"YEARNING TO BREATHE FREE":[1] IMMIGRANT DUE PROCESS RIGHTS CONSTRAINED BY THE SUPREME COURT'S RECENT UPHOLDING OF 8 U.S.C. § 1226

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I. INTRODUCTION

Most fathers envision walking their daughters down the aisle and giving a heartfelt wedding speech, toasting the new couple and reflecting, maybe bittersweetly, on the new family and life she is creating with her spouse. Juan Lozano Magdaleno's role in his daughter's wedding was reduced to giving a speech, played over speaker phone at the wedding reception.[2] The reason for Magdaleno's absence? He was imprisoned at an Immigration and Customs Enforcement (ICE) detention facility and had been there for nearly five months.[3] Magdaleno came from Mexico to the United States in 1974 and was a lawful permanent resident for thirty-nine years.[4] In 2007, Magdaleno was convicted of driving with a suspended license, driving under the influence, and possession of a controlled substance.[5] Magdaleno served six months in prison and was released in early 2008.[6] Fast forward five years. ICE arrested Mr. Magdaleno—based on his prior convictions—at his residence and charged him with removal.[7] Most

* J.D., 2020, University of Kansas School of Law; B.S., 2013, Marquette University. I would like to dedicate this article to my late grandfather, Dr. Luis Fernández-Sosa, and my grandmother, Maria Rosa Corominas-Fernández. Each showed extraordinary courage and sacrifice leaving their family, friends, and way of life in Cuba to start anew in the United States. They will forever be my heroes. I would also like to thank my mother who exhibits her own bravery and Julia Reilly for her constant love and support. Finally, I would like to sincerely thank Robert Curtis, Jared Jevons, and contributing members of the *Kansas Journal of Law & Public Policy* for their intelligent and thoughtful editing.

[1] Emma Lazarus, *The New Colossus*, *in* EMMA LAZARUS: SELECTED POEMS (John Hollander ed. 2005).

[2] Jack Herrera, *Understanding the Supreme Court's Decision on Indefinite Detention of Immigrants*, PAC. STANDARD (Mar. 19, 2019), https://psmag.com/news/understanding-the-supreme-courts-decision-on-indefinite-detention-of-immigrants [https://perma.cc/K4YA-K9WH].

[3] *Id.*

[4] Preap v. Johnson, 303 F.R.D. 566, 573 (N.D. Cal. 2014), *rev'd*, Nielsen v. Preap, 139 S. Ct. 954 (2019) (citing to the factual record).

[5] *Id.*

[6] *Id.*

[7] *Id.*

troubling, the immigration judge afforded no opportunity for a bond hearing.[8]

In the five years prior, Mr. Magdaleno, having served his time, lived peaceably and innocently in the community.[9] Magdaleno lived with his wife, two children, a son-in-law, and one of his grandchildren, all of whom are United States citizens.[10] Magdaleno's unfortunate situation is all too similar to many other civil detainees. In 2017, 320,000 people were detained in immigrant detention centers,[11] with at least seventy-one percent of detainees being denied a bond hearing by statute.[12] Different than in a criminal setting, these mandatory detainees never have a legitimate opportunity for their voice to be heard in requesting release while they await judgment.[13] Nevertheless, they are held in prison-like detention centers; shackled; subject to constant surveillance and strip searches; and reclaimed by number, not by name.[14]

Recently, the Supreme Court discussed immigrant detention with respect to 8 U.S.C. § 1226 of the Immigration and Nationality Act ("INA") in two pivotal cases: *Jennings v. Rodriguez*[15] and *Nielsen v. Preap*.[16] In *Jennings*, the Court upheld § 1226(c) and held that the statute permits limitless detention periods with no bond hearing opportunity.[17] The majority opinion adhered to a textualist interpretation, rejecting the lower court's ruling which implemented automatic bond proceedings to comport with due process.[18] Nearly a year later, the Court in *Preap* had a second opportunity to strike down § 1226(c),[19] thereby achieving a step toward immigrants' due process rights. However, again, the Court adhered to the text, upheld the statute, and repudiated noncitizens' inherent right to a proceeding.[20]

The debate concerning immigrant detention, under § 1226, centers around

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[8] *Id.*
[9] *See* Herrera, *supra* note 2.
[10] *Preap*, 303 F.R.D. at 573.
[11] KATHERINE WITSMAN, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2017, at 9 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/99PV-VXQ6].
[12] The Supreme Court, 2017 Term—Leading Cases, *Immigration and Nationality Act—Mandatory and Prolonged Detention—Access to Bond Hearings*—Jennings v. Rodriguez, 132 HARV. L. REV. 417, 417 (2018); *see generally* Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet [https://perma.cc/B4PJ-PJJD] (citing to 2016 immigrant detention data).
[13] Nielsen v. Preap, 139 S. Ct. 954, 959 (2019).
[14] Transcript of Oral Argument at 8, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1204_2c83.pdf [https://perma.cc/QG3T-68PV]; The Supreme Court, 2017 Term—Leading Cases, *supra* note 12, at 417.
[15] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 836–37 (2018).
[16] *See Nielsen*, 139 S. Ct. at 959.
[17] *Jennings*, 138 S. Ct. at 842.
[18] Rodriguez v. Robbins (*Rodriguez III*), 804 F.3d 1060, 1082 (9th Cir. 2015).
[19] *See Nielsen*, 139 S. Ct. at 959–60 (focusing on §§ 1226(a) and (c)).
[20] *Id.*

a fear that immigrants with prior criminal convictions pose a threat to our communities.[21] Proponents of the current legal regime and Supreme Court ruling argue that immigrants who commit certain "enumerated crimes" pose a risk of flight, committing future crimes, or both.[22] Therefore, it is justifiable to detain immigrants for an inordinate time period until they can be removed.[23] Additionally, proponents of mandatory detention buttress their argument by reasoning due process is not violated because immigrants are noncitizens in civil detention.[24] Noncitizens do not have the same constitutional protections—criminal or civil—as do citizens.[25] However, the amalgamation of *Jennings* and *Preap* decisions raise, as Justice Breyer put it, "grave doubts" as to § 1226's constitutionality.[26] This is because the *Jennings* and *Preap* outcomes effectively wipe out due process rights for immigrants held in detention.

The legal outcome endorsed by *Jennings* and *Preap*, places immigrant due process rights in a chokehold. This article adopts a new policy solution that breathes air into an otherwise suffocated system. Specifically, this article argues for an overhaul of § 1226(c)'s text and new interpretation, including clear, unambiguous language prohibiting immigrant detention without a bond hearing. This article also advocates for alternative solutions to a wholesale prohibition on bail proceedings, like Executive Office of Immigration Review (EOIR)-sponsored supervisor programs and GPS tracking. Part II provides a literature review of scholarly articles discussing immigrant detention due process. Part III of this article unpacks the background of *Jennings* and *Preap,* the relevant INA statute 8 U.S.C. § 1226(c), the majority decisions, and Breyer dissent. Part IV discusses the rule of due process and when it is applicable. Part V provides an analysis of the remedy. Finally, Part VI wraps up the discussion by providing a brief synopsis and concluding remarks.

II. LITERATURE REVIEW

Since the outcome of *Jennings* and *Preap*, legal scholarship posits due process is necessary in all situations: criminal or civil, citizen or noncitizen.[27] At

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[21] *See id*. at 958–59.

[22] *See id.* at 973 (Kavanaugh, J., concurring); Hillel Smith, CONG. RSCH. SERV., R45915, *Immigration Detention: A Legal Overview* 17 (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/QWQ4-CL5Z].

[23] *See Nielsen*, 139 S. Ct. at 959–60.

[24] Supplemental Reply Brief for the Petitioners at 2, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204); Joe Bianco, *Chance to Change:* Jennings v. Rodriguez *As A Chance to Bring Due Process to A Broken Detention System*, 13 DUKE J. CONST. L. & PUB. POL'Y 37, 50 (2018).

[25] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *but see* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law . . . .") (emphasis added).

[26] Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting).

