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21-1044(XAP)

In the United States Court of Appeals for the Second Circuit

JUNIOR ONOSAMBA-OHINDO,
on behalf of himself and all others similarly situated,

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

[caption continued from previous page]

JUNIOR ONOSAMBA-OHINDO,
on behalf of himself and all others similarly situated,

Petitioner-Appellee–Cross-Appellant,

ANTONIO LOPEZ AGUSTIN,
on behalf of himself and all others similarly situated,

Petitioner-Appellee,

v.

JEFFREY J. SEARLS, in his official capacity as
Acting Administrator of the Buffalo Federal Detention Facility,

Respondent-Appellant–Cross-Appellee,

MERRICK B. GARLAND, in his official capacity as
Acting United States Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; JAMES MCHENRY, in his official capacity as the Director of the Executive Office for Immigration; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; MATTHEW ALBENCE, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of Immigration and Customs Enforcement; and ALEJANDRO N. MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security,

Respondents-Appellants,

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

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 the 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 seeks 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 removable 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. Gov't 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." Gov't Br. 31 (quoting *Demore v. Kim*, 538 U.S. 510, 522 (2003)). And it invokes the Supreme Court's approval, on two occasions, of statutes permitting the detention of entire classes of individuals pending their removal proceedings. *Id.* at 27. Neither argument, however, justifies 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 procedural safeguards of the Due Process Clause fully protect noncitizens against the risk of erroneous decisions in the implementation of those laws. The government's authority to detain people in the course of removal proceedings, therefore, does not entail 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 consistently required the government to 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. Due process calls for "a heightened burden of proof" whenever "the individual interests at stake" are "particularly important," *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quotation marks omitted), and the constitutionality of preventive detention is "evaluated in precisely the same manner" regardless of whether it is used to enforce immigration measures or other laws, *Salerno*, 481 U.S. at 749.

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 or its attendant

procedural safeguards disappear whenever the government detains someone pursuant to removal. Instead, they establish, as a matter of "substantive due process," *Demore*, 538 U.S. at 515, that *Congress* may authorize or require detention without bail (1) of specific classes of noncitizens whom Congress has deemed especially dangerous, (2) when Congress has spoken clearly, (3) based on abundant legislative findings, (4) the detention is limited in duration, and (5) adequate guardrails are in place to prevent the abuse of this authority. None of those factors is present here. In their absence, the cases the government cites offer no basis for its 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). "Even 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), and "may not be deprived of his life, liberty or property without due process of law," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).[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." *Diaz*, 426 U.S. 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 already here, *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893), and detention can be necessary to effectuate removal, *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] The Supreme Court has not extended due process protections to noncitizens outside the United States seeking entry 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). "Merely invoking the fact that a case is raised in the immigration context does nothing to address much less to abrogate due process principles." *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020).

Moreover, "the fact that some detention is permissible" to effectuate removal "does not change the fact that a detainee suffers significant liberty deprivations." *Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021). Nor does it imply that noncitizens in removal proceedings have any less of a liberty interest than citizens in freedom from physical confinement. "While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration," the Supreme Court has warned that "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." *Kwong Hai Chew*, 344 U.S. at 601; *see 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 due process safeguards against detention continue to apply with full force even after noncitizens 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 carried out to effectuate removal simply imposes the same type of treatment on noncitizens that the government inflicts on citizens where it wields comparable power over them—as the Supreme Court has long recognized. *See id.* at 235 (approving "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"); *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 suspected 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 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, "[t]he Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake," *Velasco Lopez*, 978 F.3d at 856, regardless of whether the person in question is a citizen or whether the government is exercising its powers over immigration. In each context, the Court has insisted on "the clear and convincing standard." *Id.*

In removal proceedings, for example, the Supreme 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 same standard of proof 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 completion of a 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; *see Cooper*, 517 U.S. at 363.

"The Government's claim that these precedents are inapplicable in an immigration context is unpersuasive." *Velasco Lopez*, 978 F.3d at 856. Both the reasoning and the results of these precedents refute that claim. The Supreme Court has repeatedly drawn on precedent from the immigration context when assessing what process is due in other contexts. *See, e.g.*, *Addington*, 441 U.S. 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" (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).

Conversely, the Court has repeatedly drawn on precedent from outside the immigration context when defining the due process rights of noncitizens within that context. For instance, in *Zadvydas v. Davis*, which addressed the detention of noncitizens with final removal orders, the Court relied on precedent concerning pretrial detention in *Salerno* and insanity-related civil commitment in *Foucha* and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). *See Zadvydas*, 533 U.S. at 690; *see also Woodby*, 385 U.S. at 285 & n.18 (imposing clear-and-convincing standard of proof in deportation cases by borrowing it from the standard used in "a variety of other kinds of civil cases" that threaten important private interests); *Wong Wing*, 163 U.S. at 235 (relying on tradition of pretrial detention in approving removal-related detention).

