter, this Court already has held that “once an alien enters the country,” due process constrains the Government’s power to confine him, “for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas*, 533 U.S. at 693.

But even apart from the Court’s controlling decision in *Zadvydas*, the debate over the Alien Friends Act in fact reveals the very opposite of what the Government seeks to establish. That Act, which conferred power on the President to deport foreigners considered “dangerous,” was “one of the most notorious laws in our country’s history.” *Sessions v. Dimaya*, 584 U.S. 148, 185 & n.2 (2018) (Gorsuch, J., concurring). It was a measure that “was understood as a temporary war measure,” not appropriate to peacetime.² *Id.* It “went

² The Government’s reliance on the Alien Enemies Act is likewise misguided because it too was a wartime measure. *See Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2, 771–72 (1950) (explaining

unenforced, may have cost the Federalist Party its existence,” “lapsed a mere two years after its enactment,” and drew the condemnation of Madison and a chorus of his contemporaries. *Id.*

Indeed, in opposing the Alien Friends Act, Madison—the author of the Bill of Rights—stated that aliens had “rights under the constitution” and enjoyed “all the common privileges” of the law. Report of 1800. Madison was particularly concerned with the “banishment” of aliens who, like lawful permanent residents, “may have nearly completed . . . [their] probationary title to citizenship.” *Id.* In Madison’s view, the Act infringed “sacred” principles “[i]n the administration of preventive justice.” *Id.* Aliens were entitled to have “some probable ground of suspicion be exhibited before some judicial authority,” to the right of habeas corpus if wrongfully confined, and to “avoid being thrown into confinement[] by finding pledges or sureties for [their] legal conduct sufficient in the judgment of some judicial authority”—*i.e.*, the right to bail or the kind of bond requested here. *Id.*

Thomas Jefferson likewise opposed the Act, declaring that Congress could not unilaterally extinguish the rights of noncitizens and warning:

[I]f the acts before specified should stand, these conclusions would flow from them; that the General Government may place any act they think proper on the list of crimes, and punish it themselves whether enumerated or not enumerated by the Constitution as cognizable by

that the restrictions imposed on “alien enem[ies]” apply as “an incident of war and not . . . an incident of alienage”); *cf.* Madison, Report of 1800 (distinguishing the rights afforded to “alien enemies” and “alien friends”).

them: that they may transfer its cognizance to the President, or any other person, who may himself be the accuser, counsel, judge and jury, whose *suspensions* may be the evidence, his *order* the sentence, his *officer* the executioner, and his breast the sole record of the transaction . . . and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority in Congress

Resolutions Relative to the Alien and Sedition Acts.

Due process, as originally understood, does not empower the Executive to detain legal permanent residents without assuring fair procedures, particularly regarding detention and confinement.

B. Prolonged Detention Under Section 1226(c) Without a Hearing to Determine Whether Continued Confinement Is Warranted Violates Due Process

Consistent with the Due Process Clause’s origins, this Court has repeatedly recognized that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Clause protects. *Zadvydas*, 533 U.S. at 690. Thus, “civil commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.” *Adlington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added). This fundamental right to liberty applies to citizens and noncitizens alike. *See, e.g., Wong Wing*, 163 U.S. at 238.

In enacting Section 1226(c) **Error! Bookmark not defined.**, Congress authorized mandatory detention of certain classes of noncitizens, *Jennings*, 583 U.S. at

305, which this Court in *Demore* held facially valid. See 538 U.S. at 516. But *Demore* ruled only that the Due Process Clause imposes no absolute prohibition against mandatory detention during removal proceedings. See *id.* at 531. Crucially, the Court rested its analysis on the Government’s representation that “the vast majority” of such detentions lasted only a “brief period” of time, emphasizing that most detentions lasted about six weeks and only about five months “in the minority of cases in which the alien chooses to appeal.” *Id.* at 523, 530.³

Section 1226(c) does not contain an explicit deadline by which detention must end. But the absence of a fixed statutory cutoff does not license the Executive to keep a noncitizen detained for prolonged and indeterminate periods—at times lasting years⁴—without providing a hearing to determine whether such prolonged detention is necessary to prevent them from fleeing or re-offending. Constructing such a regime—whether by legislative or executive decree—would exceed the limits set by the Due Process Clause. Cf. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249 (1972) (“A confinement that is in fact indeterminate cannot rest on procedures designed to authorize

³ Cf. *Carlson v. Landon*, 342 U.S. 524, 526, 542, 546 (1952) (upholding a statutory scheme authorizing the Attorney General to deny bail to noncitizens determined to be “active alien communists” based on the legislative finding that that class of noncitizens were dangerous, but emphasizing that “the problem of . . . unusual delay in deportation hearings [was] not involved” and that the “large majority” of noncitizens were granted bail).