[27] *See Nielsen*, 139 S. Ct. at 985 (Breyer, J., dissenting); Brief for Amici Curiae Constitutional and Immigration Law Professors Supporting Respondents at 2–7, Nielsen v. Preap, 139 S. Ct. 954

minimum, immigrants shackled in detention deserve civil protection from the government who must necessarily show, by clear and convincing evidence, that there is a civil commitment before deprivation of due process.[28] Subsequent court opinions argue § 1226(c) is unconstitutional only when the court finds the noncitizen's imprisonment is unreasonably prolonged after the noncitizen petitions.[29] Additionally, some scholarship and court opinions discuss in greater detail *Joseph* hearings.[30] *Joseph* hearings are a procedural defense afforded to noncitizens subject to § 1226(c)'s mandatory detention.[31] Some view these hearings as an opportunity for noncitizens to contest their holding under § 1226(c), acting as a safeguard against due process violations,[32] while many others discount these hearings as procedurally unfair.[33]

This article takes a different approach. It advocates that noncitizens held in mandatory detention are guaranteed a bond hearing under the Due Process Clause regardless of habeas petitions or *Joseph* hearings. Additionally, this article relies on prior scholarship advocating for hard deadlines for when the Department of Homeland Security (DHS)[34] can begin to pursue noncitizens after their release and when DHS may no longer pursue noncitizens because of their reintegration into the community. Critically, prior scholarship fails to incorporate any concrete policy solutions to fix the unconstitutionality of § 1226(c).[35] Unlike existing scholarship, this article proposes that relitigating § 1226(c) in federal courts may not be the solution at all; rather, an overhaul of § 1226(c) is necessary.

III. *JENNINGS* AND *PREAP* BACKGROUND

A. Jennings *Background*

Alejandro Rodriguez is a Mexican national who has lived in the United

(2019) (No. 16-1363); Bianco, *supra* note 24, at 53.

[28] Addington v. Texas, 441 U.S. 418, 431 (1979); Bianco, *supra* note 24, at 53.

[29] *See, e.g.*, Reid v. Donelan, 390 F. Supp. 3d 201, 227 (D. Mass. 2019); Kabba v. Barr, 403 F. Supp. 3d 180, 185–88 (W.D.N.Y. 2019).

[30] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 522–23 (2003); Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 356–57 (David A. Martin & Peter H. Schuck eds., 2005); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 87–88 (2012); Gerard Savaresse, *When Is When?: 8 U.S.C. § 1226(c) and the Requirements of Mandatory Detention*, 82 FORDHAM L. REV. 285, 303 (2013).

[31] *In re* Joseph, 22 I. & N. Dec. 799, 807–08 (B.I.A. 1999).

[32] Taylor, *supra* note 30, at 356–57; *see* Savaresse, *supra* note 30, at 302–03.

[33] *See, e.g.*, Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 76–95 (2006); Noferi, *supra* note 30, at 87–88; *see* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 75–76 (2011).

[34] Immigration and Customs Enforcement is an arm of the Department of Homeland Security.

[35] *See, e.g.*, Noferi, *supra* note 30; Savaresse, *supra* note 30; Bhargava, *supra* note 33.

States since he was a child.[36] Rodriguez became a lawful permanent resident of the United States in 1987.[37] However, in April 2004 Rodriguez was convicted of a drug offense and vehicle theft.[38] Because of these convictions the government held Rodriguez subject to detainment and removal.[39] Rodriguez argued that he was not subject to removal, but the immigration judge ordered Rodriguez to be deported to Mexico.[40] Rodriguez appealed and lost.[41] But again, Rodriguez sought further review, this time petitioning to the Ninth Circuit Court of Appeals.[42]

While the removal decision was still being litigated, Rodriguez filed a habeas petition in the lower district court, alleging he was entitled to a bond hearing.[43] DHS incarcerated him for three years during his removal and appeal process.[44] Rodriguez's case was then consolidated with a similar claim and the two proceeded as a class.[45] The district court certified a class of noncitizens who were (1) detained for longer than six months while removal was pending; (2) have never been detained for national security purposes; and (3) have been denied bond proceedings.[46] The district court certified the Rodriguez class, entering a permanent injunction as relief.[47] The Ninth Circuit affirmed.[48] Subsequently, the government petitioned for certiorari.[49] Importantly, the district court construed an implicit requirement for detainees to be afforded a bond hearing after a six-month period.[50] This requirement is read into the statute for the purpose of avoiding due process violations.[51] The bond hearings occur mechanically, and the burden rests with the government to demonstrate, by a clear and convincing standard, that a detainee poses risk of flight or danger to the community.[52]

Upon granting certiorari, the Supreme Court reversed the Ninth Circuit's

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[36] Jennings v. Rodriguez, 138 S. Ct. 830, 838 (2018).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* (appealing to the Board of Immigration Appeals).
[42] *Id.*
[43] *Id.*
[44] *See id.*
[45] *Id.*
[46] Class Certification Order, Rodriguez v. Hayes, No. CV 07-03239 (C.D. Cal. Apr. 5, 2010), ECF No. 77.
[47] Rodriguez v. Robbins (*Rodriguez III*), 804 F.3d 1060, 1065 (2015).
[48] *Id.* at 1090.
[49] *Jennings*, 138 S. Ct. at 839.
[50] *Rodriguez III*, 804 F.3d at 1079.
[51] *Id.* at 1082–83 ("Because those persons are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns. We therefore construed the statutory scheme to require a bond hearing after six months of detention . . . .") (citations omitted).
[52] *Jennings*, 138 S. Ct. at 847.

opinion.[53] The court interpreted § 1226 in a strictly textual manner,[54] rather than using a canon of construction to avoid an interpretation that arguably results in unconstitutionality as the lower court did.[55] The Supreme Court's decision expressly contravened the Ninth Circuit's ruling.[56] Justice Samuel Alito opined the Ninth Circuit incorrectly applied constitutional avoidance.[57] His rationale was courts must engage in statutory interpretation in the following two-step manner: (1) apply ordinary textual analysis and (2) apply constitutional avoidance, only if after engaging in ordinary textual analysis, the text yields an interpretation "susceptible of more than one construction."[58] In other words, the buck stops where ordinary textual analysis yields only one logical result.[59] According to the Court, the ordinary textual analysis of the subsections of § 1226 at issue yield only one meaning and therefore, the Court need not engage in step two.[60] Therefore, the Ninth Circuit impermissibly applied constitutional avoidance.[61] When the lower court read an implicit, automatic six-month bond hearing, the lower court wrongfully legislated from the bench.[62] Nowhere in the statute does it mention a six-month bond hearing provision or a clear and convincing burden of proof.[63]

To support their reasoning for rejecting constitutional avoidance, the Court analyzed §§ 1225(b), 1226(a), and 1226(c) under each statute's plain meaning.[64] Even if the plain meaning was not clear enough, the Court distinguished the constitutional avoidance from the case the lower court relied on, *Zadvydas v. Davis*.[65] Instead they chose to rely on *Demore v. Kim*.[66] Akin to *Demore*, the Court found the statute's language means that detention ends when removability is complete.[67] Thus, the statute equals clear, bright-line language, rather than open-endedness.[68] Because the Court scrutinized only the textual meaning of the statute, it deferred due process constitutional questions back to the Ninth Circuit for examination.[69]

Justices Breyer, Ginsburg, and Sotomayor dissented. In his dissent, Justice Breyer admonished the Court's outcome, because it raised serious constitutional

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[53] *Id.* at 851.
[54] *See id.* at 847 (interpreting § 1226).
[55] *See id.* at 842.
[56] *Id.*
[57] *Id.*
[58] *Id.* (citing Clark v. Martinez, 543 U.S. 371, 385 (2005)).
[59] *Id.* (citing Warger v. Shauers, 574 U.S. 40, 50 (2014).
[60] *Id.*
[61] *Id.*
[62] *See id.* at 843 (referring to the Ninth Circuit as "rewrit[ing] a statute as it please[d].").
[63] *See id.* at 844; *see also id.* at 846–48.
[64] *See id.* at 846–47.
[65] *See id.* at 843 (distinguishing Zadvydas v. Davis, 533 U.S. 678 (2001)).
[66] *Id.* at 835 (citing Demore v. Kim, 538 U.S. 510 (2003)).
[67] *Id.* at 846.
[68] *See id.* at 846–47.
[69] *Id.* at 851.

