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NEITHER CIVIL NOR FAIR: CONSTITUTIONAL SHORTFALLS OF INCARCERATING IMMIGRANTS UNDER 8 U.S.C. § 1226(C)

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ABSTRACT

Under 8 U.S.C. § 1226(c), noncitizens are subject to mandatory detention throughout their removal proceedings "by reason of" certain criminal convictions. In 2025, the Laken Riley Act broadened the categories of criminal offenses covered under the statute. Although courts have held that immigration detention is categorized as "civil" and therefore not penal, the Supreme Court in Kennedy v. Mendoza-Martinez provided a framework for courts to determine whether civil penalties amount to punishment. This paper addresses a de facto second sentence imposed only on targeted noncitizens and argues that, using the Kennedy framework, the mandatory detention provision at § 1226(c) violates double jeopardy and equal protection. Finally, it concludes by proposing less restrictive alternatives to detention that protect public safety and ensure court appearance without sacrificing core constitutional guarantees.

"A statute permitting indefinite detention of a [noncitizen] would raise a serious constitutional problem." – Justice Breyer[1]

TABLE OF CONTENTS

* J.D. Candidate 2026, Rutgers Law School. This comment is dedicated to those who journey in search of freedom. With special gratitude to the Honorable Vaani Chawla, whose path made mine possible, and to my father and fiancé, who believed in me every step of the way.

1. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

I. INTRODUCTION

Robert Savio Panton came to the United States when he was just four years old.[2] He entered with a visa and became a lawful permanent resident.[3] In 1994, Robert was sentenced to life in prison for a nonviolent drug offense under a harsh mandatory minimum that no longer exists today.[4] During his thirty years behind bars, Robert made efforts to improve his life by graduating from college and mentoring youth.[5]

After thirty years in prison, a federal judge released Robert due to his declining health and efforts to rehabilitate.[6] After becoming a free man, Immigration and Customs Enforcement ("ICE") took him directly into immigration custody.[7] Robert described the conditions as far worse than in federal prison.[8]

If Robert were a U.S. citizen, he would reunite with his family, apply for a job, and return home after serving his sentence. As a lawful permanent resident, but not yet a citizen, Robert and others like him are at risk of being punished again with a second jail term.[9] In Robert's

2. *Robert Panton: A Community Leader. A Youth Mentor. A Second Chance.*, #NEWWAYFORWARD, https://newwayforwardact.org/2022/02/15/robert-panton/ [https://perma.cc/W8TD-DBC9] (last visited Jan. 11, 2026).

3. Rafael Bernal, *Harlem Community Youth Leader Fights Deportation*, THE HILL (Sept. 26, 2023), https://tinyurl.com/ynu2n7sm [https://perma.cc/EKH3-VYYK].

4. *Id.*; *Robert Panton*, *supra* note 2 ("Today, Robert might [serve] six years.").

5. Bernal, *supra* note 3.

6. *Id.*; *see also* 18 U.S.C. § 3582(c)(1)(A)(i) (authorizing court-ordered release based on "extraordinary and compelling reasons").

7. *Panton*, *supra* note 2.

8. *Id.* ("I thought conditions were bad in federal prison—they are so much worse in immigration detention."); *see infra* Part III.

9. *See* 8 U.S.C. § 1226(c)(1)(A)–(E).

words, "[o]ur current laws continue to punish [immigrants]—like me—even after we complete our sentences."[10]

Robert's story can be attributed to a single provision buried within a lengthy federal statute. Codified at 8 U.S.C. § 1226(c), the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and its 2025 revision under the Laken Riley Act,[11] mandates the transfer of certain noncitizens to immigration jail[12] after they have already completed their criminal sentences.[13] Under § 1226(c), ICE *must* detain noncitizens who are deemed deportable "based on a prior conviction"[14] for the entire duration of their removal proceedings, which may extend for months or years.[15] In some cases, immigrants sentenced merely to a term of probation, with no jail time, may still be jailed by ICE in prison-like conditions.[16]

This illustrates how § 1226(c) infringes upon key constitutional protections, including the prohibition against double jeopardy and the guarantee of equal protection under the law. Enshrined in the Fifth Amendment, the prohibition against double jeopardy prevents individuals from being tried or punished multiple times for the same offense.[17] However, § 1226(c) imposes a second term of confinement *only on noncitizens* who have already served a criminal sentence.

Moreover, equal protection prohibits the disparate treatment of similarly situated individuals without sufficient justification.[18] Since § 1226(c) subjects only noncitizens to a second jail term while U.S. citizens are released, the statute also violates equal protection. In other words, "[t]hey remain imprisoned only because they are immigrants."[19] Thus, § 1226(c) requires further judicial review and should be held

10. *Panton*, *supra* note 2.

11. *See infra* Section II.A.

12. I refer to detention as immigration "jail" or "incarceration" to emphasize the reality that many immigrants are held in jails or private prisons contracted by ICE. *See Incarceration*, MERRIAM-WEBSTER, https://tinyurl.com/8u9yj7er [https://perma.cc/N7UU-6EU4] (last visited Jan. 11, 2026).