⁴ See, e.g., *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008) (lawful permanent resident detained for nearly seven years); *Leslie v. Att’y Gen. of the U.S.*, 678 F.3d 265, 271 (3d Cir. 2012) (lawful permanent resident detained for four years).

a brief period” of detention); *O’Connor v. Donaldson*, 422 U.S. 563, 574–75 (1975) (explaining that even where initial commitment is permissible, “it could not constitutionally continue after [its original] basis no longer existed”).

The Government incorrectly claims that the Executive can hold noncitizens for prolonged and indeterminate periods because civil detention will, by definition, ensure their appearance for removal proceedings and prevent them from re-offending. *See* Pet’rs’ Br. at 34–37. This reasoning could apply to *any* detention or civil commitment program—yet this Court has repeatedly held that due process requires individualized hearings to determine whether such detention is warranted. *See, e.g., Foucha*, 504 U.S. at 81; *Hendricks*, 521 U.S. at 356–57. Even the criminally convicted, who lose their physical liberty when they serve their criminal sentences, retain a due process liberty interest that requires the government to provide an individualized hearing before it may subject them to involuntary civil detention for reasons independent of their criminal conviction. *Vitek v. Jones*, 445 U.S. 480, 487–94 (1980) (holding that “the involuntary transfer” of a state prisoner “to a mental hospital implicates a liberty interest that is protected by the Due Process Clause”).

These cases confirm that the Due Process Clause requires individualized consideration to justify prolonged detention. As this Court observed in *Hendricks*, “[w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor” specific to the individual, so as “to limit involuntary civil confinement” to those who would present a genuine and ongoing threat if released. 521 U.S. at 358. If Section

1226(c) were construed to forbid an individualized hearing even in cases of prolonged detention, it would lead to a denial of due process. There is no reason to believe that Congress intended to preclude individualized hearings in the case of prolonged detentions. Indeed, as shown below, the Government previously told this Court that an individual subjected to prolonged detention without an individual bond hearing could challenge that detention in court as an unconstitutional application of Section 1226(c).

In short, while Congress may authorize mandatory detention under certain circumstances, as it did when enacting Section 1226(c), this Court's cases confirm that a general statutory authorization to detain a class of persons initially cannot negate the Constitution's demand for individualized procedures to justify prolonged detention.

C. The Longer the Liberty Deprivation, the Greater Scrutiny Due Process Requires

The Government now takes the extraordinary position that the length of detention is entirely irrelevant to the due-process inquiry, Pet'rs' Br. at 37–38, and that even prolonged detention does not implicate a fundamental due process liberty interest. That position ignores the commonsense and historically rooted principle that the longer an individual is detained, the greater the liberty deprivation and the greater scrutiny required to ensure due process. *See, e.g., Jackson*, 406 U.S. at 738 (“At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”).

It is also contrary to this Court's precedents. In *Zadvydas*, this Court explained that in the

immigration-detention context, due process requires the government to establish a “sufficiently strong special justification” that “outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’” 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356).

The same is true of *Demore*. Although the Court did not require Congress to choose the “least burdensome means to accomplish its goals,” *see* 538 U.S. at 528, the Court upheld the mandatory detention scheme under Section 1226(c) only after emphasizing the brief nature of most detentions under Section 1226(c), *id.* at 529, confirming that it was weighing the burden on individual liberty against the government’s interest. In *Demore*, the Court found that brief detention without a hearing did not violate due process.

Together, *Zadvydas* and *Demore* make clear that even in the immigration context—where the political branches generally enjoy considerable discretion over admission, exclusion, and removal—the government may not deprive an individual of the foundational right to freedom from prolonged and unjustified detention without a “sufficiently strong special justification” outweighing that liberty interest. *Zadvydas*, 533 U.S. at 690, 695 (explaining that the Due Process Clause places “important constitutional limitations” on Congress’s power over immigration).

