22-70

In the United States Court of Appeals for the Second Circuit

KEISY [redacted],

Petitioner-Appellant,

v.

THOMAS DECKER, New York Field Office Director for U.S. Immigration and Customs Enforcement, MERRICK B. GARLAND, United States Attorney General, ALEJANDRO MAYORKAS, Secretary of Homeland Security, and DAVID L. NEAL, Director of the Executive Office of Immigration Review,

Respondents-Appellees.

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

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

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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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STATUTES AND 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 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

In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court approved the mandatory detention of certain individuals for a "brief period" pending their removal proceedings, repeatedly emphasizing the "very limited time of the detention at stake." *Id.* at 513, 529 n.12. By any measure, Petitioner Keisy [redacted]'s detention "exceeds the 'brief period' that the Supreme Court deemed reasonable in *Demore*." *Keisy G.M. v. Decker*, 2021 WL 5567670, at *8 (S.D.N.Y. Nov. 29, 2021) (quoting *Demore*, 538 U.S. at 530). The district court nonetheless allowed the government to continue detaining him without a bail hearing, seemingly indefinitely, based mainly on an assessment that government officials had not unnecessarily

[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.

prolonged his removal proceedings. *Id.* at *5. That decision misconstrues the substantive and procedural limits that the Fifth Amendment imposes on preventive incarceration, and it should be reversed.

The safeguards of the Due Process Clause apply "without regard to any differences of . . . nationality," *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted), protecting noncitizens as fully as citizens against arbitrary and unreasonable deprivations of liberty, *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (the Clause protects "all persons, aliens and citizens alike"). While the government may detain noncitizens in aid of deportation, it must afford them the same due process safeguards that protect citizens in similar contexts. When bringing its immigration authority to bear on a specific "person," U.S. Const. amend. V, the government must observe "the most exacting" due process standards, not "a more permissive form." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

For citizens and noncitizens alike, "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)); *see Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In "certain narrow circumstances," individuals "may be subject to limited confinement" outside of the criminal process, *Foucha*, 504 U.S. at 80, but two separate inquiries are needed to determine if the Due Process Clause allows such confinement.

First, preventive detention must be a proportional—not excessive—response to a government imperative. Detention that becomes inordinately prolonged fails this test. Even if the government is operating in good faith to promote a valid objective, "due process requires that the . . . duration of commitment bear some *reasonable relation* to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (emphasis added). Preventive detention cannot be "excessive in relation to the regulatory goal [it aims] to achieve," *Salerno*, 481 U.S. at 747, and there must be "a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose," *Reno v. Flores*, 507 U.S. 292, 305 (1993).

The district court misapplied this principle. It reasoned that Petitioner's detention remains permissible because it still "serves a valid purpose" and is being used to facilitate removal rather than "for other reasons." *Keisy G.M.*, 2021 WL 5567670, at *1, *11 (quotation marks omitted). But "the mere invocation of a legitimate purpose" is not enough. *Schall v. Martin*, 467 U.S. 253, 269 (1984). As the Supreme Court has made clear, preventive detention can become constitutionally unreasonable due to excessive length alone, notwithstanding a valid objective. Because that threshold has been crossed here, this Court should reverse.

Second, even when government imperatives justify a deprivation of liberty, the Due Process Clause also requires procedures that adequately guard against

erroneous individual decisions being made in the exercise of that authority. And when the government seeks to imprison someone as a preventive measure, the usual requirements of procedural due process are well established: the government must "convince a neutral decisionmaker by clear and convincing evidence" of the need for the detention. *Salerno*, 481 U.S. at 750. Indeed, the Supreme Court has required the government to meet that standard before depriving a person of *any* significant liberty interest, whether or not that person is a citizen, and whether or not the government is exercising its immigration powers. As the Court has explained, "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake" are "particularly important." *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996).

