

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**

**BRIEF OF AMICUS CURIAE MIÑANA FAMILY
CENTER FOR IMMIGRATION LAW AND POLICY,
UCLA SCHOOL OF LAW,
IN SUPPORT OF RESPONDENT**

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8 Annals of Cong., 5th Cong., 2d Sess. 2034–35 (June 25, 1798)	8
1 W. Blackstone, Commentaries on the Laws of England 123-34 (1769)	22, 28
4 W. Blackstone, Commentaries on the Laws of England 20, 24 (1775).....	22, 24, 25, 26, 27
1 W. Blackstone, Commentaries on the Laws of England, Editor's App. (St. George Tucker ed. 1803).....	9, 11
Jennifer K. Elsea, Cong. Rsch. Serv., R42337, Detention of U.S. Persons as Enemy Belligerents (2014).....	13

P. Arnold, How Immigration Detention Became Exceptional, 75 Stan. L. Rev. 261 (2023)	25
A. Arulanantham, Rethinking Preventive Detention, 73 UCLA L. Rev (forthcoming 2026), available at https://ssrn.com/abstract=6168808	23, 24, 30
S. Baradaran Baughman, Restoring the Presumption of Innocence, 72 Ohio St. L.J. 723 (2011)	23
W. Bird, Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798 (2020)	13, 14
D. Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 Cal. L. Rev. 693 (2009)	23, 24
K. Funk & S. Mayson, Bail at the Founding, 137 Harv. L. Rev. 1816 (2024)	22
R. Holland, State Jury Trials and Federalism: Constitutionalizing Common Law Concepts, 38 Val. U. L. Rev. 373 (2004).....	28
A. Kent, The Alien Enemies Act, 95 Fordham L. Rev. (forthcoming 2026) (manuscript at 64)	19

P. Lermack, The Law of Recognizances in Colonial Pennsylvania, 50 Temp. L.Q. 475, (1977)	27
L. Nash, Deportation Arrest Warrants, 73 Stan L. Rev. 433 (2021)	9, 10, 15
L. Nash, Resurrecting Immigration Releases, 135 Yale L.J. 1533 (2026)	30
G. Neuman Whose Constitution?, 100 Yale L.J., 909 (1991)	20
G. Neuman & C. Hobson, John Marshall and the Enemy Alien: A Case Missing from the Canon, 9 Green Bag 2d (2005)	19, 20
T. Schnacke et al., The History of Bail and Pretrial Release, Pretrial Justice Institute, (2010)	27
J. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties(1956)	10, 11, 12, 13, 18,
Letter from Timothy Pickering to President Adams (Aug. 28, 1798), National Archives, https://founders.archives.gov/docume nts/Adams/99-02-02-2897	13

Letter From John Adams to Timothy Pickering (Oct. 16, 1798), National Archives, https://founders.archives.gov/docu- ments/Adams/99-02-02-3120 ;	11
Letter to John Adams from Timothy Pickering (Aug. 1, 1799), National Archives, https://founders.archives.gov/docu- ments/Adams/99-02-02-3833	12
Letter From John Adams to Thomas Jefferson (June 14, 1813), National Archives, https://founders.archives.gov/docu- ments/Adams/99-02-02-6063	12
J. Madison, The Report of 1800, Founders Online (Jan. 7, 1800), https://founders.archives.gov/docu- ments/Madison/01-17-02-0202	10
Circular from J. Monroe, Dep't of State, to the Sec'y of the Miss. Territory (July 11, 1812), available at https://da.mdah.ms.gov/series/territo- rial/s499/detail/10761	19

INTEREST OF AMICUS CURIAE¹

Amicus curiae Miñana Family Center for Immigration Law and Policy at the UCLA School of Law is a hub for innovative ideas at the intersection of immigration law scholarship and practice.

The Center has a strong interest in this case because immigration detention is one of the Center's core areas of research and litigation. Center attorneys also represented a class of individuals subject to prolonged detention in the Central District of California. *Rodriguez v. Bondi*, 2:07-cv-03239-TJH-RNB (CD Cal). That case was litigated in this Court. See *Jennings v. Rodriguez*, 583 U.S. 281 (2018).

¹ No counsel for any party has authored this brief in whole or in part. No entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The Fifth Amendment guarantees that “[n]o person shall be . . . deprived of liberty without due process of law.” There is no dispute that Mr. G.M. is a person. And detention is surely a deprivation of liberty. Yet Petitioners claim authority to confine Mr. G.M. for as long it takes to complete removal proceedings against him—an indeterminate period that could (and did) last for years—without a bond hearing to determine whether his detention is necessary.

Unsurprisingly, that position contravenes the founding-era conception of the government’s power to detain people outside the criminal legal system. Petitioners urge this Court to assess Mr. G.M.’s due process rights under the Fifth Amendment by asking whether the “Anglo-American common-law tradition” has recognized the right to liberty asserted. *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997); see Pet. Br. 28–30. If “the government generally may not deprive a person of [liberty] without affording him the benefit of (at least) those ‘customary procedures to which freemen were entitled by the old law of England,’” then this is an easy case. *Sessions v. Dimaya*, 584 U.S. 148, 176 (2018) (Gorsuch, J., concurring in part) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in judgment)).

The right to liberty Mr. G.M. asserts is simply the right to be free from confinement—the same constitutional right this Court has repeatedly recognized in civil detention cases, including immigration cases. See, e.g., *Zadvydas v. Davis*, 533

U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[C]ivil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection.”) (emphasis added)).