Moreover, the Court has treated the length of detention as central when weighing the liberty interest protected under the Due Process Clause. The Court in *Zadvydas* explicitly recognized that the prospect of lengthy detention implicated a core liberty interest, declaring that “freedom from imprisonment—from government custody, detention, or other forms of

physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Id.* at 690. “And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Id.* at 701. In *Demore*, the Court emphasized that “in the majority of cases [detention] lasts for less than the 90 days we considered presumptively valid in *Zadvydas*.” 538 U.S. at 529.

The holdings in *Zadvydas* and *Demore* in the immigration setting accord with the Court’s treatment of prolonged detention more generally. This Court in *Foucha* held that while “insanity acquittees may be initially held without complying with the [applicable] procedures,” *continued* post-recovery confinement violated the Due Process Clause. 504 U.S. at 76 n.4, 80 (invalidating the continued civil confinement of a criminal defendant acquitted by reason of insanity after his recovery from mental illness). In *McNeil*, this Court recognized that “[i]f the commitment is properly regarded as a short-term confinement with a limited purpose,” “lesser safeguards may be appropriate, but by the same token, the duration of confinement must be strictly limited.” 407 U.S. at 249–50. Conversely, *Salerno* sustained pretrial detention of criminal arrestees only because “[t]he arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.” 481 U.S. at 747 (citation omitted).

Outside of the context of detention, this Court has repeatedly held that the Due Process Clause prohibits unreasonably lengthy deprivations of a protected interest without an individualized hearing. Whether the deprivation involves the impoundment of a vehicle, *see*

Culley v. Marshall, 601 U.S. 377, 387 (2024) (requiring civil asset forfeiture hearings to be “timely”); the summary suspension of a horse trainer’s license, *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (invalidating statute that “neither on its face nor as applied[,] . . . assured a prompt proceeding” because of the “sever[ity]” of the “consequences to a trainer of even a temporary suspension”); or the termination of employment of government employees, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985) (explaining that “[a]t some point, a delay in the post-termination hearing would become a constitutional violation”), this Court has recognized that “[t]he duration of any potentially wrongful deprivation of a [due-process] interest is an important factor” in assessing what process is due. *Mackey v. Montrym*, 443 U.S. 1, 12 (1979). It follows *a fortiori* that duration is an important factor when liberty itself is being deprived.

This long line of precedent—spanning civil and criminal detention and concerning both citizens and noncitizens—establishes that the length of detention is a core consideration in determining the weight of the individual liberty interest at stake and the process that is due to protect that interest. Detaining a person for a “brief period” as “necessary for their removal proceedings,” *Demore*, 538 U.S. at 513, does not offend due process where the reasons for confinement remain reasonably tied to its duration. But these reasons lose force the longer the detention lasts. *See Zadvydas*, 533 U.S. at 701.

That the Government intends to effectuate removal someday in the distant future does not lessen an individual’s fundamental liberty interest against arbitrary detention. Under the Government’s logic, it

could reduce staffing to a single immigration judge, resulting in a decades-long backlog in removal proceedings, yet noncitizens would be categorically barred from ever seeking a bond hearing as long as removal proceedings remain ongoing. Pet'rs' Br. at 40. Such an absurd result is not due process. "[O]nce it is determined that the Due Process Clause applies, 'the question remains what process is due'" and the answer "is not to be found in the . . . statute." *Loudermill*, 470 U.S. at 541 (citing, *inter alia*, *Vitek*, 445 U.S. at 491, and quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

D. The Government Cannot Extinguish Detainees' Core Liberty Interest by Forcing Them to Choose Between Accepting Removal and Accepting Deprivation of Their Rights

The Government claims that it has not deprived noncitizens detained under Section 1226(c) of a core liberty interest because they simply could consent to removal and obtain release. *See* Pet'rs' Br. at 30. The Government's assertion rests on three false premises: first, that liberty may be conditioned on surrendering due-process protections; second, that detainees can "freely" choose removal despite the grave consequences it may entail; and third, that removal necessarily results in freedom from detention.