The district court overlooked this second inquiry entirely. *Demore* permitted a limited departure from the procedural requirements above, deferring to Congress's judgment that individuals subject to detention under 8 U.S.C. § 1226(c) may be categorically presumed to be dangerous or flight risks without individualized hearings. But *Demore* gave its blessing to that presumption only for the brief period of detention that it addressed, which the district court recognized has been exceeded here. *Demore*'s categorical presumption of danger and flight risk does not continue indefinitely, and once it loses its conclusive force, courts must ask what additional procedures are necessary to protect against the risk of mistaken decisions. The

district court, however, did not even consider whether the procedures that Petitioner has received are constitutionally sufficient to detain him as a flight risk or threat to safety. For this additional reason, the court's decision should be reversed.

ARGUMENT

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

In defending against challenges to immigration detention, the government has sometimes asserted that the Due Process Clause gives noncitizens less protection than citizens against unjustified deprivations of liberty. This is plainly wrong. *See Zadvydas*, 533 U.S. at 692 (rejecting such an argument); *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020) (same).

Contrary to such assertions, the Constitution forbids relegating noncitizens to a watered-down version of due process in connection with immigration proceedings. Although noncitizens are vulnerable to a form of detention and expulsion from which citizens are exempt, they receive the full benefit of the Fifth Amendment's safeguards when the government attempts to exercise that power over them. *See Reno*, 507 U.S. at 306 ("the Fifth Amendment entitles aliens to due process of law in deportation proceedings"). Indeed, the requirements of due process apply "without regard to . . . nationality," *Wong Wing*, 163 U.S. at 238 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)), protecting "aliens and citizens alike," *Diaz*, 426 U.S. at 78.

A. The Framers 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 hold congressional office); *id.* art. II, § 1, cl. 5 (only a "natural born Citizen" may be president). But they established in the Fifth Amendment that no "person" may be deprived of life, liberty, or property without due process of law. *Id.* amend. V; *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("the Fifth Amendment . . . speaks in the relatively universal term of 'person'").

Because the Framers "employed words in their natural sense" and "intended what they have said," *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), the safeguards of the Due Process Clause are not "confined to the protection of citizens," but rather "are universal in their application to all persons within the [nation's] territorial jurisdiction," *Wong Wing*, 163 U.S. at 238 (quotation marks omitted). A noncitizen present in the United States, therefore, 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," *Diaz*, 426 U.S. at 77, 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). Consistent with the Fifth Amendment's unqualified language, due process shields all persons "who have once

passed through our gates, even illegally." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).[2]

B. Despite the parity of citizens and noncitizens under the Due Process Clause, noncitizens are "subject to the plenary power of Congress to expel them." *Carlson v. Landon*, 342 U.S. 524, 534 (1952). But the government's "power to terminate its hospitality," *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952), is not a license to "disregard the fundamental principles that inhere in 'due process of law'" when "executing the provisions of a statute involving the liberty of persons," *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). That power remains "subject to . . . the 'paramount law of the constitution.'" *Carlson*, 342 U.S. at 537 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)).

As soon as the federal government began regulating immigration in the late nineteenth century, therefore, the Supreme Court recognized that the Fifth Amendment entitles noncitizens to due process of law before being imprisoned in connection with deportation. *Wong Wing*, 163 U.S. at 238. Because immigration authority "is a power to be administered, not arbitrarily and secretly, but fairly and

[2] Conversely, a noncitizen "on the threshold of initial entry stands on a different footing." *Mezei*, 345 U.S. at 212. Lacking entitlement to "the privilege of entry," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), noncitizens have no liberty interest to protect in their "initial admission," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982-83 (2020).

openly," *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920), the government may not "cause an alien who has entered the country . . . to be taken into custody" without "giving him all opportunity to be heard" regarding "the matters upon which [his] liberty depends," *Kaoru Yamataya*, 189 U.S. at 101.