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 because all these contexts involve the "protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual." *Cooper*, 517 U.S. at 368. 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). 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, or whether the government was enforcing immigration measures or other types of laws.

While the *result* of any due process analysis "varies with the circumstances," *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see Mathews v. Eldridge*, 424 U.S. 319 (1976), the analytical framework remains the same whether the liberty of citizens or noncitizens is at stake. *See Plasencia*, 459 U.S. 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).

The government has sometimes argued that immigration detention is a less serious liberty deprivation than other types of detention because noncitizens can end their confinement by allowing themselves to be deported. "This argument is a bit like telling detainees that they can help themselves by jumping from the frying pan into the fire." *Hernandez-Lara*, 10 F.4th at 29. It ignores "'the grave nature of deportation,'" 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 v. United States*, 137 S. Ct. 1958, 1968 (2017)). Because "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 hardly diminishes the strength of a noncitizen's constitutional interest in freedom from incarceration.

In short, 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. Gov't Br. 1. Indeed, the government believes it is exempt from any burden of proof at all, and that the burden is instead "on the noncitizen, not the government, to demonstrate that release is warranted." *Id.* 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, it says, the Supreme Court has "upheld the constitutionality of detention during removal proceedings based on categorical, rather than individualized, assessments of flight risk and dangerousness." *Id.* at 27 (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—permitting detention without bail (1) of specific classes of noncitizens whom Congress has deemed especially dangerous, (2) when Congress has spoken clearly, (3) based on abundant legislative findings, (4) the detention is limited in duration, and (5) adequate guardrails are in

place to prevent the abuse of this authority. None of those factors is present here. In their absence, 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 *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 approved in *Reno* has little bearing here: "the unsuitability of custodians other than parents, close relatives, and guardians" to be handed control over unaccompanied minors. *Id.* at 313.

suggest that people detained pending removal lack the benefit of the normal presumption of liberty embedded in the Due Process Clause.

In *Demore*, Congress was permitted to require the "brief" detention without bail of a particular class of noncitizens whom Congress had deemed especially dangerous based on extensive findings, 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."). *Carlson* is to the same effect.

Here, by contrast, without any clear authorization from Congress, much less an authorization bolstered by extensive legislative findings, the executive branch has 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. *Demore* rejected a "substantive due process" challenge, 538 U.S. at 515, to a statutory provision that "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 person who meets the statutory criteria (emphasis added)); *id.* § 1226(c)(2) (permitting release only in narrowly defined circumstances).

Upholding the constitutionality of this legislation against a facial challenge, 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

[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)).

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 dangerous crimes . . . .").

Demore also "focused on the heightened risk posed" by the "narrow class of noncitizens" affected. *Velasco Lopez*, 978 F.3d at 850 n.7. As the Supreme Court explained, Section 1226(c) applies 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.[5] And those convictions

[5] 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.

"reflect[ed] personal activity that Congress considered relevant to future dangerousness." *Id.* at 525 n.9 (quotation marks omitted).

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

All of these factors supported upholding Congress's legislative response to the problem it identified concerning certain "criminal aliens." *See Hernandez-Lara*, 10 F.4th at 35-36. Combined, these factors sufficed "to overcome a lawful permanent resident alien's liberty interest" in freedom from detention. *Demore*, 538 U.S. 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), § 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* Gov't Br. 8-11. 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," Gov't Br. 9, 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))). A lack of resources, not the applicable legal standard, was 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. Gov't Br. 10. 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." Gov't Br. 9 (quoting *Reno*, 507 U.S. at 306). The statutory change to which this quote refers, however, does not support the government's inference.

What *Reno* discussed was Congress's response to statutory interpretations by the courts that had made release *mandatory* 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 if bond was posted, release was obligatory, *id.* at 539. A "need for clarification" prompted Congress to add the phrase "in the discretion of the Attorney General." *Id.* at 539-40. That change simply made clear that under the revised statute, as under Section 1226(a) today, the government had to make a decision about whether release was warranted under the circumstances—a decision subject to judicial review, *see id.* at 540. In clarifying that release was not *mandated* by this statute, Congress did not purport to override the normal due process presumptions that apply when the government is considering whether to detain someone 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). 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 statute 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 flight risk. *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.

D. The other case on which the government chiefly relies, *Carlson v. Landon*, reflects similar principles and is likewise 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. But in both cases, "Congress made specific findings as to the dangerousness of a class of noncitizens, and those findings were found to have justified the detention of noncitizens even in the absence of individualized determinations as to danger and flight risk." *Hernandez-Lara*, 10 F.4th at 36.

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 court 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, this Court should affirm the district court's decision to require custody hearings in which the government bears the burden of proof under a standard of clear and convincing evidence.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: November 29, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amici curiae* 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.

Dated: November 29, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 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: November 29, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae