No. 25-1965

In the United States Court of Appeals for the Sixth Circuit

JUAN MANUEL LOPEZ-CAMPOS,

Petitioner-Appellee,

v.

KEVIN RAYCRAFT, Immigration and Customs Enforcement, Acting Director of Detroit Field Office Enforcement and Removal Operations; KRISTI NOEM, Secretary of U.S. Department of Homeland Security; PAMELA BONDI, U.S. Attorney General; DOJ – Executive Office of Immigration Review,

Respondents-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan

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

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   No.

Dated: January 9, 2026

/s/ Brianne J. Gorod
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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC works to uphold constitutional protections for noncitizens as well as for citizens and to ensure that the Constitution is applied as robustly as its text and history require. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's new policy of categorically detaining every noncitizen who enters the country without inspection has no basis in immigration law, as Petitioner explains. And even if it were statutorily authorized, this policy violates the Fifth Amendment. For that additional reason, this Court should affirm.

I. "[T]he Fifth Amendment entitles aliens to due process of law in the context of removal proceedings." *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025) (quotation marks omitted). That is because this constitutional safeguard protects "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). And under the Due Process Clause, preventive detention is an extraordinary, "carefully limited" measure that departs from the "norm" of liberty.

[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 the brief's preparation or submission. All parties have consented to the filing of this brief.

Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (citation omitted). Accordingly, the government typically must demonstrate the need for a person's detention in a fair hearing before a neutral decisionmaker. That crucial restriction applies here.

Disagreeing, the government argues that noncitizens facing removal can claim only whatever process Congress provides. But precedent firmly establishes otherwise. In removal proceedings as elsewhere, the Fifth Amendment guarantees certain protections, whether or not statutorily mandated, to guard against "the mistaken or unjustified deprivation of life, liberty, or property." *A.A.R.P. v. Trump*, 605 U.S. 91, 94 (2025) (citation omitted). It has long been settled that officials may not "cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody" and "deprived of his liberty" without an "opportunity to be heard" regarding "the matters upon which [his] liberty depends." *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

The government's only ostensible authority to the contrary, *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), did not involve noncitizens living in the United States, and it did not involve detention. *Thuraissigiam* addressed a person "apprehended in the very act of attempting to enter this country" who thus remained "on the threshold." *Id.* at 118, 140. The Supreme Court therefore applied a "century-old rule" distinguishing noncitizens who are "seeking initial

entry" from those who already live here. *Id.* at 139; *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (a person "on the threshold of initial entry stands on a different footing"). Moreover, the petitioner in *Thuraissigiam* was seeking a chance for legal admission, not release from detention.

The Fifth Amendment's protection of noncitizens' physical liberty is compelled not only by text and precedent but also by original meaning. Our legal tradition has long shielded "aliens" from arbitrary detention. Under Founding-era common law, aliens were among "the people" of England, 1 William Blackstone, *Commentaries on the Laws of England* 366, 370 (1791), who could protect their personal and property rights in court and were detained only on the same terms as subjects. So too in the early American states. James Madison, author of the Fifth Amendment, thus championed noncitizens' constitutional right to be free from any "arbitrary and unusual process." 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 559 (Jonathan Elliot ed., 1836).

II. Despite the government's fleeting assertion, *Demore v. Kim*, 538 U.S. 510 (2003), does not support its new policy of indiscriminate detention. Far from blessing the denial of immigration bond hearings as a general matter, *Demore* concerned "a special rule for aliens who have committed certain dangerous crimes," *Nielsen v. Preap*, 586 U.S. 392, 396 (2019), permitting Congress to mandate a "brief period" of detention for this "subset of deportable criminal

aliens," whom Congress deemed especially risky based on extensive findings and who already received the "full procedural protections" afforded in criminal prosecutions, *Demore*, 538 U.S. at 513, 530, 521, 525 n.9. None of the factors on which *Demore* relied supports mandatory detention of everyone who enters the country without inspection.

III. As *Demore* implies, due process is violated by the blanket detention of every noncitizen who enters the country without inspection. Congress has not designated this group categorically dangerous in legislation to which courts could reasonably defer. And the government has not afforded hearings to demonstrate that any particular individual's risk justifies overriding the norm of physical liberty. Across diverse contexts, however, the government may imprison someone without a criminal trial only by persuading an impartial decisionmaker of the need for that person's detention. Indeed, the government must satisfy that standard before depriving a person of *any* significant liberty interest.