First, the Government cannot blackmail a noncitizen by denying them their liberty and demanding the surrender of other constitutional and statutory rights as ransom. This Court has long adopted the "overarching principle" that "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v.*

St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interest” because “his exercise of those freedoms would in effect be penalized and inhibited”). Here, the Government goes even further, claiming that it may force detained noncitizens to choose between obtaining their freedom from detention and giving up their constitutional right to procedural due process.⁵ This Court’s unconstitutional-conditions precedents apply *a fortiori* to this brazen attempt to coerce the waiver of either constitutional guarantee. *See Perry*, 408 U.S. at 597 (arguing that the government cannot weaponize a condition to “produce a result which [it] could not command directly” (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

Second, even if the Government could force noncitizens to make this choice, it would not be a free choice. Deportation is a “drastic measure,” which “may be of greater concern to a convicted alien than any potential jail sentence.” *Dimaya*, 584 U.S. at 157 (plurality op.) (internal quotation marks omitted). This is especially true for noncitizens, like G.M., who seek relief from removal based on asylum or the Convention Against

⁵ The Government’s proposal also does not take into account that it would force noncitizens to decide between exchanging their release by removal and potentially relinquishing challenges or appeals to whether, for example, they qualify for asylum or cancellation of removal or can seek protection from removal to a particular country. *See, e.g.*, 8 U.S.C. § 1158; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 (Convention Against Torture or CAT).

Torture. *See Black v. Decker*, 103 F.4th 133, 140 (2d Cir. 2024). A person forced to “choose” between two intolerable alternatives—remaining confined or returning to a country in which they “would be in danger of being subjected to torture,” *see* Convention Against Torture, or experience persecution, *see* 8 U.S.C. § 1158—is not at “liberty” simply because two options are theoretically available. Where the choice is “between the rock and the whirlpool, duress is inherent.” *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967).

Third, the Government’s “choice” is a false one. The Government cannot guarantee the choice of liberty that it purports to offer. For many detainees, agreeing to removal may result in detention in the receiving country—which may not be their native country—even though they are entirely innocent of any crime there. Recently, for example, noncitizens who have been removed to Eswatini (formerly Swaziland) have been incarcerated in maximum-security prisons for over a year—even though those deportees have no connections to the country, no criminal history there, and no chance to appeal their confinement.⁶ These

⁶ *See, e.g.,* N. Casey, *He Was Deported to a Country He’d Never Heard of. He May Never Go Free*, N.Y. TIMES (Aug. 12, 2026), <https://www.nytimes.com/2026/08/12/magazine/deportation-immigrants-prison-eswatini.html>. There is evidence of similar detentions in other countries of individuals removed from the United States in the first Trump administration. Human Rights Watch has documented at least thirty-nine people deported from the United States to Cameroon between 2019 and 2021 who were detained upon arrival, including in military camps or prisons. *“How Can You Throw Us Back?” Asylum Seekers Abused in the US and Deported to Harm in Cameroon*, Human Rights Watch (Feb. 10, 2022). Eritrean nationals likewise have faced detention

noncitizens *cannot*, despite the Government’s assertion, “achieve freedom on their own.” Pet’rs’ Br. at 30. Especially when the foreseeable consequence of leaving U.S. detention is confinement elsewhere, the Government’s proposed “choice”—between detention here and detention abroad—cannot be used to justify diminishing the liberty interest protected by the Due Process Clause.

The Government cannot provide the requisite due process through coercion. It cannot circumvent the Due Process Clause by detaining a noncitizen, allowing confinement to extend well beyond the timeframe this Court has recognized as presumptively valid, and then offering a hypothetical restoration of liberty abroad in exchange for abandoning all legal claims to remain in the United States—least of all when that “restoration” may be removal to persecution, torture, or detention of another kind.

E. The Government’s Argument Departs from Its Prior Positions Before this Court and Would Have Far-Reaching Implications

For two decades, the Government has defended Section 1226(c) against facial challenges before this Court by conceding that prolonged detention without an individualized bond hearing can support an as-applied challenge. Now that precisely such a challenge is before the Court, the Government reverses course,

upon return; one assessment notes reports of torture, overcrowding, and poor conditions. GOV.UK, Country Policy and Information Note: National Service and Illegal Exit, *Eritrea* (Dec. 2025), <https://www.gov.uk/government/publications/eritrea-country-policy-and-information-notes/country-policy-and-information-note-national-service-and-illegal-exit-eritrea-december-2025-accessible>.

insisting that “the length of an alien’s detention does not affect the” denial of a bond hearing under Section 1226(c). Pet’rs’ Br. at 38. The Government offers no justification for this about-face.

