No. 22-2252

# In the United States Court of Appeals for the Eighth Circuit

NYYNKPAO BANYEE,

*Petitioner-Appellee*,

v.

MERRICK B. GARLAND, Attorney General of the United States, et al.,

*Respondents-Appellants.*

*On Appeal from the United States District Court*
*for the District of Minnesota*

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

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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 and public interest law firm 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 Nyynkpao Banyee's detention exceeded the "brief period" the Supreme Court sanctioned in *Demore*. The government nonetheless argues that it could have continued detaining Banyee without a bail hearing, seemingly indefinitely, as long as the detention continued to "serve its immigration purposes" and was not prolonged by dilatory tactics. Appellants' Br. 1-2. That argument misconstrues the substantive and procedural limits that the Fifth Amendment imposes on preventive incarceration.

[1] 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 its preparation or submission. Counsel for both parties have consented to the filing of this brief.

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) (plurality opinion).

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 conditions must be satisfied for the Due Process Clause to allow such confinement.

First, preventive detention must be a proportional response to a government imperative. Detention that becomes inordinately prolonged generally fails this test.

Even if the government is operating in good faith to promote a valid objective, preventative 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 government ignores this principle. It argues that it remains permissible to detain Banyee because his detention would still serve "valid purposes" that "do not abate simply because of the passage of time." Appellants' Br. 17. 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. The excessive length of Banyee's detention alone is a sufficient reason for this Court to affirm.

Second, even when government imperatives justify a deprivation of liberty, the Due Process Clause also requires procedures that adequately guard against erroneous decision-making. 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 detention. *Salerno*, 481 U.S. at 750. Indeed, the Supreme Court has required the government to meet that heightened 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.

The government argues that the Constitution "does not require" these important protections in the immigration context. Appellants' Br. 25. But the few cases on which the government relies do not address prolonged detention. *Id.* at 26. *Demore*, for example, 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 assessments. But *Demore* gave its blessing to that presumption only for the brief period of detention that it addressed. *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 correctly concluded that requiring the government to prove that detention is justified by clear and convincing evidence appropriately balances the various interests at stake under the Due Process Clause. *See* App. 227-31; R. Doc. 16, at 9-13.

The government further argues that, even if prolonged detention requires bond hearings, this Court should adopt the "procedures applicable to noncitizens detained under section 1226(a)." Appellants' Br. 17. But, as other courts of appeals have

recognized, the government's § 1226(a) procedures themselves violate the Due Process Clause. *See infra* at 25-27. Furthermore, there is no reason why the procedures that the government applies at the outset of a noncitizen's detention should bear upon what the Due Process Clause requires when detention has become prolonged.

## ARGUMENT

### I. Under the Due Process Clause, Noncitizens Have the Same Liberty Interest as Citizens in Freedom from Arbitrary Imprisonment.

The government sees no reason to hold immigration detention to the same due process standards that shield "U.S. citizens" from other forms of civil detention. *See* Appellants' Br. 25-26. But the Constitution forbids relegating noncitizens to a watered-down version of due process in immigration proceedings, particularly where bodily freedom is at stake. Although noncitizens are vulnerable to a form of detention and expulsion from which citizens are exempt, the Fifth Amendment still "entitles [noncitizens] to due process of law in deportation proceedings." *Flores*, 507 U.S. at 306. 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)), as the Amendment's text and history make clear.

**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'"); Alexander M. Bickel, *The Morality of Consent* 38 (1975) (the Constitution never uses "citizens" interchangeably with "people").

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 universal in their application to all persons within the [nation's] territorial jurisdiction," *Wong Wing*, 163 U.S. at 238 (quotation marks omitted). The Clause thus protects "all persons, aliens and citizens alike." *Mathews*, 426 U.S. at 78.

**B.** The Fifth Amendment's history confirms its text's plain meaning. The Framers derived the concept of "due process of law" from English common law, Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340-41 (1987), and the common law's "settled usages and modes of proceeding" provided the original standards for the Due Process Clause, *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855). Those settled usages gave all people, regardless of nationality, the same freedom from unjustified imprisonment.