The Due Process Clause offers no basis for carving out immigration detention as the lone exception to that rule. The Supreme Court routinely draws on precedent involving citizens when discerning the process due to noncitizens in removal, and vice versa. Due process indisputably requires a fair hearing with respect to the question of whether a person may be removed, *see A.A.R.P.*, 605 U.S. at 94, the effectuation of which is the basis for detention. Noncitizens in the

United States have the same liberty interest as citizens do in freedom from bodily confinement. And successfully "contesting the lawfulness of restraint" does not hinge on (or confer) any "right to enter or remain in a country." *Thuraissigiam*, 591 U.S. at 117. The government's broad discretion to set immigration policy does not mean it can indiscriminately imprison noncitizens without convincing an impartial decisionmaker of the need for their detention after a fair hearing.

ARGUMENT

I. Noncitizens Residing in the United States Have the Same Liberty Interest as Citizens in Freedom from Imprisonment.

A. "[A]ll persons, aliens and citizens alike, are protected by the Due Process Clause." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). The Framers knew how to distinguish citizens from noncitizens, and "when the Framers meant to limit a provision's application to 'Citizen[s]' *per se*, they did so expressly." *United States v. Escobar-Temal*, No. 24-5668, 2025 WL 3632831, at *4 (6th Cir. Dec. 15, 2025) (quoting *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1045 (11th Cir. 2022)). Only "a Citizen," for instance, may hold congressional office. U.S. Const. art. I, § 2, cl. 2. By contrast, the Fifth Amendment does not refer to citizens and instead "speaks in the relatively universal term of 'person.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

Because the Fifth Amendment declares that "no person" shall be deprived of liberty without due process of law, this safeguard is "universal in [its] application

to all persons within the [nation's] territorial jurisdiction" and is not "confined to the protection of citizens." *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted). "Even one whose presence in this country is unlawful … is entitled to that constitutional protection," *Diaz*, 426 U.S. at 77, and "may not be deprived of his … liberty … without due process of law," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). Due process shields all persons "who have once passed through our gates, even illegally." *Mezei*, 345 U.S. at 212.

The removal context does not change that. "It is well established that the Fifth Amendment entitles aliens to due process of law in the context of removal proceedings." *J.G.G.*, 604 U.S. at 673 (quotation marks omitted). Although noncitizens are "subject to the plenary power of Congress to expel them," that power must be exercised in accordance with "the 'paramount law of the constitution.'" *Carlson v. Landon*, 342 U.S. 524, 534, 537 (1952) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)). And because removal efforts "involv[e] the liberty of persons," the government may not "disregard the fundamental principles that inhere in 'due process of law'" when attempting to remove people who allegedly entered "unlawfully." *Kaoru Yamataya*, 189 U.S. at 94, 100.

In short, although "[p]olicies pertaining to the entry of aliens and their right to remain here" are political matters, "[i]n the enforcement of these policies … the

Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). "While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration," "it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him." *Kwong Hai Chew*, 344 U.S. at 601.

B. In addition to being textually mandated and settled by precedent, the Due Process Clause's protection of noncitizens is faithful to the Framers' original understanding. At the Founding, English common law gave "aliens" the same safeguards against arbitrary detention as subjects. Aliens were among "the people" of England alongside its "natural-born" subjects and were protected by the law "during [their] residence in this realm." Blackstone, *supra*, at 366, 370; *see United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) (explaining that the reciprocal relationship of allegiance and protection between subject and monarch was "not restricted to natural-born subjects," but extended to aliens "so long as they were within the kingdom").

Like natural-born subjects, aliens could "challenge Executive and private detention," *INS v. St. Cyr*, 533 U.S. 289, 302 (2001), and could bring actions to protect their personal and property rights, *see* 9 William Holdsworth, *A History of English Law* 97 (1926); *Pisani v. Lawson*, 133 Eng. Rep. 35 (C.P. 1839)

(surveying precedent). Deportation did not exist, *Thuraissigiam*, 591 U.S. at 123, and so there was no detention of aliens in aid of deportation. Expulsion or banishment was instead a criminal punishment applying equally to aliens and natural-born subjects. *See* W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 34 (1890); Javier Bleichmar, *Deportation as Punishment*, 14 Geo. Immigr. L.J. 115, 130 (1999).