concern.[70] Notably, the Fifth Amendment says that "no *person* shall be . . . deprived of life, liberty, or property without due process of law.[71] An alien is a 'person.'"[72] Thus, "all persons within the territory of the United States" are protected by the Fifth Amendment.[73] Holding immigrants for excessive periods, with no possibility of bail, violates the Due Process Clause in two fundamental aspects.[74] Excessive periods of detention deprive the detainee their "liberty"[75] and blind prohibitions on bail proceedings deprive detainees of "process."[76] Thus, immigrant detainees have a right to seek protection of the Fifth Amendment, and the INA statutes unconstitutionally infringe those rights.[77]

Additionally, Breyer noted the historical gloss on arbitrary detention versus a broad right to bail, a concept so fundamental, it reaches back to the Magna Carta.[78] As Breyer noted, the government's rationale for denying constitutional protection to immigrants is because the law treats them as though they never entered the United States.[79] But this is a mere "legal fiction."[80] The Constitution irretrievably protects all persons from arbitrary imprisonment.[81] Indeed, there is perhaps no more fundamental right than freedom within the Constitution's bounds.[82]

Importantly, the concept of a broad right to bail, though it traces back to our deep-rooted Anglo-ancestry, is carried forward and embraced under U.S. law.[83] In fact, current U.S. law has really only narrowed a broad right to bail by introducing two significant factors. These include risk of flight and threat to community safety.[84] But when there is no individualized determination of risk of flight nor showing of present danger to others, these factors are irrelevant.[85] In *Jennings*, Justice Breyer noted a sheer dearth of evidence suggesting

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[70] *Id.* at 861 (Breyer, J., dissenting) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).
[71] *Id.* (quoting U.S. CONST. amend. V).
[72] *Id.* (quoting Wong Wing v. United States, 163 U.S. 228, 237–38 (1896)).
[73] *Id.* at 862 (quoting *Wong Wing*, 163 U.S. at 238).
[74] *See id.* at 861–62.
[75] *See id.* (referring to deprivation of "liberty" in United States v. Salerno, 481 U.S. 739, 748–51 (1987)).
[76] *Id.* at 861.
[77] *See id.* at 861–62.
[78] *See id.* at 861, 863.
[79] *Id.* at 862.
[80] *Id.*
[81] *Id.* at 862–63; *see, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that immigrants are people and must be afforded Fourteenth Amendment protections); Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (finding that indefinite detention of noncitizens raises serious constitutional concerns); Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–598 (1953).
[82] *See Jennings*, 138 S. Ct. at 863.
[83] *Id.*
[84] *Id.* at 864.
[85] *Id.*

noncitizens pose a risk of flight or danger to the community.[86] Then, Breyer documented the Court's precedents involving detention, where he found that case law primarily supports the notion that bail is necessary and ought to be preferred.[87] For these reasons, Breyer found the INA statutes to raise serious constitutional concerns, sufficient for applying constitutional avoidance.[88]

B. **Preap** *Background*

Mony Preap entered the United States as an infant in 1981 and became a lawful permanent resident soon thereafter.[89] He was born in a Cambodian refugee camp and later came to the United States[90] after his family fled Cambodia's Khmer Rouge.[91] Preap is a single father to a U.S. citizen and takes care of his mother, who is in remission from cancer and suffers seizures.[92] In 2006, he was convicted of two misdemeanor marijuana possession charges.[93] Rather than being detained upon release, ICE did not arrest Preap until seven years later.[94] The other two class members joining Preap are lawful permanent residents from Mexico.[95] Juan Magdaleno was not arrested by ICE until five years after his release from criminal custody, and Eduardo Padilla waited eleven years until he was picked up by ICE.[96] The common denominator among these immigrants is that each served their time, rehabilitated, and lived their lives before being recaptured by ICE.

Each immigrant was charged under 8 U.S.C. § 1226(c), thus not afforded a bond hearing.[97] The language of § 1226(c) says that immigrants convicted of certain types of crimes are to be "take[n] into custody. . . when the alien is released" from criminal custody.[98] In the California district court, the plaintiffs argued they were not picked up *immediately* upon release from criminal custody; therefore, they do not fall under the statute and must be afforded a bond proceeding.[99] The District Court agreed with this analysis and issued a preliminary injunction, prohibiting class members from mandatory detention with no bond hearing.[100] Similar to *Jennings*, the Ninth Circuit affirmed the lower court and the government petitioned for certiorari.[101]

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[86] *See id.* at 865.
[87] *See id.* at 866–69.
[88] *Id.* at 869.
[89] Preap v. Johnson, 303 F.R.D. 566, 571 (N.D. Cal. 2014).
[90] *Id.*
[91] The Khmer Rouge are Cambodian communist party followers.
[92] *Preap*, 303 F.R.D. at 571.
[93] *Id.*
[94] *Id.* at 572.
[95] *Id.* at 572–73.
[96] Nielsen v. Preap, 139 S. Ct. 954, 961 (2019).
[97] *Id.*
[98] 8 U.S.C.A. § 1226(c)(1) (West).
[99] *Preap*, 303 F.R.D. at 574–75.
[100] *Id.* at 584.
[101] Preap v. Johnson, 831 F.3d 1193, 1207 (9th Cir. 2016).

In 2019, the Supreme Court took up the issue, focusing on whether the words "when . . . released" in the statute mean immediately.[102] According to 8 U.S.C. § 1226(c), "the Attorney General shall take into custody any [noncitizen]" present in the United States who has been convicted of certain enumerated crimes.[103] These aliens are not to be released nor have the opportunity for a bond hearing.[104] All other noncitizens subject to potential removal "may be arrested and detained" under 8 U.S.C. § 1226(a) but *are* entitled to a bond hearing.[105] Essentially, all detained immigrants, who are subject to removal from prior convictions, fit into one of these two buckets.[106] The court, again, scrutinized the language of 8 U.S.C. § 1226 and adhered strictly to a textual interpretation of the statute,[107] finding that only one derivation of the statute existed: its plain meaning.[108] The respondents contended that when ICE picks up an immigrant any time later than twenty-four hours after their release from criminal custody, they are exempt from being thrown into the § 1226(c) bucket.[109] However, according to Alito, the words "when released" do not limit the government's ability to detain immigrants even when considerable time has elapsed after a release from criminal custody.[110] Thus, the Court rejected the respondent's interpretation that "when released" means immediate or less than twenty-four hours.[111]

In the same vein as *Jennings*, the respondents rested their argument on constitutional avoidance in interpreting the statute.[112] The respondents contended § 1226(c) cannot possibly be interpreted to permit mandatory detention without possibility of bail so many years after release from criminal custody, because these individuals developed strong ties to the country and were rehabilitated.[113] There was no reason to believe they would not be allowed to stay if given a hearing.[114] For this reason, the underlying purpose of § 1226(c) in denying bail fails entirely.[115] The whole premise for denying bail is to protect the community and prevent risk of flight, yet the class of immigrants in question clearly posed no risk of either.[116] Therefore, detention under § 1226(c) stands on

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[102] Nielsen v. Preap, 139 S. Ct. 954, 961 (2019).
[103] 8 U.S.C.A. § 1226(c)(1) (West).
[104] *See id.* § 1226(c)(2); *Nielsen*, 139 S. Ct. at 959.
[105] 8 U.S.C.A. § 1226(a) (West).
[106] *See Nielsen*, 139 S. Ct. at 959–60.
[107] *See id.* at 971.
[108] *See id*. (noting that the plain meaning of the text prevails when deciding to invoke constitutional avoidance with regard to § 1226(c)).
[109] *Id.* at 959.
[110] *See id.* at 971.
[111] *See id.*
[112] *See id.*
[113] *Id.*
[114] *Id.*
[115] *See id*. at 971–72.
[116] *See id*. at 972 ("[M]andatory detention may be insufficiently linked to public benefits like protecting others against crime and ensuring that aliens will appear at their removal proceedings.").

constitutionally shaky ground[117] as noted in *Zadvydas v. Davis*.[118] In response, Alito deferred to the rule in *Jennings* for applying constitutional avoidance: the canon only comes into play after ordinary textual analysis yields multiple constructions.[119] According to the Court, because there was no ambiguity, the respondent's argument was moot.[120] In carbon copy format, the Court again emphasized that its decision did not foreclose constitutional challenges to the statute.[121] Because respondents raised strictly statutory arguments (and not constitutional), the Court did not address the merits.[122]

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan dissented in the case. Justice Breyer engaged in a lengthy textual battle with the majority, parsing the statute's words on a molecular level.[123] Breyer harkened back to his dissent in *Jennings*,[124] underscoring the due process issues, and scolded the majority for aggravating the issue.[125] Critically, Breyer pointed out that the majority's interpretation permits the Secretary of Homeland Security to hold indefinitely, without bail, those who have never been to prison and who received only a fine or probation as punishment.[126] For example, § 1226(c)(1)(A), by incorporating § 1182(a)(2) of the INA, covers controlled substance offenses.[127] These offenses constitute a maximum penalty exceeding one year; thus, committing the immigrant to detainment with no bail proceeding.[128] In conclusion, Breyer's dissent, importantly, criticizes the majority opinion for upholding a statute which violates immigrant due process rights.

