19-3220-pr

In the United States Court of Appeals for the Second Circuit

JOSE CELAN PADILLA RAUDALES,

Petitioner-Appellee,

v.

THOMAS DECKER, in his official capacity as Field Office Director, New York City Field Office, United States Immigration & Customs Enforcement, CHAD F. WOLF, in his official capacity as Acting United States Secretary of Homeland Security, WILLIAM P. BARR, in his official capacity as Attorney General, United States Department of Justice,

Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC works to uphold constitutional protections for noncitizens as well as for citizens and to ensure that the Constitution is applied as robustly as its text and history require. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

What the government seeks from this Court is remarkable: the power to incarcerate for months—or even years—any person whom executive branch officers believe to be a deportable noncitizen, even when those officers are incapable of convincing an immigration judge that the person is likely to abscond or endanger the community if released on bail. The government claims it need not satisfy any burden of proof before confining such individuals for months or years on end, and that the onus is on those detained to prove their entitlement to freedom by showing that they

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

are *not* dangerous or a flight risk. Appellants' Br. 7 (citing *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006)).

That policy inverts basic premises at the core of the Fifth Amendment's Due Process Clause, under which liberty is the norm and "detention prior to trial or without trial is the carefully limited exception." *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). Although the government argues that these bedrock principles do not apply when it detains people for removal proceedings, that claim has no basis in constitutional text or precedent.

As the district court recognized, due process typically requires placing a heightened burden of proof on the government before it deprives a person of a significant liberty interest—especially before it incarcerates a person without trial. Disputing the relevance of those norms here, the government leans heavily on two concepts. It cites the Supreme Court's observation that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Appellants' Br. 26 (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). And it invokes the Supreme Court's approval, on rare occasions, of statutes permitting the detention of entire classes of individuals pending their removal proceedings. *Id.* at 20-23. Neither of those principles, however, supports the unusual burden-shifting regime the government has adopted.

First, notwithstanding Congress's power to deport noncitizens and otherwise enact laws that make distinctions based on citizenship, the Due Process Clause protects noncitizens as fully as citizens in the implementation of those laws. The government's authority to detain individuals in the course of removal proceedings, therefore, does not carry with it any special leeway to deny them the same level of due process protection that applies elsewhere. Under the Due Process Clause, citizens and noncitizens stand on equal footing.

Second, the Supreme Court has repeatedly demanded that the government meet a heightened standard of proof—clear and convincing evidence—before depriving a person of a significant liberty interest, whether or not that person is a citizen, and whether or not the government is exercising its powers over immigration and naturalization. The government's suggestion that less is at stake here because a noncitizen may "unilaterally decide to end his detention by conceding to removal," Appellants' Br. 23, flies in the face of the Court's repeated admonishments that "[d]eportation is always a particularly severe penalty" and may be more oppressive "than any potential jail sentence." *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365, 368 (2010)).

Third, the cases on which the government chiefly relies—in which categorical detention regimes have withstood constitutional challenges—do not support the inferences the government draws from them. Those cases do not hold, or even

suggest, that the presumption of liberty under the Due Process Clause disappears when the executive branch detains someone pursuant to removal. Instead, they establish that *Congress* may adjust the normal due process presumptions for certain removable noncitizens when abundant legislative findings establish that they are particularly dangerous *and* Congress has spoken clearly on the matter. As shown below, however, none of the special circumstances that were crucial to the holdings in those prior cases are present, and Congress has not authorized the policy at issue here. Those cases supply no basis for the government's attempt to upend fundamental norms of due process.

ARGUMENT

I. The Due Process Clause Protects Noncitizens as Fully as Citizens.

The Framers of our Constitution knew how to distinguish citizens from noncitizens, *see, e.g.*, U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3 (only "a Citizen" may be elected to Congress), but they established in the Fifth Amendment that no "person" shall be deprived of life, liberty, or property without due process of law, *id.* amend. V. This vital safeguard against the power of the federal government "is not confined to the protection of citizens," but rather is "universal in [its] application to all persons within the [nation's] territorial jurisdiction, without regard to any differences of . . . nationality." *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted). Because the term "person" is "broad enough to

include any and every human being within the jurisdiction of the republic," a noncitizen "is entitled to the same protection under the laws that a citizen is entitled to." *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (1982) (quotation marks omitted). "He may not be deprived of his life, liberty or property without due process of law," therefore, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953), and "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection," *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).[2]