In *Demore*, the government defended mandatory detention under § 1226(c) as “constitutional in the ordinary case,” while clarifying that “exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis.” Brief for Petitioners, *Demore*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560, at *48–49; *see also* Reply Brief for Petitioners, *Demore*, 2002 WL 31969024, at *15. In *Jennings*, the Government again acknowledged that detention could become “unjustifiably prolong[ed]” such that “the length of time could itself indicate that closer scrutiny is warranted” in as-applied challenges. Supplemental Reply Brief for Petitioners, *Jennings*, 583 U.S. 281 (No. 15-1204), 2017 WL 727754, at *17.

The Government’s arguments in those cases rested on a balancing of interests, which of course necessarily implies that there is a liberty interest to weigh. Invoking *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Government argued to this Court in *Demore* that the Government’s interests “outweigh [the detainee’s] interest in release from custody during his removal proceedings.” Brief for Petitioners, *Demore*, 2002 WL 31016560, at *24 n.9. The Government likewise affirmed that the “duration of detention in aid of removal is another factor bearing upon” the constitutionality of prolonged detention without an individualized hearing. Brief for Petitioners, *Demore*, 2002 WL 31016560, at *48. It echoed this position in subsequent briefing. *See* Reply Brief for Petitioners, *Garland v. Aleman Gonzalez* (No. 20-322), 2021 WL

6144106, at *20–21 (stating that a prolonged mandatory detention constitutes “a more serious deprivation of liberty” than discretionary detention).

Now, however, the Government—without seeking to justify its change of position—tells this Court that Section 1226(c) detention implicates no fundamental liberty interest. The length of detention has suddenly become irrelevant to its constitutionality, so long as removal “remains practically attainable.” Pet’rs’ Br. at 40. Previously, even when the Government argued that duration alone was not dispositive, it preserved the backstop it now abandons—that prolonged detention could, in exceptional circumstances, warrant closer scrutiny. The Government now claims that detention can be endless without any meaningful scrutiny whatsoever.

The Government’s current position has far-reaching implications for citizens and noncitizens alike. Over two centuries ago, James Madison presaged the ill effects of the position the Government takes today. He noted that if the government could pass any law with respect to noncitizens and deprive them of the core rights protected by the Fifth Amendment, then noncitizens “might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial.” Report of 1800. The Fifth Amendment—then and now—prohibits such draconian treatment of noncitizens. And as the Due Process Clause makes no distinction between noncitizens and all other “person[s],” it is difficult to discern any limiting principle that would cabin the Government’s position to noncitizens alone—exposing its irreconcilable inconsistency with this Court’s precedents and basic principles of due process. As Thomas Jefferson warned: “[T]he friendless alien has indeed been

selected as the safest subject of a first experiment; but the citizen will soon follow.” Resolutions Relative to the Alien and Sedition Acts.

The Government’s position also threatens U.S. citizens abroad. Just last year, the President directed the Secretary of State to designate a foreign country as a State Sponsor of Wrongful Detention in order to “strengthen efforts to protect U.S. nationals from wrongful detention abroad.” Exec. Order No. 14348, 90 Fed. Reg. 43895, 43895 (Sept. 5, 2025). In making these designations, the Secretary considers whether “due process of law has been sufficiently impaired so as to render the detention arbitrary.” 22 U.S.C. §1741(a)(10). Iran—where U.S. citizens must “[b]e ready for the possibility of detention for an unknown length of time” and “possibly without clear reason,” U.S. Dep’t of State, *Iran*, <https://travel.state.gov/en/international-travel/travel-advisories/iran.html>—has been so designated. See U.S. Dep’t of State, *Iran Designated as a State Sponsor of Wrongful Detention*, <https://www.state.gov/releases/office-of-the-spokesperson/2026/02/iran-designated-as-a-state-sponsor-of-wrongful-detention> (this and other websites last visited Sept. 7, 2026).