That right was jealously guarded at the founding, as both immigration statutes and laws governing other forms of detention enacted in that era demonstrate. There was federal immigration law at the founding, but even the most expansive assertions of immigration enforcement authority from that period did not permit immigration detention outside of wartime. And even then, such detention was authorized only for “enemy” noncitizens from countries with which the U.S. was at war. As to “friends” like Mr. G.M., the federal immigration law of the time authorized no restraint on physical liberty at all prior to entry of a deportation order—even though that law was widely seen as operating on the very outer bounds of permissible authority. Noncitizen “friends” could be detained for violating a departure order only upon *conviction*.

The presence of federal immigration law at the founding makes it unnecessary to consider analogous forms of state power under *Glucksberg*, as one might when applying common law rules to “modern situations that were unknown or unanticipated by the Constitution’s Framers.” *Trump v. Barbara*, 146 S. Ct. 2438, 2472 (2026) (Kavanaugh, J., concurring in judgement). Unlike cars, the Internet, and semi-automatic handguns, see *id.*, there was both federal

deportation authority and civil detention at the founding, but the former did not authorize the latter outside of wartime.

Petitioners nonetheless argue there was no recognized right to liberty analogous to that Mr. G.M. asserts here, which Petitioners characterize as “the right of a[] ... []deportable alien, detained pending a decision on removal, to a bond hearing.” Pet. Br. 30. But Petitioners’ argument puts the cart before the horse. At the founding, there was no need for Congress or the courts to recognize the particular bond hearing right Mr. G.M. asserts because he could not have been detained to begin with. And because the right to freedom from confinement was recognized as “liberty” at the founding, it is Petitioners who bear the burden of establishing that the government had the power to confine people like Mr. G.M. without access to a bond hearing. As explained below, it did not.

While the fact that the government lacked authority to detain noncitizens like Mr. G.M. at the founding should be conclusive, it warrants emphasis that the right to bond is also deeply rooted in our history and tradition. At the founding, the government had authority to detain people accused of crimes prior to trial, but that authority was accompanied by the right to seek release on bond. In keeping with that tradition, when this Court first sanctioned immigration detention (albeit in passing) a century after the founding, it did so by analogy to pretrial criminal detention. Thus, to the extent the Court looks to other founding-era forms of detention, these make clear the government’s power to detain was limited and access to bond was widespread.

None of this history contravenes the basic principle that Congress may make rules as to noncitizens that would be unacceptable if applied to citizens—were it otherwise, deportation itself would be impermissible. But it hardly follows that the government can confine noncitizens for months or years on end, with no process for determining whether that severe deprivation of liberty is necessary. As the founding era statutes illustrate, the power to deport does not always entail the power to detain—much less without access to bond. Such is the case here.

SUMMARY OF ARGUMENT

Contrary to Petitioners' claim, there is no history and tradition of immigration detention without bond—that is, no history of mandatory confinement outside the criminal legal system to facilitate removal proceedings and, if necessary, deportation.

There was federal immigration law at the founding, but it did not permit immigration detention outside of wartime. Congress enacted a law authorizing the deportation of certain noncitizens in the Alien Act of 1798, commonly known as the “Alien Friends Act” (“AFA”). That law was immediately controversial partly because many saw deportation without criminal process as an unconstitutional deprivation of liberty without due process. In part for that reason, the AFA was never used to deport anyone before it lapsed in 1800.

Yet contrary to Petitioners' suggestion, Pet. Br. 31, even the AFA did not authorize the confinement of noncitizens, much less confinement without any individualized opportunity to contest whether their

detention was necessary. The AFA permitted confinement only pursuant to criminal process after a finding that a noncitizen had violated a departure order. See *infra* Section I.A.

The only authority arguably permitting anything akin to immigration detention at the founding was the “Alien Enemies Act” (“AEA”), which was limited to “enemy” noncitizens during wartime. Because Petitioners do not assert wartime authority to detain Mr. G.M., the AEA provides no analogue that could support his detention today. See *infra* Section I.B.

The lack of any detention authority in the AFA or AEA analogous to that at issue here reflects the founding era’s embrace of stringent common law limits on confinement outside of criminal process. No common law doctrine authorized *any* civil detention scheme analogous to the one Petitioners defend here—where people are confined based on crimes for which they have already served sentences, and without access to bond. The law governing civil detention at the founding shows that the government’s power to confine people outside of criminal process was limited to certain purposes, and immigration enforcement was not among them. Moreover, while some arguably analogous forms of detention did exist at the founding, such as criminal pretrial detention, bond was widely available for people subject to them. See *infra* Section II.

In the few instances where civil detention based on dangerousness was permissible, it operated in lieu of criminal punishment (rather than after it), because the state could not punish the conduct it sought to prevent—as with quarantines for infectious disease,

civil commitment of those both dangerous and mentally ill, and enemy soldiers in war. See *infra* Section II.A. And while pretrial detention within the criminal system existed during the founding era, people charged with crimes had access to a bail hearing at which they could seek release while their case remained pending. See *infra* Section II.B. Detention prior to trial was thus permissible only upon an individualized showing that detention was necessary to ensure the defendant's appearance. Once a defendant was convicted and served their sentence, there was no system of post-sentence confinement—whether in aid of deportation or for any other purpose.

Petitioners also rely on immigration detention provisions which were enacted in the late 19th and early 20th centuries. Pet. Br. 31. From an originalist perspective these are of limited relevance because they were enacted a century after the Fifth Amendment. In any event, they provide Petitioners little support. See *infra* Section III. Unlike their founding-era counterparts, the federal immigration statutes of this period did authorize immigration detention outside the criminal legal system pending a decision on whether to deport someone. But when this Court first blessed federal immigration detention in 1896, albeit in passing, it did so by analogy to pretrial criminal confinement, thus incorporating the longstanding norm affording access to bail in that system. See *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). Immigrants facing deportation proceedings during this time period thus had the opportunity to secure release by demonstrating detention was unnecessary to protect against the risk of flight.

This Court did not sanction immigration detention based on dangerousness until half a century later in *Carlson v. Landon*, 342 U.S. 524 (1952), and did not authorize such detention based on crimes for which people had already served their sentences, and without bond hearings, until this century in *Demore v. Kim*, 538 U.S. 510 (2003).

In other words, at the founding, the government most certainly could not have subjected Mr. G.M. to prolonged detention without access to a bond hearing. Indeed, it could not have detained him prior to entry of a removal order at all unless he were an “enemy” national during wartime.

Accordingly, this Court should affirm the judgment below.

ARGUMENT

I. At the Founding, the Federal Government Lacked Immigration Detention Authority Outside of Wartime.

Petitioners characterize the Alien Friends Act (AFA) and Alien Enemies Act (AEA) as the country’s “first immigration detention statutes,” implying that immigration detention was permissible at the founding and thus constitutional.² Pet. Br. 31. Not so.

² Despite its common name, the Alien Friends Act applied in peace and war to noncitizen “enemies” and “friends.” See An Act Concerning Aliens (Alien Friends Act), ch. 58, 1 Stat. 570–71. By contrast, the Alien Enemies Act applied only in wartime to noncitizen “enemies.” See Alien Enemies Act of 1798, ch. 66, 1 Stat. 577–78, now codified at 50 U.S.C. 21–24; 8 Annals of Cong., 5th Cong., 2d Sess. 2034–35 (June 25, 1798) (noting that because

In fact, the AFA did not authorize detention at all, and both statutes highlight the founding-era understanding that the government lacked general authority to detain noncitizens outside of wartime.

The “earliest federal legislation authorizing deportation”³ was the AFA, and it did not authorize detention at all—let alone prolonged detention without bond. It authorized deportation—an assertion of power that was deeply controversial at the time—and permitted confinement only after conviction under criminal law for violating a deportation order.

The only statute authorizing the detention of noncitizens outside the criminal process, the AEA, was limited to wartime. Tellingly, the government cites no examples of immigration detention at the founding, not to mention without process. See Pet. Br. 31–33. That is because there are none. Outside of wartime, no law authorized it.⁴

the AFA was “passed against aliens generally,” “if [the AEA] is not passed, the President . . . will [still] have the power of removing from the country all those aliens whom he may think it necessary and proper to remove.”

³ L. Nash, *Deportation Arrest Warrants*, 73 *Stan L. Rev.* 433, 498 (2021).

⁴ Laws or practices applied to people who were not viewed as full persons are not relevant to assessing due process rights today, which are defined at minimum by reference to the rights customarily afforded to free men. See *Dimaya*, 584 U.S. at 176 (Gorsuch, J., concurring in part). Noncitizens were generally understood to have liberty rights similar to those of citizens during peacetime. See, e.g., 1 Blackstone’s *Commentaries*, Editor’s App. 98–99 (St. George Tucker ed. 1803) (“[A]n alien, whose nation is in amity with England, is clearly and

**A. As the Alien Friends Act
Demonstrates, the Federal
Government Lacked General
Immigration Detention Authority at
the Founding.**

From 1798 to 1800, the AFA authorized the President to order the deportation of noncitizens deemed “dangerous” or suspected of “treasonable or secret machinations.” An Act Concerning Aliens (Alien Friends Act), ch. 58, § 1, 1 Stat. 570–71. Although by its terms it authorized such deportation during peace or war, it was enacted in anticipation of war with France, and “understood as a temporary war measure.” *Dimaya*, 584 U.S. at 185 (Gorsuch, J., concurring in part).⁵ Even so, the Act was “widely condemned as unconstitutional.” *Dimaya*, 584 U.S. at 185 (Gorsuch, J., concurring in part).⁶

indisputably entitled to the full protection of the laws in every matter that respects his personal liberty[.] . . . An alien in America . . . was entitled to *all* the rights and privileges of an alien in England, and *many more*.”); J. Madison, The Report of 1800, Founders Online (Jan. 7, 1800), <https://founders.archives.gov/documents/Madison/01-17-02-0202> (rejecting argument that non-citizens lack constitutional rights because “as they owe on one hand, a temporary obedience, they are entitled in return, to their protection and advantage”); 8 Annals of Cong., 5th Cong., 2d Sess. 2012 (June 21, 1798) (statement of Rep. Livingston) (“neither common law, common justice, nor the practice of any civilized nation, will permit this distinction [between the constitutional rights of citizens and non-citizens]”).

⁵ See also J. Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* 8 (1956) (describing the period as “virtual state of undeclared war with France”).

⁶ Nash, *Deportation Arrest Warrants*, 73 Stan L. Rev. at 501–02 (noting state resolutions declaring the AFA “unconstitutional”).

Republicans thought it so because it “subjected men to arbitrary actions” “without a speedy and public trial,” thus effecting a “depriv[ation] of [] liberty without due process of law.” J. Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* 83–84 (1956). As the prominent legal commentator St. George Tucker observed at the time, the AFA was passed “[n]otwithstanding th[e] express declaration of the [Constitution],” that “[n]o person shall be deprived of life, liberty, or property without due process of law.” 1 Blackstone’s Commentaries 137 n.24 (St. George Tucker ed. 1803).⁷ One source of controversy concerned whether deportation was necessarily punitive, such that the absence of full criminal process preceding entry of a deportation order under the AFA rendered it unconstitutional. James Madison held that view.⁸

Although President Adams disagreed, when weighing how to use his deportation authority under the AFA he recognized it was extremely broad, writing the law should be given “a strict construction.”⁹ He declined enforcement in several instances, and a year

⁷ Tucker published and annotated “the most important early American edition of Blackstone’s Commentaries.” *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

⁸ Madison, The Report of 1800 (arguing the AFA constituted impermissible punishment without conviction); see also 8 Annals of Cong., 5th Cong., 2d Sess. 2025–27 (June 21, 1798) (various congressmen protesting the government “assuming and exercising arbitrary power” and decrying the lack of criminal process); 8 Annals of Cong., 5th Cong., 2d Sess. 1980 (June 19, 1798) (similar).