13. *See* 8 U.S.C. § 1226(c)(1)(A)–(E).

14. Black v. Decker, 103 F.4th 133, 137 (2d Cir. 2024).

15. *See* NEW WAY FORWARD ACT, *Why We Need a New Way Forward* 4 (2023), https://newwayforwardact.org/wp-content/uploads/2023/02/2023-NWF-backgrounder.pdf [https://perma.cc/RBW3-FGM8].

16. *See id.*; Castaneda v. Souza, 952 F. Supp. 2d 307, 310 (D. Mass. 2013), *aff'd*, 810 F.3d 15 (1st Cir. 2015) (en banc).

17. U.S. CONST. amend. V; *see infra* Section IV.A.1.

18. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

19. *Building an Immigration System Worthy of American Values: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (Statement of Ahilan T. Arulanantham, Deputy Legal Dir., ACLU of S. Cal.).

facially unconstitutional on double jeopardy and equal protection grounds.

This Comment begins by examining the language of § 1226(c)'s mandatory incarceration provision and outlining its blanket approach. It also discusses the 2025 Laken Riley Act and its amendments to the statute. Second, the Comment describes the horrors of civil immigration jail and its resemblance to criminal confinement. Third, the Comment provides background on the double jeopardy and equal protection doctrines, arguing that 8 U.S.C. § 1226(c) violates both by imposing a *de facto* second punishment only on noncitizens. Finally, the Comment offers viable alternatives to jail as a practical remedy to avoid incarcerating immigrants.

II. STATUTORY CONSTRUCTION OF 8 U.S.C. § 1226(C)

In 1996, President Clinton signed IIRIRA, which permitted indefinite incarceration of targeted noncitizens without a bond hearing.[20] The statute provides that upon release from criminal custody, *any* "alien"[21] is subject to mandatory incarceration without bond if convicted of an enumerated offense.[22] As a result, those who have already completed their criminal sentences are subject to automatic, indefinite immigration imprisonment solely on the basis of their past conduct.

Further, § 1226(c) strips noncitizens of the right to an individualized risk assessment in the context of immigration proceedings.[23] Because the criminal justice system recognizes that imprisoning every person awaiting trial violates civil liberties,[24] the accused are entitled to a bond hearing.[25] Conversely, the blanket approach of § 1226(c) eliminates this right in the immigration context.[26] Section 1226(c)'s mandatory detention provision "does not require a hearing to begin or continue a noncitizen's detention under that statute."[27]

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

21. "Alien" is defined as "any" noncitizen, which includes lawful permanent residents, visa-holders, and those without status. 8 U.S.C. § 1101(a)(3).

22. 8 U.S.C. § 1226(c)(1)(A)–(D) (1996) (including controlled substance offenses, crimes involving moral turpitude, firearms offenses or "aggravated felonies"). Many of the "aggravated felony" offenses are not considered felonies; *see* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1370 (2014).

23. *See* Demore v. Kim, 538 U.S. 510, 517 (2003).

24. United States v. Salerno, 481 U.S. 739, 755 (1987) (holding detention an exception).

25. 18 U.S.C. § 3142(c)(1) (assessing danger and flight risk).

26. *See Demore*, 538 U.S. at 558 ("Section 1226(c) neither requires nor permits . . . determin[ing] whether . . . detention [is] necessary to prevent flight or danger.").

27. *Van v. Oddo*, No. 25-cv-00322, 2025 WL 3492736, at *5 (W.D. Pa. Dec. 5, 2025).

A. 2025 Laken Riley Act and Amendments to the Statute

For nearly thirty years, IIRIRA remained largely unchanged. In January 2025, within days of his second term, President Trump signed the Laken Riley Act, which expanded the enumerated offenses subjecting noncitizens to mandatory incarceration under § 1226(c).[28] Not only does the Act require the detention of noncitizens convicted of petty theft or shoplifting, but also of those "*charged* with," "*arrested* for," or "admit[ting]" to those crimes.[29] Legal advocacy groups condemn the Act for stripping immigrants of due process rights and placing them in jail indefinitely based on mere accusations.[30]

Since its original passage, double jeopardy and equal protection concerns continue to plague the provision. Noncitizens who served time and were later arrested by ICE are forced into a *de facto* second punishment in conditions that are the same, if not worse, than in criminal jails and prisons.

III. BLURRED LINES BETWEEN CIVIL AND CRIMINAL INCARCERATION

Proponents of immigration jail argue that double jeopardy does not apply because it is civil in nature and distinct from criminal incarceration.[31] Despite the Supreme Court upholding mandatory incarceration under § 1226(c),[32] courts and scholars across the nation have noted parallels between civil and criminal jails through shared conditions and overlapping purposes of incarceration.