IV. DUE PROCESS

A. Due Process to the "People"

Justice Breyer emphasizes what the Court fails to see in both its *Jennings* and *Preap* decisions. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[129] "Freedom from arbitrary detention is as

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[117] *Id.*
[118] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (holding that detention violates due process absent adequate procedural protections, which may outweigh a detainee's constitutional interest in avoiding arbitrary restraint).
[119] *Nielsen*, 139 S. Ct. at 972.
[120] *See id.*
[121] *See id.*
[122] *See id.* ("Our decision today on the meaning of that statutory provision does not foreclose . . . constitutional challenges to applications of the statute . . . .").
[123] *See id.* at 976–81 (Breyer, J., dissenting).
[124] *Id.* at 982.
[125] *Id.*
[126] *See id.*
[127] *Id.*
[128] *See id.*
[129] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing Plyler v. Doe, 457 U.S. 202, 210 (1982));

ancient and important a right as any found within the Constitution's boundaries."[130] Furthermore, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."[131] And physical detention is among the gravest deprivations the government can impose on a person.[132]

The question of due process, with respect to noncitizen mandatory detention, has come up before in both *Zadvydas v. Davis*[133] and *Demore v. Kim*.[134] Therefore, to engage in a proper discussion on due process, requires reconciling these cases which, individually, stand apart from each other. In *Zadvydas*, the issue involved due process of noncitizens under 8 U.S.C. § 1231.[135] This statute pertains to detention following a final order of removal.[136] In particular, the statute says that if the noncitizen has not actually been removed during the mandated ninety-day removal period, that the noncitizen may be held in detention for such time period until determined by the Attorney General.[137] For this reason, the court held that noncitizens kept in detention, under the Attorney General's discretion, is violative of the Due Process clause.[138]

In contrast, *Demore* dealt squarely with § 1226(c),[139] which is the focus of this article. Although, the respondents in *Demore* relied heavily on *Zadvydas*, the key differentiation is that § 1226(c) involves noncitizen detention *pending* removal proceedings, whereas § 1231 involves detention after a final order of removal.[140] Thus, according to the *Demore* Court, the material difference is noncitizens held under § 1231 are held for an unknowable time period; whereas, § 1226(c) involves a definite ending point, because noncitizens are held in mandatory detention up until the final removal proceeding.[141] Therefore, the Court found § 1226(c) and mandatory detention constitutional.[142] Finally, it found § 1226(c) constitutional, because at the time of its enactment, Congress was faced with evidence that "discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens

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see Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–598 (1953).

[130] Jennings v. Rodriguez, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting) (citing *Zadyvydas*, 533 U.S. at 720–21).

[131] *Zadvydas*, 533 U.S. at 690; *see also, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 356 (1997); Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

[132] Brief for Constitutional and Immigration Law Professors in Support of Respondents as Amici Curiae Supporting Respondents at 3, Nielsen v. Preap, 139 S. Ct. 954 (2018) (No. 16-1363).

[133] *Zadvydas*, 533 U.S. at 682.

[134] Demore v. Kim, 538 U.S. 510 (2003).

[135] *Zadvydas*, 533 U.S. at 683 (noting the word "may" in the statute).

[136] *See* 8 U.S.C.A. § 1231 (West).

[137] *See id.* § 1231(a)(3).

[138] *Zadvydas*, 533 U.S. at 697.

[139] *Demore*, 538 U.S. at 513.

[140] *Id.* at 528–29.

[141] *See id*.

[142] *Id.* at 531.

skipping their hearings and remaining at large in the United States unlawfully."[143] Even if that were the case in 1995, the Court implicitly admitted bond hearings were not the most effective solution, and that mandatory detention is not the least burdensome solution on noncitizens.[144] Relying on immigration data at the time, the Court found that detention periods lasted, at most, five months.[145] Essentially, the *Demore* Court's reasoning was that a procedure comports with the Due Process Clause, even if it is burdensome, so long as the procedure is not the *most* burdensome.[146]

The *Demore* Court based its decision on anachronistic figures. The EOIR Criminal Charge Completion Statistics show noncitizens are being physically detained for unreasonable time periods.[147] According to these recent statistics, between 2003 and 2015, more than 32,000 people were detained over six months, more than 10,000 people over a year, and more than 2,000 people over two years.[148] However, these numbers may not even accurately reflect the severity of the problem. EOIR does not count detention time until the government files a formal charging document.[149] EOIR also does not account for the time spent during any appeal to the federal courts or remand proceedings before the agency, which may take months or years.[150] In addition, those with significant defenses to removal or meritorious claims often have lengthy proceedings that lead to their being detained much longer than many who do not challenge removal.[151] These facts indicate that, with the outcome in *Jennings* and *Preap*, the numbers of individuals arbitrarily detained will continue, if not grow, until federal opinions rule otherwise or until a new legislative policy reforms § 1226(c).

B. Since **Preap** *Federal Courts Hold Mandatory Detention Unconstitutional*

The Court in *Jennings* and *Preap* twice-over failed to raise due process concerns,[152] opting instead to apply legal formalism. The application of legal formalism is ill-suited to immigration cases, because such obsequious and robotic adherence to the literalness of the word often yields an illogical outcome.[153] Human lives are at stake. Constitutional avoidance simultaneously

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[143] *Id.* at 528.
[144] *Id.*
[145] *Id.* at 530.
[146] *See id.* at 528.
[147] *See* Brief for Constitutional and Immigration Law Professors as Amici Curiae Supporting Respondents at 3, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363).
[148] *See id.* (citing EOIR, Certain Criminal Charge Completion Statistics (Aug. 2016)), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf [https://perma.cc/SD32-FGRB]).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018); Nielsen v. Preap, 139 S. Ct. 954, 971–72 (2019).
[153] *See The Supreme Court, 2017 Term—Leading Cases*, *supra* note 12, at 424 (citing United States

preserves the law's integrity and mitigates the cost to life (or freedom).[154] Nevertheless, because the Court relied solely on legal formalism, the Court punted mandatory detention's constitutionality under § 1226(c) back to the lower courts.[155] But even though it deferred the issue on the merits, in each case the Court emphasized the questionable constitutional underpinning of § 1226(c) to be relitigated in the lower courts.[156] This can be seen as tacit acceptance that had the plaintiffs raised due process violations in their complaint, the Court could have struck down the statute. And perhaps by punting the issue, their emphatic words[157] can be seen as a harbinger for further cases addressing § 1226(c)'s constitutionality.

Subsequent federal district court opinions support this proposition: that the *Preap* and *Jennings* decisions provided fodder for litigating § 1226(c)'s constitutionality.[158] For example, in *Reid v. Donlan* the court held that mandatory detention, without a bond hearing under § 1226(c), violates due process when the noncitizen's detention is unreasonably prolonged respective to the governmental purpose for ensuring removal of criminally convicted noncitizens.[159] Whether the noncitizen's detention is unreasonably prolonged depends on the noncitizen's individual circumstances.[160] The court weighed the individual circumstances, establishing a factors test.[161] According to the Massachusetts district court, the single most important factor for determining unreasonably prolonged detention is the detention length.[162] A period of more than one year almost certainly qualifies as unreasonably prolonged.[163] A period of less than one year may qualify as unreasonably prolonged if the matter arbitrarily lingers on the Board of Immigration Appeal's docket.[164] The *Reid* Court also emphasized the burden rests on the government's shoulders to prove—by the preponderance of evidence—the noncitizen's risk of flight and

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v. Witkovich, 353 U.S. 194 (1957) ("Beginning in *United States v. Witkovich*, the Court rejected 'the tyranny of literalness' by limiting a statute's delegation of 'unbounded authority' to the Attorney General to question deportable noncitizens.").