To be sure, "[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 that does not imply that noncitizens are entitled to only a diminished form of due process. As the Supreme Court explained immediately after that remark, it simply reflects the fact that citizens are exempt from immigration measures: "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). "In the enforcement of [immigration] policies," however, "the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

That is why "an 'essential' of due process" like the void-for-vagueness doctrine applies the same in removal proceedings as it does in criminal prosecutions. *Dimaya*, 138 S. Ct. at 1212. Indeed, the Supreme Court "long ago held that *the most exacting vagueness standard* should apply in removal cases." *Id.* at 1213 (emphasis added); *see Jordan v. De George*, 341 U.S. 223, 231 (1951) ("We do this in view of the grave nature of deportation."). The government "cannot take refuge in a more

permissive form" of this due process safeguard in the immigration context. *Dimaya*, 138 S. Ct. at 1213.

C. The government has sometimes argued that immigration detention is less of a 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 v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021). "Deportation is always 'a particularly severe penalty,'" *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010)), which the Supreme Court has long regarded as a "drastic measure" akin to "banishment or exile," *Jordan*, 341 U.S. at 231. Because "deportation may result in the loss 'of all that makes life worth living,'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)), its availability does nothing to diminish noncitizens' liberty interest in freedom from incarceration.

II. In Immigration Proceedings as Elsewhere, Preventive Detention May Not Be Excessive in Duration.

Because "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), the government may imprison people as a preventive measure only within strict limits. "Two separate inquiries are necessary" to determine if preventive detention is constitutional. *Schall*, 467 U.S. at 263.

First, the detention must be a proportional—not excessive—response to a legitimate state objective. *Id.* at 264. Second, the detention regime must also have adequate procedural safeguards to guard against erroneous individual decisions. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

Regarding the first inquiry, the "general rule" is that the government "may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749. In "certain narrow circumstances," persons may be subject to "limited confinement" without conviction, *Foucha*, 504 U.S. at 80, if there is "a constitutionally adequate purpose for the confinement," *Jones v. United States*, 463 U.S. 354, 361 (1983) (quotation marks omitted). But "the mere invocation of a legitimate purpose" is not enough. *Schall*, 467 U.S. at 269. Instead, "due process requires that the . . . duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. In other words, preventive detention cannot be "excessive in relation to the regulatory goal [it aims] to achieve." *Salerno*, 481 U.S. at 747. There must be "a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose." *Reno*, 507 U.S. at 305.

When detention becomes excessively prolonged, it no longer has a *reasonable* relation to its purpose, thereby violating due process. *See Jackson*, 406 U.S. at 733 (a "rule of reasonableness" limits preventive detention, without an individualized

determination of dangerousness, to a "reasonable period of time"); *Zadvydas*, 533 U.S. at 689 (detention of individuals who have been ordered removed cannot exceed "a period reasonably necessary to bring about that alien's removal"); *cf. Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring magistrate's approval for "prolonged" detention after arrest).

Accordingly, the Supreme Court has upheld preventive detention—in the immigration context as elsewhere—only where the detention was not "excessively prolonged . . . in relation to [its] regulatory goal." *Salerno*, 481 U.S. at 747 n.4; *see, e.g.*, *id.* at 747 ("the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act"); *Schall*, 467 U.S. at 269 ("the detention is strictly limited in time"); *Reno*, 507 U.S. at 314 ("The period of custody is inherently limited by the pending deportation hearing, which must be concluded with 'reasonable dispatch' to avoid habeas corpus." (quoting former version of 8 U.S.C. § 1252(a)(1))); *Carlson*, 342 U.S. at 546 ("the problem of . . . unusual delay in deportation hearings is not involved in this case"); *Wong Wing*, 163 U.S. at 235 (approving of "temporary" confinement in aid of deportation).

Consistent with that principle, *Demore v. Kim* repeatedly emphasized the "very limited time of the detention at stake," 538 U.S. at 529 n.12, confining its holding to this "brief period," *id.* at 513, which the Court believed to be "roughly a month and a half in the vast majority of cases . . . and about five months in the

minority of cases in which the alien chooses to appeal," *id.* at 530; *see also id.* at 523 ("the brief period necessary for [Kim's] removal proceedings"); *id.* at 526 ("the limited period necessary"); *id.* at 531 ("the limited period of his removal proceedings"); *id.* at 528 (distinguishing *Zadvydas* because "the detention here is of a much shorter duration").

