

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 FOR RESPONDENT

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QUESTIONS PRESENTED

Keisy G.M. is a lawful permanent resident who was detained under 8 U.S.C. §1226(c) for twenty-one months without any hearing on whether he posed a flight risk or danger. The court of appeals held that such a prolonged period of detention exceeded the bounds set in *Demore v. Kim*, 538 U.S. 510 (2003), where this Court approved of detention without such a hearing for a “brief” and “limited” period, emphasizing that the average detention under §1226(c) was five months or less. *Id.* at 513, 531. Based on *Demore*, the court of appeals held that G.M. was entitled to an individualized hearing before an immigration judge on flight risk and danger, and it remanded for the district court to determine what procedures were appropriate. Pet.App.5a.

The questions presented are:

1. Whether G.M.’s case is moot because he is no longer deportable following the Governor of New York’s full and unconditional pardon of the criminal conviction that was the sole basis for removal, and is therefore not subject to §1226(c) detention.
2. If the case is not moot, whether G.M.’s prolonged detention without a hearing exceeded the bounds of *Demore*, such that due process would require a bond hearing if he were redetained.
3. Whether, at such a bond hearing, due process requires the government to justify G.M.’s continued detention by clear and convincing evidence.

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INTRODUCTION

On August 28, the Governor of New York granted Respondent Keisy G.M. a full and unconditional pardon of the state criminal conviction that is the sole basis for his removal. Suppl.App.1a. As a result, G.M. is no longer deportable, so he is not subject to mandatory detention under 8 U.S.C. §1226(c). The Court should therefore dismiss this case as moot.¹

If the case were not moot, this Court should affirm on the merits.

Freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause. From our Nation's Founding, it has been a bedrock principle of American law that the government cannot detain a person without a valid justification. This principle originates in Magna Carta, and the Founders enshrined it in the Due Process Clause. In a long line of civil detention precedents, this Court has held that the government's asserted justification must be evaluated through some procedure. And, in the pretrial detention context—whether involving a criminal defendant or a noncitizen confronting removal charges—the general rule is that a person cannot be detained absent a hearing on whether they present a flight risk or danger.

This case tests the limits of an exception to that general rule. In *Demore v. Kim*, this Court rejected a facial challenge to the mandatory detention statute at

¹ As documented in the attached Supplemental Appendix, the Governor granted G.M.'s pardon one business day before Respondent filed this brief. Suppl.App.1a, 3a.

issue here, 8 U.S.C. §1226(c)—but narrowly cabined its holding. The Court repeatedly emphasized that it was approving only “brief” detention without individualized hearings on danger and flight risk. 538 U.S. at 513, 530 (noting average length of detention under §1226(c) was one-and-a-half months, and five months for those who appealed). The due process principles underlying all this Court’s civil detention cases, including *Demore*, make clear that when detention exceeds the outer bounds of *Demore*’s exception, due process requires an individualized determination of flight risk or danger.

Recognizing that G.M.’s constitutionally protected liberty was at stake, and applying these precedents, the court of appeals correctly held that due process required an individualized hearing on flight risk and dangerousness to determine whether further detention was justified. G.M.’s twenty-one-month detention, over four times longer than the average duration of mandatory detention noted in *Demore*, is an outlier by any measure. And other case-specific considerations—including the likelihood G.M. would, if redetained, face substantial additional detention under punishing conditions—buttress that holding.

History and tradition support keeping the *Demore* exception within its narrow confines, as mandatory immigration detention is a modern aberration that first arose only in the late twentieth century. A century earlier, when the federal immigration system first authorized detention pending a decision on deportation, both the Executive Branch and federal courts understood they had the power to release. Congress did not enact a mandatory detention statute

until 1988. And if one were to look to when the Due Process Clause was ratified, the nearest analogue is criminal pretrial detention, where bail was readily available and detention was exceptional.

In the face of this Court's precedents, due process first principles, and historical practice, the government makes the astonishing assertion that prolonged detention under §1226(c) does not implicate the "liberty" at the core of the Due Process Clause. The government also argues that *Demore* upheld detention of *any* length as long as removal proceedings remain pending. The government has not taken this radical position in the past—and for good reason: It finds no support from any of this Court's cases involving physical freedom. Instead, the government invokes cases involving unenumerated rights like *Washington v. Glucksberg*, 521 U.S. 702 (1997). Those cases have no bearing where freedom from bodily restraint—the core of the liberty protected by the Due Process Clause—is at stake.

Taken to their logical conclusion, the government's arguments would give it limitless power to detain people while they are contesting removal charges. The government's only concession is that if it were pursuing "sham" removal charges, then a hearing might be required. U.S.Br.40. Whatever the government means by that (and it does not say), it still asserts the power to detain a person for months, years, or decades—as long as a non-"sham" removal proceeding might take—without the minimal protection of a bond hearing. In short, the government's theory would permit the prolonged detention of people who in fact pose no flight risk or

danger. That would render the Due Process Clause’s protection of “liberty” a nullity.

The notion of unlimited pretrial detention without any individualized hearing on whether it serves the government’s asserted purposes would be anathema to our Founders, and it is contrary to the constitutional text and this Court’s reasoned precedents.

If this case were not moot, the Court should affirm.

STATEMENT OF THE CASE²

A. Legal Framework

Mandatory immigration detention is a recent development. At the Founding, there was no authority to detain pending immigration proceedings. *See infra* Part III.C. When federal immigration law eventually permitted detention pending deportation proceedings, it also permitted release. *See* Lindsay Nash, *Resurrecting Immigration Releases*, 135 Yale L.J. 1533, 1565, 1587 (2026). Executive Branch officials and federal courts understood that they had the power to release noncitizens pending deportation proceedings. *Id.* at 1564-68, 1601-07.

Congress did not depart from this practice for a century. In 1988, Congress enacted the first mandatory detention statute for individuals placed in

² The Second Circuit consolidated the appeals of G.M. and another habeas petitioner, Carol Black. Pet.App.2a. Black’s case is also moot: He has a final order of removal and permanently left the United States. BIO.30-31. This Court granted certiorari only as to G.M. *Genalo v. Black*, No. 25-886, 2026 WL 1718025 (Sup. Ct. June 15, 2026).

deportation proceedings, narrowly focusing on noncitizens who committed “aggravated felonies,” initially defined to include only murder and drug and firearm trafficking. *Demore*, 538 U.S. at 520-21; *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§7242, 7243, 102 Stat. 4181, 4469-70.

In 1996, Congress vastly expanded mandatory detention through §1226(c). Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104–208, §303, 110 Stat. 3009-546, 3009-585. Section 1226(c) mandated detention for a much broader range of criminal conduct, including nonviolent offenses like shoplifting or writing bad checks. *See Demore*, 538 U.S. at 558 (Souter, J., concurring in part and dissenting in part).³

Section 1226(c) provides that immigration authorities “shall take into custody any alien who” is inadmissible or deportable by reason of committing certain criminal offenses or engaging in terrorist activity. 8 U.S.C. §1226(c)(1)(A)-(D). It “mandates detention of any alien falling within its scope [until] the conclusion of removal proceedings,” permitting release only for “witness-protection purposes.” *Jennings v. Rodriguez*, 583 U.S. 288, 305-06 (2018).

In 2003, the Court rejected a facial challenge to §1226(c) in *Demore v. Kim*. The noncitizen respondent, Kim, argued he was entitled, at the outset of

³ Congress recently further expanded §1226(c) to include certain inadmissible noncitizens based on mere accusations of designated crimes. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025), codified at 8 U.S.C. §1226(c)(1)(E). That expansion is not at issue here.

detention, to an individualized determination of flight risk and dangerousness. *Id.* at 514 & n.2. The government conceded that “prolonged detention imposes a greater burden” on the individual, but argued that the typical brevity of detention under §1226(c) “strongly support[ed] the statute’s constitutionality.” Pet’rs’ Br. *48, *Demore v. Kim*, No. 01-1491, 2002 WL 31016560 (Sup. Ct. Aug. 29, 2002).

This Court concluded that §1226(c) was facially constitutional, premised on two limiting principles:

First, the Court based its constitutional analysis on Kim’s “concession” that he was deportable on one of the enumerated criminal grounds for removal. *Demore*, 538 U.S. at 522 n.6, 513. Relying on this concession, the Court repeatedly limited *Demore*’s holding to “deportable criminal aliens.” *Id.* at 513; see also *id.* at 528.⁴

Second, the Court upheld detention without a bond hearing only for a “very limited time.” *Id.* at 529 n.12. Based on data the government provided, the Court understood §1226(c) detention to “last roughly a month and a half in the vast majority of cases ... and about five months in the minority of cases in which the alien chooses to appeal.” *Id.* at 530. The Court

⁴ Noncitizens are entitled to a hearing to contest whether they are covered by one of §1226(c)’s categories. *Demore*, 538 U.S. at 514 (citing 8 C.F.R. §3.19(h)(2)(ii)); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Because Kim conceded he was deportable on one of §1226(c)’s grounds, the adequacy of *Joseph* hearings was irrelevant to *Demore*’s analysis. See *Demore* at 514 n.3. The opinion likewise did not address whether mandatory detention is consistent with due process when an individual raises a colorable argument that they are *not* deportable under §1226(c).

reasoned that noncitizens who committed crimes that triggered §1226(c) could be presumptively deemed a flight risk or danger at the outset of their detention, justifying a “limited period” of detention without inquiry into individual circumstances. *Id.* at 523-26, 531.