The Founding-era common law regarded "aliens" who were present in England as owing a "temporary" allegiance, in exchange for which the king "affords his protection ... during [the alien's] residence in this realm." William Blackstone, 1 *Commentaries on the Laws of England* 370 (1791 ed.); *see Calvin's Case*, 7 Co. Rep. 1a (1608) (while an alien "is within England, he is within the King's protection"); *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) ("Such allegiance and protection" were "not restricted to natural-born subjects" but encompassed aliens "so long as they were within the kingdom."). Aliens were thus among "the people" of England, Blackstone, *supra*, at 366, although that status was "acquired only by residence here, and lost whenever they remove," *id.* at 371.

Accordingly, aliens had the same procedural rights as English subjects. Their substantive rights were "circumscribed" in just three main ways: they could not hold office, could not bequeath land, and paid "higher duties at the custom-house." *Id.* at 371-72, 374. Aliens could, however, maintain personal actions to protect their property and redress injuries. *Id.*; *see* 1 Edward Coke, *Institutes of the Laws of England* § 198 (1794 ed.); *Pisani v. Lawson*, 133 Eng. Rep. 35 (C.P. 1839). They could also "challenge Executive and private detention" through habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

Significantly, the common law did not recognize anything resembling preventive detention of aliens to aid deportation, for there was no deportation. *DHS*

*v. Thuraissigiam*, 140 S. Ct. 1959, 1973 (2020) ("England had nothing like modern immigration restrictions"). In theory, aliens were "liable to be sent home," Blackstone, *supra*, at 260, but there is "very little historical evidence" of that occurring, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 322 (2008); *see* W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 34 (1890) (finding no clear examples of deportation from the sixteenth through eighteenth centuries).

As a result, aliens were expelled from England only on the same terms that subjects were—as criminal punishment. Markowitz, *supra*, at 323-24. And the penalties of "banishment" and "transportation" (temporary banishment) applied to aliens and subjects alike. Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 469 (2021); *see Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893). No form of detention applied only to aliens, therefore, or applied differently to aliens than to subjects, Nash, *supra*, at 470-73; Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115, 130 (1999), with the lone exception that, during war, visitors from an enemy nation could temporarily be detained as "alien-enemies," Blackstone, *supra*, at 372. *But see Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (restrictions on alien enemies were "imposed

temporarily as an incident of war and not as an incident of alienage"). Under the common law's "settled usages and modes of proceeding," *Murray*, 59 U.S. at 277, aliens had the same entitlement to physical liberty and legal process as citizens.

**C.** Despite this history and the Fifth Amendment's clear text, some proponents of the 1798 Alien Friends Act (part of the infamous Alien and Sedition Acts) claimed that noncitizens lacked constitutional protections "because they were not 'parties' to the Constitution." Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 Conn. L. Rev. 743, 759 (2013). On this view, advanced in the fevered atmosphere of near-war with France in the 1790s, the Constitution was a "compact ... made between citizens only." 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834).

Opponents of the legislation, however, defended noncitizens' right to due process in terms that would later be vindicated by the Fourteenth Amendment and the Supreme Court. Under the common law, they explained, noncitizens "residing among us, are entitled to the protection of our laws." *Id.* And on this subject, "the Constitution expressly excludes any ... distinction between citizen and alien." *Id.*; *see id.* at 1956 (the Clause "speaks of persons, not of citizens"); *id.* at 2013 ("Unless ... an alien is not a 'person,' ... we must allow that all these provisions extend equally to aliens and natives.").

As Thomas Jefferson wrote, expelling noncitizens without legal process was "contrary to the Constitution, one amendment to which has provided, that 'no person shall be deprived of liberty without due process of law.'" *The Virginia Report of 1799–1800, Together with Several Other Documents* 164 (1850). James Madison likewise explained that noncitizens were "under a local and temporary allegiance, and entitled to a correspondent protection," including freedom from "any arbitrary and unusual process." *Id.* at 205-06, 208.

**D.** The short-lived Alien Friends Act "left no permanent traces in the constitutional jurisprudence of the country." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1288 (1833); *see Dimaya*, 138 S. Ct. at 1229-30 (Gorsuch, J., concurring in part and concurring in the judgment) (the Act was "a temporary war measure" that was "notorious" and "went unenforced"). But because the federal government did not yet restrict immigration, the Supreme Court had no opportunity to confirm noncitizens' entitlement to due process. That changed in the wake of "the *Dred Scott* decision and its subsequent rejection in the form of the Fourteenth Amendment." Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 732 (1995).