⁹ Letter From John Adams to Timothy Pickering (Oct. 16, 1798), National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-3120>; Smith, *Freedom’s Fetters* 163.

after its enactment, Secretary of State Pickering noted in correspondence with President Adams that many considered the AFA a “dead letter” because it had gone unenforced.¹⁰ Though President Adams ultimately signed three arrest warrants under the law, in the two years it was in effect they were never enforced.¹¹

Given the deep controversy over its constitutionality, the AFA provides useful evidence of what even the most ardent supporters of federal power considered the outer limits of government authority during the founding era. It is striking, then, that the AFA did *not* authorize civil detention, let alone detention without any individualized assessment of the need for confinement. Contra Pet. Br. 31. The AFA only authorized detention upon *criminal* conviction, after entry of a deportation order, for failing to depart or returning to the U.S. in violation of such order.

Government officials at the time, including the President and Secretary of State, clearly understood the statute not to authorize detention. Writing to President Adams shortly after its passage, Secretary of State Pickering stated the law was ineffectual in part because it did not “authoriz[e] the Executive to

¹⁰ Letter to John Adams from Timothy Pickering (Aug. 1, 1799), National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-3833>.

¹¹ Letter From John Adams to Thomas Jefferson (June 14, 1813), National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-6063> (“This Law was never executed by me in any Instance.”); Smith, *Freedom’s Fetters* 159, 176.

apprehend & confine” noncitizens.¹²

Pickering’s understanding is confirmed by the AFA’s text. As written, it enabled the president to order the departure of individual noncitizens the President deemed “dangerous to the peace and safety of the United States” or suspected of engaging in “treasonable . . . machinations.” Alien Friends Act, ch. 58, § 1, 1 Stat. 570–71. Individuals so designated were required to depart within the time specified in the deportation order unless they could obtain “license” to stay by proving they were not a danger. *Id.* Such individuals could be required to “enter into a bond” for their “good behavior,” backed by sureties. *Id.*

Individuals ordered to depart (and who did not obtain a “license”) were to be given time to do so, thus making clear they were to remain at liberty pending their departure. See Alien Friends Act, ch. 58, §§ 1 & 5, 1 Stat. 570–72 (providing for order to specify time for departure and for those ordered deported to be able to take their property); W. Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of*

¹² Letter from Timothy Pickering to President Adams (Aug. 28, 1798), National Archives, <https://founders.archives.gov/documents/Adams/99-02-02-2897> (“I have been apprehensive, out of the law itself, in its not authorizing the Executive to apprehend & confine, or require sureties for their going, until they can be sent off, or that they depart from the U. States.”); see Smith, *Freedom’s Fetters* 162–63, 175 (both the President and Secretary of State acknowledged the lack of confinement authority); W. Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798* 337 (2020) (same); see also Jennifer K. Elsea, Cong. Rsch. Serv., R42337, *Detention of U.S. Persons as Enemy Belligerents* 11 (2014) (“Outside of [] a conviction [for returning to the U.S. after being expelled], the act did not permit summary detention.”).

1798 330–31 (2020) (reproducing form ordering departure within certain time). The Act also authorized the President to order an individual who had been “ordered to depart” and had not “obtained a license” to “be arrested and sent out” in cases where he determined “public safety require[d] a speedy removal,” but only *after* a deportation order issued. Alien Friends Act, ch. 58, § 2, 1 Stat. 570–71. Those who failed to depart or returned in violation of the deportation order could be imprisoned, but only upon conviction for a crime. *Id.* §§ 1 & 2.

Contemporaneous legislative debates confirm the AFA provided no detention authority. Legislators understood the AFA to authorize deportation, but only the AEA permitted detention without trial prior to deportation. Justice Black described this history in his dissent in *Ludecke v. Watkins*, 335 U.S. 160 (1948), explaining that “just before the [Alien Enemies Act] was ordered to be read for its third time, Mr. Gallatin pointed out that the Alien [Friends] Act had already made it possible for the President to remove all aliens, whether friends or enemies; he interpreted the measure here under consideration, aimed only at alien enemies, as providing ‘in what manner they may be laid under certain restraints by way of security.’” *Id.* at 177 (Black, J., dissenting)); see also 8 Annals of Cong., 5th Cong., 2d Sess. 1998–99 (June 21, 1798) (discussing confinement under the AFA solely in the context of “offences”); 8 Annals of Cong., 5th Cong., 2d Sess. 1579–80 (May 3, 1798) (statement of Rep. Sewall) (rejecting “the existence of such a power as shall be able to place every alien in the country in a dungeon” and stating, “in making regulations against alien enemies, let us not subject every foreigner . . . to

the fear of a dungeon or removal”).

The AFA’s text and contemporaneous legislative debates thus confirm what Secretary Pickering and President Adams made clear: anyone ordered to depart would remain at liberty until the deadline specified for their departure. Arrest was authorized only for immediate deportation (“speedy removal”) *after* a removal order issued, not for prolonged confinement pending an attempt to obtain such an order. See Alien Friends Act, ch. 58, §§ 1–2, 1 Stat. 570–71.; L. Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 501 (2021) (“[T]he Act only provided for post-order arrest for immediate deportation.”).¹³

Thus, the AFA—as confirmed by its text, debates over its passage, and the understanding of those who wielded its power—reflects the founding-era understanding that the government had no authority to subject noncitizens to detention except in wartime. Like all other free men, noncitizens generally could not be detained—with or without process—unless they were charged with or convicted of a crime.