In the decades after *Demore*, all but one of the circuits to consider the question recognized that *Demore* did not address challenges to *prolonged* detention under §1226(c). These courts consistently held that prolonged detention based on categorical presumptions (and not individual determinations) of dangerousness and flight risk raised serious due process concerns. *Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1211-12 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 493 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601, 613-14 (2d Cir. 2015); *Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060, 1079 (9th Cir. 2015); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003); *but see Banyee v. Garland*, 115 F.4th 928, 931 (8th Cir. 2024).

This Court next considered §1226(c) in *Jennings v. Rodriguez*, 583 U.S. 281 (2018). *Jennings* raised a threshold statutory question: whether §1226(c) should be construed to require an individualized hearing on flight risk and dangerousness once detention exceeds six months. After argument, the Court ordered supplemental briefing on whether such detention would violate due process. Order, *Jennings v. Rodriguez*, No. 15-1204 (Sup. Ct. Dec. 15, 2016). But the Court did not ultimately reach that question, holding only that the text of §1226(c) requires

detention until the conclusion of removal proceedings. It reversed the Ninth Circuit's interpretation of the statute and remanded for consideration of the constitutional question. *Jennings*, 583 U.S. at 303-05, 312.

In *Jennings*, the government disagreed with the Ninth Circuit's statutory interpretation requiring bond hearings after six months of detention. *Jennings*, 583 U.S. at 291-92. As in *Demore*, however, the government recognized that mandatory detention under §1226(c) could violate due process as detention grows prolonged: "[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely." Pet'rs' Br. *47, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 5404637 (Sup. Ct. Aug. 26, 2016).

B. Respondent's Background and Immigration Proceedings

1. Respondent Keisy G.M. was born in the Dominican Republic and immigrated to the United States in 2011. Since then, he has continuously resided here as a lawful permanent resident. Pet.App.8a, 52a. G.M. has five U.S.-citizen children, all under the age of thirteen. Pet.App.52a, 193a. His wife, mother, and two sisters are all U.S. citizens or lawful permanent residents. Pet.App.194a. G.M. worked at a medical supply distribution company as an essential worker during the COVID-19 pandemic. Pet. App.194a. He supports his mother financially and

manages her diabetes, vertigo, and hypertension treatment. Pet.App.194a.

In 2014, G.M. was the victim of a violent home invasion. His roommate was killed and the lives of G.M., his then-pregnant partner, and her three-year-old son were threatened. Pet.App.195a. G.M. provided a statement to police and testified at his assailant's trial. Pet.App.195a. As a result of the incident, he was diagnosed with post-traumatic stress disorder and suffers from ongoing symptoms of trauma, depression, anxiety, and insomnia. Pet.App.195a-96a.

In 2015, G.M. was convicted of second-degree assault in New York state court in connection with an incident in 2012. Pet.App.8a. He was sentenced to two years' imprisonment and three years of supervised release. *Id.* After nineteen months, G.M. was released for good behavior. Pet.App.8a, 53a. He complied with the terms of his release and was discharged from parole in 2019. Pet.App.53a. He has no other criminal history. Pet.App.196a-97a.

2. Four years after G.M. returned home to his family and job, Immigration and Customs Enforcement ("ICE") arrested him before dawn at the home he shared with his mother, as his young sons slept inside. Pet.App.8a, 197a. ICE charged him with deportability solely based on the assault conviction, which it charged as an aggravated felony. Pet.App.54a; *see* 8 U.S.C. §1227(a)(2)(A)(iii). ICE also determined that, based on this ground of deportability, G.M. was subject to mandatory detention. Pet.App.228a; *see* 8 U.S.C. §1226(c)(1)(B).

G.M. appeared unrepresented for his first hearing in immigration court in October 2020. Pet.App.54a, 198a. The immigration judge adjourned the case so he could speak with a local legal services organization. Pet.App.54a. Several weeks later, G.M. retained pro bono counsel, who submitted an application for deferral of removal under the Convention Against Torture (“CAT”), Pet.App.136a, based on threats of violence he and his family had received in the Dominican Republic before immigrating, Pet.App.193a-94a.

G.M.’s final merits hearing occurred about six months after his initial hearing. Pet.App.199a. The immigration judge found G.M. credible, Pet.App.194a, but denied his CAT claim, Pet.App.199a.

G.M. promptly appealed. In December 2021, the Board of Immigration Appeals (“BIA”) granted G.M.’s appeal and remanded for further analysis of his CAT claim. Pet.App.9a; Ex. A—BIA Decision 5, *G.M. v. Decker*, No. 22-70 (2d Cir. Apr. 25, 2022), Dkt. No. 33-3. In June 2022, the immigration judge again denied G.M. relief, and he again appealed. Pet.App.9a; Suppl. App. 4-5, *G.M. v. Decker*, No. 22-70 (2d Cir. July 25, 2022), Dkt. No. 125. That appeal has been pending for more than four years.

C. Proceedings Below

While his first BIA appeal was pending, G.M. filed a habeas action in federal district court. Pet.App.189a. He challenged his prolonged detention without a bond hearing. Pet.App.226a. By that point, detention had caused him to miss the birth of his child, worsened his mental health and depression, and prevented him

from supporting his family financially and emotionally. Pet.App.32a, 204a-07a.

In November 2021, the district court acknowledged that G.M. had been detained at that point for over a year without a bond hearing but denied his habeas petition, reasoning that the government had not “unreasonably delay[ed]” G.M.’s removal proceedings. Pet.App.66a-69a, 79a.

A few weeks later, G.M. won his appeal at the BIA. Pet.App.9a. But he remained detained as his case was remanded back to the immigration judge.

G.M. appealed the district court’s order to the Second Circuit. Pet.App.14a. While that appeal was pending, in July 2022, the government released him pursuant to a nationwide injunction in *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev’d and remanded*, 16 F.4th 613 (9th Cir. 2021), which required the government to conduct custody reviews of ICE detainees with certain medical conditions during the COVID-19 pandemic. Pet.App.9a. ICE determined through its review that G.M. presented “neither a security risk nor a risk of absconding.” Suppl. App. 6, *G.M. v. Decker*, No. 22-70 (2d Cir. July 25, 2022), Dkt. No. 125. At that point, G.M. had spent twenty-one months in detention. Pet.App.9a.

In an appeal consolidated with another petitioner, Carol Black, the Second Circuit reversed. Siding with the majority of circuits, the Second Circuit held that this Court’s precedents “suggest strongly that due process places *some* limits on detention under section 1226(c),” and that *Demore* permitted G.M.’s as-applied

constitutional challenge to his prolonged mandatory detention. Pet.App.20a.

Declining to draw a bright-line length-of-detention rule, Pet.App.20a, 30a-31a, the court of appeals applied case-specific factors to hold that G.M. was entitled to a bond hearing before he could be further detained. G.M.'s twenty-one-month detention, health issues, and separation from his mother and three young children (including one born while he was in ICE custody), all weighed heavily in his favor. Pet.App.32a. The court of appeals also determined the risk of erroneous deprivation was high absent any process to assess if G.M. posed a flight risk or danger, Pet.App.35a-36a, and that detaining G.M. without a hearing served no public interest, Pet.App.37a-38a. Weighing G.M.'s and the government's interests, the Second Circuit held the appropriate remedy was an administrative bond hearing before an immigration judge. Pet.App.39a.

After holding that G.M. and Black were entitled to a bond hearing on their respective facts, the court of appeals issued additional case-specific remedies. For Black, the court ordered a bond hearing where the government bore the burden of proof by clear and convincing evidence. Pet.App.39a-45a. However, because the district court in G.M.'s case had "never reached the issue of what procedural requirements would follow," the court of appeals remanded his case for further proceedings. Pet.App.39a n.27.

The government unsuccessfully sought rehearing en banc. Pet.App.105a-08a.

D. The New York State Pardon

On August 28, 2026, the Governor of New York granted a full and unconditional pardon of G.M.'s second-degree assault conviction, the government's sole basis for removing G.M. G.M. was one of six people pardoned that day in recognition of their contributions to their communities. *See* Suppl.App.1a.

SUMMARY OF ARGUMENT

I. G.M.'s case is now moot and this case should be dismissed. The Governor of New York recently granted G.M. a full and unconditional pardon of his state assault conviction. The pardon extinguishes the sole basis for his removal, 8 U.S.C. §1227(a)(2)(A)(vi), and G.M.'s detention under §1226(c) (or otherwise). Accordingly, he no longer has an "ongoing interest" in the outcome of this case.

II. If this case were not moot, the Court should affirm. Due process analysis proceeds in two steps: (1) "whether there exists a liberty or property interest which has been interfered with by the State," and (2) if so, what process is due. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). At step one, this case concerns the most basic form of liberty the Due Process Clause protects. Since the Founding, it has been well established that if "liberty" means anything, it is "freedom from physical restraint," *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997), which "has always been at the core of the liberty protected by the Due Process Clause." *Id.* (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The Clause protects the "liberty" of every "person" in the United

States, including noncitizens like G.M. U.S. Const. amend. V.

The government's arguments to the contrary rest on a foundational error that runs throughout its case. It asserts that G.M. has no implied fundamental right to a hearing on flight risk and danger by applying *Washington v. Glucksberg*, 521 U.S. 702 (1997). U.S.Br.28. But this conflates the two steps of the due process analysis. *Glucksberg* sets out a test for determining when to “expand the concept of substantive due process” beyond enumerated rights. 521 U.S. at 720 (citation modified). G.M. seeks no such expansion; his case concerns liberty in its “most elemental” form. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.).

III. At step two, “[o]nce it is determined that due process applies, the question remains what process is due.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The court of appeals held an individualized hearing on flight risk and danger is the appropriate form of process. That decision is correct under this Court’s civil detention cases and through application of the *Mathews v. Eldridge* test. 424 U.S. 319 (1976).

A.1. The Due Process Clause ordinarily requires an individualized hearing to test the government’s justifications for depriving a person of his liberty. *See, e.g., Hamdi*, 542 U.S. at 532-33. An individualized hearing is especially critical for civil detention, which must be justified by a non-punitive, “constitutionally adequate purpose.” *O’Connor v. Donaldson*, 422 U.S. 563, 574 (1975); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

This Court “usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.” *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). And even if individualized process is not required at the outset, it becomes necessary as detention grows longer or more severe. *See, e.g., Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972).

2. This Court has departed from the default requirement of individualized process only in rare and narrow circumstances, and only for brief periods of detention. This case concerns the outer bounds of one such departure, in *Demore v. Kim*, which also concerned detention under §1226(c). In *Demore*, the Court recognized that the government has a legitimate interest in detaining individuals to address flight risk and dangerousness. 538 U.S. at 527-28. It held that Congress could use the fact of a qualifying criminal conviction as a categorical proxy for an individualized determination of flight risk and danger, for the “*brief* period necessary for ... removal proceedings,” *id.* at 513 (emphasis added), which the Court understood to last on average five months or less, *id.* at 530-31. But that qualifier was key to the holding: *Demore* did not approve of *prolonged* §1226(c) detention without an individualized hearing.

3. The Second Circuit’s case-specific ruling is consistent with this Court’s civil detention precedents. G.M.’s twenty-one-month detention far exceeded the bounds approved by this Court in any previous case. For example, G.M. was detained more than four times as long as the five-month average for §1226(c)

detention noted by this Court in *Demore*. If this case were not moot, this Court could resolve it simply by affirming the Second Circuit's case-specific ruling.

B. If the Court wishes to provide more general guidance to the lower courts, it should endorse the Second Circuit's approach applying *Mathews v. Eldridge*. That test gives ample consideration to the government's interests, as well as the individual's. The court of appeals weighed factors including the specific harms G.M. suffered as a result of his prolonged detention, Pet.App.32a; how much value an individualized bond hearing would yield, Pet.App.33a-36a; and the administrative costs and benefits to the government in providing an individualized bond hearing, Pet.App.36a-39a. That application of *Mathews* was correct and, if this case were not moot, should be affirmed.

C. The government's arguments against an individualized bond hearing are foreclosed by precedent, logic, and history.

1. The government argues that G.M. "fails to state a procedural-due-process claim at all" because he seeks process relating to whether he presents a risk of flight or danger, rather than §1226(c)'s statutory criteria based on the criminal ground of removal alone. U.S.Br.21. Here again, the government relies on cases that do not implicate the core enumerated right to liberty. Civil detention must be supported not just by the relevant statutory criteria, but by a constitutionally adequate purpose. Thus, the government's reliance on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), repeats its *Glucksberg* error.

2. Continuing with this error, the government argues that detention under §1226(c) may continue as long as it is “rationally related” to the government’s interest in preventing flight and danger, and argues that this lenient standard is met, regardless of the length of detention, so long as removal proceedings are not a “sham.” U.S.Br.33-37, 40. In addition to misapplying *Glucksberg*, the government also relies on *Demore*. But *Demore* clearly did not apply rational-basis review, as the Court closely scrutinized the government’s justification and the evidence before Congress to reach its conclusion.

The government’s proposed rational-basis test is contrary to basic due process principles. It would authorize almost *any* detention: After all, detaining *everyone* in removal proceedings would eliminate the risk of flight. Tellingly, *Demore* did not rest on the sweeping argument made here. And for good reason: The Constitution does not tolerate the *prolonged* civil detention of persons who do not pose a flight risk or danger.

3. The government next invokes Congress’s “broad power over naturalization and immigration.” U.S.Br.29 (citation modified). But Congress’s authority in the immigration context does not render it a due-process-free zone. *Demore* is consistent with this Court’s civil detention cases, that recognize due process limits on prolonged detention. And *Demore* already took Congress’s general immigration power into account when it approved brief detention without a hearing—and no more.

4. The government also illogically asserts that the due process analysis remains unchanged as

detention becomes prolonged. *See* U.S.Br.37-38. This ignores that an individual's liberty deprivation increases in severity as time goes on. And empirical data shows that people who received a bond hearing after a prolonged detention and were released posed a *lower* flight risk: They typically have persevered through detention because they have strong defenses against removal, giving them every incentive to appear as directed.

5. Finally, the government argues that, historically, Congress authorized detaining immigrants without bond. U.S.Br.31-32. The government makes this claim in service of its faulty *Glucksberg* analysis. In any event, the government misunderstands the history. Mandatory detention of noncitizens facing removal from inside the United States is a modern anomaly, not a historical norm. From the advent of pretrial immigration detention in the late nineteenth century until Congress first enacted a mandatory detention statute in 1988, federal courts and agency officials understood that they had the power to release noncitizens.

IV. Lastly, if the Court reaches the third question presented, it should conclude that due process requires the government to bear the burden of demonstrating by clear and convincing evidence that G.M.'s prolonged detention is justified on a straightforward application of *Mathews*. *See also Addington v. Texas*, 441 U.S. 418, 424, 430-33 (1979).

ARGUMENT

I. RESPONDENT'S CASE IS NOW MOOT.

As he disclosed at the certiorari stage, G.M. filed a pardon application in New York for his second-degree assault conviction—the sole ground on which he was deemed removable. *See* BIO.11, 32-33. Because the Governor of New York recently granted that application and issued a full and unconditional pardon, this case is now moot, and this Court must dismiss it. *See* Suppl.App.1a, 3a. ICE charged G.M. with a single ground for removal, “convict[ion] of an aggravated felony,” based on his New York State assault conviction, his sole conviction. Pet.App.54a; *see* 8 U.S.C. §1227(a)(2)(A)(iii). Under 8 U.S.C. §1227(a)(2)(A)(vi), that deportability ground “shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by ... the Governor of any of the several States.” *Id.* Accordingly, G.M. is not deportable, his removal proceedings will be terminated, and he will remain a lawful permanent resident.

Because of the pardon, G.M. also cannot be redetained. Section 1226(c)(1)(B) covers noncitizens who are “deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D).” 8 U.S.C. §1226(c)(1)(B). G.M. is no longer deportable under §1227(a)(2)(A)(iii). Thus, by its plain text, §1226(c) no longer reaches him. In fact, G.M. cannot be redetained by ICE at all, because there is no longer any ground for removing him. *See Demore*, 538 U.S. at 527-28 (purpose of immigration detention is to ensure removal orders can be carried out).

Given the pardon, any decision in this case will have no direct consequences for the parties. Because G.M. is not at risk of redetention under §1226(c), he no longer has an “ongoing interest” in this case’s outcome; nor does the government, as no decision by this Court could possibly “clear[] the way for it to redetain G.M.” under §1226(c) or any other immigration statute. U.S.Br.17-18. Accordingly, there is no case or controversy for this Court to decide. *See* U.S. Const. art. III, §2; *United States v. Sanchez-Gomez*, 584 U.S. 381, 385 (2018) (personal stake “must be extant at all stages of review, not merely at the time the complaint is filed” (citation modified)); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013).

The Court must dismiss this case.

II. SECTION 1226(c) DETENTION IMPAIRS THE CORE “LIBERTY” PROTECTED BY DUE PROCESS.

If this case were not moot, the Court should affirm.

The first step in any due process analysis is to ask “whether there exists a liberty or property interest which has been interfered with by the State.” *Thompson*, 490 U.S. at 460. Below, the government conceded “a noncitizen has at least some degree of liberty interest in not being detained.” Br. for Resp’ts-Appellees 24 n.7, *G.M. v. Decker*, No. 22-70 (2d Cir. July 25, 2022), Dkt. No. 126. Now, the government makes the extraordinary argument that G.M.’s physical detention does not implicate any protected due process right. The government is wrong, and its

other arguments fail because of this foundational error.

1. If “liberty” means anything, it is “freedom from physical restraint,” *Hendricks*, 521 U.S. at 356, which “has always been at the core of the liberty protected by the Due Process Clause against arbitrary governmental action.” *Id.* (quoting *Foucha*, 504 U.S. at 80); see also 1 William Blackstone, *Commentaries on the Laws of England* 130, 132 (1765) (“personal liberty” consists of “the power of locomotion ... without imprisonment or restraint”—i.e., without “[t]he confinement of the person, in any wise”).