*Dred Scott v. Sanford* held that constitutional rights are exclusively "privileges of the citizen," 60 U.S. 393, 449 (1857), embracing the "social contract reading of the Constitution" earlier espoused by the Alien Act's proponents, Gerald

L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 940 (1991). "The first sentence of the Fourteenth Amendment consciously overruled *Dred Scott*'s holding that blacks could never be 'citizens.'" Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1223 n.134 (1992). Conspicuously, the Amendment went on to frame its new rights to due process and equal protection "in terms of 'person' rather than 'citizen.'" Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 810 n.32 (2013).

In congressional debates over the Amendment, lawmakers extensively discussed "the rights of aliens as 'persons'" and the "mistreatment of the Chinese on the Pacific coast." Neuman, *supra*, at 941. As Senator Howard explained in one debate, the Amendment would "disable a State from depriving not merely a citizen of the United States, but any person ... of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). In the House, Representative Bingham did the same. *Id.* at 1090.

After the Amendment's passage, the Supreme Court soon recognized that the constitutional safeguards for "persons" encompass noncitizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the Fourteenth Amendment's Due Process Clause covers noncitizens); *Wong Wing*, 163 U.S. at 238 (applying *Yick Wo*'s "reasoning to the fifth ... amendment[]"). Noncitizens therefore could not be imprisoned as

punishment for immigration violations without the same procedures owed to citizens. *Id.*

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 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 in removal proceedings just as 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.

Despite the government's broad power over immigration, then, its enforcement efforts may not "arbitrarily ... cause an alien who has entered the country ... to be taken into custody" or otherwise "disregard the fundamental principles that inhere in 'due process of law.'" *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903). In immigration proceedings as elsewhere, preventive detention is allowed only "where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (citation and quotation marks omitted). Because "the liberty of an individual is at stake," removal efforts must adhere to the central "notions of fairness on which our legal system is founded." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).[2]

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

The government argues that the court below placed "undue weight" on the length of detention, Appellants' Br. 17, suggesting that any length of detention is appropriate so long as "removal proceedings advance[] at a typical pace," *id.* at 21. This is wrong.

[2] Conversely, a noncitizen "on the threshold of initial entry stands on a different footing." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). 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 Thuraissigiam*, 140 S. Ct. at 1982-83.

**A.** The government misunderstands the strict limits that courts have placed on preventative detention—a "carefully limited exception" to the "norm" of liberty. *Foucha*, 504 U.S. at 83 (quoting *Salerno*, 481 U.S. at 755). "Two separate inquiries are necessary" to determine if preventive detention is constitutional. *Schall*, 467 U.S. at 263. First, a court must conclude that the detention is a proportional—not excessive—response to a legitimate state objective. *Id.* at 264. Second, a court must conclude that the detention regime provides 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 v. Indiana*, 406 U.S. 715, 738 (1972). In other words, there must be "a 'reasonable fit' between governmental purpose ... and the means chosen to advance that purpose." *Flores*, 507 U.S. at 305.

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"); *Flores*, 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 8 U.S.C. § 1252(a)(1))); *Carlson v. Landon*, 342 U.S. 524, 546 (1952) ("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).

This constitutional limit on excessive duration does more than ensure that detention serves "valid purposes." Appellants' Br. 17. The requirement of proportionality also prevents detention from functioning as punishment without trial. As *Salerno* recognized, a restriction on liberty can constitute impermissible punishment if it derives from punitive intent, 481 U.S. at 747, but also if it "appears excessive in relation to" its purpose, *id.*, as is necessarily the case when detention becomes "excessively prolonged," *id.* at 747 n.4 (noting that detention "might become excessively prolonged, and therefore punitive"); *see Schall*, 467 U.S. at 269 (noting that "a legitimate purpose will not justify ... confinement amounting to

punishment"); *Flores*, 507 U.S. at 303 (observing that detention of juvenile noncitizens "is not punitive since it is not excessive in relation to that valid purpose"). Additionally, by fixing a realistic end point, the prohibition on excessive detention avoids "indefinite detention," a categorically distinct infringement on liberty that requires a "sufficiently strong special justification." *Zadvydas*, 533 U.S. at 690.