[154] *See Jennings*, 138 S. Ct. at 842; *Nielsen*, 139 S. Ct. at 971.

[155] *Jennings*, 138 S. Ct. at 851; *Nielsen*, 139 S. Ct. at 971–72.

[156] *Jennings*, 138 S. Ct. at 852 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) ("[D]ue Process . . . calls for such procedural protections as the particular situation demands."); *Nielsen*, 139 S. Ct. at 972.

[157] *Nielsen*, 139 S. Ct. at 972 ("We emphasize that respondents' arguments here have all been statutory . . . . While respondents might have raised a head-on constitutional challenge to § 1226(c), they did not. Our decision today on the meaning of that statutory provision does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.").

[158] *See, e.g.*, Reid v. Donelan, 390 F. Supp. 3d 201 (D. Mass. 2019); Kabba v. Barr, 403 F. Supp. 3d 180 (W.D.N.Y. 2019).

[159] *Reid*, 390 F. Supp. 3d at 219 (establishing a reasonableness hearing).

[160] *Id.*

[161] *See id.*

[162] *Id.*

[163] *See id.* at 219–21.

[164] *See id.* at 220.

prove—by clear and convincing evidence—that the noncitizen is not dangerous to the community.[165]

Kabba v. Barr, is another case where a court held a noncitizen's unreasonably prolonged detention violated due process.[166] The Western District Court of New York evaluated procedural due process in a similar manner to the *Reid* Court.[167] It calculated a two-step analysis to challenge due process under § 1226(c).[168] First, the court considered whether the noncitizen's detention had been unreasonably prolonged.[169] If not, then no violation occurred. If it had, then the court proceeded to step two: identifying the specific reasons for keeping the individual restrained.[170] If no procedural safeguards were given, then continued detention was in clear violation of procedural due process.[171] Under the first step, the court cited *Reid*, holding that the most important factor in determining unreasonably prolonged detention is the detention length.[172] *Kabba* also considered other factors, like the detention center's conditions, whether one party caused unnecessary procedural delay, and likelihood that removal proceedings will result in a final order of removal.[173] Ultimately, the court found the noncitizen's eighteen-month detention was unreasonably prolonged and that he did not receive adequate procedural protection. Thus, a due process violation occurred.[174]

These cases expose an inevitable conflict: by placing noncitizens in § 1226(c), the government willingly violates procedural due process by keeping noncitizens detained for an unreasonable time period until such time when the noncitizen raises their hand. Noncitizens must file a habeas petition, rather than being automatically afforded a bond hearing by law.[175] The reason is because granting a habeas petition is subject to the court's discretionary authority.[176] In the immigration context, the court's rationale comes from the Supreme Court's unwillingness to read an automatic bond proceeding into § 1226(c).[177] But because the individual must raise a petition to receive their day in court, rather than it being given to them, this provides fodder for the government to continue

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[165] *Id.* at 210.
[166] Kabba v. Barr, 403 F. Supp. 3d 180, 190 (W.D.N.Y. 2019).
[167] *See id.* at 185.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 185–86.
[173] *Id.* at 186–87.
[174] *Id.* at 190.
[175] Reid v. Donelan, 390 F. Supp. 3d 201, 209–10 (D. Mass. 2019).
[176] *See* Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003) (noting that the court has authority to *grant* a writ of habeas corpus under 28 U.S.C. § 2241); Schlup v. Delo, 513 U.S. 298, 319 (1995) ("[H]abeas corpus is, at its core, an equitable remedy."); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193 (1978) ("'[S]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the [Court's] discretion.'").
[177] *See Reid*, 390 F. Supp. 3d at 219–21.

denying the noncitizen procedural due process.

Although, the EOIR has an internal goal for resolving removal proceedings swiftly,[178] this article offers a prediction: due process claims will proliferate in federal court, because the government will continue to hold noncitizens in unreasonably prolonged detention, relying on noncitizens to raise their hand. The resulting conclusion, then, is that due process should not be afforded based on habeas petitions from individualized circumstances, but rather it must be automatically afforded by law. Due process is a *right* not a privilege.[179] Thus, § 1226(c) must be repealed and rewritten because it is constitutionally unsound.

C. Immigrant Detention Conditions

Kabba highlights a critical factor in determining due process violations—the noncitizen's conditions while detained.[180] Immigrant detention is purely civil. Because immigrant detention is civil, it should not be likened to criminal restraint.[181] However, noncitizens given mandatory detention are continually held in criminal-like custody, or sometimes worse conditions.[182] The underlying rationale is based on the immigration authorities' skewed perception.[183] From the outset, authorities believe noncitizens do not have a right to remain in the United States and place them in detention when noncitizens do have a reasonable claim for having such a right.[184]

This skewed perception plays out in dramatic fashion in the way immigration authorities treat noncitizens. Noncitizens are treated like criminal detainees: they are shackled and wear orange jumpsuits.[185] But worse, there are no regulations or enforceable standards regarding detention conditions, so often conditions are worse than criminal detention.[186] For instance, detainees are deprived medical treatment, mental health care, religious services, bus transfers, access to telephones, library materials, language services, and, crucially, right to

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[178] *See* Memorandum from James R. McHenry III, Dir. of the Exec. Off. for Immigr. Rev. to the Off. of the Chief Immigr. J., et al. 2 (Jan. 17, 2018) (on file with author), https://www.justice.gov/eoir/page/file/1026721/download [https://perma.cc/4AFE-C8GY].

[179] *See* U.S. CONST. amend. V, cl. 4.

[180] Kabba v. Barr, 403 F. Supp. 3d 180, 186 (W.D.N.Y. 2019).

[181] *See id.* at 184 (noting that immigration detention is civil and assumed to be nonpunitive).

[182] *See* Zadvydas v. Davis, 533 U.S. 678, 691–92 (2001).

[183] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting).

[184] *See id.*

[185] *See* Transcript of Oral Argument at 8, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1204_2c83.pdf [https://perma.cc/2S9L-X5TN]; Freedom for Immigrants, *Melting the ICE/Derritiendo el Hielo*, https://www.freedomforimmigrants.org/melting-the-ice [https://perma.cc/NCC4-S7RN] (describing Episode 1: Tony Chen's story).

[186] *See Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting); *Immigration Detention Conditions*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions [https://perma.cc/8JVG-EJTW] [hereinafter ACLU, *Immigration Detention Conditions*].

counsel.[187] In a 2017 DHS inspection of detention centers, the report found that the centers were rife with substandard care and living conditions, invasive and indiscriminate strip searches, and egregious wait times for personal hygiene products.[188] Furthermore, ICE repeatedly placed individuals in solitary confinement as punishment.[189]

In comparison, criminal inmates must receive, by law, medical treatment[190] and personal hygiene,[191] appropriate mental health care,[192] at least one telephone call per month,[193] opportunities to pursue religious beliefs and practices,[194] right to counsel,[195] education,[196] and deferment of proceedings until proper language services can be utilized.[197] Additionally, any search, other than a visual or pat down, requires staff to solicit the inmate's prior consent and reasonable belief that contraband will be found.[198] Finally, solitary confinement is generally viewed as a measure of last resort.[199]

Perhaps the most troubling side effect is immigrants are separated from their families. In one chilling story, Astrid Morataya, a victim of sexual abuse, was detained, under § 1226(c), fifteen years after committing a drug-related offense.[200] Morataya was locked up for two years and separated from her three children, missing formative parent-child bonding time.[201] For example, Morataya missed taking her child to the first day of kindergarten.[202] There was likely no question Morataya would be exonerated upon removal proceedings, because she could successfully testify against her abuser.[203] Even so, that is not