First, individuals in civil and criminal jails encounter the same restrictions on personal liberty prior to formal adjudication. Individuals awaiting immigration proceedings are held in jails owned by the government or operated under private contracts.[33] In fact, Congress expressly authorized the purchase or lease of "existing prison[s], jail[s

28. *See generally* Laken Riley Act, Pub. L. 119–1, 139 Stat. 3 (Jan. 29, 2025) (amending the statute to mandate detention of noncitizens charged with, arrested for, convicted of, or admitting to acts "constitut[ing] the essential elements of [] burglary, theft, larceny, shoplifting, or assault of a law enforcement officer").

29. *Id.* (emphasis added).

30. *See, e.g.*, *Misguided Laken Riley Act Does Nothing to Fix the Problems That Plague Our Immigration System*, AM. IMMIGR. COUNCIL, (Jan. 22, 2025), https://www.americanimmigrationcouncil.org/press-release/misguided-laken-riley-act-fails-to-fix-broken-immigration-system/ [https://perma.cc/XTL5-HJMB].

31. Demore v. Kim, 538 U.S. 510, 558 n.14 (2003) (Souter, J., concurring in part and dissenting in part); s*ee* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

32. *Id.* at 530–31 (majority opinion).

33. *See* GEO Grp., Inc. v. Inslee, 720 F. Supp. 3d 1029, 1039 (W.D. Wash. 2024).

and] detention center[s]" to incarcerate immigrants.[34] Thus, people undergoing immigration proceedings are held in the very *same* facilities used to hold criminal convicts who are serving their sentences.

Second, while courts do not agree that civil confinement is inherently punitive, Third Circuit courts have held that conditions in ICE jails are "penal in character."[35] In both criminal and immigration jails, people are locked in cells, "lack adequate medical care" and "hygiene supplies," and experience restrictions on communication and basic freedoms.[36] Further, courts note the impacts of civil and criminal incarceration, which include loss of employment, family separation, and stigma.[37] These mirrored repercussions frustrate distinctions between measures intended to "facilitate deportation" and systems designed to inflict punishment.[38]

Third, opponents contend that civil incarceration is not intended to be punitive. However, immigrant detainees who have also served criminal sentences contend that conditions under ICE custody are the same, if not worse, than those in prisons.[39] Incarcerated immigrants describe unsanitary conditions, abusive staff, denial of basic hygiene, overcrowding, and punitive responses, including physical force, pepper spray, and solitary confinement.[40] Often, detainees are subject to racial harassment or physical and sexual abuse by ICE officers, in some cases resulting in death.[41] Though labeled "civil confinement," immigrant jails resort to the same modes of punishment as criminal incarceration.[42]

Fourth, in the criminal system, pretrial detainees maintain a constitutional right to a bond hearing, and often, time spent in pretrial

34. 8 U.S.C. § 1231(g)(1)–(2); *see also* DORA SCHRIRO, ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009) ("ICE uses [facilities] operat[ing] as jails and prisons to confine pre-trial and sentenced felons.").

35. Centeno-Martinez v. Jamison, No. 25-cv-3593, 2025 WL 3157711, at *2 (E.D. Pa. Nov. 12, 2025) (collecting cases).

36. Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 675, 685 (D.N.J. 2020).

37. *See* Tuffly v. Dep't of Homeland Sec., 870 F.3d 1086, 1098 (9th Cir. 2017) (noting detained immigrants experience subsequent stigma and discrimination).

38. *See* Demore v. Kim, 538 U.S. 510, 532–33 (2003) (Kennedy, J., concurring).

39. *See supra* note 8 and accompanying text.

40. Matt Katz, *ICE Jailer in New Jersey is Sued by its Landlord, Claiming Unsafe Conditions*, GOTHAMIST (May 3, 2021), https://tinyurl.com/8hmme84h [https://perma.cc/7KRD-V32P]; NAT'L IMMIGRANT JUST. CTR., SNAPSHOT OF ICE DETENTION: INHUMANE CONDITIONS AND ALARMING EXPANSION 2, 4 (2024).

41. *See, e.g.*, Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NPR (Aug. 16, 2023, 5:01 ET), https://tinyurl.com/f6be8c8t [https://perma.cc/ME4P-H7SF].

42. Velasco Lopez v. Decker, 978 F.3d 842, 850, 856 (2d Cir. 2020) ("He was not 'detained'; he was, in fact, incarcerated under conditions indistinguishable from those imposed on criminal defendants sent to prison . . . .").

detention counts towards their final sentence.[43] However, unlike criminal incarceration with a fixed trial or release date, ICE subjects individuals to indefinite confinement.[44] While the Supreme Court contemplated removal proceedings to last less than five months,[45] this does not take into account the reality of lengthy wait times for a court date or additional time for appeals. For those who completed their sentence, a subsequent term of indefinite incarceration is undeserving of the label "civil confinement."