Consistent with these principles, *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 their removal proceedings"); *id.* at 526 ("the limited period necessary"); *id.* at 531 ("the limited period of his removal proceedings").

**B.** Excessive confinement can violate the Due Process Clause based on its length alone, regardless of whether the government is acting in good faith. 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 (quotation marks omitted); *see Zadvydas*, 533 U.S. at 685 (rejecting

argument that detention was permissible simply because "good-faith efforts to remove [the petitioners] from the United States continued").

While the government cites *Demore* to argue that Banyee's detention did not become unconstitutional "simply because of its length," Appellants' Br. 25, that case did not decide what length of detention under § 1226(c) is permissible or impermissible. *Demore* did not consider an as-applied challenge to the length of Hyung Joon Kim's detention, because 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. 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). That is all that *Demore* held.

And notwithstanding the government's suggestion to the contrary, *Demore* clearly indicates that, at some point, excessive length alone can make preventive detention without a bail hearing constitutionally impermissible. That is why the Court distinguished *Zadvydas* "in two respects." *Demore*, 538 U.S. at 527. The Court first noted that 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. The length of detention, apart from its relationship to the government's "purposes," Appellants' Br. 1, was crucial.

In short, "duration" is an independent factor to be considered in evaluating a noncitizen's detention. *Demore*, 538 U.S. at 527-28; *see id.* at 532 (Kennedy, J., concurring) (bond hearings may be required if detention becomes either "unjustified" *or* "unreasonable"). Even if preventive detention is still "justified," *id*., and is advancing a legitimate regulatory goal, excessive length can render it "unreasonable," *id.*, and unconstitutional. It is not enough, therefore, that the government has no "illegitimate purpose" and is innocent of "dilatory tactics." Appellants' Br. 24, 17. A lack of proportionality between the government's purpose and the means used to achieve it can make prolonged detention excessive—and hence a violation of due process.[3]

[3] Put another way, as the period of detention becomes prolonged, "the private interest that will be affected by the official action," *Mathews*, 424 U.S. at 335, is more substantial, and greater procedural safeguards are therefore required. *See Zadvydas*, 533 U.S. at 701 (explaining that the due process analysis changes as "the period of . . . confinement grows"); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021) (noting that prolonged detention may create a weightier liberty interest); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may ... imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

Moreover, Supreme Court precedent fully supports construing the Due Process Clause as presumptively requiring a bond hearing after a certain period of detention under § 1226(c). The Court in *Zadvydas* treated six months as a "presumptively reasonable period of detention," 533 U.S. at 701, noting that similar presumptions exist in the context of Fourth Amendment protections, *id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991) (O'Connor, J.)), and the Sixth Amendment's right to jury trial, *id*. (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966) (plurality opinion); *see also Muniz v. Hoffman*, 422 U.S. 454, 477 (1975) (observing that "[i]t is not difficult to grasp the proposition that six months in jail is a serious matter for any individual"). A presumptive bright-line rule has the advantage of administrability while still allowing the government to rebut that presumption based on unusual or compelling individual circumstances.

## 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 under that standard has the Court permitted the government to detain 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; *see also Revels v. Sanders*, 519 F.3d 734, 742 (8th Cir. 2008) (state law "[r]equiring an insanity acquittee to prove both a lack of present mental illness and dangerousness, is clearly contrary to *Foucha*, and violates the substantive protections of the Due Process Clause"); *United States v. Neal*, 679 F.3d 737, 742 (8th Cir. 2012) (vacating order for an inpatient competency evaluation under 18 U.S.C. § 4247(b) because "the district court did not conduct a hearing, require the government to present evidence to justify the inpatient commitment ... or make findings of fact concerning the need for commitment").

Most analogous here, the Supreme Court's approval of pretrial detention for serious felony defendants based on their dangerousness rested on the "numerous

procedural safeguards" required by the Bail Reform Act. *Salerno*, 481 U.S. at 755, 750. The Act required the government to "convince a neutral decisionmaker by clear and convincing evidence," at "a full-blown adversary hearing," of the need for detention. *Id.* at 750. Detention was permissible only if a judge found, by clear and convincing evidence, that "no conditions of pretrial release [could] reasonably assure the safety of other persons and the community." *Id.* (citations and quotation marks omitted). Arrestees were entitled to expedited appellate review of detention orders. *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," providing "good reason for diminished concern as to the risk of error").