Thus, while the government’s power to deport noncitizens during peacetime without using criminal process was disputed at the founding, even those

¹³ As the contemporaneous evidence confirms, the power “to arrest” in § 2 of the AFA is cabined by its stated purpose and the source of its authority: causing certain noncitizens to be “sent out.” See Alien Friends Act, ch. 58, § 2, 1 Stat. 570–71 (note in margin summarizing arrest sentence in section 2: “The President may order certain aliens to be removed out of the U. States.”). In other words, the power to arrest is tied to the power to effectuate “a speedy removal” and does not confer prolonged detention authority.

exercising that power recognized they lacked authority to detain noncitizens absent criminal conviction. It follows that the government’s assertion of power here—prolonged civil detention without individualized process to ascertain whether detention is necessary—would surely have been viewed as unconstitutional.

B. As the Alien Enemies Act Illustrates, at the Founding the Detention of Noncitizens Was Only Permissible During Wartime.

Although the Alien Enemies Act, also enacted in 1798, did authorize detention without criminal process, it does not support Petitioners here because it authorized such detention only for a discrete group of noncitizens during wartime.¹⁴

The AEA is thus instructive as to the founding-era limits on detention authority in two respects: First, when coupled with the AFA (enacted just days earlier), the AEA shows that the government’s power to confine noncitizens absent criminal process was limited to wartime. Second, the AEA illustrates that, even during wartime, the law did not *mandate* detention. Indeed, when it was first invoked in 1812, the primary restriction imposed on “enemy” noncitizens was a relocation requirement. Detention

¹⁴ Unlike the AFA, the AEA did expressly authorize detention, indicating Congress knew how to specify detention authority and could have done so if it intended to authorize detention under the AFA (and thought it had such authority). Compare Alien Friends Act, ch. 58, §§ 1–2, 1 Stat. 570–71 with Alien Enemies Act, ch. 66, §§ 1–2, 1 Stat. 577–78.

was reserved for those who violated a relocation order.

The AEA provided that in the event of war and a presidential proclamation, citizens of “the hostile nation or government” “shall be liable to be apprehended, restrained, secured and removed, as alien enemies.” Alien Enemies Act of 1798, ch. 66, §§ 1, 2, 1 Stat. 577–78. It authorized the President, during war, to “direct the conduct to be observed” toward these noncitizens, the appropriate “manner and degree of [] restraint” suitable in any given instance, and “any other regulation” “necessary . . . for [] public safety.” *Id.* § 1. Where the President directed these noncitizens to depart the country, the statute required that those “not [] chargeable with actual hostility, or other crime against the public safety” be given a reasonable time to depart. *Id.*

Two features of the AEA are relevant here. First, by its terms the detention authority it sanctioned operated only during wartime—“[w]henever there [was] a declared war . . . or any invasion or predatory incursion”—and only against the citizens of nations with which the U.S. was at war. Alien Enemies Act, ch. 66, § 1, 1 Stat. 577–78. When read alongside its companion, the AFA, that limitation strongly suggests the founding-era generation understood the government to have detention powers over “enemy” noncitizens in wartime, but no such power outside that context.

Representative Otis, one of the leading spokesmen for both the AFA and AEA stated as much during a debate on the latter’s passage. He explained that “the moment war was declared,” the President acquired “the power to . . . apprehend” noncitizens “as enemies,

and make them prisoners of war.” 8 Annals of Cong., 5th Cong., 2d Sess. 1791 (May 22, 1798). But this power was contingent on and limited to war: “in a time of tranquility, he should not desire to put a power like this into the hands of the Executive.” *Id.*; Smith, *Freedom’s Fetters* 36, 44. In keeping with that understanding, legislators analogized the treatment of “alien enemies” to “prisoners of war,” see 8 Annals of Cong., 5th Cong., 2d Sess. 1980 (June 19, 1798) (statement of Rep. Gallatin), which distinguished their treatment from the “hospitalities which we owe to those foreigners who are alien friends.” 8 Annals of Cong., 5th Cong., 2d Sess. 1577 (May 3, 1798) (statement of Rep. Sitgreaves); see also Madison, *The Report of 1800* (emphasizing distinction between “Alien enemies” and “Alien friends” and noting only the former could be detained as prisoners of war while the latter “are under the municipal law, and must be tried and punished according to that law only”); *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2, 771–72 (1950) (“alien enemy” is subject to “disabilities” that apply as “an incident of war and not . . . an incident of alienage”).

Second, even during wartime, the AEA did not *mandate* the detention of noncitizen “enemies”—or, for that matter, their deportation. It authorized the deportation of noncitizens from a warring nation who were not permitted to remain but nonetheless “refuse[d] or neglect[ed] to depart” after the time specified. Alien Enemies Act, ch. 66, § 1, 1 Stat. 577–78. Anyone found “at large” in violation of the proclamation or regulations could be “apprehended and convened” before courts of criminal jurisdiction or federal courts, and, “after a full examination and

hearing . . . and sufficient cause,” ordered removed, ordered to provide “sureties of their good behaviour” or “otherwise restrained” in accordance with the proclamation or regulations. *Id.* § 2.

In practice, the AEA was generally not used to detain noncitizens when it was first invoked. During the War of 1812 with Britain, President Madison’s administration declared all British subjects “alien enemies,” and required them to report to the U.S. marshals, and move away from the coast and major cities. G. Neuman & C. Hobson, John Marshall and the Enemy Alien: A Case Missing from the Canon, 9 Green Bag 2d 39, 39–40 (2005).¹⁵ It was these restrictions, rather than widespread detention, which the administration used for all “enemy” noncitizens. A. Kent, The Alien Enemies Act, 95 Fordham L. Rev. (forthcoming 2026) (manuscript at 64).