This core concern of the Framers has deep historical roots. “The Due Process Clause has its origin in Magna Carta.” *Kerry v. Din*, 576 U.S. 86, 91 (2015) (plurality opinion). Sir Edward Coke wrote in his *Institutes*—a foundational source for the Framers’ understanding of due process, see *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-29 (1991) (Scalia, J., concurring in judgment)—that Magna Carta gave rise to the common-law understanding that “the liberty of a mans person” against imprisonment was “more precious to him, than all the rest that follow.” 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797). Physical detention thus deprives the individual of “the most elemental of liberty interests.” *Hamdi*, 542 U.S. at 529. Recognizing this, the colonists created bulwarks against arbitrary deprivations of the right, viewing “pretrial liberty” as “precious.” Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1823 (2024). For example, they developed

a “right to release” for “nearly all accused people” facing criminal charges. *Id.*

2. The Due Process Clause protects the precious “liberty” of every “person” in the United States—citizen or not. *Compare* U.S. Const. amend. V *with*, e.g., U.S. Const. art. I, §§2-3 (restricting the right to serve in congressional office to “Citizen[s]”); U.S. Const. art. II, §1 (restricting eligibility for the presidency to “natural born Citizen[s]”). The 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; *accord*, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). In this regard, too, the Clause is consistent with its historical antecedents, under which “aliens” and natural-born subjects alike shared in this foundational protection. *See* 1 Blackstone 354, 359-61 (considering noncitizens as among “the people” of England, capable of employing legal process to protect their rights); 9 William S. Holdsworth, *A History of English Law* 96-98 (1926).

The more recent history of American immigration detention confirms as much. As soon as the government was authorized to detain people arrested within the country pending deportation proceedings, administrators and federal courts understood they had the power to release those individuals. Nash, *Resurrecting*, *supra*, at 1601-07 (describing the rationale for release in administrative deportation schemes in the early twentieth century); *id.* at 1564-68 (describing federal courts’ recognition of the authority to grant pretrial release concurrently with the emergence of statutory detention pending

deportation in 1888); *see also, e.g., In re Lum Poy*, 128 F. 974, 976 (C.C.D. Mont. 1904) (similar). The power for release was understood to be necessary to account for the core interest in personal liberty. *See Nash, Resurrecting, supra*, at 1603-04 (citing 1920 opinion of the Labor Department's Acting Solicitor asserting that administrators retained "inherent power" to release noncitizens on recognizance where failure to do so would "result in denying an individual a constitutional right").

Thus, the Due Process Clause's protection of "liberty" imposes "important constitutional limitations" on Congress's "plenary power" to create immigration law." *Zadvydas*, 533 U.S. at 690, 695; *see also Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (Congress's exercise of broad immigration powers, even against noncitizens subject to final deportation orders, must remain within "the sphere of constitutional legislation"). In keeping with the text and meaning of the Fifth Amendment, the Court has never held that noncitizens have any less of a core liberty interest in freedom from detention than citizens do.

3. Ignoring constitutional text, precedent, and historical practice, the government argues for the first time that detaining G.M. in a jail cell does not implicate any "right to be free from detention." U.S.Br.30 (emphasis omitted). It reaches that spurious result by urging that G.M. has no implied fundamental right under *Glucksberg*. *See* U.S.Br.28.

But G.M. asserts an enumerated right, not an implied one. *Glucksberg* itself begins by noting that the core of the Due Process Clause is "the absence of

physical restraint,” 521 U.S. at 719, and then sets out a test for determining when to “*expand* the concept of substantive due process” beyond such enumerated rights, to recognize unenumerated but implied fundamental rights, *id.* at 720 (emphasis added), such as “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion,” *id.* (citations omitted). *Glucksberg* never comes into play in cases involving “deprivation of the expressly protected right of liberty under the original understanding of the term.” *Din*, 576 U.S. at 99.

The cases cited by the government (U.S.Br.28-33) applied *Glucksberg* precisely because, unlike here, “liberty” in the most literal sense was not at issue. In *Department of State v. Muñoz*, 602 U.S. 899 (2024), this Court rejected Muñoz’s effort to expand the “fundamental right to marriage” and “spousal cohabitation” to “the right to have her noncitizen husband enter (and remain in) the United States.” *Id.* at 910. Similarly, in *Reno v. Flores*, 507 U.S. 292 (1993), this Court expressly recognized that the “‘freedom from physical restraint’ ... [was] not at issue,” and concluded that Flores did not have a fundamental right “to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.” *Id.* at 302.

This case presents no such expansion of the concept of “liberty.” The freedom from government detention is anything but “new ground,” *Glucksberg*, 521 U.S. at 720; it is liberty in its “most elemental”

form, *Hamdi*, 542 U.S. at 529. *Glucksberg* is therefore inapplicable.

4. In another effort to sidestep the Due Process Clause, the government makes the Kafkaesque argument that it is not actually depriving G.M. of any “right to be free from detention” because he can choose to “simply withdraw[]” his defenses and agree to removal. U.S.Br.30 (emphasis omitted). But no such “choice” is available to G.M., who is threatened with torture if he is forced to return to the Dominican Republic. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In any event, the argument is baseless. It rests on the false premise that because G.M. is in removal proceedings, he has no right to be at liberty in the United States. See Pet.App.145a. This Court has held that the Due Process Clause protects the liberty of noncitizens in the United States *independent of* their right to remain. Thus, although the detained noncitizens in *Zadvydas* had final orders of removal that eliminated their right to reside in the United States, the Court readily recognized their interest in “[f]reedom from ... physical restraint,” 533 U.S. at 690, which demanded “strong special justification” and “procedural protection,” *id.* at 690-92; see also *id.* at 721 (Kennedy, J., dissenting) (agreeing that such “aliens are entitled to be free from detention that is arbitrary or capricious”).⁵

⁵ In any event, following his pardon, G.M. is neither “deportable” nor a “criminal alien[].” *Demore*, 538 U.S. at 513; see *supra* Part I. He is a lawful permanent resident, so he retains *both* his

The government implicitly acknowledges as much. It concedes that due process prohibits it from detaining noncitizens for “sham” removal proceedings. U.S.Br.40. But why? If the government’s argument were correct, then there would be no basis for due process to limit “sham” proceedings: Even then, noncitizens would retain the “choice” to accede to removal. If such confinement is detention subject to due process constraints, it remains so even when proceedings are not a “sham.”

Finally, the government’s position would short-circuit the Due Process Clause by conditioning G.M.’s pursuit of defenses to removal—which he is legally entitled to seek by statute—on a deprivation of his liberty without due process. That is impermissible even if G.M.’s right to seek non-discretionary relief under the CAT were recast as a mere benefit. See Pet.App.146a-48a. As this Court has long recognized, the government may not erase a constitutional right (here, G.M.’s right to due process) “under the guise of a surrender of [the] right in exchange for a valuable privilege,” even if the government otherwise has “power to deny [the] privilege altogether.” *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 593 (1926); accord *Koontz v. St. Johns River Water Mgmt. Distr.*, 570 U.S. 595, 604 (2013) (“[T]he unconstitutional conditions doctrine ... vindicates the Constitution’s enumerated rights by

interest in freedom from physical restraint *and* his right to reside in the United States.

preventing the government from coercing people into giving them up.”).⁶

Because the government may not deprive G.M. of his due process rights directly, it also may not deprive him of those rights “by the indirect, but no less effective, process of requiring a surrender.” *Frost*, 271 U.S. at 593. However the government tries to characterize it, detaining G.M. in a jail cell triggers the protections of due process.

III. DUE PROCESS REQUIRED AN INDIVIDUALIZED HEARING ON FLIGHT RISK AND DANGEROUSNESS.

“Once it is determined that due process applies, the question remains what process is due.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Hamdi*, 542 U.S. at 532 (determining what process “strikes the proper constitutional balance”). The Second Circuit properly determined that an individualized hearing on flight risk and danger is the appropriate form of process. Its decision was correct under both this Court’s civil

⁶ G.M. is not disputing the government’s authority to detain anyone *if* it affords them due process. As this Court noted in *Demore*, even constitutionally compliant detention may create hard choices between litigating and being detained during litigation. *Demore*, 538 U.S. at 530 n.14. And a government action that is constitutionally valid, like the brief detention in *Demore*, does not necessarily become unconstitutional because it creates a difficult choice. *See id.* (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31 (1973); *McGautha v. California*, 402 U.S. 183, 213 (1971)). In contrast, G.M.’s detention without individualized process violates the Due Process Clause, and the government cannot paper over that violation by pretending that enduring it is a voluntary choice.

detention cases and the familiar procedural due process standard set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A. The Due Process Clause Required an Individualized Hearing on Flight Risk and Danger Because G.M.’s Detention Far Exceeded the Brief Period Addressed in *Demore*.

1. In order to detain someone, the government ordinarily must provide the individual an opportunity to be heard and present evidence challenging the justifications for detention. After all, “the right to notice and an opportunity to be heard” is “fundamental” to the meaning of due process. *Hamdi*, 542 U.S. at 533. This basic requirement guards against the “risk of an erroneous deprivation” by giving the individual “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 532-33 (first citation modified).