Finally, Justice Kennedy suggested that in cases of unreasonably prolonged incarceration, it may be necessary to "inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons."[46] Thus, both judges and scholars have concluded that civil incarceration regimes, despite their formal classification, operate with punitive characteristics. This blending of criminal and civil incarceration frameworks necessitates careful scrutiny to protect the rights of noncitizens.

IV. 8 U.S.C. § 1226(C) VIOLATES DOUBLE JEOPARDY AND EQUAL PROTECTION

A. Double Jeopardy

1. Background and Framers' Intent

The Fifth Amendment's Double Jeopardy Clause states that no person shall "be twice put in jeopardy of life or limb" for the same offense.[47] Double jeopardy prohibits retrial for the same offense after a final judgment has been issued,[48] and it invokes the multiple-punishment doctrine, which ensures that "the initial punishment is not increased."[49] Detaining noncitizens after a prior criminal sentence directly implicates the multiple-punishment doctrine.

The multiple-punishment doctrine guarantees "finality and fairness" in punishing convicts.[50] While fairness ensures that the punishment is

43. *See* Shawn Bushway, *Understanding Racial Disparities in Criminal Court Outcomes* 37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 33403, 2025).

44. HUMAN RIGHTS WATCH, COSTLY & UNFAIR: FLAWS IN US IMMIGRATION DETENTION POLICY 9 (2010).

45. Demore v. Kim, 538 U.S. 510, 530–31 (2003).

46. *Id.* at 532–33 (Kennedy, J., concurring).

47. U.S. CONST. amend. V.

48. Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L. J. 632, 635 (1981).

49. *Id.* at 635 n.17.

50. *Id.* at 634.

proportional to the crime, finality assures that the defendant will not be punished further for the same offense.[51] In fact, history confirms that the double jeopardy provision was intended to protect against double *punishment*, not to prevent multiple trials.[52] In 1789, when Congress met to construct the Fifth Amendment, Representative Egbert Benson described the clause as "prevent[ing] more than one punishment . . . for the same offen[s]e."[53] Ultimately, the Framers referred to "jeopardy of life or limb" to establish protections against double punishment.[54]

2. Application of Double Jeopardy to Civil Penalties

Because the Double Jeopardy Clause is vaguely written, the Supreme Court began to interpret and define its contours. In *Ex parte Lange*, the Supreme Court clarified that the clause was designed "to prevent a second punishment for the same crime."[55] The majority held that a convict subject to a second punishment "must be discharged,"[56] and that to constitute double jeopardy, a defendant must be "put to *actual punishment* twice for the same thing."[57]

One hundred years later, the Supreme Court considered the possibility that a civil penalty could amount to punishment.[58] In a unanimous opinion, Justice Blackmun indicated that the omission of the word "criminally" in the clause was intentional and that punishment "may arise from either criminal or civil proceedings."[59] Importantly, the Court recognized that the "civil" label may not "defeat the applicable protections of federal constitutional law."[60]

Still, the Court required a standard to determine whether a civil penalty rose to the level of punishment. In *Kennedy v. Mendoza-Martinez*, the Supreme Court established seven factors for courts to consider when determining whether a civil sanction may be considered punitive for the purpose of double jeopardy.[61] The seven factors are as follows: 1) whether the civil sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its

51. *Id.*
52. *Id.* at 632.
53. GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 121 (1998).
54. *Id.* at 122.
55. Ex parte Lange, 85 U.S. 163, 164 (1873).
56. *Id.*
57. *Id.* at 175 (emphasis added).
58. United States v. Halper, 490 U.S. 435, 443 (1989).
59. *Id.*
60. *Id.* at 447–48.
61. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–70 (1963).

operation will promote the traditional aims of punishment; 5) whether the behavior is already a crime; 6) whether an alternative purpose may be rationally connected; and 7) whether it appears excessive in relation to the alternative purpose assigned.[62] In *Kennedy*, the Court applied this framework to the immigration context and determined that divesting respondents of their U.S. citizenship, though labeled a civil penalty, amounted to punishment and could not be imposed "without due process of law."[63]

Finally, in *Hudson v. United States*, the Supreme Court clarified that courts must "look at the 'sanction actually imposed' to determine whether double jeopardy is implicated."[64] If the Court in *Kennedy* could recognize that revoking citizenship constituted punishment safeguarded by Fifth Amendment protections, courts must also recognize immigration incarceration as punishment. While federal courts have dismissed double jeopardy claims as applied to § 1226(c), they have consistently refused to consider the actual punitive nature of immigration jail.[65]

3. Civil Immigration Jail is Punitive in Nature

In three cases, federal circuit courts opined that because incarcerating immigrants is "civil in nature," double jeopardy does not apply.[66] In *De La Teja v. United States*, the Eleventh Circuit held that the clause "applies only to proceedings that are 'essentially criminal' and its purpose is to prevent successive proceedings for the same offense."[67] However, the legislative history of the Double Jeopardy Clause reveals that its original purpose was not to prevent successive *proceedings* for the same offense, but to prevent double *punishment*.[68]

De La Teja also held that an arrest "pursuant to a deportation proceeding is not an arrest for a federal criminal offense" but instead for a "civil action to determine eligibility to remain in this country."[69]

62. *Id.* at 168–69.