Similarly, the State Department regularly warns U.S. citizens about traveling to countries where they may face indefinite detention without due process, such as Russia, where “the risk of wrongful detention of U.S. nationals is significant” and where detention can last “for an unknown amount of time, possibly without a clear reason, and without the ability to contact your embassy or anyone else for help,” and China, where U.S. nationals “may . . . face interrogations and detention without fair and transparent treatment under the law.” U.S. Dep’t of State, *Russia*,

<https://travel.state.gov/en/international-travel/travel-advisories/russia.html>; U.S. Dep't of State, *China*, <https://travel.state.gov/en/international-travel/travel-advisories/china.html>.

In other words, the U.S. Government warns its nationals traveling in these countries to prepare for textbook due-process violations. The United States' authority to condemn such treatment would be greatly undermined if, as the Government argues, noncitizens present in the United States themselves lack due-process protections against such indeterminate detention.⁷

II. Section 1226(e) Does Not Bar Judicial Review of this Constitutional Challenge to Prolonged, Mandatory Detention under Section 1226(c).

Several of the Government's *amici* argue that Section 1226(e) precludes judicial review of due process challenges to detention under Section 1226(c). *See* Br. for Am. First Legal Found. at 2; Br. for Iowa et al. at 16. They reject even the bare-minimum standard of rational-basis review that the Government endorses, *see* Pet'rs' Br. at 2–3, claiming that Congress placed as-applied constitutional challenges to detention under Section 1226 *entirely* beyond the judiciary's reach. These arguments ignore both this Court's precedents and the statute's text.

⁷ It does not suffice to distinguish the Government's position from that of other repressive governments by saying that the "key" to release is in the hands of detained noncitizens in the United States but not Americans abroad. Either way, the underlying premise is that the government can declare that a noncitizen within its territorial detention lacks fundamental due-process rights.

This Court has twice held that Section 1226(e)**Error! Bookmark not defined.** does not preclude judicial review of due-process challenges to “the statutory framework that permits [noncitizens] detention without bail.” *Jennings*, 583 U.S. at 295 (internal quotation marks omitted); *Demore*, 538 U.S. at 517 (concluding that Section 1226(e) does not bar judicial review of a “constitutional challenge to the legislation authorizing his detention without bail”); *see also Nielsen v. Preap*, 586 U.S. 392, 401 (2019) (“As we have held, [Section 1226(e)] applies only to ‘discretionary’ decisions about the ‘application’ of § 1226 to particular cases”). The Government’s *amici* have provided no basis to depart from these precedents, much less offered a “special justification” sufficient to overcome the “enhanced force” this Court accords to decisions interpreting statutes. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 447 (2015).

Nor can these *amici* claim textual support for their revisionary reading. Section 1226(e) precludes judicial review of “any action or decision by the Attorney General” (or immigration judges under his authority), in the exercise of his “discretionary judgment,” “regarding the detention of any alien or the revocation or denial of bond or parole” pending removal. 8 U.S.C. § 1226(e). In *Jennings*, *Demore*, and *Preap*, this Court established that Section 1226(e)’s text does not preclude judicial review of legal questions that raise legal challenges to the “statutory framework that permits [the noncitizen’s] detention without bail.” *Demore*, 538 U.S. at 517 (holding that constitutional challenge to the statute as a whole is reviewable); *accord Jennings*, 583 U.S. at 295–96 (holding that whether the statutory text provides for mandatory, prolonged detention is reviewable); *Preap*, 586 U.S. at 401 (holding that

challenges to the applicability of the statute to certain classes of noncitizens is reviewable). G.M. is *not* disputing the decision to detain him based on his individual circumstances; statutorily, his detention under Section 1226(c) is mandatory, not “discretionary.” See *Jennings*, 583 U.S. at 295–96, 301; see also *Olmos v. Holder*, 780 F.3d 1313, 1316 (10th Cir. 2015) (concluding that Section 1226(e) did not bar review due to the lack of discretion involved in detention under Section 1226(c)). Instead, just as in *Demore* and *Jennings*, G.M. raises constitutional challenges to “the extent of the Government’s detention authority” to continue to hold him without a bond hearing, no matter how protracted the length of detention. *Jennings*, 583 U.S. at 296.