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[187] ACLU, *Immigration Detention Conditions*, *supra* note 186.
[188] DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3–11 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf; *see also Jennings*, 138 S. Ct. at 861 (Breyer, J., dissenting).
[189] Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 236 (2019) (discussing conditions at various ICE facilities).
[190] *See* 28 C.F.R. §§ 549.10–549.95 (2020).
[191] *Id.* § 551.6.
[192] *See id.* §§ 549.40–549.46.
[193] *Id.* § 540.100(b).
[194] *Id.* § 548.10(a).
[195] U.S. CONST. amend VI; 28 C.F.R. § 543.12.
[196] *See* 28 C.F.R. §§ 544.20–544.101 (2020).
[197] G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015), https://undocs.org/A/RES/70/175 [https://perma.cc/6VWA-C6NQ] [hereinafter Mandela Rules].
[198] 28 C.F.R § 552.11 (2020).
[199] Mandela Rules, *supra* note 197, Rule 45.
[200] Liz Martinez, *This Supreme Court Immigration Case Could Mean More Family Separations*, THE HILL (Oct. 10, 2018, 7:30 AM), https://thehill.com/opinion/immigration/410490-this-supreme-court-immigration-case-could-mean-more-family-separations [https://perma.cc/GFP5-AFKV].
[201] *Id.*
[202] *Id.*
[203] *Id.*

the key takeaway. What is crucial is that Morataya had all the information necessary to secure a bond release, but since she was held under § 1226(c), she could have been spared years of separation and anguish.[204]

Not only does the time stolen cause great familial discord, it also causes financial strife. In another example, Tony Chen, a lawful permanent resident, was placed in mandatory detention for a nonviolent financial crime for which he committed seven years prior and only received probation and a fine.[205] Chen's family greatly depended on him for everything.[206] For example, Chen's children were in high school and depended on their father for help with schoolwork,[207] and Chen's wife was forced to work three jobs, in his stead, to financially support the family.[208] Upon Chen's detention, his son seriously contemplated dropping out of high school to help with the family's living costs.[209] Chen attributed his exoneration to hope and his attorney, whom he hired,[210] to resolve his removability.[211] If he did not have these, his family would have quickly fallen apart. As Chen exclaimed, his mandatory detention was "like a bomb" to the family.[212]

Noncitizens held in ICE mandatory detention facilities are subject to abhorrent conditions.[213] These conditions violate not just due process rights but also human rights.[214] Sometimes courts consider detention center conditions, but only as a factor in particularized habeas hearings.[215] However, because the conditions for nearly all noncitizens are akin to—if not worse than—criminal custody, the statute is almost certainly unconstitutional. Traditionally, the government must show a legitimate civil commitment before deprivation of due process.[216] Judging by current immigrant detainee standards and conditions,

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[204] *Id.*
[205] Freedom for Immigrants, *supra* note 185.
[206] *See id.*
[207] *Id.*
[208] Martinez, *supra* note 208.
[209] *Id.*
[210] Noncitizen detainees do not automatically receive an attorney. ACLU, *Immigration Detention Conditions*, *supra* note 186.
[211] Freedom for Immigrants, *supra* note 185.
[212] Martinez, *supra* note 208 (stating that the effect of section 1226(c) was "like a bomb").
[213] *See supra* note 187, and accompanying text.
[214] *See, e.g.*, SONYA CHUNG & ANDREA SAVIDE, N.J. ADVOCATES FOR IMMIGRANT DETAINEES ET AL., ISOLATED IN ESSEX: PUNISHING IMMIGRANTS THROUGH SOLITARY CONFINEMENT 25–37 (2016); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 81–85 (2005) (noting that the United States is subject to treaties on solitary confinement, a technique used in immigrant detention, including treaties like American Declaration of the Rights and Duties of Man; American Convention on Human Rights; International Covenant on Civil and Political Rights; and Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment); *see generally* Brief of United Nations High Commissioner for Refugees as Amicus Curiae Supporting Respondents, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).
[215] *See, e.g.*, Kabba v. Barr, 403 F. Supp. 3d 180, 186 (W.D.N.Y. 2019); Rodriguez v. Barr, No. 20-CV-00886-LJV, 2020 WL 5651603, at *5 (W.D.N.Y. Sept. 23, 2020)
[216] *See* Addington v. Texas, 441 U.S. 418, 431 (1979).

there is serious doubt detainees are given due process. But, from the beginning, is there even a legitimate civil commitment to keep noncitizens detained this way? As this article will show there often is not.

D. No Civil Commitment, No Due Process

The government cannot show, by clear and convincing evidence, a reason for depriving the noncitizen a right to plead their case in a bond hearing. As mentioned, the standard is that the government must show a civil commitment, by clear and convincing evidence, before it can deprive an individual's liberty for an extended period.[217] This means the government must show the detention bears some reasonable relationship to a legitimate governmental interest.[218] Typically, the legitimate governmental interest argued is to prevent flight and to avoid danger to the community.[219] But by denying a hearing altogether, the government cannot demonstrate the person poses a risk to either of these interests.[220] A legitimate interest can never be served without a showing of why the government has chosen to detain someone.[221] The bond hearing would be an opportunity to demonstrate this interest, but § 1226(c) obviates that opportunity. Thus, § 1226(c) is prima facie unconstitutional.

Even if the noncitizens were given a bond hearing, the government could probably not meet its burden in showing risk of flight or danger to the community. The individuals detained under § 1226(c) are not the same as criminal defendants seeking bail. These individuals are noncitizens who have served their time, rehabilitated, and reentered into their communities, living productively in society.[222] For example, after his criminal release, Mony Preap had sole custody of his son, cared for his ailing mother, and worked a part-time job.[223] Following Juan Magdaleno's criminal release, he served as a household provider.[224] Magdaleno was a financial contributor for his wife and children and caregiver to his grandchildren, watching over them after school.[225] Some studies show how firmly rooted the noncitizen has become in the community and in their home. For example, one study in Southern California "found that 94% of those in detention are a significant source of financial or emotional support for their families. Of those 94%, 'nearly two-thirds (64%) . . . reported that during their time in detention, their family was late paying rent, mortgage, or utility bills.'"[226]

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[217] *Id.*; Bianco, *supra* note 24, at 53.
[218] *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972); Bianco, *supra* note 24, at 54.
[219] *See* Demore v. Kim, 538 U.S. 510, 514 (2003).
[220] Bianco, *supra* note 24, at 54–55.
[221] *Id.*
[222] *See* Brief for Constitutional and Immigration Law Professors as Amici Curiae Supporting Respondents at 7, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363).
[223] *Id.* (citations omitted).
[224] *See id.* (citations omitted).
[225] *Id.*
[226] *Id.* at 9 (citations omitted).

Additionally, often times the crime the noncitizen committed does not warrant a fear of flight or danger to the community. For example, the crime could be a minor drug offense or a crime of "'moral turpitude' such as illegally downloading music or possessing stolen bus transfers."[227] Furthermore, individuals could be placed into the § 1226(c) category by virtue of committing a crime with a sentence of at least one year.[228] However, the actual crime committed may bear no reasonable relationship to the noncitizen's risk of flight or danger to the community. In Tony Chen's story, he was convicted of a nonviolent financial crime carrying a sentence of at least one year.[229] However, the financial crime is not correlative to a risk of flight or danger to the community, because it is nonviolent and there was no risk Chen might flee because he was the sole contributor to his family.[230]

Also, there is simply no data supporting that noncitizens seeking to remain in the United States threaten the safety of the community more frequently, if released, than criminal defendants.[231] The same is true for risk of flight.[232] No evidence suggests that noncitizens present a greater risk of flight than criminal defendants where there is probable cause to believe they have a committed a crime.[233] In fact, individuals who have been at liberty are less likely to flee precisely because they would be fleeing their families, their livelihoods, and their property.[234] Nevertheless, these arguments presuppose the court has given an opportunity to assess release. That opportunity simply does not occur under § 1226(c). For this reason, the government proves no legitimate purpose for detention; therefore, violating due process.