63. *Id.* at 186.

64. Hudson v. United States, 522 U.S. 93, 102 (1997).

65. *See* Valerga v. Holder, No. 13-cv-03014, 2014 WL 103551 at *6 (D. Colo. Jan. 9, 2014) ("[R]emoval proceedings are inherently civil in nature [and] cannot form the basis for a double jeopardy claim."); Jefferally v. Barr, No. H-19-1244, 2019 WL 3935977, at *2 (S.D. Tex. Aug. 20, 2019) (holding double jeopardy fails because immigration proceedings are civil).

66. De La Teja v. United States, 321 F.3d 1357, 1364–65 (11th Cir. 2003); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994); *accord* Gisbert v. U.S. Att'y Gen., 988 F.2d 1437, 1442 (5th Cir. 1993).

67. *De La Teja*, 321 F.3d at 1364.

68. *See supra* Section IV.A.1.

69. *De La Teja*, 321 F.3d at 1364.

Nonetheless, the court failed to consider that an "arrest" under § 1226(c) occurs precisely "*on the basis of* an offense."[70] Because noncitizens are subject to mandatory detention "*by reason of having committed*" a specific offense,[71] the consequence of § 1226(c) is a *de facto* second punishment for the same criminal offense.

While some circuit courts have recognized limited due process protections under § 1226(c),[72] avenues remain to facially challenge the statute's constitutionality.[73] As the Supreme Court clarified in *Demore v. Kim*, § 1226(e) does not preclude "challenges [to] the statutory framework" or assertions of constitutional claims that permit a noncitizen to challenge incarceration.[74]

4. *Kennedy* Factors Applied to § 1226(c) Detention

While convicted prisoners are protected from *cruel and unusual* punishment, "pretrial and civil detainees are protected from *any* punishment."[75] While time spent in pretrial detention counts towards the length of a final sentence,[76] mandatory § 1226(c) incarceration imposes a second jail term on people who already served a criminal sentence and are supposed to be protected from punishment. Thus, the question remains whether the conditions of post-sentence, pre-hearing immigration jail "amount[s] to punishment" under the Double Jeopardy Clause.[77]

Courts should apply *Kennedy*'s punishment framework to incarceration under § 1226(c), consistent with the Supreme Court's application of the factors to the immigration context.[78] A thorough

70. 8 U.S.C. § 1226(c)(1)(C) (emphasis added).

71. *Id.* at § 1226(c)(1)(A)–(B) (emphasis added).

72. *See* Jennings v. Rodriguez, 583 U.S. 281, 305–06 (2018) (foreclosing a right to a bond hearing for individuals detained under § 1226(c)). *But see* Black v. Decker, 103 F.4th 133, 137 (2d Cir. 2024) (recognizing a constitutional right to a bond hearing where § 1226(c) detention exceeds six months); Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 209 (3d Cir. 2020) (adopting a test to determine whether prolonged § 1226(c) detention without a bond hearing violates due process and finding unconstitutional application of the statute).

73. Plaintiffs may either file a petition for habeas corpus or assert a facial challenge to the statute. *See* 28 U.S.C. § 2241; Demore v. Kim, 538 U.S. 510, 511 (2003) (federal courts may grant habeas relief to those challenging detention under § 1226(c)).

74. *Demore*, 538 U.S. at 511 (explaining that the provision does not permit a plaintiff to challenge a discretionary judgment regarding the noncitizen's release).

75. Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 684 (D.N.J. 2020) (citing Hubbard v. Taylor, 399 F.3d 150, 166–67 (3d Cir. 2005)) (emphasis added).

76. *See* Bushway, *supra* note 43, at 37.

77. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

78. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

analysis using the *Kennedy* factors reveals that civil detention under § 1226(c) amounts to unconstitutional punishment.

The first factor asks whether the sanction involves an affirmative disability or restraint.[79] Mandatory immigration incarceration inherently imposes a significant restraint on liberty by requiring noncitizens to be confined in a jail cell without the possibility of bond unless they are cooperating with an investigation.[80] Thus, §1226(c) incarceration mandates an affirmative restraint and disability.

The second factor is whether the civil penalty has historically been regarded as punishment.[81] Incarcerating individuals in tight spaces, for months or years, in traditional prisons and jails has historically been regarded as punishment in the criminal context. In recent months, Third Circuit courts have increasingly found that "[d]espite its civil label,"[82] ICE jails are "penal in character."[83] In fact, ICE itself admits to relying on "correctional standards designed for pre-trial felons."[84] Thus, the use of jail space is both historically regarded as punishment and remains governed by standards of confinement crafted for the penal system.

The third factor asks whether the punishment comes into play only upon a finding of "scienter."[85] The mandatory incarceration provision attaches only when a noncitizen has "committed an [enumerated] offense," many of which require a finding of scienter.[86] Therefore, a finding of scienter triggers criminal punishment *and* an additional term of civil incarceration under § 1226(c).