The fact that noncitizens have the same due process rights as citizens does not, of course, "lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship." *Id.* at 78. The federal government, "through the action of the legislative department," may "exclude aliens from its territory," *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889), or "expel or deport" those who are already here, *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893), and "[d]etention is necessarily a part of this deportation procedure," *Carlson v. Landon*, 342 U.S. 524, 538 (1952). The federal government therefore wields a power over noncitizens that it lacks over citizens—the power to remove them from within its borders and detain them in furtherance of that goal.

[2] These principles do not, however, apply to a noncitizen seeking entry to the United States for the first time. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

It is therefore true, as the Supreme Court has remarked, that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79-80. But as the Court explained immediately after that remark, this power stems from the fact that our Constitution permits the enforcement of immigration and naturalization policies, not from any diminished due process rights of noncitizens: "The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." *Id.* at 80 (footnotes omitted). And this power remains "subject to . . . the paramount law of the constitution." *Carlson*, 342 U.S. at 537 (quoting *Fong Yue Ting*, 149 U.S. at 713).

The government's power to detain people as a means of effectuating removal, therefore, does not imply that noncitizens have any less of a liberty interest than citizens in freedom from physical confinement. *See Kwong Hai Chew*, 344 U.S. at 601 ("While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration . . . it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."); *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (despite its power to "expel aliens," the government may not "disregard the fundamental principles that

inhere in 'due process of law' . . . when executing the provisions of a statute involving the liberty of persons"). That is why, for instance, due process safeguards against detention continue to apply with full force to noncitizens even after they are subject to a final order of removal. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238.

In other words, detention that is carried out as part of removal proceedings simply inflicts the same type of treatment on noncitizens that the government inflicts on citizens in contexts where it wields comparable power over them—such as in criminal prosecutions or military conscriptions. The Supreme Court has long recognized this equivalence. *See id.* at 235 (approving of "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens" because "[d]etention is a usual feature in every case of arrest on a criminal charge, even when an innocent person [is] wrongfully accused"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (reasoning that because "the Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business . . . . it is hard to find justification for holding that the Constitution requires that [such] hardships must be spared the [noncitizen]").

In sum, because the government may remove noncitizens, it may detain people it suspects of being removable noncitizens. But it may not detain those

people—some of whom, after all, may turn out to be citizens—without affording them the same due process protections that are owed to everyone else. Under the Due Process Clause, the noncitizen "stands on an equal footing with citizens." *Id.* at 586.

II. For Noncitizens, as for Citizens, Due Process Normally Requires the Government to Satisfy a Heightened Burden of Proof Before Depriving People of Significant Liberty Interests.

Consistent with the equality of citizens and noncitizens under the Due Process Clause, the Supreme Court has repeatedly demanded that the government satisfy an elevated burden of proof—clear and convincing evidence—before depriving a person of a significant liberty interest, regardless of whether that person is a citizen and regardless of whether the government is exercising its powers over immigration and naturalization.

In removal proceedings, for example, the Court has held that the Constitution requires the government to "establish the facts supporting deportability by clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 277 (1966). In denaturalization proceedings, the government likewise bears the burden of supporting its case with clear and convincing evidence, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), and so too in expatriation proceedings, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955).

The very same standard determines whether the government may

involuntarily commit a person to a mental hospital, *Addington v. Texas*, 441 U.S. 418, 433 (1979), terminate a person's parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), detain a criminal defendant based on danger to the community, *Salerno*, 481 U.S. at 741, or confine a legally insane person after he has completed his criminal sentence, *Foucha*, 504 U.S. at 86.

Thus, across "various civil cases" involving citizens and noncitizens, the Court has determined that due process requires "the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests." *Addington*, 441 U.S. at 424.