An individualized hearing is especially critical for civil detention because such detention must be justified by a non-punitive, “constitutionally adequate purpose.” *O’Connor*, 422 U.S. at 574. Any civil detention that does not serve a “constitutionally adequate purpose” is, by definition, unconstitutional. *Id.*; see also *Zadvydas*, 533 U.S. at 690 (civil detention “violates th[e] Due Process] Clause unless the detention is ordered ... in certain special and ‘narrow’ nonpunitive ‘circumstances,’ where a special justification ... outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint’” (citations omitted)). The Court has recognized that detention under §1226(c) is warranted

only to ensure appearance for removal proceedings and to prevent individuals from committing crimes. *See Demore*, 538 U.S. at 515, 518-21. The government continues to rely exclusively on those justifications here. *See* U.S.Br.33-37. Thus, any further detention of G.M. must serve the government's purpose of addressing flight risk and danger; the question here is whether, after twenty-one months of past detention, he is entitled to an individualized hearing on that issue.

This Court “usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.” *Zinermon*, 494 U.S. at 127; *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). For example, in *Foucha*, this Court struck down a state law requiring continued detention of insanity acquittees in a psychiatric institution, holding such individuals are “entitled to constitutionally adequate procedures in order to establish the grounds” justifying civil confinement. 504 U.S. at 79. Similarly, in *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court held that criminal defendants could not be committed based solely on a finding that they were incompetent to stand trial; civil commitment had to be justified in a separate proceeding. *Id.* at 738; *see also Kansas v. Crane*, 534 U.S. 407, 409-10 (2002); *Hendricks*, 521 U.S. at 352-53, 357-58; *Addington*, 441 U.S. at 420, 425-27. And in *United States v. Salerno*, 481 U.S. 739 (1987), the Court upheld a statute permitting pretrial detention based on dangerousness because it provided for a “full-blown adversarial hearing.” *Id.* at 750.

Even if individualized process is not required at the outset, it becomes necessary as detention grows longer or more severe. *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.” (emphasis added)); *McNeil*, 407 U.S. at 249-50 (“If the commitment is properly regarded as a short-term confinement with a limited purpose ... then lesser safeguards may be appropriate, but by the same token, the duration of the confinement must be strictly limited.”). Indeed, the government conceded below “that as time goes on and the duration [of detention] grows, so would the due process scrutiny.” Oral Arg. at 6:33, *Black v. Decker*, No. 22-70 (2d Cir. Jan. 3, 2023), Dkt. No. 177 <https://perma.cc/D5KE-FHQ8>.⁷

2. In light of these principles, this Court has deviated from the default requirement of individualized process only in narrow circumstances, and only for brief periods of detention.

In *Jones v. United States*, 463 U.S. 354 (1983), this Court upheld a federal statute that provided for civil commitment based solely on the fact of an acquittal on

⁷ The government made the same concession in *Jennings*. *See* Pet’rs’ Br. *47, *Jennings*, 2016 WL 5404637 (“[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely[.]”); Pet’rs’ Suppl. Reply Br. *17, *Jennings v. Rodriguez*, No. 15-1204, 2017 WL 727754 (Sup. Ct. Feb. 21, 2017) (similar); *see also* Tr. of Oral Arg. 67, *Jennings*, No. 15-1204 (Sup. Ct. Nov. 30, 2016) (someone detained for five years “would have an individualized as-applied challenge”).

insanity grounds—but only because the statute provided for an initial hearing after fifty days and an entitlement to subsequent hearings every six months thereafter. *See id.* at 357-58, 366. This Court noted it was not “unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness.” *Id.* at 366. But that inference was carefully limited: “a hearing is provided within 50 days,” so “there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered.” *Id.* In other words, the fact of an acquittal on insanity grounds could be treated as a proxy for an individual finding that the grounds for civil commitment were met, but only for a limited initial period. Any further detention had to be justified in the normal way through individualized process.

Similarly, *Demore* upheld §1226(c) detention without an individualized hearing on flight risk and dangerousness, permitting Congress to use a past crime as a categorical proxy to detain certain individuals, “for the *brief* period necessary for their removal proceedings.” 538 U.S. at 513 (emphasis added). For this brief period, the Court approved Congress’s “presumption” that Kim’s conviction was sufficient to establish flight risk and danger. *Id.* at 526. *Demore* cited at length Congress’s evidence of “increasing rates of criminal activity” and failure-to-appear rates, *id.* at 518-22; *see* U.S.Br.34-37 (discussing same), to support the use of a conviction as

a proxy for an individualized finding of flight risk and danger.⁸

Consistent with other narrow exceptions to the requirement of individualized process, *Demore* relied heavily on the government’s factual assertions about the brevity of §1226(c) detention—both in Kim’s individual case (six months) and on average (“roughly a month and a half in the vast majority of cases,” and “about five months in the minority of cases” involving an appeal). 538 U.S. at 530-31.⁹

The government’s assertion that *Demore*’s holding was not time-limited, U.S.Br.39-40, ignores what this Court actually said. *Demore*’s emphasis on brevity was key to its holding, see 538 U.S. at 513, 530-31, which followed the constitutional principle that the use of “lesser safeguards” for detention “must be “strictly limited” to “short-term confinement,” *McNeil*, 407 U.S. at 249-50; see *Jones*, 463 U.S. at 366; *Salerno*, 481 U.S. at 747 (approving pretrial detention scheme where the “maximum length” was “limited by ...

⁸ Half a century earlier, in *Carlson v. Landon*, 342 U.S. 524 (1952), the Court upheld a federal statute giving the Attorney General discretion to deny bail to certain “active alien communists” in deportation proceedings, based on a legislative assumption of dangerousness. *Id.* at 526-27 & n.4. The noncitizens were detained for only six months, see Resp’t-Appellee’s Br. *5 n.3, *Carlson v. Landon*, No. 136, 1951 WL 82227 (Sup. Ct. Nov. 20, 1951), and the Court noted the case did not raise “the problem of ... unusual delay in deportation hearings,” *Carlson*, 342 U.S. at 546.

⁹ The government later disclosed that it had provided incorrect information in *Demore*. See Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, U.S. Supreme Court 1 (Aug. 26, 2016), <https://perma.cc/VMB8-YZJT>.

stringent time limitations”); *Schall v. Martin*, 467 U.S. 253, 263, 270 (1984) (upholding “a brief pretrial detention” in part because “the maximum possible detention” was “17 days”).

3. Viewed against those precedents, G.M.’s detention is an outlier that goes beyond anything contemplated by the *Demore* exception.

As an initial matter, the government’s assertion that *Demore* blesses its power to redetain G.M. without any process is now insupportable in light of the pardon G.M. recently received. Because that pardon erased G.M.’s sole conviction, he is not “deportable” based on a qualifying crime and is not within the class of “criminal aliens” that Congress determined to be a categorical flight risk and danger based on the “evidence” before it. *Demore*, 538 U.S. at 513, 518-21. Indeed, G.M. cannot be detained at all. *See supra* Part I.

Even under the circumstances the Second Circuit confronted prior to the pardon, G.M.’s detention plainly exceeded *Demore*’s bounds, entitling him to a bond hearing under the ordinary rule of individualized process.

First and foremost, G.M. was civilly detained without individualized process for far longer than this Court has authorized in any context outside of national security. *See infra* n.16. His twenty-one-month detention was more than four times the average length of detention under §1226(c) noted by this Court in *Demore*. *See* 538 U.S. at 530 (detention lasts “about five months in the minority of cases in which the alien chooses to appeal”). He was detained

three times longer than the individuals before the Court in *Demore* and *Carlson*. See *id.* at 530-31 (respondent's detention was "six months"); *supra* n.8. And he was detained without an individualized hearing about twelve times as long as the fifty days permitted by the Court in *Jones*. 463 U.S. at 366.

Even in *Hendricks*, where (unlike here) a hearing *was* afforded at the outset of civil commitment based on dangerousness, this Court emphasized that "[t]he maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year." 521 U.S. at 364. To continue detention beyond that point, a court would "once again" have to provide individualized process to determine whether that detention was still justified. *Id.* G.M. was detained nearly double the one-year limit in *Hendricks*, but without *ever* receiving an individualized hearing on flight risk or danger. As a result, he missed milestone events like the birth of his child, lost the opportunity to support his family financially and emotionally, and suffered myriad other personal harms. *E.g.*, Pet.App.32a, 204a-07a.

Importantly, too, G.M. experienced these harms, over this lengthy duration, without any allegation of unusual delay, much less undue delay on his part. The government never suggested that G.M. was dilatory; he defended against removal only in good faith, and his proceedings unfolded in the ordinary course. The immigration judge granted G.M. reasonable continuances to seek representation and adequately prepare—tasks complicated by COVID-related restrictions and ICE's decision to transfer him from New York, where he lives, to Alabama. Pet.App.32a,

191a. Moreover, the BIA took eight months to rule for G.M. on appeal, resulting in vacatur of the immigration judge's initial decision and remand. Pet.App.8a-9a & n.6.¹⁰

In addition, when the Second Circuit issued its decision, it was very likely that further removal proceedings would not have been brief. G.M.'s case was on appeal at the BIA for a second time (where it remains); he could have been remanded to the immigration judge again or, if he lost before the BIA, he could have petitioned for review in the court of appeals. *See* Pet.App.9a. Under such circumstances, where removal appeared far from imminent and any detention was likely to grow longer still, an individualized hearing was especially warranted. *Cf. O'Connor*, 422 U.S. at 575 (requiring additional justification for confinement that stood to continue "indefinitely"); *Zadvydas*, 533 U.S. at 691 (similar).