The fourth factor questions whether its operation promotes the traditional aims of punishment, namely, retribution and deterrence.[87] Scholars note that immigration detention was "intended to stigmatize

79. *Id.*

80. *See* 8 U.S.C. § 1226(c)(4).

81. *Kennedy*, 372 U.S. at 168.

82. Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 213 (3d Cir. 2020).

83. Centeno-Martinez v. Jamison, No. 25-cv-3593, 2025 WL 3157711, at *2 (E.D. Pa. Nov. 12, 2025) (collecting cases finding ICE conditions are "not meaningfully different from criminal punishment").

84. SCHRIRO, *supra* note 34, at 2.

85. *Kennedy*, 372 U.S. at 168. Scienter is defined loosely as "mens rea." *Scienter*, BLACK'S LAW DICTIONARY (6th pocket ed. 2021).

86. The enumerated predicate offenses incorporated into § 1226(c) are themselves defined by reference to criminal categories that generally require a culpable mental state. *See* 8 U.S.C. § 1226(c)(1)(A)–(B); *see also* 21 Am. Jur. 2d Criminal Law § 112 ("Mens rea is generally an essential element of any criminal offense . . . ."). For example, a crime involving moral turpitude requires "the requisite level of scienter for the specific actus reus that constitutes the . . . conduct." Matter of Khan, 28 I&N Dec. 850, 856 (BIA 2024).

87. *Kennedy*, 372 U.S. at 168.

and penalize."[88] Incarcerating immigrants also promotes retribution by "signal[ing] to detainees that they have committed a social wrong" and must suffer "a deprivation of liberty."[89] In 2025, President Trump claimed that bolstering immigration enforcement plays a role in deterring migrants, whom he called "criminals," from entering the U.S.[90] Moreover, the Secretary of Homeland Security emphasized deterrence, stating noncitizens should "not come to this country or [ICE] will hunt you down" and "lock you up."[91]

The fifth factor considers whether the behavior is already a crime.[92] Although the absence of citizenship is not a crime, incarceration is triggered by a criminal charge or conviction of an enumerated offense under § 1226(c).[93] Therefore, an allegation of criminal activity is a prerequisite for incarceration under § 1226(c).[94]

The sixth and seventh factors ask whether an alternative purpose may be rationally connected and whether the penalty "appears excessive in relation to the alternative purpose."[95] While the government justifies mandatory incarceration as serving the non-punitive objective of protecting public safety and preventing flight risk,[96] detaining individuals in prisons is excessive relative to that purpose.

In assessing these factors, immigration incarceration under § 1226(c) ought to be considered a *de facto* second punishment. In *Kennedy*, the Court determined that divesting U.S. citizenship under the guise of a "civil penalty" amounted to punishment and could not be imposed "without due process."[97] If revoking citizenship constitutes a civil penalty amounting to punishment, it cannot be that an individual stripped of basic freedoms, shackled at the feet, and residing in a jail cell under ICE custody is not being punished. When civil incarceration becomes excessive, arbitrary, and punitive in effect, it triggers precisely the double jeopardy concerns the Fifth Amendment was designed to prevent.

88. *See, e.g.*, Hernández, *supra* note 22, at 1350 (explaining how Congress entangled immigration detention with antidrug initiatives in the War on Drugs).

89. *Id.* at 1402.

90. Donald J. Trump, Address to Joint Session of Congress (Mar. 4, 2025) (transcript available at https://www.nytimes.com/2025/03/04/us/politics/transcript-trump-speech-congress.html) [https://perma.cc/88FX-QGB2].

91. *See* Kristi Noem (@Sec_Noem), X (Feb. 10, 2025 at 8:54 ET), https://tinyurl.com/5h5z9bep [https://perma.cc/3VL7-4G7D].

92. *Kennedy*, 372 U.S. at 168.

93. *See* 8 U.S.C. § 1226(c)(1)(A)–(B).

94. *See id.*

95. *Kennedy*, 372 U.S. at 168–69.

96. Demore v. Kim, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring).

97. *Kennedy*, 372 U.S. at 186.

B. Equal Protection

1. Background and Framers' Intent

Following emancipation, Congress adopted the Fourteenth Amendment to secure equal protection for "all persons," a formulation which is intentionally broader than constitutional provisions limited to citizens.[98] Its principal drafter, Representative John Bingham, sought to guarantee the promise of equality to "*any person*" regardless of national origin or citizenship.[99] In a speech to Congress, Bingham stated that no man, "*no matter beneath what sky he may have been born*, . . . shall be "deprived of life[,] liberty or property without due process of law."[100] In line with Bingham, the Supreme Court has consistently held that its protections apply to all "persons" inside the United States, "including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."[101]

While Fourteenth Amendment equal protection governs state action, the same principles constrain the federal government through the Fifth Amendment's Due Process Clause.[102] The Supreme Court has also held that the Fifth Amendment "entitles [noncitizens] to due process of law in the context of removal proceedings."[103] For the purpose of analyzing federal immigration law, the Fifth Amendment governs.[104]

2. Equal Protection Applied to § 1226(c) Detention

An equal protection claim begins with examining how the law distinguishes between two groups. Under § 1226(c), noncitizens are

98. *Compare* U.S. CONST. amend. XIV, § 1, *with* U.S. CONST. art. IV, § 2, cl. 1.