The reasoning of these cases, not just their results, demonstrates the equivalence of citizens and noncitizens under the Due Process Clause. The Supreme Court has repeatedly drawn on precedent from the immigration and naturalization contexts when assessing what process is due in other contexts. *See, e.g.*, *id.* at 432 (likening civil commitment to removal and denaturalization, and adopting the same standard of proof, because in all three contexts "the consequences to the individual [a]re unusually drastic"); *Santosky*, 455 U.S. at 756 (relying on removal and denaturalization cases in requiring clear and convincing evidence to terminate parental rights, and noting that "the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of

liberty or stigma" (quotation marks omitted)); *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970) (relying on the heightened standard of proof governing removal proceedings in holding that juvenile delinquency adjudications require more than a preponderance of the evidence).

Likewise, the Supreme Court has repeatedly drawn on precedent from outside the immigration and naturalization contexts in defining the due process rights of detained noncitizens. For instance, in *Zadvydas v. Davis*, which addressed the detention of noncitizens after final removal orders, the Court relied on precedent concerning insanity-related civil commitment in *Foucha*, criminal pretrial detention in *Salerno*, and civil commitment of sexual predators in *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). *See Zadvydas*, 533 U.S. at 690; *see also Wong Wing*, 163 U.S. at 235 (relying on precedent involving criminal pretrial detention in assessing detention of noncitizens pending removal proceedings).

Driving this point home, the Court expressly stated in *Salerno* that the constitutionality of pretrial detention under the Bail Reform Act "must be evaluated in *precisely the same manner* that we evaluated the laws in the cases discussed above," 481 U.S. at 749 (emphasis added), which included both *Carlson v. Landon* (concerning detention pending removal decisions), and *Wong Wing v. United States* (concerning detention and punishment after removal decisions). *See Salerno*, 481 U.S. at 748; *see also id.* at 753-55 (extensively discussing *Carlson*).

The Court's analysis has remained consistent across these cases because they all concern "the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual." *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996). Where "the liberty of an individual is at stake," citizen or not, "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (addressing removal proceedings); *see Woodby*, 385 U.S. at 285 & n.18 (adopting clear-and-convincing standard for removal by analogizing to other civil proceedings with weighty consequences, such as cases involving "fraud," "illegitimacy of a child born in wedlock," "lost wills," and "oral contracts to make bequests"). Over and over, the Court "has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof," *Santosky*, 455 U.S. at 759, without regard to whether the liberty in question was that of a citizen or a noncitizen.

To be sure, the *result* of any due process analysis "varies with the circumstances." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). But the analytical framework remains the same, whether the liberty of citizens or noncitizens is at issue. *See id.* at 37. So does the foundational principle that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S.

at 690 (citing *Foucha*, 504 U.S. at 80).

Despite that, the government suggests that a person detained on suspicion of removability has less at stake because he "can unilaterally decide to end his detention by conceding to removal." Appellants' Br. 23. In other words, according to the government, the deprivation of liberty is not as great here as in other contexts because a detainee can always agree to be deported from the United States. But that assertion blithely ignores "'the grave nature of deportation,'" which is a "'drastic measure,' often amounting to lifelong 'banishment or exile.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (quoting *Jordan v. De George*, 341 U.S. 223, 231 (1951)).

Time and again, the Supreme Court "has reiterated that deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'" *Id.* (quoting *Jae Lee*, 137 S. Ct. at 1968); *accord Padilla*, 559 U.S. at 365-66, 368. Removal "is a particularly drastic remedy where aliens have become absorbed into our community life," *Carlson*, 342 U.S. at 537-38, and for many people it entails "los[ing] the right to rejoin [one's] immediate family, a right that ranks high among the interests of the individual," *Plasencia*, 459 U.S. at 34.

In short, "deportation may result in the loss 'of all that makes life worth living.'" *Bridges*, 326 U.S. at 147 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284

(1922)). The Hobson's choice made available by this supposedly voluntary option, therefore, hardly diminishes the strength of a noncitizen's constitutional interest in freedom from incarceration. For noncitizens, no less than for citizens, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Foucha*, 504 U.S. at 83 (quoting *Salerno*, 481 U.S. at 755).

III. Deviations from Due Process Norms in the Removal Process Have Been Permitted Only in Narrow Circumstances Not Present Here.

Despite the above, the government argues that whenever it incarcerates a person it suspects of being a removable noncitizen, it need not justify that detention by clear and convincing evidence. Appellants' Br. 18. Indeed, the government believes it is exempt from any burden of proof at all, and that the burden instead "is on the alien to show that he merits release on bond." *Id.* at 12. Because noncitizens have the same due process rights as citizens, however, the government's position requires accepting that the removal process is so different from the civil and criminal proceedings discussed above that it justifies a wholesale inversion of the normal due process framework.

To support that notion, the government relies on three decisions in which the Supreme Court has "upheld detention pending removal proceedings on the basis of a categorical, rather than individualized, assessment that a valid immigration purpose warranted interim custody of a particular class of aliens." *Id.* at 19 (citing *Demore*, 538 U.S. at 530; *Carlson*, 342 U.S. at 538; and *Reno v. Flores*, 507 U.S.

292, 306 (1993)). But the most these cases establish is that *Congress*, in certain narrow circumstances, may override the typical presumptions of the due process framework for specific categories of removable noncitizens. Because Congress has not authorized the policy at issue here and none of those circumstances are present, these cases fail to support the government's departure from due process norms.

A. While detention in furtherance of removal triggers core due process rights, it also implicates unique government interests that require some deference to legislative judgments. "Congress has developed a complex scheme governing admission to our Nation and status within our borders," based upon its power to establish naturalization rules, "upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders." *Plyler*, 457 U.S. at 225; *see Harisiades*, 342 U.S. at 590 (deferring to "congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States").

This deference to Congress reaches its apogee in cases like *Demore* and *Carlson*, which upheld categorical detention policies against constitutional challenges.[3] Contrary to the government's position, however, those cases do not

[3] The government's reliance on *Reno v. Flores* is clearly misplaced. *Reno* upheld the denial of bail to "arrested alien *juveniles*," 507 U.S. at 295 (emphasis in original), who had "no available parent, close relative, or legal guardian," *id.* at 302. But "juveniles, unlike adults, are always in some form of custody." *Id.* (quoting

suggest that people detained pending removal lack the benefit of the normal presumption of liberty embedded in the Due Process Clause. Instead, they establish that, in narrow circumstances, Congress may legislatively alter this presumption for certain dangerous noncitizens when Congress has spoken clearly based on abundant legislative findings.

In *Demore*, for instance, where all of those conditions were met, Congress was permitted to require the "brief" detention without bail of particular classes of noncitizens whom Congress had deemed especially dangerous, and who had already been convicted of prior offenses after receiving the full range of procedural safeguards afforded in criminal prosecutions. *See* 538 U.S. at 513 ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that [such] persons . . . be detained for the brief period necessary for their removal proceedings.").

Here, by contrast, without any clear authorization from Congress, much less an authorization bolstered by extensive legislative findings, the executive branch has

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Schall v. Martin, 467 U.S. 253, 265 (1984)). While the Court acknowledged that the executive branch may adopt "reasonable presumptions and generic rules" in immigration enforcement, the presumption at issue was "the unsuitability of custodians other than parents, close relatives, and guardians" to be handed control over unaccompanied minors. *Id.* at 313. The validity of that presumption has little bearing on the presumption imposed here: that all adults suspected of removability should remain incarcerated unless they can prove otherwise.

unilaterally adopted a policy requiring the presumptive detention of any person the government accuses of being a removable noncitizen. None of the factors that combined to support the holdings of *Demore* and *Carlson* are present.

B. The stark differences between *Demore* and this case highlight the constitutional inadequacy of the government's policy.

Demore concerned a challenge to 8 U.S.C. § 1226(c). Enacted in 1996, that provision "sprang from a 'concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.'" *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) (quoting *Demore*, 538 U.S. at 513). "To address this problem, Congress *mandated* that aliens *who were thought to pose a heightened risk* be arrested and detained without a chance to apply for release on bond or parole." *Id.* (emphasis added). Congress did so through an unequivocal command. *See* 8 U.S.C. § 1226(c)(1) (the Attorney General "*shall* take into custody any alien" who meets the statutory criteria (emphasis added)); *id.* § 1226(c)(2) (permitting release only in narrowly defined circumstances).

Upholding the constitutionality of this legislation in *Demore*, the Supreme Court went out of its way to stress the extensive legislative findings that supported Congress's decision—repeatedly citing congressional reports and the evidence detailed therein about the gravity of the problem Congress sought to address and

how to ameliorate it.[4] As the Court emphasized, "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large." *Demore*, 538 U.S. at 528. And "[i]t was following those Reports that Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521; *see id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected . . . .").