Detention under the AEA appears to have been limited to cases where a noncitizen did not comply with a specific relocation order. See Neuman & Hobson, John Marshall and the Enemy Alien, 9 Green Bag 2d at 40–41. *Lockington’s Case*, for example, upheld the detention of a noncitizen who had failed to comply with an AEA relocation order. *See id.* (citing *Lockington’s Case*, Bright. (N.P.) 269 (Pa. 1813–14)). In *United States v. Thomas Williams*, in contrast, a court ordered the release of a noncitizen detained under the AEA because “the regulations made by the President . . . did not authorize his confinement”—specifically, “the marshal had not designated a place

¹⁵ Circular from J. Monroe, Dep’t of State, to the Sec’y of the Miss. Territory (July 11, 1812), available at <https://da.mdah.ms.gov/series/territorial/s499/detail/10761>.

to which Williams should remove, as the official instructions required, and given him the opportunity to remain at liberty.” Neuman & Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d at 42–43; see also *Bagwell v. Babe*, 1 Rand. 272, 276 (1823) (upholding noncitizen’s damages suit against military officer for unlawful detention as an “alien enemy” where noncitizen had not been ordered removed).

In sum, the AEA further illustrates that at the founding, the federal government could only detain noncitizens during wartime, and even then, the AEA reflected the idea that personal liberty should not be needlessly restricted.

* * *

The history of the AFA and AEA demonstrates that Mr. G.M.’s detention would have been understood as unlawful at the founding because the federal government had no power to detain noncitizen “friends” absent criminal process. Nor did the government have power to detain such non-citizens pending a decision on whether to issue a deportation order, much less the power to do so without the possibility of bond and for a prolonged period. As Gerald Neuman has explained, “[t]he legacy of the Alien Act debates includes the fundamental rejection of the claim that citizenship is the key to right-bearing capacity under the Constitution”—the “mainstream position” being “the Madisonian position on the right-bearing capacity of aliens,” which “was later confirmed in the judicial exposition of American constitutional law.” G. Neuman, *Whose Constitution?*, 100 Yale L.J., 909, 927–28, 981 (1991). In other words, the general prohibition on imprisonment without trial

outside of wartime barred the detention of non-citizens pending deportation, absent criminal process.

II. At the Founding, Civil Detention Was Permissible Only for Limited Purposes, and Even Pretrial Criminal Detention Required Access to Bail.

Analogous forms of government power at the founding confirm what the earliest immigration laws show: the government had no power to confine people for prolonged periods without any opportunity to seek bond. Cf. *United States v. Rahimi*, 602 U.S. 680, 700 (2024) (discussing use of historical analogues); *Trump v. Barbara*, 146 S. Ct. 2438, 2472 (2026) (Kavanaugh, J., concurring in the judgment) (discussing interpretive principles for applying original understanding to new circumstances “unknown or unanticipated by the Constitution’s Framers”).

Civil confinement at the founding was constrained in two ways relevant here. First, because incarceration was generally deemed punishment, it was not permissible outside the criminal legal system except in narrow circumstances where the state sought to constrain conduct that could not be punished—typically because it was involuntary. Through that bedrock constraint, the common law guarded against the possibility that the state might circumvent the criminal legal system and its protections to effect arbitrary detention. Second, under criminal law, pretrial detention was accompanied by prompt individualized consideration for bail. As Kellen Funk and Sandra Mayson have

shown, the right to bail was the “default.”¹⁶

Thus, at the founding, the government could not have incarcerated Mr. G.M. without access to bail—indeed, it could not have jailed him based merely on his prior conviction at all. It would have been required to utilize criminal process, where release on bail would have been the default. And at minimum, he would have received access to bond and an individualized assessment of whether confinement was necessary.

A. Common Law Forms of Civil Detention Were Constrained By Their Purpose.

Freedom from incarceration constituted one of the core liberties that free men enjoyed at common law. See W. Blackstone, 1 Commentaries on the Laws of England 123–34 (1769) (“Blackstone”) (recognizing “the absolute rights of every Englishman” included “personal liberty,” “consist[ing] in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint”). In keeping with that principle, incarceration was generally considered punishment. 4 Blackstone 371; cf. *Cummings v. Missouri*, 71 U.S. 277, 321 (1867) (citing Blackstone for this proposition).

While the common law permitted pretrial detention, its purpose was to ensure that people appeared for trial, not to prevent them from committing other crimes. 4 Blackstone 297 (“[I]n this dubious interval between the commitment and trial,”

¹⁶ K. Funk & S. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1835, 1843 (2024).

“this imprisonment, as has been said, is only for safe custody, and not for punishment.”); see *Barret v. Lewis*, 1 Mart. (o.s.) 189, 192 (La. 1810) (“Bail is required in this territory for the purpose of securing the plaintiff from the flight of the defendant and for no other purpose. It is the same in England.”); S. Baradaran Baughman, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 731 (2011) (“Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.”).

Thus, as a doctrinal matter, at the time of the founding (and for decades thereafter), American constitutional law did not authorize detention to confine people outside the criminal legal system simply because they were dangerous. In order to detain someone for conduct that could be punished under criminal law, the government had to use the criminal legal system—and respect its accompanying procedural and substantive protections. D. Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 Cal. L. Rev. 693, 708–12, 719 (2009); A. Arulanantham, *Rethinking Preventive Detention*, 73 UCLA L. Rev (forthcoming 2026) (manuscript at 14–18).¹⁷ That framework reflected a basic normative constraint, grounded in common law history and founding-era concerns about arbitrary detention, that confinement to prevent dangerous conduct should not be used to circumvent the criminal legal system. No doctrine permitted the preventive detention of people based on prior criminal activity for which they had *already* been punished, as Petitioners

¹⁷ Available at <https://ssrn.com/abstract=6168808>.

seek to do here.

To the extent the state could take steps to prevent offenses, it rested on an opportunity for bond—precisely what Petitioners argue against here. As Blackstone explained, where there was reasonable suspicion that a crime was likely to occur, the primary means of preventing it was the use of surety bonds—magistrates could require an individual to post a bond while they remained at liberty. See 4 Blackstone 251–57 (focusing entirely on use of sureties in chapter on “Means of Preventing Offenses”); Funk & Mayson, *supra* n.16 at 1847–48 (discussing practice). Such bonds involved individualized determinations and “offered the accused significant procedural protections.” *Rahimi*, 602 U.S. at 695–97. Most relevant here, they were of limited duration—they “could not be required for more than six months at a time.” *Id.* at 697. Early American state practice included surety laws and “peace bond[s]” of this kind. Funk & Mayson, *supra* n.16 at 1847–48.

There were also other forms of civil detention, but these either targeted conduct that could not be punished criminally or were motivated by paternalistic purposes. Most prominently, the state could detain based on conduct for which an individual was not criminally responsible, including for mental illness that rendered them dangerous, to quarantine a communicable disease, and to incapacitate enemy combatants in war. See Cole, *Out of the Shadows*, 97 Cal. L. Rev. at 707–08; Arulanantham, *supra* n.17 at 18–24, 27). As Blackstone explained, the state could not detain such individuals using criminal law because their dangerousness arose from conduct for

which they could not be held criminally responsible.¹⁸

Similarly, the confinement of those who were mentally ill (even if not dangerous), juveniles, or indigent was permitted primarily based on paternalistic grounds. The distinct purposes of these paternalistic forms of civil detention gave rise to different doctrinal constraints. See P. Arnold, *How Immigration Detention Became Exceptional*, 75 *Stan. L. Rev.* 261, 266, 270–81 (2023). Whereas the state has long had paternalistic power to confine based on conduct for which individuals are not criminally responsible, there is no comparable history of state power, outside of criminal law, to confine based on conduct for which individuals *are* criminally responsible. Arulanantham, *supra* n.17 at 32.

The limited nature of these forms of civil detention confirms what the AFA and AEA already illustrate: no legal doctrine of the founding era authorized confinement without access to bond to prevent conduct that could be punished. Immigration detention based on crimes for which people have already served their sentences is not analogous to any common law form of civil confinement.

B. Criminal Pretrial Detention Was Permissible Only to Address Flight Risk and Was Accompanied by a Prompt Bond Hearing.

The common law doctrinal tradition governing criminal pretrial detention further supports Respondents' position. Pretrial detention was

¹⁸ See 4 Blackstone 20, 24 (explaining involuntary acts could not be punished).

permitted solely to ensure appearance at trial, not to prevent other crimes. Moreover, those subject to pretrial detention for non-capital offenses in England generally had the opportunity to secure their release; bail was available for non-capital offenses, and even in capital cases, the King's Bench retained discretion to bail. Funk & Mayson, *supra* n.16 at 1835, 1840-42; 4 Blackstone 299 (“[I]t is agreed that the court of king's bench . . . may bail for any crime whatsoever, be it treason, murder, or any other offense, according to the circumstances of the case.”).

Unsurprisingly then, at the founding, bail was the default rule in the pretrial criminal context. In the federal system, individuals arrested on suspicion of crime could be detained, but the government had to afford them access to bail—criminal defendants had an absolute right to bail and “magistrates retained discretion to detain only in cases of capital crimes” based on the severity of the allegations and the evidence. Funk & Mayson, *supra* n.16 at 1835, 1840–42.

This view of bail, initially adopted by Pennsylvania, became the “consensus text” for bail clauses in new state constitutions,” Funk & Mayson, *supra* n.16 at 1821, and was adopted by the federal government in the Northwest Ordinance of 1787, and the Judiciary Act of 1789. See Northwest Ordinance of 1787, 1 Stat. 50, 52 (providing “[a]ll persons shall be bailable” except for certain capital offenses); Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (providing “bail shall be admitted” in “all arrests in criminal cases” “except where the punishment may be death, in which cases it shall” be discretionary). By the end of the founding

era, the federal government and the growing majority of states affirmatively adopted this view, and expressly rejected the idea that there should be a category of “mandatory detention” crimes which were not bailable. See Funk & Mayson, *supra* n.16 at 1842–45.¹⁹

Crucially, this founding-era view also recognized *timely* access to bail as necessary to prevent unjustly *prolonged* detention. Defendants were entitled to prompt bail hearings to ensure near-immediate release, a feature also inherited from the common law tradition. Funk & Mayson, *supra* n.16 at 1828, 1829 (founding-era statutes required pretrial “release on bail” “in a timely manner”); T. Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute, 3–4 (2010) (in “the Habeas Corpus Act of 1679, [Parliament] established procedures to prevent long delays before a bail bond hearing was held” in response to a case in which the defendant was not

¹⁹ See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“From the passage of the Judiciary Act of 1789, . . . to the present . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.”); Madison, *The Report of 1800*, (“In the administration of preventive justice, [certain] principles have been held sacred,” including an individualized assessment of the “probable ground of suspicion” “before some judicial authority” and “that the party may avoid being thrown into confinement, by finding pledges or sureties for his legal conduct sufficient in the judgment of some judicial authority.”). The use of bail in civil cases was also routine. Funk & Mayson, *supra* n.16 at 1846–48 (describing widespread use of bond in civil cases); 4 Blackstone 297 (“In civil cases we have seen that every defendant is bailable.”); P. Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 Temp. L.Q. 475, 511 (1977) (“In civil cases, it was highly unusual for any party to be incarcerated in lieu of bail.”).

offered bail for “two months on a charge that, by law, required admittance to bail.”).

As this history makes clear, the right to prompt bail hearings was measured in days, not months. Indeed, punishment by a sentence of more than six months required a *jury* trial, absent narrow exceptions. *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (noting that in late 18th century, jury trial was generally required for any crime punishable by more than six months).²⁰

This practice is also consistent with the deep founding-era respect for habeas corpus. So great was the founders’ concern about arbitrary detention—of any length—that they wrote the writ of habeas corpus into the Constitution and provided that Congress could only suspend it in limited circumstances. U.S. Const. art. I, § 9, cl. 2; 1 Blackstone 132–33 (describing confinement as a “dangerous engine of arbitrary government” and the “great and efficacious writ” as “that second magna carta, and stable bulwark of our liberties”).

In view of this history, it is clear that even if there had been a statute authorizing the civil confinement of Mr. G.M. under immigration law at the founding, he would have had an opportunity for release on bond.

²⁰ See R. Holland, State Jury Trials and Federalism: Constitutionalizing Common Law Concepts, 38 Val. U. L. Rev. 373 (2004).

III. The History of Immigration Detention Authority in the Late 19th and Early 20th Centuries Confirms That G.M.’s Detention Without Access to Bond Is Impermissible.

Petitioners also seek support from immigration laws enacted more than a century after the founding to establish authority to confine Mr. G.M. for a prolonged period without any individualized finding that his detention is necessary. Pet. Br. at 31–32. For obvious reasons, laws enacted in the late 19th and early 20th centuries tell us little about the “customary procedures to which freemen were entitled by the law of old England.” *Dimaya*, 584 U.S. at 176 (Gorsuch, J., concurring in part). But in any event, Petitioners misunderstand those laws. See Brief of Amici Curiae Scholars of Early Immigration Detention.

When this Court first sanctioned federal immigration detention pending deportation proceedings, albeit in dicta, it analogized to pretrial *criminal* detention, explaining:

“We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. . . . Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.”

Wong Wing, 163 U.S. at 235. As Justice Breyer

explained in his dissent in *Jennings v. Rodriguez*, *Wong Wing*’s “analogy to criminal detention is an analogy to instances in which bail hearings are required.” 583 U.S. 281, 339 (2018) (Breyer, J., dissenting). Unsurprisingly, then, courts considering challenges to immigration detention under the laws of this period provided access to bond, as it had long been available in “every case of arrest on a criminal charge.” *Id.* See L. Nash, *Resurrecting Immigration Releases*, 135 Yale L.J. 1533, 1564–76 (2026) (tracing practice and noting courts concluded right to bail was inherent, given “default bail authority in other analogous—if technically distinct—cases”). Indeed, the four petitioners in *Wong Wing* were all released on bail pending appeal prior to this Court’s decision. *Wong Wing*, 163 U.S. 228, R. at 7–14 (bond orders); see *Wong Wing*, 163 U.S. at 241 (Field, J., concurring in part).

The immigration laws of this period did not authorize immigration detention without the opportunity for release on bond, nor did they authorize detention based on dangerousness—whether presumed from prior criminal history or other conduct. This Court did not authorize immigration detention for the purpose of preventing danger (as opposed to flight risk) until after World War II. See *Carlson v. Landon*, 342 U.S. 524 (1952) (upholding detention without bond of certain noncitizen Communist Party members); Arulanantham, *supra* n.17 at 35–40. Tellingly, *Carlson* did not cite *Wong Wing* (or any other immigration detention case) in support of its claim that “[d]etention is necessarily a part of . . . deportation procedure,” 342 U.S. at 538, because the notion that the government could detain

noncitizens who presented no flight risk while it attempted to obtain deportation orders against them was entirely novel. And this Court did not extend *Carlson*’s logic *outside* the national security context to authorize the detention of people based on crimes for which they had already served their sentences until *Demore v. Kim*, 538 U.S. 510 (2003).

Thus, even a century after the founding, doctrinal constraints on immigration detention authority would have prohibited Mr. G.M.’s detention here. While *Wong Wing* countenanced the government’s power to detain noncitizens outside wartime and prior to entry of a removal order, such detention was authorized only to mitigate flight risk and accompanied by access to bail.

CONCLUSION

Prolonged immigration detention without access to bond violates the Due Process Clause. The founding-era history of federal immigration law, civil detention, and pretrial criminal detention all confirm that the detention authority Petitioners seek would have been understood as well beyond the government’s power. There was no authority to detain non-citizens under immigration law (rather than criminal law) outside of non-citizen “enemies” during wartime. That fact alone should be dispositive from an originalist perspective. To the extent the Court looks to arguably analogous forms of detention at the founding, they guaranteed access to a bond hearing—the relief Mr. G.M. seeks here. And even a century later, when this Court first sanctioned widespread federal immigration detention, the longstanding right to bond was extended to that context.

All this should hardly be surprising—the liberty protected by the Due Process Clause includes the right to be free from confinement, and that right would be meaningless if it could not be vindicated through access to bond.

“The upshot is the following: The Constitution’s language, its basic purposes, the relevant history, our tradition, and many of the relevant cases point in the same interpretive direction. They tell us that an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution.”

Jennings, 583 U.S. at 343 (Breyer, J., dissenting).

This Court should affirm the judgment below.

Respectfully Submitted,

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