99. *Citizenship Rights, Equal Protection, Apportionment, Civil War Debt*, NAT'L CONST. CTR., https://tinyurl.com/mvbvz3nr [https://perma.cc/UD7X-JK4X] (last visited Jan. 11, 2026) (emphasis added).

100. John Bingham, U.S. Representative, One Country, One Constitution, One People 8 (Feb. 28, 1866) (emphasis added).

101. Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *accord* Plyler v. Doe, 457 U.S. 202, 211–16 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating all persons *within* the United States are subject to like punishment and prohibiting discrimination based on alienage); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

102. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 683 (6th ed. 2020); *see* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that equal protection principles apply to the federal government through the Fifth Amendment's Due Process Clause); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment).

103. A.A.R.P. v. Trump, 605 U.S. 91, 94 (2025) (quoting Trump v. J.G.G., 604 U.S. 670, 673 (2025)).

104. *Zadvydas,* 533 U.S. at 690.

subject to a second jail term for particular criminal offenses,[105] while similarly situated U.S. citizens are not.[106] As a result, a distinction between similarly situated citizens and noncitizens[107] creates an alienage classification.[108] When § 1226(c) attaches, alienage alone triggers continued incarceration.[109]

Secondly, the appropriate level of scrutiny must be determined. In *Graham v. Richardson*, the Supreme Court applied strict scrutiny to a discriminatory state law, establishing noncitizens as a "discrete and insular minority."[110] Though *Graham* applied strict scrutiny to a discriminatory state law,[111] strict scrutiny should still apply when challenging discriminatory federal laws. Like classifications based on nationality or race, noncitizens lack voting power and the ability to "mute" the trait.[112] Further, noncitizen status has frequently led to "purposeful unequal treatment" throughout U.S. history.[113] Thus, noncitizens are uniquely positioned as an "inherently suspect," "discrete and insular minority" worthy of strict scrutiny.[114]

Additionally, a fundamental right to liberty is at stake. Courts have consistently held that "all 'persons'" in the U.S. retain certain rights, including the right to liberty.[115] In the criminal context, a citizen's liberty is routinely reinstated after a sentence.[116] However, § 1226(c) denies liberty categorically to noncitizens without an individualized

105. *See* 8 U.S.C. § 1226(c).

106. HUMAN RIGHTS WATCH, *supra* note 44, at 5 ("While citizens convicted of the same crimes . . . return to the community as soon as they complete their sentences, ICE holds lawful permanent residents indefinitely pending removal proceedings . . . .").

107. *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (providing that Congress has power to make rules that would be unacceptable if applied to citizens).

108. *Alienage* is defined as "the condition or status of being an alien." *Alienage*, BLACK'S LAW DICTIONARY 35 (6th pocket ed.); *see supra* note 21 (defining *alien*).

109. *See* 8 U.S.C. § 1226(c).

110. Graham v. Richardson, 403 U.S. 365, 372 (1971).

111. *Graham*, 403 U.S. at 371–72 (distinguishing the federal government's plenary power over immigration and its authority to discriminate by alienage).

112. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (outlining a test for determining which classifications are subject to strict scrutiny).

113. Mass. Bd. Of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976); *see, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (denying noncitizen participation in political institutions).

114. *Graham*, 403 U.S. at 372. In *Trump v. Hawaii*, the Supreme Court applied rational basis to a proclamation excluding foreign nationals from specific countries from entering the United States. 585 U.S. 667, 710 (2018). This contrasts with alienage classifications affecting noncitizens already present in the United States. Accordingly, *Trump v. Hawaii* does not undermine the strict scrutiny framework governing the rights of noncitizens incarcerated under § 1226(c) who exist within the national community. *See id.*

115. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

116. *See* Morrissey v. Brewer, 408 U.S. 471, 482–83 (1972).

determination despite the fact that immigration detainees are entitled to the same due process protections as pretrial detainees.[117] Accordingly, equal protection requires strict scrutiny when the right to liberty is granted to some but denied to others.

Under strict scrutiny, a law is upheld if it is proven to be *necessary* to achieve a *compelling* government interest.[118] The Supreme Court outlined the underlying interests for detaining noncitizens during immigration proceedings: to ensure attendance at their hearing and protect the community from potential danger.[119] In *Zadvydas v. Davis*, the Supreme Court limited post-removal-order incarceration to "a presumptively reasonable period" of six months absent a significant likelihood of removal in the reasonably foreseeable future.[120] The Court reasoned that detention for the purpose of public safety is "limited to [e]specially dangerous individuals,"[121] whereas many detained under § 1226(c) were convicted of nonviolent crimes. Given the *Zadvydas* framework for post-removal-order detention, and assuming courts declare public safety as a compelling government interest, incarcerating noncitizens is not the *least* restrictive means to achieve the same goal.

V. ALTERNATIVES TO INCARCERATING IMMIGRANTS

While the Supreme Court declined to recognize a right to bond hearings for those awaiting immigration proceedings,[122] some appellate courts have granted bond hearings in cases of prolonged § 1226(c) detention.[123] At a minimum, courts can ensure that all detained noncitizens have a right to individualized bond hearings[124] or adopt a presumptive six-month limit to detention, as in *Zadvydas*.[125]

117. E.D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) (collecting cases).

118. *Graham*, 403 U.S. at 376.

119. Jennings v. Rodriguez, 583 U.S. 281, 285–86, 339 (2018) (Breyer, J., dissenting) ("[A]n analogy to criminal detention is an analogy to instances in which bail hearings are required."). *Zadvydas* also cited a case upholding pretrial detention when dangerousness is proved "by *clear and convincing evidence*." *Zadvydas*, 533 U.S. at 691 (emphasis added) (citing United States v. Salerno, 481 U.S. 739, 750 (1987)).

120. *Zadvydas*, 533 U.S. at 680; *see also* Demore v. Kim, 538 U.S. 510, 529 (2003) (estimating a one-month to five-month duration for removal proceedings).

121. *Zadvydas*, 533 U.S. at 679.

122. *See Demore*, 538 U.S. at 530; *Jennings*, 538 U.S. at 312.

123. *See supra* cases and text accompanying note 72; German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203, 208 (3d Cir. 2020) (holding immigration detention amounted to punishment, violated due process, and required a bond hearing).

124. *See Jennings*, 583 U.S. at 330 (Breyer, J., dissenting) ("[T]here is every reason for providing a bail proceeding to the noncitizens at issue here, because they have received no individualized determination [of flight risk or danger] . . . .").

125. *Zadvydas*, 533 U.S. at 701.

Alternatively, eliminating the mandatory incarceration provision would give rise to an opportunity to rethink detention altogether. By imposing minimal conditions of release or utilizing community-based case-management programs, the government can ensure court appearance and promote public safety without subjecting individuals to an additional term of incarceration.

In the early 2000s, ICE instituted Alternatives to Detention ("ATD") for those who met certain criteria.[126] In FY 2024, 98.6% of people in ATD programs attended their immigration hearings.[127] Moreover, ATD programs cost less than $4.20 per day, while ICE spends an average of $152 per day incarcerating one person.[128]

Another successful program was the short-lived Family Case Management Program ("FCMP"). From 2016 to 2017, FCMP worked with community organizations to provide families with food, clothing, medical care, legal assistance, education enrollment, and language classes.[129] Statistical data confirms that 99.4% of individuals enrolled in the FCMP attended their court hearings.[130]

While ATD programs are successful alternatives to detention, ICE continues to overutilize incarceration. U.S. citizens released from criminal incarceration are transitioned into similar parole programs, which enable them to renew their fundamental right to freedom with minimal restraint.[131] Conversely, similarly situated noncitizens are unequally subject to a *de facto* second sentence.

VI. CONCLUSION

Section 1226(c) punishes noncitizens twice for the same offense: first in the justice system and again during ICE detention. By subjecting noncitizens to a *de facto* second sentence, the statute violates the prohibition of multiple punishments and the guarantee of equal protection. As the Laken Riley Act expands the statute's enumerated

126. ICE, *Alternatives to Detention*, https://www.ice.gov/features/atd [https://perma.cc/F65J-W64M] (Jan. 7, 2026).

127. ICE, Fiscal Year 2024 Detention Statistics, https://tinyurl.com/3vhs5t36 [https://perma.cc/4LEP-8ENL] (Jan. 8, 2026). In FY 2025, 98.2% attended. *Id.*

128. ICE, *Alternatives to Detention*, https://www.ice.gov/features/atd [https://perma.cc/F65J-W64M] (Jan. 7, 2026).

129. HUMAN RIGHTS WATCH, DISMANTLING DETENTION: INTERNATIONAL ALTERNATIVES TO DETENTION 27 (2021).

130. *Id.*

131. Dep't of Just., *What is Parole?*, https://www.justice.gov/uspc/frequently-asked-questions [https://perma.cc/H7KK-ATS6] (Feb. 4, 2025).

offenses, courts should reexamine a system that incarcerates noncitizens for crimes they have already paid for.

Without the mandatory incarceration provision, judges could invoke an individualized approach to determine whether confinement is necessary in each case. The availability of effective alternatives reveals that mandatory detention is not a civil necessity, but a punitive choice. Finally, alternatives to detention, and ultimately freedom itself, have the power to move the needle toward a system that embraces constitutional principles and human dignity.