In short, the detention regime upheld in *Demore* reflected a clear determination by Congress that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id.* at 520; *see Nielsen*, 139 S. Ct. at 959 ("Congress has decided . . . that this procedure is too risky in some instances. Congress therefore adopted a special rule for aliens who have committed certain

[4] *See, e.g.*, *Demore*, 538 U.S. at 518 ("Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." (citing Senate hearing and Senate report)); *id.* at 519 ("Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." (citing Justice Department report and House report)); *id.* at 521 ("Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country."); *see also id.* at 518 ("Congress' investigations showed . . . ."); *id.* ("One study showed . . . ."); *id.* ("[A]s Congress explained . . . ." (citing additional Senate report)); *id.* at 518-19 ("One 1986 study showed . . . ." (citing additional House hearing)).

dangerous crimes . . . .”).

The Court’s decision also rested on the narrow class of persons affected, and on Congress’s determination that those persons posed a heightened risk. Section 1226(c), the Court explained, applied to noncitizens with specific types of “prior convictions, which were obtained following the full procedural protections our criminal justice system offers.” *Demore*, 538 U.S. at 513. And those convictions “reflect[ed] personal activity that Congress considered relevant to future dangerousness.” *Id.* at 525 n.9 (quotation marks omitted).[5]

The Court further relied on the procedural safeguards in place to mitigate the risk of erroneous detention. As the Court explained, any individuals claiming to be wrongly detained—alleging, for example, that they were U.S. citizens or were never convicted of a predicate crime—were “immediately provided” a hearing to determine whether they were “properly included in a mandatory detention category.” *Id.* at 514 & n.3 (citing 8 C.F.R. § 3.19(h)(2)(ii)); *see id.* at 522 n.6 (noting “the procedural protections . . . provided to aliens detained under § 1226(c)”). And the Court stressed “[t]he very limited time of the detention at stake,” *id.* at 529 n.12, based on the Court’s understanding that detention lasted “roughly a month and a half

[5] As the Court has since noted, one rarely invoked provision in Section 1226(c), concerning “those who are thought likely to engage in terrorist activity,” does not require a prior criminal conviction. *Nielsen*, 139 S. Ct. at 960. The constitutionality of that provision was not at issue in *Demore*. *See* 538 U.S. at 513.

in the vast majority of cases." *Id.* at 530; *see id.* at 528 (distinguishing *Zadvydas* on this basis).

All of these factors militated in favor of upholding Congress's legislative response to the problem that Congress identified with certain "criminal aliens" under Section 1226(c). Combined, these factors sufficed "to overcome a lawful permanent resident alien's liberty interest" in freedom from detention. *Id.* at 515 (quotation marks omitted).

None of those factors are present here. Congress has not mandated the policy chosen by the executive branch. No legislative findings support that (non-existent) statutory mandate. The policy is not limited to a narrow class of persons deemed particularly dangerous by Congress because they were convicted of serious crimes after being afforded robust procedural safeguards. And nothing suggests that detention under Section 1226(a) is anywhere near as short as the "brief" period contemplated in *Demore*.

Whereas Section 1226(c) explicitly prescribed the bail policy challenged in *Demore*, nothing in Section 1226(a) clearly authorizes the executive branch to adopt the unusual standard it has imposed here. To the contrary, the law simply says that the Attorney General "may" detain or release individuals pending their removal proceedings. 8 U.S.C. § 1226(a)(1), (2). A vague directive like that is hardly a mandate for the executive branch to flip due process norms by shouldering detained

suspects with the burden of proving their fitness for release. If Congress had meant to sanction such a dramatic inversion of the due process framework—a framework in which "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *Salerno*, 481 U.S. at 755—Congress "certainly could have spoken in clearer terms." *Zadvydas*, 533 U.S. at 697. Demonstrating the point, Congress *did* speak more clearly in *other* detention provisions that it enacted at the same time, where it expressly overrode the normal due process presumption that the government bears the burden of proof. *See* 8 U.S.C. § 1226(c)(2); *id.* § 1536(a)(2)(A).