Finally, the conditions in which G.M. was detained were also relevant. Civil detention must not be punitive. *See, e.g., Crane*, 534 U.S. at 412; *Zadvydas*, 533 U.S. at 690; *O'Connor*, 422 U.S. at 575. Yet "the entirety of" G.M.'s detention occurred in "conditions that [were] not meaningfully different from penal incarceration." Pet.App.65a-66a.

¹⁰ In any event, regulatory checks prevent a noncitizen from unduly delaying immigration proceedings. *See, e.g.,* 8 C.F.R. §1003.29 (permitting a continuance only "for good cause shown"); *id.* at §1003.1(d)(2)(D) (authorizing summary dismissal where appeal lacks an arguable basis or is made to cause unnecessary delay).

As this Court has “stressed repeatedly,” *Jennings*, 583 U.S. at 314, “[d]ue process is flexible” and “calls for such procedural protections as the particular situation demands,” *id.* (citation modified). Under the case-specific considerations here, G.M.’s twenty-one months of mandatory detention without a hearing surpassed all limits described in this Court’s precedents, including *Demore*. Thus, if the case were not moot, this Court could resolve this case on that ground alone.

B. The Court of Appeals Correctly Applied *Mathews v. Eldridge* to Hold That an Individualized Hearing Before an Immigration Judge Was Required.

If this case were not moot and this Court wished to go beyond G.M.’s particulars to provide further guidance for determining when a hearing would become necessary in other cases, it should endorse the Second Circuit’s approach applying the familiar *Mathews v. Eldridge* test. See Pet.App.39a.

1. This Court has repeatedly relied on *Mathews* as the “ordinary mechanism” for balancing the “serious competing interests” at stake when determining what procedures are required to satisfy due process outside the criminal context, including for civil detention. *Hamdi*, 542 U.S. at 528-29; *see also*, e.g., *Schall*, 467 U.S. at 274; *Addington*, 441 U.S. at 425. Under *Mathews*, this Court considers (1) “the private interest that will be affected,” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards,” and (3) “the

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

Mathews's flexible framework allows courts to account for significant governmental interests by permitting more informal procedures than traditional judicial process. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 607 (1979) (depending on the circumstances, "the neutral and detached trier of fact" need not be a judicial officer); *Morrissey*, 408 U.S. at 486 (similar). For that reason, this Court has turned to *Mathews* in contexts where the government's countervailing interests are significant, including immigration, enemy combatants, and civil detention. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Boumediene v. Bush*, 553 U.S. 723, 796 (2008); *Schall*, 467 U.S. at 263, 274; *Salerno*, 481 U.S. at 745-48.

2. Here, the Second Circuit weighed the *Mathews* factors carefully and tailored the process due to be least intrusive to the government's interests.

Among other things, the Second Circuit considered the specific harms inflicted by G.M.'s prolonged detention. For example, he is a lawful permanent resident with U.S.-citizen minor children; was the primary caretaker for his sick mother; and experienced his own significant health problems while in detention. These burdens made his interest in remaining free from detention—particularly over a prolonged period—especially weighty. *See* Pet.App.32a.

The Second Circuit further considered that any individualized hearing on flight risk and danger would yield significant value because there was no prior process addressing those factors. At a hearing, G.M. could finally present concrete evidence to show that he does not pose a flight risk or danger—as ICE itself concluded through its security review before releasing him under the *Fruihat* injunction. Suppl. App. SA-4, *G.M. v. Decker*, No. 22-70 (2d Cir. July 25, 2022), Dkt. No. 125. For example, since he completed his criminal sentence and was released from ICE custody, he has maintained steady employment and provided for his family. Pet.App.35a. He has committed no further crimes. *Id.* To the contrary, he assisted law enforcement as the victim of and witness to a violent crime after his release. Pet.App.35a, 197a. Thus, the second *Mathews* factor also strongly supports individualized process.

Finally, while giving due weight to the government’s interest in detention, the court of appeals noted the administrative burdens of providing individualized process in these circumstances are limited because very few cases involve facts like G.M.’s. Pet.App.37a-39a. This continues to be borne out by empirical analysis. See Graeme Blair, *Fact Sheet: Detention Length among ICE Civil Immigration Detentions Nationally* 1-2 (Aug. 28, 2026), <https://perma.cc/SBS5-6P4W> (summarizing government data showing that only 0.5% of all people detained were held for more than six months under §1226(c) and only 0.04% of such detainees were held as long as G.M.). By contrast, continued prolonged detention imposes substantial burdens on the

government, as ICE pays on average between \$88 and \$134 per person per day of detention, Pet.App.38, and longer-term detainees use a disproportionate share of the government's resources. *See Blair, supra*, at 1-2.

The burdens on the government are further limited because the hearing will occur not before an Article III court, but before an immigration judge, who has "broad discretion in setting terms and can exercise that discretion by considering a multitude of relevant factors." Pet.App.47a. Immigration judges are within the Justice Department's Executive Office for Immigration Review are well positioned to accommodate the government's operational needs and minimize its burdens.¹¹ This kind of hearing is especially respectful of Executive prerogatives and is the most minimal form of individualized process permitted under this Court's civil detention cases.

Accordingly, the Second Circuit's determination that *Mathews* compelled a hearing before an immigration judge was correct and should be affirmed.

¹¹ Government data bears this out. Immigration judges conducting federal-court-ordered bond hearings generally *denied* release to §1226(c) detainees subjected to prolonged detention. *See* David K. Hausman, *The Prospect of Release from Immigration Detention Prevents Self-Deportation* 35, tbl. 6 (Aug. 22, 2026), <https://perma.cc/8T6H-2BTR> (finding that judges granted bond in only 14.8% of such cases). But in the minority of cases where judges granted release, they got it right: Noncitizens overwhelmingly complied with their legal obligations and appeared for their removal proceedings. *See id.* (finding that nearly 95% of individuals appeared, while 5.2% failed to do so and were ordered removed *in absentia*).

C. The Government's Arguments Are Foreclosed by Precedent, Logic, and History.

The government makes a series of unavailing arguments to deny G.M. the simple requirement of a bond hearing. Most hinge on its *Glucksberg* error, *supra* Part II, and nearly all would give the government essentially unlimited detention authority under §1226(c) based solely on a qualifying criminal ground for removal—which violates due process.

1. The government argues that G.M. “fails to state a procedural-due-process claim at all” because he seeks process relating to whether he presents a risk of flight or danger, rather than the conviction-based criteria of §1226(c). U.S.Br.21-23. In the government’s view, seeking process related to anything other than what the statute deems relevant “sounds in substantive, not procedural, due process,” U.S.Br.23, by which it means the fundamental-rights analysis of *Glucksberg*, *supra* Part II.

As explained *supra* Part II, *Glucksberg* does not apply to this case because G.M. is asserting the quintessential liberty interest. Detention must be supported not just by the relevant statutory criteria, but by a constitutionally adequate purpose. See *O'Connor*, 422 U.S. at 574 (“The fact that state law may have authorized confinement ... does not itself establish a constitutionally adequate purpose for the confinement.”). If the Due Process Clause requires fair procedures to evaluate statutory criteria for detention, as the government appears to concede, then *a fortiori* it requires fair procedures to evaluate constitutionally mandated criteria as well. See

Foucha, 504 U.S. at 81 (noting the lack of an “adversary hearing at which the State must prove” danger to the community).

The government’s reliance on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), repeats its *Glucksberg* error. *Doe* did not involve the physical liberty at the “core” of the Due Process Clause; the respondents asserted that their reputational interests were harmed by a statute requiring the publication of their names on a list of sex offenders. *See id.* at 5-6. They further argued that they were entitled to an individualized finding of dangerousness before being listed. *Id.* But unlike *G.M.*, they never argued that some independent constitutional obligation required the government to justify this asserted deprivation based on individual dangerousness. *See id.* at 7-8. The only limiting criteria were imposed by statute, under which an individual’s dangerousness was irrelevant. *See id.*¹²

In contrast, this Court has long recognized a constitutional requirement that civil detention, which infringes on an expressly enumerated constitutional right, must be justified by reference to an adequate purpose—here, flight risk or danger. *See Demore*, 538 U.S. at 520-21; *see also* U.S.Br.33-37 (relying exclusively on those justifications). *Demore* approved

¹² *Reno v. Flores* and *Michael H. v. Gerald D.* are distinguishable for similar reasons. *See Flores*, 507 U.S. at 302 (“freedom from physical restraint” was “not at issue” because the respondents were minors and therefore always “in some form of custody”) (citation omitted); *Michael H.*, 491 U.S. 110, 127-30 (1989) (plurality opinion) (biological father had no constitutional right to legal paternity).

§1226(c)'s use of a categorical proxy for dangerousness and flight risk for only a "brief" detention. *See supra* Part III.A. G.M. asserts that *further* detention cannot rest solely on the statutory proxy; he is entitled to an individualized hearing on whether detention serves the government's actual purposes of addressing flight risk and danger. *Doe* is inapposite.