V. REMEDIES

This article introduces revisions to sections 1226(c)(1)(D) and 1226(c)(2)(A), providing a thirty-day (30) grace period for when ICE can initiate arrest as well as a one-year statutory cap for when an arrest is no longer possible. Section V.A discusses the revisions to § 1226(c) and explains reasons for imposing these changes to the statute. Section V.B discusses alternatives to mandatory detention in lieu of a revised statute which may also comport with

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[227] Nielsen v. Preap, 139 S. Ct. 954, 978 (2019) (Breyer, J., dissenting).
[228] *See* 8 U.S.C.A. § 1226(c)(1)(C) (West).
[229] Freedom for Immigrants, *supra* note 185.
[230] *Id.*
[231] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 865 (2018) (Breyer, J., dissenting); Walter Ewing, Daniel E. Martinez & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July 13, 2015), https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states [https://perma.cc/A9NS-EWKE]; *see generally* Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227 (2019).
[232] *See Jennings*, 138 S. Ct. at 865 (Breyer, J., dissenting); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 146 (2013).
[233] *See* Das, *supra* note 232, at 156–57, 159.
[234] *See* Brief for Constitutional and Immigration Law Professors as Amici Curiae Supporting Respondents at 7, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363).

due process.

A. Section 1226(c) Should Be Repealed and Revised

Although the Supreme Court opted not to practice constitutional avoidance like the Circuit courts in *Jennings* and *Preap*, it should repeal § 1226(c) because it is unconstitutional, and Congress should revise in the following manner:[235]

> (c) Detention of criminal aliens
>
> (1) Custody
>
> The Attorney General shall take into custody any alien who--
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *After thirty (30) calendar days from release but no later than one calendar year*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) *only if the Attorney General*
>
> *(A) grants a bond release at a bond proceeding occurring no later than four (4) calendar months after the alien's confinement and subject to certain conditions prescribed by the Attorney General;* or
>
> (B) decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.[236]

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[235] Italics indicate author's proposed revisions to the existing statutory language.

[236] *See* 8 U.S.C.A. § 1226(c) (West).

As shown above, this re-drafted version of § 1226(c) does not deny noncitizens the right to a bond proceeding, and it also does not read into the current statute an automatic six-month bond hearing. Rather, the new statute is revised in a way which grants an automatic bond hearing occurring no later than four months after the noncitizen's detainment. Any detention beyond the four-month period would violate due process. The *Demore* Court found that four months was the average detainment time length when noncitizens appeal the decision of the Immigration Judge.[237] Therefore, a four-month automatic right to a bond hearing might better alleviate due process concerns.

This article's proposed statute also does not require "reasonableness hearings" mentioned in Section IV.A. The government contends that requiring reasonableness hearings would overwhelm under-resourced immigration courts. However, the larger issue is that immigration courts do not have the jurisdiction for reasonableness hearings to begin with, because administrative bodies cannot adjudicate constitutional questions, like violations of due process.[238] Rather, that power rests with federal courts.[239] Therefore, if any noncitizen makes a habeas petition, the burden would be shifted to federal courts, alleviating the burden on immigration courts.

Also, § 1226(c)(2) should not place the power to release the noncitizen solely at the discretion of the Attorney General as it does now. Rather, the statute should read similarly to § 1226(a)(2) which institutes an automatic right to a bond hearing or conditional parole subject to a determination made by the Attorney General. To reiterate—due process is a right given to *any person*. And a statute which expressly mandates an automatic bond proceeding better accomplishes due process rights while simultaneously avoiding situations where the bench is "rewrit[ing] a statute as it pleases."[240]

Additionally, by textually committing the noncitizen to a bond proceeding, it also defeats the need for the noncitizen to make a habeas petition. As noted in Section IV, district court opinions and scholarly work suggest a habeas petition must be made by the noncitizen in which the court weighs whether the noncitizen has received adequate due process protection based on individualized circumstances. But this is not the correct solution, because this system relies on the noncitizen to raise a habeas petition. Noncitizens subject to removal are not automatically appointed an attorney and many do not speak English.[241] Therefore, relying on the noncitizen may perpetuate unreasonably prolonged detention because they are ill-equipped and unknowledgeable about bringing a habeas petition.[242] Because noncitizens are not automatically appointed an attorney, this system also presumes noncitizens will have money to hire an

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[237] Demore v. Kim, 538 U.S. 510, 529 (2003) ("[A]ppeals takes an average of four months, with a median time that is slightly shorter.").
[238] *See* Johnson v. Robison, 415 U.S. 361, 368 (1974).
[239] *See id.*; U.S. CONST. art. III, § 2, cl. 1.
[240] Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018).
[241] Bianco, *supra* note 24, at 52.
[242] *See id.*

attorney to help make a due process claim. Thus, a revised § 1226(c) instituting an automatic bond proceeding assures noncitizens are accorded due process rights.

The article's proposed law also redefines the parameters for when ICE can arrest the noncitizen. The proposed statute expressly allows the government to arrest the noncitizen only after thirty days and simultaneously extinguishes the government's opportunity to arrest after one year. The reason for a 30-day grace period is because immediate capture and arrest after the noncitizen is released is impractical.[243] In response, the new statute's 30-day gap period serves two critical functions. First, it allows the Department of Homeland Security time to identify, collect, and allocate the necessary resources to ensure the agency captures noncitizens posing the most serious risk of danger to others or fleeing the country.[244] Second, the time period provides a period of respite whereby the agency can exercise caution conducting the legal inquiry required to determine whether the noncitizen has committed an enumerated crime under § 1226(c).[245] Such period of respite would likely limit erroneous detention.[246] In essence, the thirty-day rule provides clarity in the law around "when released" and is more likely to assuage due process concerns where no party can claim unfair surprise.

Additionally, as it stands, the words "when released" give the government too much deference to find and detain noncitizens who have rehabilitated and reestablished themselves as productive community members. The new statute sets a statutory bar at one year to relieve the noncitizen's fear of detention coming several years after their release.[247] Less than a one-year bar would frustrate the government's ability to arrest noncitizens actually posing a legitimate risk of flight or threat to the community.[248] This is because it greatly constrains the window of time that ICE can use in arresting noncitizens. Accordingly, a one-year time limit strikes the right balance where any longer period likely violates the law of diminishing return.[249] Finally, plain language of an expiration date acts as a statute of limitations,[250] because it better assures the noncitizen that they cannot be subject to removal proceeding beyond the one-year time period. Indeed, a one-year period is short;[251] it is commensurate with

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[243] *See, e.g.*, Khodr v. Adduci, 697 F. Supp. 2d 774, 780 (E.D. Mich. 2010); Zabadi v. Chertoff, No. C 05-03335 WHA, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005); *see also* Nielsen v. Preap, 139 S. Ct. 954, 971 (2019).
[244] Savaresse, *supra* note 30, at 329.
[245] *Id.*
[246] *Id.*
[247] *See* IMMIGRANT LEGAL RESOURCE CENTER, LIMIT REMOVAL BASED ON LONG AGO CONDUCT 1 (2013), https://www.ilrc.org/sites/default/files/resources/ijn-statute-of-limitations-factsheet.pdf [https://perma.cc/BAX5-39ST] [hereinafter ILRC FACTSHEET].
[248] Jenna Neumann, *Proposing a One-Year Time Bar for 8 U.S.C. § 1226(c)*, 115 MICH. L. REV. 707, 729 (2017).
[249] *See id.* at 729–30.
[250] *See id.* at 730 (noting "the increasing similarity between immigration and criminal law").
[251] *See id.*

many misdemeanor statutes of limitation.[252] However, there is good reason for its brevity: an individual's life is at stake.[253] A one-year period more closely aligns with an appreciation toward preserving human lives[254] whereas any time period longer would compromise the dignity of human lives.[255]

Another purpose for the hard stop is to alleviate the attendant social costs which are simply too high when DHS is able to abruptly halt the noncitizen's life one year after release.[256] Indeed, such fearmongering immigration laws produce a seismic effect on the noncitizen's life, to their families, and on society as a whole. For example, mandatory detention carries a steep toll against the noncitizen's mental and physical health, diminishing the individual's capacity to reintegrate into society.[257] The public bears the cost of funding mental and physical health and reintegration-related services for noncitizens permitted to stay in the United States after their removal hearing.[258] The cost levied on families is also unnecessarily high. Families suffer deep emotional and financial tumult,[259] as illustrated in Astrid Morataya and Tony Chen's story. Noncitizens are often income-bearers, and as a result of the upheaval, their families require public assistance and even lose homes and businesses.[260]

B. Alternatives to Mandatory Detention

Rather than indefinitely holding noncitizens without possibility of a bail proceeding, courts should look to alternative solutions which ensure the community's safety and the noncitizens' future court appearance. The government's interest for holding noncitizens in mandatory detention under § 1226(c) is because of the noncitizen's perceived risk of flight or threat to the community.[261] However, an alternative solution, like a pretrial services program or location based monitoring programs could ensure the government that the noncitizen will neither flee nor cause harm to the community.[262] Pretrial services

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[252] *Id.*; *see, e.g.*, ALA. CODE § 15-3-2 (LexisNexis 2020); KY. REV. STAT. ANN. § 500.050(2) (LexisNexis 2020); MD. CODE ANN., CTS. & JUD. PROC. § 5-106(a) (LexisNexis 2020).