Lacking the sort of express statutory mandate that Congress has elsewhere provided, the government points to the legislative history surrounding Section 1226. *See* Appellants' Br. 7-10. But even if such history could suffice without the type of clear textual command at issue in *Demore*, nothing the government cites gives any indication that Congress meant for Section 1226(a) to authorize a departure from established due process standards for detainees.

Congress's desire to increase pre-removal detention "as a general matter," Appellants' Br. 8, is irrelevant here. *Cf. id.* at 11 ("The mandate of Congress, as evidenced by budget enhancements and other legislation, is increased detention to ensure removal." (quoting 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997))). Resource constraints, not legal standards, were the reason that detention was lagging. *See*

Demore, 538 U.S. at 519 ("Despite [its] discretion to conduct bond hearings, . . . in practice the INS faced severe limitations on funding and detention space, which considerations affected its release determinations."). As Congress was aware, "notwithstanding circumstances that the Attorney General believed justified detention (for example, a significant probability that the released alien would not appear, as agreed, at subsequent exclusion or deportation proceedings)," many individuals "were released into the community due to a lack of detention facilities." 8 U.S.C. § 1368(b)(2)(B) (requiring measures to address the issue).

The government also notes that Congress included language in Section 1226(e) to shield the Attorney General's "discretionary judgment" from judicial review. Appellants' Br. 9. But the statute's predecessor had similar language, *see* 8 U.S.C. § 1252(a)(1) (1996) (providing that release determinations be made "in the discretion of the Attorney General"), and when Congress drafted Section 1226, the executive branch had long maintained that under the old statute "an alien generally should not be detained . . . unless there is a finding that he is a threat to the national security or is a poor bail risk," *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (BIA 1987) (citing *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976)). "This principle," therefore, "was a fixture of the legal backdrop when Congress enacted § 1226[(a)]." *Nielsen*, 139 S. Ct. at 967. Because Congress made no substantive change to the legal standards in enacting Section 1226(a), it had no way of anticipating that the

executive branch might subsequently reverse the liberty presumption long applied to individuals in removal proceedings. *Cf. Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999) (acknowledging that new regulations "*have added as a requirement* for ordinary bond determinations . . . that the alien must demonstrate that release would not pose a danger to property or persons," even though the statute "does not explicitly contain such a requirement" (emphasis added and quotation marks omitted)).

Still reaching for legislative support for its policy, the government cites—but misconstrues—the Supreme Court's remark in *Reno* that Congress "eliminated any presumption of release pending deportation" and instead "commit[ed] that determination to the discretion of the Attorney General." Appellants' Br. 8 (quoting *Reno*, 507 U.S. at 306). The statutory change to which this quote refers, however, does not support the government's inference.

What the Court was discussing there was Congress's elimination of a perceived *statutory* presumption that had been erroneously construed as *mandating* release whenever a detainee could post bond. The statute Congress amended had previously said that detainees "may be released" if they posted bond, *Carlson*, 342 U.S. at 538 n.31 (quoting 8 U.S.C. § 156 (1946)), and some courts had interpreted this language to mean that release was entirely at the option of the detainee, *id.* at 539. A "need for clarification" prompted Congress to add the phrase "in the

discretion of the Attorney General." *Id.* at 539-40. Congress's change simply clarified that under the revised statute, as under Section 1226(a) today, the decision about whether to release was to be made by the government (subject to judicial review, *see id.* at 540), not by the detainee. Congress's correction of this misinterpretation was not an effort to alter the *constitutional* presumptions that apply under the Due Process Clause when the government seeks to detain people without trial.

In sum, "Congress has not addressed itself to the question" at issue here. *Woodby*, 385 U.S. at 284. And that fundamentally distinguishes this case from *Demore*, which hinged on the deference owed to Congress when it has spoken clearly on immigration matters in light of extensive legislative findings.

C. Even while granting robust deference to Congress's judgment, the Supreme Court upheld the "brief period" of detention in *Demore*, 538 U.S. at 513, only because, like other regimes of preventive detention that have passed constitutional muster, it was "limited to specially dangerous individuals *and* subject to strong procedural protections." *Zadvydas*, 533 U.S. at 691 (emphasis added); *see supra* at 16-18. Indeed, that combination of features represents the "only" situation in which the Court has "upheld preventive detention based on dangerousness." *Zadvydas*, 533 U.S. at 691. The government's policy here is not limited in those ways.