That this challenge is “as-applied,” not facial, changes nothing. *Contra* Br. for Am. First Legal Found. at 2. In *Jennings*, this Court unambiguously concluded that a challenge to the statute’s application to certain individuals was also a challenge to “the extent of the Government’s detention authority under the ‘statutory framework’ as a whole.” 583 U.S. 281, 295–96. The plaintiffs’ claims necessarily depended on their individual circumstances—including the fact that they had been detained for longer than six months. *Id.* at 290–91. They did not object to Section 1226(c)’s application in *all* circumstances, as a facial challenge demands. See *Salerno*, 481 U.S. at 745. Instead, they disputed the application of Section 1226(c) to individuals who had already spent considerable time in detention. This Court deemed that challenge reviewable. *Jennings*, 583 U.S. at 295.

Like the *Jennings* plaintiffs, G.M. challenges the limits of the Government’s detention authority under the mandatory statutory scheme—a matter on which

Section 1226(e) is silent. As this Court held in *Demore* and *Jennings*, even in cases of prolonged detention, the federal judiciary has jurisdiction to hear this due-process challenge to “the statutory framework that permits [the alien’s] detention without bail” or a bond hearing. *Jennings*, 583 U.S. at 295 (quoting *Demore*, 538 U.S. at 517).

CONCLUSION

Amici agree that historical understandings must inform this Court’s analysis. The Framers built upon an English legal tradition deeply suspicious of imprisonment by the Executive, even under the guise of broad, unspecified statutory authority. The Fifth Amendment’s Due Process Clause carried the revolutionary tradition forward by safeguarding freedom for any person from prolonged confinement. But the Government now seeks to subvert that guarantee by crossing lines this Court has never crossed before. The administration asserts that, outside of the context of war or national security, it may administer an immigration system in which removal proceedings extend for protracted periods, with no fixed timetable or ending point. In so doing, the Government would deprive noncitizens of their liberty indeterminately, without ever assessing whether continued detention serves any valid government interest. This is deprivation of liberty without due process of law. The statutory text does not authorize a system so deeply antithetical to our founding traditions, and the Constitution’s text and history forbid it.

The Court should affirm the judgment below.

Respectfully submitted,

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SEPTEMBER 8, 2026

⁸ This brief sets forth the position of the signatories, as represented by counsel and law student members of the Peter Gruber Rule of Law Clinic, but does not purport to state the views of Yale Law School or Yale University.

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APPENDIX—LIST OF *AMICI CURIAE*

Donald B. Ayer

Deputy Attorney General (1989–1990)
Principal Deputy Solicitor General (1986–1988)
United States Attorney, Eastern District of California (1982–1986)
Board Member, Society for the Rule of Law

Richard D. Bernstein

Appointed by the Supreme Court to argue in
Montgomery v. Louisiana, 577 U.S. 190 (2016);
Carmell v. Texas, 529 U.S. 513 (2000)
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Phillip Brady

Deputy Counsel to the President (Reagan) (1988–1989)
Acting Assistant Attorney General (1984–1985)
Associate Attorney General (1983–1984)
Charter Member, Society for the Rule of Law

Ty Cobb

Special Counsel to the President (Trump) (2017–2018)
Assistant U.S. Attorney (1980–1986)
Member, Society for the Rule of Law

Benedict S. Cohen

General Counsel, Department of the Army (2006–2009)
Deputy General Counsel, Department of Defense (2001–2005)
Associate Counsel to the President (Reagan) (1986–1989)

Member, Society for the Rule of Law

The Hon. Barbara Comstock

Member, U.S. House of Representatives (R-VA,
2015–2019)

Chief Counsel, House of Representatives Govern-
ment Reform and Oversight Committee

Board Member, Society for the Rule of Law

The Hon. Mickey Edwards

Member, U.S. House of Representatives (R-OK,
1977–1993)

Member of the House Republican Leadership
(Chair of House Republican Policy Committee)

Charter Member, Society for the Rule of Law

Stuart M. Gerson

Acting Attorney General (1993)

Assistant Attorney General (Civil) (1989–1993)

Assistant United States Attorney for the District
of Columbia (1972–1975)

Board Treasurer, Society for the Rule of Law

John Giraudo

Legal Adviser, Office of Legal Counsel, U.S. Dept.
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