2. The government also argues that detention under §1226(c) may continue if it is "rationally related" to the government's interest in preventing flight and danger. U.S.Br.33-37. In the government's view, this lenient standard is met, regardless of duration, so long as removal proceedings are not a "sham." U.S.Br.40.

Again, the government's invocation of rational-basis review follows from its erroneous reliance on *Glucksberg* and fails for the same reason. The government presents a false dichotomy between strict scrutiny for fundamental rights recognized under *Glucksberg* and rational basis review. But neither standard governs here, where the enumerated constitutional right of liberty is at stake and the question is what process is due to protect it.

Demore did not conduct rational-basis review as the government claims. U.S.Br.29. No reference to rational-basis review appears in the opinion. And under rational-basis review, a statute passes muster if "there is any reasonably conceivable state of facts that could provide a rational basis" for Congress's choice. *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation modified). A court applying such review "never require[s] a legislature to articulate its reasons for enacting a statute," and defers to the legislature even

when its choices are “based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

Demore subjected §1226(c) to far more careful examination. Indeed, the government itself effectively acknowledges that *Demore* applied more searching review by discussing the Court’s substantial reliance on the detailed “[e]vidence before Congress,” including studies justifying a general presumption of danger and flight risk. U.S.Br.34-37. That is not rational-basis review.

The government’s proposed rational-basis standard would authorize precisely the kind of “indefinite detention” the Constitution abhors. *See Zadvydas*, 533 U.S. at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”); *O’Connor*, 422 U.S. at 575 (rejecting indefinite “custodial confinement” for persons “dangerous to no one”). In the government’s view, detention is always justified because it “necessarily serves the purpose of preventing deportable criminal aliens from fleeing.” U.S.Br.34. That logic would justify detention of any length—months, years, even decades.¹³ Under the government’s theory, mandatory detention would be constitutionally permitted even if immigration court backlogs resulted in two-, five-, or even ten-year

¹³ Such cases are not hypothetical. *See, e.g., Sopo*, 825 F.3d at 1213 (asylee detained four years); *Leslie v. U.S. Att’y Gen.*, 678 F.3d 265, 267, 271 (3d Cir. 2012) (lawful permanent resident detained four years); *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008) (lawful permanent resident detained nearly seven years).

delays in processing cases, and even if the detained person concededly posed no individualized flight risk or danger if released. Indeed, the government’s theory proves far too much: Immigration detention would *always* serve to prevent flight risk in every case or any category of cases. But that would be arbitrary detention.

3. The government next invokes Congress’s “broad power over naturalization and immigration,” and cites *Demore*’s comment that detention is “a constitutionally valid aspect of the deportation process.” U.S.Br.29. G.M.’s case does not challenge Congress’s power over immigration or the government’s ability to detain people when necessary to prevent flight or danger to the public. The only question is whether some process is due to assess whether G.M.’s detention actually serves those purposes.

Congress’s authority in the immigration context does not render it a due-process-free zone. If the government’s immigration authority gave it carte blanche to detain, then surely this Court would have said so in *Demore*. But it did not. Rather, *Demore* took Congress’s general immigration power into account in approving a categorical, but brief, detention without a hearing—and no more. *See* 538 U.S. at 526, 528. In this regard, *Demore* is consistent with other precedents on immigration detention, which make clear that Congress’s immigration power does not include unbounded power to detain noncitizens in the interior. *E.g.*, *Zadvydas*, 533 U.S. at 695 (Due Process Clause places “important constitutional limitations” on Congress’s “plenary power” to create immigration

law”); *Wong Wing*, 163 U.S. at 237 (immigration detainee could not be put to hard labor, reasoning unlawful entrants subject to final orders of deportation must remain within “the sphere of constitutional legislation”).

4. Furthermore, the government errs in claiming that the justifications this Court relied on in *Demore* extend equally to prolonged detention like G.M.’s. See U.S.Br.37-38. To the contrary, logic and empirical data support *Demore*’s limitations.

Even if it were true that the risk of flight remained the same for individuals subjected to prolonged detention—it is not—the government ignores that the individual’s deprivation increases in severity as detention becomes more prolonged, and the due process inquiry reflects that. See *supra* Part III.A. Common sense confirms that a process that is adequate to justify a detention of forty-eight hours or fifty days may not suffice for a detention of twenty-one months or five years. Here, the twenty-one months G.M. spent in immigration detention not only exacerbated the loss of his physical liberty—they deprived him of the opportunity to be present at the birth of his daughter. His nearly two years in detention also caused the loss of his job and thus his family’s financial and medical support. And confinement exacerbated his own medical problems. See Pet.App.32a. The Constitution’s insistence on protecting liberty is the reason exceptions to the requirement of individualized hearings as in *Demore* have been carefully limited.

Moreover, the empirical data undermines the government’s assertion that flight risk remains stable

as detention becomes prolonged. Rather, many people detained under §1226(c) for a prolonged period present a *lower* flight risk. They are precisely those who have a strong incentive to appear as directed; they have persevered through detention because they have strong defenses against removal and claims for relief based on deep community ties, both of which reduce their risk of flight.¹⁴ The government's blithe assertion that even prolonged detention necessarily serves its interest in preventing flight is thus unfounded. U.S.Br.38.

5. The government also argues that the right to a bond hearing is not deeply rooted in history and tradition because, in its telling, prior to 1907, release on bond was either prohibited or purely a matter of legislative grace. U.S.Br.31-32. The government again makes this claim in service of its *Glucksberg* analysis, which does not apply here: G.M. does not need to establish that an individualized consideration for release is deeply rooted in this Nation's history and tradition because he is not asserting an unenumerated, implied right to such a consideration.

In any event, the government misunderstands the history at every step. Mandatory detention of noncitizens pending a decision on their removal from

¹⁴ Government data confirms this. A recent study of court-ordered bond hearings for noncitizens subject to prolonged detention found 95% of the §1226(c) detainees who obtained release duly appeared for their removal proceedings. Forty-one percent of them won their removal cases and 15% still had cases pending at the end of the study period, whereas 86% of §1226(c) detainees who were detained throughout their proceedings lost their removal cases. Hausman, *supra*, at 35, tbl. 6.

the interior of the United States is a modern anomaly that arose for the first time in 1988. It is not, as the government suggests, a historical norm.

First, the government relies on what it describes as the “first immigration-detention statutes,” U.S.Br.31, referring to the Alien Friends Act of 1798, ch. 58, 1 Stat. 570, and the Alien Enemies Act of 1798, ch. 66, 1 Stat. 577. But neither authorized detention in any form remotely like §1226(c). The Alien Enemies Act applies only during “declared war,” “invasion,” or “predatory incursion,” and to individuals based on their relationship to a “hostile nation or government.” §1, 1 Stat. at 577; see *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2, 771-72 (1950) (statute’s “disabilities” apply “as an incident of war and not as an incident of alienage”). The Alien Friends Act was “widely condemned as unconstitutional.” *Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J., concurring in part and in judgment), and permitted the government to “arrest” noncitizens, but only *after* they had “been ordered to depart.” Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 500 & n.301 (2021) (emphasis omitted).

The government next relies on historical statutes governing detention pending the *exclusion* of noncitizens seeking admission at a port of entry and denying release on bond to those with a final order of deportation.¹⁵ But powers attendant to exclusion

¹⁵ See U.S.Br.32 (citing Act of May 5, 1892, ch. 60, §5, 27 Stat. 25; Act of Nov. 3, 1893, ch. 14, §2, 28 Stat. 8); U.S.Br.31 n.7 (citing Act of Mar. 3, 1891, ch. 551, §8, 26 Stat. 1085; Act of Mar. 3, 1893, ch. 206, §5, 27 Stat. 570).

proceedings at the border or post-order proceedings have no bearing here. “Our immigration laws historically distinguished” between noncitizens “who have ‘entered’ the United States,” and those who are “still seeking to enter.” *Jama v. ICE*, 543 U.S. 335, 349 (2005). Until Congress created unitary removal proceedings in 1996, those who had entered were placed in “deportation” proceedings, and those at the threshold of entry in “exclusion” proceedings. *See id.* Noncitizens in exclusion proceedings have limited, if any, due process rights,¹⁶ *see Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), whereas individuals in deportation proceedings have greater constitutional protections because they have “entered the country,” *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). And although detention pending the execution of a final order of removal is also subject to due process constraints, *see Zadvydas*, 533 U.S. at 699, such detention involves individuals whose “right to presence in this country” has been “totally extinguished,” *id.* at 704 (Scalia, J., dissenting) (emphasis omitted).

Finally, citing *Demore*, the government points to the Immigration Act of 1907, ch. 1134, §20, 34 Stat. 905, which authorized releasing noncitizens on bond pending deportation proceedings. U.S.Br.31. The

¹⁶ For related reasons, the Court has upheld the indefinite detention of a noncitizen denied entry to this country. *See Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 215 (1953). Critically, Mezei stood on the “threshold of initial entry.” *Id.* at 212. In addition, Mezei (unlike G.M.) was ordered excluded based on “danger to the national security” and remained detained only because no other country would accept him. *Id.* at 215-16.

implication is twofold: that prior to this grant, release was not available, and that what Congress provides, it can take away.¹⁷ The government is wrong on both counts. Individualized consideration for release was already a part of the deportation system before 1907; the 1907 Act simply *expanded* existing avenues of release for noncitizens in administrative deportation proceedings. Nash, *Resurrecting*, *supra*, at 1586, 1594.