[253] Neumann, *supra* note 248, at 729–30; *see* ILRC FACTSHEET, *supra* note 247.

[254] Neumann, *supra* note 248, at 730.

[255] *Id.*; *see also* ALINA DAS, MEREDITH FORTIN & JORGE CASTILLO, PRACTICE ADVISORY: GOVERNMENT RETREATS FROM MATTER OF SAYSANA'S INTERPRETATION OF MANDATORY DETENTION STATUTE, N.Y.U. IMMIGRANT RIGHTS CLINIC 11–13, http://www.immigrantdefenseproject.org/wp-content/uploads/2011/02/Saysana.pdf [https://perma.cc/RW2T-EAV8] (sample habeas petition challenging mandatory detention).

[256] *See* Neumann, *supra* note 248, at 730.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *See* Demore v. Kim, 538 U.S. 510, 514 (2003); 8 U.S.C.A. § 1226(c)(2) (West).

[262] *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1367–68 (2014) ("[T]he effectiveness of any given monitoring program at reducing flight risk is an empirical question, and while . . . existing technology shows promise, no conclusive empirical evidence of effectiveness currently exists . . . ."); *see also* United States v. O'Brien, 895 F.2d 810, 814–16 (1st Cir. 1990) (noting a reduction in flight rate from Federal Pretrial Services monitoring

and location monitoring programs are legislatively granted programs acting in partnership with the court system.[263] Each program assists in monitoring and supervising released pretrial criminal defendants.[264] These programs reasonably assure released defendants return to court and do not engage in criminal activity.[265]

Additionally, the programs facilitate the defendants' return and curtail further engagement with crime by instituting certain release conditions. These conditions can be equally applied to noncitizens.[266] The conditions include orders to (1) stay away from designated people or places;[267] (2) remain within the court's jurisdiction[268] or reside in specified areas;[269] (3) remain at the individual's residence, such as a curfew; [270] (4) have regular in-person or telephone contact with a court liaison;[271] (5) intermittent drug testing;[272] (6) and referrals for treatment assessment and program placement.[273] If the noncitizen cannot comply with these predetermined conditions, the matter would be brought to the court's attention and may result in a final order of removal.[274] Supervision programs are effective,[275] and they would certainly be beneficial to the immigration court system. For example, a 2014 D.C. supervision program reported 89% of defendants who committed any type of crime remained arrest-free during their release while 99% who committed a violent crime remained arrest free.[276] Finally, 88% of defendants made all of their scheduled court

program).

[263] *See* BRUCE MAHONEY, BRUCE D. BEAUDIN, JOHN A. CARVER III, DANIEL B. RYAN & RICHARD B. HOFFMAN, NAT'L INST. OF JUST., PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 3–4 (2001), https://www.ncjrs.gov/pdffiles1/nij/181939.pdf [https://perma.cc/2J43-3N7W]; *see generally* PROBATION AND PRETRIAL SERVICES OFFICE, OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 70–72 (2016), https://www.uscourts.gov/file/20262/download [https://perma.cc/BQT3-JUCX].

[264] MAHONEY ET AL., *supra* note 263, at 3–4; PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 71.

[265] MAHONEY ET AL., *supra* note 263, at 3–4; PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 71.

[266] Breyer's dissenting opinion compares mandatory civil detention to criminal proceedings. *See, e.g.*, Jennings v. Rodriguez, 138 S.Ct. 830, 865 (2018) (Breyer, J., dissenting).

[267] 18 U.S.C.A. § 3563(b)(6) (West).

[268] *Id.* § 3563(b)(14).

[269] *Id.* § 3563(b)(13).

[270] *See id.* § 3563(b)(19).

[271] MAHONEY ET AL., *supra* note 263, at 15; PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 73.

[272] MAHONEY ET AL., *supra* note 263, at 11, 13.

[273] *See* PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 71.

[274] *See id.* at 76.

[275] *See* Clifford T. Keenan, *It's About Results, Not Money*, PRETRIAL SERVICES AGENCY FOR D.C. (Sept. 4, 2014), https://www.psa.gov/?q=node/499 [https://perma.cc/7GWL-8G7K] ("PSA's outcomes speak volumes about what is possible under a high functioning and well-funded pretrial system.").

[276] *Id.*

appearances during the pretrial period.[277]

Also, monitoring technology, like GPS, can track noncitizens and better ensure the court the individual will not flee, commit subsequent crimes, or both. A crucial purpose to location monitoring technology involves detecting behavioral patterns based on travel and location and addressing the noncitizen's risk to a specific person or to fleeing the country.[278] Monitoring technology grants the court assurance that the released individual stays away from designated locations and certain people, because they are under heavy surveillance from court officers but still are able to be with their families and continue work.[279] Plus, compared to detention in jail, electronic monitoring is of relatively low cost, is simple enough to administer, and, while intrusive, vastly preferable among defendants.[280] To illustrate the point, it costs at least four times as much to jail a defendant as it does to monitor.[281] Additionally, in recent years there has been rapid advancement and ubiquity of tracking technology (emerging from scientific research and animal tracking).[282] Current effective technology includes voice recognition, radio frequency monitoring, and, of course, GPS monitoring.[283] For these reasons, a non-removable GPS signal may strike the necessary balance between protecting the public and ensuring court appearances, while allowing less interruption in a noncitizen's pretrial life, unlike mandatory incarceration. Alternative solutions like supervision programs and GPS tracking should be considered if the government has sufficiently demonstrated there is a legitimate interest in holding the noncitizen in mandatory detention. These solutions would be preferable to incarceration which can carry on for an inordinate period of time and severely deprive noncitizens of livelihood.

VI. CONCLUSION

Due process is a fundamental right which stretches to noncitizens, yet recent policy and authoritative legal outcomes demonstrate a gradual shift away from noncitizens' fair treatment. This article advocates for a change to § 1226(c), emphasizing specific timelines for when and how long immigration officials can detain noncitizens. This change is more in tune with basic principles which underlie this country's basic foundation in fair treatment under the law.

Furthermore, a statutory change to § 1226(c) illustrates a clear shift away

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[277] *Id.*
[278] PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 71.
[279] *Id.*
[280] *See id.* at 71–72.
[281] Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION 1, 6 (2009) (showing average costs of $19,000 per pretrial detainee and "between $3,100 and $4,600" per released defendant).
[282] Wiseman, *supra* note 262, at 1347–48.
[283] PROBATION AND PRETRIAL SERVICES OFFICE, *supra* note 263, at 71; Timothy P. Cadigan, *Electronic Monitoring in Federal Pretrial Release*, 55 FED. PROBATION 26, 28 (1991).

from unfettered government discretion[284] and instead, supports noncitizens who are living productively and innocently among us. This is not to say that the government's interest in detaining noncitizens is without merit when there is a clear showing of a legitimate civil commitment. Nevertheless, *Jennings* and *Preap* endorse a view that mandatory detention, in the pendency of removal, does not violate due process; however, such treatment of noncitizens is certainly a "constitutional oddity."[285] "Give me your tired, your poor, Your huddled masses yearning to breathe free," is the proverbial text enshrined at Ellis Island[286]—a place where not less than ninety years ago immigrants, many our kin, crossed into the United States. This text implies a promise of freedom. Yet, the interpretation of § 1226(c) belies the fundamental freedom of due process of law and should leave policymakers wondering—how much longer will our nation suffocate the fundamental rights of noncitizens who, indeed, are "yearning to breathe free"?

[284] *See generally* Nielsen v. Preap, 139 S. Ct. 954, 959–60 (2019) (illustrating the words "when released" gives the government discretion because of its open-endedness).
[285] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).
[286] Lazarus, *supra* note 1.