**B.** The government argues that detention during removal proceedings requires fewer procedural safeguards than other forms of preventive detention. Appellants' Br. 26. This is wrong.

Both inside and outside the immigration context, 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 v. Oklahoma*, 517 U.S. 348, 363 (1996) (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); *Neal*, 689 F.3d at 740 ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). 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 temporary immigration detention "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 (relying on similar comparison).

Importantly, too, a noncitizen's liberty interest in freedom from arbitrary 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.

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; *Salerno*, 481 U.S. at 739, 748; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970). 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.

**C.** *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 "brief" 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 before an immigration judge 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)); *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").[4]

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.

**D.** The government argues that the "appropriate remedy" for a due process violation "would be a bond hearing applying the procedures applicable to noncitizens detained under section 1226(a)," in accordance with the government's "customary bond-hearing procedures." Appellants' Br. 26-27 (citing *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1114 (BIA 1999)). But, as the government recognizes, neither the Supreme Court

[4] *Carlson v. Landon* similarly deferred to Congress's "legislative judgment of evils," 342 U.S. at 543, concerning a narrow class of individuals ("active alien communists," *id.* at 526) that Congress had a "reasonable apprehension" imperiled national security, *id.* at 542. But as in *Demore*, prolonged detention was not at issue, *id.* at 546, and the government bore the burden of justifying detention in individual hearings. *See id.* at 541-43 (explaining that the Attorney General had to "*justify* his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity," and concluding that "evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention" (emphasis added)).

nor this one has evaluated the constitutionality of the procedures applicable by regulation to individuals detained under § 1226(a). *Id.* The BIA decisions cited by the government did not involve the Due Process Clause, *see Adeniji*, 22 I. & N. Dec. at 1116; *Guerra*, 24 I. & N. Dec. at 40, in accordance with the Board's long-held position that it has no "authority to rule on the constitutionality of the statutes [it] administer[s]," *Matter of G-K-*, 26 I. & N. Dec. 88, 96 (BIA 2013).[5] And several circuits have explicitly concluded that the government's § 1226(a) procedures violate detainees' due process rights. *See Hernandez-Lara*, 10 F.4th at 45; *Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020).

Moreover, the government does not explain why procedures it applies to detainees at the outset of their confinement should establish what the Due Process Clause guarantees once detention has become excessively prolonged. Indeed, the out-of-circuit authority that it cites did not address the procedures applicable to individuals subject to prolonged detention without bail, *see Miranda v. Garland*, 34 F.4th 338, 348 (4th Cir. 2022) (evaluating detention under § 1226(a)); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1207-09 (9th Cir. 2022) (distinguishing confinement

[5] Furthermore, these "customary procedures" are of recent vintage. *See Matter of Patel*, 15 I. & N. Dec. 666 (B.I.A. 1976) (noting that a noncitizen "generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, ... or that he is a poor bail risk"); *see also Hernandez-Lara*, 10 F.4th at 26 (describing the procedures applicable "for many decades"); *id.* at 47-50 (Lynch, J., dissenting) (finding the BIA's "departure from *Patel*" after 1996 to be arbitrary and capricious).

under § 1226(a) from "detentions for which no individualized bond hearings had taken place at all because the statutes on their faces did not allow for them"). As explained above, the length of detention is crucial in determining a detainee's procedural due process rights, *see id.* at 1207 (acknowledging the relationship between length of detention and a detainee's "private liberty interest[s]"), and whether their confinement remains substantively reasonable or has "become excessively prolonged, and therefore punitive," *Salerno*, 481 U.S. at 747 n.4.

* * *

The government argues that its detention of Banyee—which, without the intervention of the court below, would have now lasted longer than two years—is constitutionally permissible because the government retains a "significant" interest in securing his removal. Appellants' Br. 25. If that were enough to legitimize prolonged detention without a bond hearing, it would render hollow the Supreme Court's focus on "the brief period" for which it approved the extraordinary measure of mandatory preventive detention, *Demore*, 538 U.S. at 513, and would undermine that Court's repeated admonition that 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). The government's arguments to the contrary should be rejected.

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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Dated: May 9, 2023

## 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 6,460 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.

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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 9, 2023

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