Unlike the provision at issue in *Demore*, Section 1226(a) "does not apply narrowly to a small segment of particularly dangerous individuals," but instead reaches "broadly" to include all people the government seeks to remove "for many and various reasons, including tourist visa violations." *Id.* (quotation marks omitted). The only trait that potentially unites these people is "removable status itself," which "bears no relation to a detainee's dangerousness" or risk of flight. *Id.* at 692.

Moreover, the respondent in *Demore* was subject to detention because of "his prior convictions, which were obtained following the full procedural protections our criminal justice system offers." *Demore*, 538 U.S. at 513. But under the government's policy here, "the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is *not* dangerous," *Zadvydas*, 533 U.S. at 692 (emphasis added), and *not* a flight risk. *See id.* (noting that the Supreme Court "str[uck] down insanity-related detention for that very reason" in *Foucha*, 504 U.S. at 82).

Finally, the "very limited time of the detention" that was believed to be at stake in *Demore*, 538 U.S. at 529-30 & n.12 ("roughly a month and a half in the vast majority of cases"), was based on erroneous statistics, as the government later acknowledged, *see Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting), and—suffice it to say—cannot be taken as a given here.

In all these ways, *Demore* falls far short of legitimizing the government's policy.

D. The other case on which the government chiefly relies, *Carlson v. Landon*, reflects similar constitutional principles as *Demore*. For that reason, it is similarly unavailing here.

Demore and *Carlson* both involved legislation in which Congress, supported by evidentiary findings, determined that particular classes of noncitizens were especially dangerous to the United States—"criminal aliens" in *Demore*, 538 U.S. at 513, and "active alien communists" in *Carlson*, 342 U.S. at 526. In *Demore*, Congress mandated detention of the relevant class with narrow exceptions, 538 U.S. at 517-18, while in *Carlson*, Congress vested the Attorney General with discretion to deny bail to members of the class based solely on their active Communist affiliations, 342 U.S. at 527.

The Supreme Court in *Carlson* "concluded that the denial of bail was permissible 'by reference to the legislative scheme to eradicate the evils of Communist activity.'" *Demore*, 538 U.S. at 525 (quoting *Carlson*, 342 U.S. at 543). That is, the Court deferred to Congress's considered determination that *all* alien Communists endangered national security by their presence at large in the United States: "As the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security

Act itself, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention to all these parties without bail as a menace to the public interest." *Carlson*, 342 U.S. at 541 (citation omitted).

"What was significant in *Carlson*," therefore, was "the fact that Congress had enacted legislation based on its judgment that such subversion posed a threat to the Nation." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 193 (1991). Because Congress had rendered such a clear legislative judgment about a particular class of noncitizens, based on a "reasonable apprehension" of their danger to national security, the Court held that "[t]here [wa]s no denial of the due process of the Fifth Amendment." *Carlson*, 342 U.S. at 542; *see id.* at 543-44 (citing "[t]he legislative judgment of evils calling for the 1950 amendments to deportation legislation"); *Barenblatt v. United States*, 360 U.S. 109, 127 (1959) ("Congress has wide power to legislate in the field of Communist activity in this Country"). Significantly, the Attorney General was "not left with untrammeled discretion as to bail," but rather was required in hearings to "justify his refusal of bail by reference to the legislative scheme." *Carlson*, 342 U.S. at 543. This "congressional determination that the presence of alien Communists constituted an unacceptable threat to the Nation" was "the statutory policy that justified the detention." *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194.

As shown above, Congress has made no comparable determination that every

person arrested by the government on suspicion of being a removable noncitizen may be deprived of the fundamental presumption of liberty at the heart of the Due Process Clause. Nor has it determined that such people should be protected by anything less than the heightened burden of proof that typically guards against deprivations of significant liberty interests. Despite that lack of congressional authorization, the executive branch claims the power to incarcerate such people for months, or years, without satisfying any burden of proof at all. "The Constitution demands greater procedural protection even for property." *Zadvydas*, 533 U.S. at 692. In these circumstances, without the imprimatur of a legislative mandate, the executive branch may not so thoroughly upend the Due Process Clause and erode its central guarantees.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: June 2, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,485 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 2nd day of June, 2020.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 2, 2020

/s/ Brianne J. Gorod
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