This limit on excessive duration performs several constitutional functions. As the district court recognized, it ensures that preventive detention—a narrow exception to the general rule of freedom from confinement—remains tethered to its justifications. *See Zadvydas*, 533 U.S. at 690 ("where detention's goal is no longer practically attainable, detention no longer 'bear[s][a] reasonable relation to the purpose for which the individual [was] committed'" (quoting *Jackson*, 406 U.S. at 738)).

But that is not all. As the district court failed to recognize, this limit further ensures that detention is not an *unreasonable* or *disproportionate* response to its justification. *Salerno*, 481 U.S. at 747. The requirement of proportionality, or "reasonable fit," *Reno*, 507 U.S. at 305, also helps ensure that detention does not function as punishment without trial. *See Schall*, 467 U.S. at 269 ("a legitimate purpose will not justify . . . confinement amounting to punishment"); *Salerno*, 481 U.S. at 747 n.4 ("detention in a particular case might become excessively prolonged, *and therefore punitive*" (emphasis added)). And by fixing a realistic end point, the

limit on excessive duration avoids "indefinite detention," a categorically distinct infringement on liberty that requires additional "special circumstance[s]" to justify it. *Zadvydas*, 533 U.S. at 690-91.

Importantly, preventive detention can become constitutionally unreasonable based on excessive length alone, regardless of whether the government is employing it in good faith to achieve a valid purpose. Even where there is no "express intent to punish," and detention remains "rationally . . . connected" to an alternative purpose such as community protection, detention may not be "excessive in relation to the alternative purpose assigned [to it]." *Schall*, 467 U.S. at 269 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)); *see Zadvydas*, 533 U.S. at 685 (rejecting argument that detention was permissible simply because "good-faith efforts to remove [the petitioner] from the United States continued").

The Court made this clear in *Demore*. Upholding detention under 8 U.S.C. § 1226(c), the Court distinguished *Zadvydas* "in two respects." *Demore*, 538 U.S. at 527. First, the detention in *Zadvydas* "did not serve its purported immigration purpose," because removal was no longer practically attainable. *Id.* But *Zadvydas* was different "in a second respect" as well: "While the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration." *Id.* at 528.

In sum, "duration" is an independent factor be considered in its own right, separate from whether the detention can still be said to "serve its purported immigration purpose." *Id.* at 527-28. Even if preventive detention is still advancing a legitimate regulatory goal, excessive length can render it unconstitutional. Therefore, it is not enough that preventive detention still "serves a valid purpose" and is being used "to facilitate deportation" rather than "for other reasons." *Keisy G.M.*, 2021 WL 5567670, at *1, *11 (quotation marks omitted). A lack of proportionality between the government's purpose and the means used to achieve it makes prolonged detention excessive—and hence a violation of due process.

III. In Immigration Proceedings as Elsewhere, Preventive Detention Generally Requires the Government to Meet a Heightened Burden of Proof Before a Neutral Decisionmaker.

When the requirements above are satisfied, the Due Process Clause imposes a second, critical check on preventive detention: procedures that adequately guard against erroneous individual decisions.

A. Even when preventive detention is supported by a valid substantive goal, the Supreme Court has typically upheld it only where the government bears the burden of persuading an impartial decisionmaker of the need to detain a particular individual. Only "[u]nder such circumstances" has the Court allowed pretrial detention of criminal defendants to ensure their presence at trial, *Bell v. Wolfish*, 441 U.S. 520, 536 (1979), or to protect the safety of others, *Salerno*, 481 U.S. at 741.

The same requirements are necessary before the government may detain defendants for significant periods after they are found incompetent to stand trial, *Jackson*, 406 U.S. at 738, or are judged not guilty by reason of insanity, *Foucha*, 504 U.S. at 86. So too before the government may involuntarily commit people with dangerous mental illnesses, *Addington v. Texas*, 441 U.S. 418, 433 (1979), or detain juveniles pending delinquency proceedings, *Schall*, 467 U.S. at 276-77.

Most analogous here, the Supreme Court's approval of pretrial detention for arrestees charged with "serious felonies," based on their dangerousness, rested on the "numerous procedural safeguards" required in "a full-blown adversary hearing" where the government had to "convince a neutral decisionmaker by clear and convincing evidence" of the need for detention. *Salerno*, 481 U.S. at 755, 750. The Bail Reform Act "require[d] a judicial officer to determine whether an arrestee [should] be detained," "after a hearing pursuant to the provisions of [the Act]." *Id.* at 742. A defendant could "request the presence of counsel at the detention hearing," "testify and present witnesses in his behalf, as well as proffer evidence," and "cross-examine other witnesses appearing at the hearing." *Id.* Detention was permissible only if "no conditions of pretrial release [could] reasonably assure the safety of other persons and the community," and a judge had to "state his findings of fact in writing, and support his conclusion with clear and convincing evidence." *Id.* (citations and

quotation marks omitted). Arrestees were "entitled to a prompt detention hearing" and to "expedited appellate review of [any] detention order." *Id.* at 747, 743.

These precedents all require an adversary hearing before a neutral decisionmaker in which the government bears the burden of showing the need for detention. And unless a special exception applies, they all impose a heightened standard of "clear and convincing evidence." *Foucha*, 504 U.S. at 86; *cf. Schall*, 467 U.S. at 265 (approving lower standard for juveniles, whose liberty interest in freedom is "qualified" because "juveniles, unlike adults, are always in some form of custody"); *Jones*, 463 U.S. at 367 (approving lower standard for insanity acquittees, who are detained "only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness," providing "good reason for diminished concern as to the risk of error").

B. The "claim that these precedents are inapplicable in an immigration context is unpersuasive." *Velasco Lopez*, 978 F.3d at 856. The power to detain in aid of deportation is not exempt from constitutional due process safeguards. *See Zadvydas*, 533 U.S. at 695; *INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *Carlson*, 342 U.S. at 537; *Kaoru Yamataya*, 189 U.S. at 101; *Wong Wing*, 163 U.S. at 238. And because the detention power comes from the need to effectuate removal and prevent harm in the interim, the government has "no interest" at all in detaining someone who is not "either a flight risk or a danger to his community." *Velasco Lopez*, 978

F.3d at 857; *see Addington*, 441 U.S. at 426 ("the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others").

Both inside and outside the immigration context, therefore, the Supreme Court has held that due process requires a fair hearing before an independent decisionmaker, with a heightened burden on the government, before depriving a person of *any* significant liberty interest. Those safeguards are required in proceedings to deport, *Woodby v. INS*, 385 U.S. 276, 277 (1966), to denaturalize, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), to expatriate, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), and to discontinue essential welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970). As the Supreme Court has summarized, "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake" are "particularly important." *Cooper*, 517 U.S. at 363 (quotation marks omitted). Thus, across "various civil cases" involving citizens and noncitizens, in immigration proceedings and elsewhere, the Court has imposed a heightened burden on the government to protect "particularly important individual interests." *Addington*, 441 U.S. at 424.

The same burden must be met to incarcerate someone pending removal proceedings. Despite noncitizens' unique vulnerability to immigration detention,

their liberty interest in bodily freedom is equal to that of citizens. As the Supreme Court has recognized, detention "*for any purpose* constitutes a significant deprivation of liberty." *Foucha*, 504 U.S. at 80 (quoting *Jones*, 463 U.S. at 361) (emphasis added). And immigration detention is justified by the same principles that support the detention of citizens where a valid regulatory goal permits it. *See Wong Wing*, 163 U.S. at 235 (approving of "detention or temporary confinement, as part of the means necessary to give effect to . . . expulsion of aliens," because "[d]etention is a usual feature in every case of arrest on a criminal charge"); *Harisiades*, 342 U.S. at 591 (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]").

Importantly, too, a noncitizen's liberty interest in freedom from detention is not contingent on any right to remain in the United States. As the Court recently underscored, the right to "contest[] the lawfulness of restraint and secur[e] release" fundamentally differs from "the right to enter or remain in a country." *Thuraissigiam*, 140 S. Ct. at 1969. That is why due process safeguards against unjustified detention continue to apply to noncitizens even after they receive a removal order. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238.

Likewise, the right to be freed from unconstitutional detention, even if it results in supervised release within the United States, bestows "no additional right" to remain in this country, *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908), or to violate the terms of supervised release, *Zadvydas*, 533 U.S. at 696.

C. Were there any doubt, precedent confirms that the immigration context does not permit deviation from the safeguards that are required whenever the "grave consequences" of a significant liberty deprivation are threatened. *Chaunt*, 364 U.S. at 353. The Supreme Court has repeatedly drawn on precedent from other contexts when assessing the due process rights of noncitizens in immigration enforcement. *E.g.*, *Zadvydas*, 533 U.S. at 690; *Flores*, 507 U.S. at 314; *Woodby*, 385 U.S. at 285 & n.18; *Wong Wing*, 163 U.S. at 235. Conversely, the Court has drawn on immigration precedent when defining the process due for other serious liberty deprivations. *E.g.*, *Cooper*, 517 U.S. at 362-63 & n.19; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970).

Driving the point home, *Salerno* stated expressly that the constitutionality of criminal pretrial detention "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* and *Wong Wing v. United States*. That is because these cases all concern 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.

D. *Demore* permitted a limited departure from the usual requirements of procedural due process in the context of preventive detention. Deferring to congressional judgments about individuals convicted of certain crimes, *see* 538 U.S. at 518-21, *Demore* allowed detention without the possibility of bail based on a categorical *presumption* of danger or flight risk, obviating the need for individual hearings. Even so, the Court stressed the procedural safeguards in place to avoid erroneous decisions about who was subject to this mandatory detention. Anyone claiming to be wrongly detained was "immediately provided" a hearing to determine whether they were "properly included in a mandatory detention category." *Id.* at 514 & n.3 (citing *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999)). That hearing would be conducted by "an Immigration Judge." *Joseph*, 22 I. & N. Dec. at 799. Thus, even *Demore* required "individualized review" before a neutral decisionmaker. 538 U.S. at 514 n.3; *cf. id.* (noting that the Court had no occasion to review the actual adequacy of *Joseph* hearings in "screening out those who are improperly detained").

Moreover, *Demore* sanctioned a loosening of detention standards only for "the brief period" that the decision contemplated. *Id.* at 523. Once that period expires—as it surely has here—no justification remains for withholding the procedural safeguards that are required whenever a serious liberty deprivation is at stake: a fair

hearing before a neutral decisionmaker with an elevated burden of proof on the government.

IV. The District Court Misapplied Due Process Standards.

The district court did not correctly apply the precedent discussed above. The upshot of its decision is that as long as immigration officials have not unjustifiably prolonged removal proceedings, the government may continue to incarcerate people, month after month, without ever showing that they are dangerous or a flight risk. That violates the Due Process Clause.

A. The district court recognized that Petitioner's detention of (then) fourteen months without a bail hearing "exceeds the 'brief period' that the Supreme Court deemed reasonable in *Demore*." *Keisy*, 2021 WL 5567670, at *8 (quoting *Demore*, 538 U.S. at 530). But the court dismissed out of hand the possibility of setting a "bright line rule" limiting the duration of preventive detention. *Id.* at *7. Neither of the court's rationales for that conclusion is sound.

First, the court rejected a proposed six-month limit based entirely on a misreading of *Demore*. According to the court, *Demore* "recognized that due process does not require a bond hearing solely because detention under section 1226(c) lasts beyond six months." *Id.* But *Demore* did not resolve an as-applied challenge to the length of Hyung Joon Kim's detention. Kim "challeng[ed] the constitutionality of § 1226(c) itself," *Demore*, 538 U.S. at 514, and the Supreme

Court treated his claim as a facial challenge. That is why it extensively discussed the "average time" that individuals are detained under § 1226(c). *Id.* at 530. The Court noted the length of Kim's detention only to acknowledge that he "was detained for somewhat longer than the average." *Id.* at 530-31.

To survive a facial challenge, detention statutes need only be found "'adequate to authorize the pretrial detention of at least some [persons]' . . . whether or not they might be insufficient in some particular circumstances." *Salerno*, 481 U.S. at 751 (quoting *Schall*, 467 U.S. at 264); *see Reno*, 507 U.S. at 309 (declining to address the possibility of "excessive delay" in immigration proceedings "on this facial challenge"). That is what *Demore* held—and all that it held.

Even if it were appropriate to speculate about how the *Demore* Court *would have* resolved an as-applied challenge to Kim's detention, the opinion, if anything, suggests that six months of mandatory detention pushes the constitutional limits. *See Demore*, 538 U.S. at 530-31. And in any event, *Demore* does not justify refusing to consider *any* duration-based limit on preventive detention without a bail hearing.

The district court's other rationale for rejecting a temporal limit was that due process is flexible. What this ignores is that detainees seeking relief from § 1226(c) are not asking for unconditional release, but rather for bond hearings to assess their individual risk of danger or flight—the very essence of a "fact-specific inquiry." *Keisy G.M.*, 2021 WL 5567670, at *1. The flexibility of due process is best served

by allowing that process to go forward, not by having district courts substitute a poor approximation for it on habeas review using factors like "the nature of the noncitizen's crimes" as proxies for dangerousness or flight risk. *Id.* at *7.

Moreover, a bright-line rule need not be a straitjacket. Courts can recognize that detention exceeding a particular duration is *presumptively* unreasonable, while allowing unusual or compelling individual circumstances to rebut that presumption. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (establishing a presumptive limit of forty-eight hours on detention before a probable-cause hearing, after which "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance"); *Zadvydas*, 533 U.S. at 701 (establishing a "presumptively reasonable period of detention," after which the government must rebut the claim that removal is not reasonably foreseeable).

B. Having rejected a bright-line limit on the length of detention without a bail hearing, the district court further erred in its individualized assessment of Petitioner's detention.

Although the court acknowledged that it needed to consider "the length of detention" and whether it "is near conclusion," the court subordinated those factors to the questions of "whether the Government has engaged in unreasonable delay" and whether the detention "is serving a valid purpose." *Keisy G.M.*, 2021 WL 5567670, at *7; *see id.* at *8 ("the principal factor" is "the degree to which the

proceedings have been prolonged by unreasonable government action" (quotation marks omitted)). The bottom line of the decision is that as long as immigration officials do not unnecessarily prolong removal proceedings, and the purpose of detention remains to facilitate deportation, incarceration may continue indefinitely without any finding of danger or flight risk by a neutral decisionmaker. *Id.* at *13.

As the Supreme Court has explained, however, detention under § 1226(c) "*necessarily* serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings." *Demore*, 538 U.S. at 528 (emphasis added). As long as removal proceedings are ongoing, therefore, the detention *always* "serves a valid purpose." *Keisy G.M.*, 2021 WL 5567670, at *1. If that were enough to legitimize continued detention, it would render hollow the Supreme Court's focus on "the brief period" for which it approved the extraordinary measure of preventive detention without possibility of bail. *Demore*, 538 U.S. at 513.

Further, the Supreme Court has expressly rejected the notion that preventive detention is constitutional simply because "good faith efforts to effectuate . . . deportation continue." *Zadvydas*, 533 U.S. at 702 (quotation marks omitted). The Court has consistently recognized that "the mere invocation of a legitimate purpose" is not enough, *Schall*, 467 U.S. at 269, and that preventive detention cannot be "excessive in relation to the regulatory goal" it promotes, *Salerno*, 481 U.S. at 747.

Due process requires not just a valid purpose but that the "duration" of detention "bear some reasonable relation to [this] purpose." *Jackson*, 406 U.S. at 738.

Consistent with that precedent, neither the Court's opinion in *Demore* nor the concurrences indicated that the *only* relevant question is "whether the detention is not to facilitate deportation . . . but to incarcerate for other reasons." *Keisy G.M.*, 2021 WL 5567670, at *11 (quoting *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring)). Instead, they indicated the opposite. *See Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (explaining that Kim could be entitled to a bond hearing if his detention "became unreasonable *or* unjustified" (emphasis added)); *Demore*, 538 U.S. at 527-28 (majority op.) (distinguishing *Zadvydas* not only because the detention in *Demore* "serve[s] its purported immigration purpose" but also because it "is of a much shorter duration").

In gauging reasonableness, moreover, the district court unduly focused on assigning blame for the length of detention. Because the individual immigration officers and judge in Petitioner's case "moved at an appropriate pace," the district court found no "unreasonable delay." *Keisy G.M.*, 2021 WL 5567670, at *13, *8. But the Due Process Clause is not merely a safeguard against the negligence or malfeasance of individual government employees. It shields individuals from unreasonable deprivations of liberty by the federal government as a whole, whatever the cause.

Conversely, the district court penalized Petitioner for trying to obtain a fair adjudication in his removal proceedings, emphasizing that he sought delays to "seek representation," to "prepare adequately," and to pursue relief from an adverse decision. *Id.* at *11. Apparently, to obtain a bail hearing, "it [must] not appear that [the petitioner] ever requested a continuance or an adjournment." *Id.* at *9 (quoting *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018)). Forcing people to sacrifice their due process rights against expulsion in order to preserve their due process rights against incarceration is neither consistent with the Fifth Amendment nor a valid reason for authorizing detention without a bail hearing beyond the brief period contemplated by *Demore*.

C. Finally, but just as importantly, the district court failed to consider whether the procedures Petitioner has received are constitutionally adequate to justify detaining him on the basis that he is dangerous or a flight risk.

Because *Demore* permits mandatory detention, based on a presumption that detainees covered by § 1226(c) pose an unacceptable risk of danger or flight, *see* 538 U.S. at 520, there is no role for bond hearings or other individual risk assessments where *Demore* is operative. The only determination needed to satisfy procedural due process is a mechanism to ensure that particular detainees are "properly included in a mandatory detention category." *Id.* at 514. But once the "brief period" of detention covered by *Demore* has expired, *id.* at 513, that is no

longer good enough. The deference to Congress that justifies *Demore*'s categorical presumption does not extend indefinitely—as *Demore* made clear by repeatedly stressing the "very limited time of the detention at stake." *Id.* at 529 n.12.

Once *Demore*'s categorical presumption loses its conclusive force, courts must ask afresh whether the procedures in place guard adequately against erroneous decisions that detainees pose a risk of danger or flight that justifies their imprisonment. In other words, when detention exceeds the initial brief period approved in *Demore*, as here, a court must decide what additional procedures are constitutionally required before continuing to subject a person to preventive detention.

As discussed above, *see supra* Part III, the answer to that question is nearly always the same: the government must "convince a neutral decisionmaker by clear and convincing evidence" of the need for preventive detention. *Salerno*, 481 U.S. at 750. Due process calls for this "heightened burden of proof" whenever the government seeks to deprive individuals of liberty interests that are "particularly important." *Cooper*, 517 U.S. at 363. If a lower standard suffices here, a court must at least explain why. The district court's failure to do so is yet another reason for reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court.

Respectfully submitted,

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Dated: May 2, 2022

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 6,483 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this 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: May 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this day 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: May 2, 2022

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