Long before the 1907 Act's specific bond provisions, both federal courts (in deportation cases under the infamous Chinese Exclusion laws) and agency officials (in other deportation cases) released individuals pending deportation proceedings. *Id.* at 1565-68, 1589-1606. Courts understood that their power to detain pending deportation proceedings under the Chinese Exclusion Act of 1882 and its later amendments included traditional powers to release on bail. *See id.*; *see also, e.g., In re Chin Wah*, 182 F. 256, 258 (D. Or. 1910) (noting that release on bail was the practice of that court "and of the courts generally"). And upon the introduction of administrative authority to arrest and detain people prior to the issuance of a deportation order, administrative officials made individualized determinations regarding the propriety

¹⁷ For the latter proposition, the government cites only *Prentis v. Manoogian*, 16 F.2d 422 (6th Cir. 1926) (per curiam), which addressed a noncitizen's claim to bond by statute. U.S.Br.32. Because *Prentis* concluded that the word "may" in the Immigration Act of 1907 granted an absolute right to be released on bail, the court did not have occasion to address whether Congress could constitutionally forbid release, and any language concerning the right to bail in the absence of a statutory mandate was dicta. *See Prentis*, 16 F.2d at 424 (construing the statutory grant as "mandatory").

of release, understanding that the power to release was necessary to avoid the constitutional violation that could result if “detention in connection with deportation proceedings” were “unnecessary for ensuring the noncitizen’s appearance in the deportation process and the deportation itself.” Nash, *Resurrecting*, *supra*, at 1599.

It was not until 1988 that Congress departed dramatically from the availability of an individualized hearing, upending decades of pretrial protections. *See id.* at 1553-63. Contrary to the government’s selective reading of the historical record, as soon as detention pending deportation proceedings appeared in the federal immigration system, it did so with the recognition that procedural protections were likewise available.

* * *

In sum, the government’s arguments against a bond hearing are unavailing. If the case were not moot, the judgment should be affirmed.

IV. DUE PROCESS REQUIRES THE GOVERNMENT TO JUSTIFY PROLONGED DETENTION BY CLEAR AND CONVINCING EVIDENCE.

The Second Circuit ordered a bond hearing for G.M. in light of his prolonged detention but did not decide what procedural protections due process required at that bond hearing. Instead, the court of appeals remanded to the district court to decide that question in the first instance. *See* Pet.App.39a-40a

n.27, 48a. The Court here may do the same. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (“[W]e do not decide in the first instance issues not decided below.”).

If the Court reaches the issue, it should conclude that due process requires the government to bear the burden to demonstrate by clear and convincing evidence that G.M.’s prolonged detention is justified. The court of appeals made that determination correctly in Black’s case, and its logic applies with equal or greater force as to G.M. *See* Pet.App.40a-45a.

Each of the *Mathews* factors supports placing the burden on the government. The government contends that the detained noncitizen has superior information and therefore should bear the burden. Pet.App.41a-42a. Not true. While detained noncitizens often lack access to counsel, the ability to gather documents or contact witnesses, or even adequate English language interpretation, *id.*, the government has ready access to the information it will use in bond hearings, including immigration and criminal history, performance on court supervision, and prior court appearances.¹⁸ Requiring the government to marshal the information it already possesses ensures a lower risk of erroneous deprivations without undue administrative cost.

Precedent also supports the standard of proof the Second Circuit imposed. This Court has required that

¹⁸ *E.g.*, *Detention FY 2026 YTD, Alternatives to Detention FY 2026 YTD and Facilities FY 2026 YTD, Footnotes*, U.S. Immigr. and Customs Enf’t (2026) <https://www.ice.gov/detain/detention-management> (detention statistics at bottom of page).

where the government seeks to deprive an individual of a “particularly important individual interest[],” it bears the burden of justifying that deprivation at least by clear and convincing evidence. *Addington*, 441 U.S. at 424 (civil commitment); see *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (parental rights termination); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization). Thus, in upholding civil detention frameworks, the Court has relied on the fact that the government bore the burden of proof by at least clear and convincing evidence. See, e.g., *Hendricks*, 521 U.S. at 352-53; *Salerno*, 481 U.S. at 750, 752. Conversely, the Court has struck down civil detention schemes that placed the burden on the detained person. See, e.g., *Foucha*, 504 U.S. at 81-83; cf. *Zadvydas*, 533 U.S. at 692.

The government overlooks these cases by suggesting the “ordinary default rule” that civil plaintiffs bear the burden of persuasion should apply. U.S.Br.41 (citation modified). That rule, which applies to civil suits between private parties, has no application where the government seeks to deprive an individual of their physical liberty—especially for a prolonged period of time. The government further errs by conflating a burden of persuasion with a presumption of release. See U.S.Br.41. Burdens and presumptions are distinct concepts. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).

Consistent with the *Mathews* framework and the Court’s civil detention cases, the government must justify prolonged detention by clear and convincing evidence at an individualized bond hearing.

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Before it became moot, this was a case about the Due Process Clause's most basic and explicit right: No person shall be deprived of "liberty" without due process of law. U.S. Const. amend. V. The Second Circuit held that, after detaining G.M. for twenty-one months in a jail cell without ever showing he posed a flight risk or danger, the government would have finally have to make that showing in a bond hearing to justify any further detention. Although G.M. is no longer detained and cannot be redetained, that holding was correct. If this Court reaches the merits, it should affirm.

CONCLUSION

The Court should dismiss this case as moot or, in the alternative, affirm.

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Dated: August 31, 2026

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

DECLARATION OF KATE S. SCANLAN

I, Kate S. Scanlan, an attorney duly admitted to practice law in the State of New York and the Commonwealth of Pennsylvania, declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the following is true and correct to the best of my knowledge:

1. My name is Kate S. Scanlan. I am a supervising attorney with The Legal Aid Society's Immigration Law Unit. I represent Keisy G.M. pro bono in his removal proceedings, which are pending before the Board of Immigration Appeals ("BIA").
2. Mr. G.M. has a single conviction for second-degree assault pursuant to New York Penal Law ("NYPL") §120.05(2). On April 27, 2026, Mr. G.M., through pro bono counsel at ArentFox Schiff LLP, submitted an application for a full and unconditional pardon to Governor Kathy Hochul.
3. On August 28, 2026, the Governor announced that she had granted Mr. G.M.'s application. The Governor pardoned Mr. G.M. as part of a group of six individuals in recognition that they had demonstrated remorse, exemplified rehabilitation, and made positive contributions to their communities. I received the pardon certificate on August 31, 2026.

4. Based on this pardon, I am in the process of drafting a motion to terminate to be filed with the BIA. Mr. G.M., a lawful permanent resident, was charged as removable solely pursuant to INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii), for having been convicted of an aggravated felony based on his NYPL §120.05(2) conviction. I will seek termination of Mr. G.M.'s removal proceedings based on INA §237(a)(2)(A)(vi), 8 U.S.C. §1227(a)(2)(A)(vi), which states that the aggravated felony clause in subsection (iii) does not apply to someone who receives "a full and unconditional pardon by ... the Governor of any of the several States." Thus, Mr. G.M. is no longer removable as charged.
5. In addition, based on Mr. G.M.'s pardon, he is no longer subject to mandatory detention. As noted, the pardon means that he is not removable for having been convicted of an aggravated felony, and he therefore does not have any convictions that subject him to a mandatory ground of detention pursuant to 8 U.S.C. §1226(c). Thus, 8 U.S.C. §1226(c) no longer authorizes Mr. G.M.'s detention.

Dated: August 31, 2026

/s/ Kate S. Scanlan



State of New York

Executive Chamber

THE PEOPLE OF THE STATE OF NEW YORK; TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, at Court held in and for the County of Bronx,

KEISI G [REDACTED] M [REDACTED] a/k/a KEISI G [REDACTED] M [REDACTED] a/k/a KEISY G [REDACTED]
M [REDACTED]

was convicted on May 6, 2015, of the crime of Assault in the Second Degree, and was sentenced to two years of incarceration, three years post-release supervision, and an order of protection, and the said KEISI G [REDACTED] M [REDACTED] a/k/a KEISI G [REDACTED] M [REDACTED] a/k/a KEISY G [REDACTED] M [REDACTED] having been represented unto me as a fit object of mercy;

THEREFORE, KNOW YE, that by these presents, I do fully and unconditionally pardon, remise and release the said KEISI G [REDACTED] M [REDACTED] a/k/a KEISI G [REDACTED] M [REDACTED] a/k/a KEISY G [REDACTED] M [REDACTED] of and from the offense whereof he stands convicted as aforesaid, and of and from all sentences, judgments and executions thereon, including offering relief from removal.



IN TESTIMONY WHEREOF I have affixed my signature and caused the Privy Seal of the State to be hereunto affixed, WITNESS, KATHY HOCHUL, GOVERNOR, in the City of Albany this 28th day of August in the year two thousand twenty-six.

Kathy Hochul

Passed the office of the Secretary of State this 28th day of August in the year two thousand twenty-six.

Walter T. Mosley
Walter T. Mosley
Secretary of State of New York