Compared with natural-born subjects, aliens had only a few specifically defined legal disabilities. Blackstone's *Commentaries*—"usually a satisfactory exposition of the common law of England," *Thuraissigiam*, 591 U.S. at 117 (quotation marks omitted)—mentions just three when describing the "principal lines, whereby [aliens] are distinguished from natives," Blackstone, *supra*, at 371. Aliens could not hold office, could not permanently own land, and could be charged higher customs duties. *Id.* at 371-74. In theory, aliens were "liable to be sent home," *id.* at 260, but there are no clear examples of that happening from the sixteenth through the eighteenth centuries, *see* Craies, *supra*, at 33-36.

In the early American states, aliens likewise had the same civil rights as citizens did and could be denied only "political" rights such as voting and holding office. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 48 (1998). The Fifth Amendment's deliberate choice of "person" over "citizen" reflects that backdrop, as well as the Amendment's roots in Magna Carta, which

protected foreigners' freedom to "move about" the country. Magna Carta 1215, ¶ 41, *Avalon Project*, https://avalon.law.yale.edu/medieval/magframe.asp; *see* 1 Matthew Hale, *History of the Pleas of the Crown* 93 (1736) (while Magna Carta's text refers to "merchants," its guarantee of "the king's protection" covered "all foreigners living or trading here").

Notably, the "consent"-based account of constitutional rights offered recently by Judge Thapar, *see Escobar-Temal*, 2025 WL 3632831, at *13 (Thapar, J., dissenting in part and concurring in the judgment), which would restrict constitutional rights to citizens, is precisely the argument that was advanced to support the "notorious" Alien Act of 1798, "a temporary war measure" that "went unenforced," *Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J., concurring in part and concurring in the judgment), and which "left no permanent traces in the constitutional jurisprudence of the country," 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1288 (1833).

Some of the Alien Act's proponents similarly argued that aliens lacked rights because the Constitution was a "compact … made between citizens only." 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834). But James Madison thoroughly refuted this account, explaining that under common law and the law of nations, noncitizens residing in the United States were "under a local and temporary allegiance, and entitled to a correspondent protection," including "rights

under the Constitution," and therefore were shielded from any "arbitrary and unusual process." *Madison's Report on the Virginia Resolutions*, *reprinted in* 4 *Elliot's Debates* 546, 556-57, 559; *see id.* at 556 ("[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection."). Thomas Jefferson likewise explained in the Kentucky Resolutions that summary imprisonment of noncitizens would be "contrary to the Constitution, one amendment in which has provided, that 'no person shall be deprived of liberty without due process of law.'" *Id.* at 541; *accord* 8 Annals of Cong. 1956 (1798) (Rep. Gallatin) (the Due Process Clause "speaks of persons, not of citizens"); *id.* at 2013 (Rep. Livingston) ("Unless … an alien is not a 'person,' … we must allow that all these provisions extend equally to aliens and natives.").[2]

[2] Inexplicably, Judge Thapar quotes Madison for the proposition that "because aliens are not parties to the Constitution … they have no right to its protection," *Escobar-Temal*, 2025 WL 3632831, at *20 (Thapar, J.), when that is the argument Madison was *refuting*.

Similarly, Judge Thapar plainly misstates Blackstone's account of aliens' rights in England, which were not restricted to "safe-passage." *Id.* at *15. And in purporting to discuss "founding-era history," he relies on descriptions of aliens' legal status 250 years before the Founding, *see id.* (quoting law review article describing sixteenth-century legislation), despite the Supreme Court's admonition that the Constitution must be interpreted "by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*," not centuries earlier. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 39 (2022).

A citizens-only account of constitutional rights was also the basis of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which drew on 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), in order to define constitutional rights as "privileges of the citizen," Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1223 (1992). The Fourteenth Amendment "overruled *Dred Scott*'s holding that blacks could never be 'citizens'" by redefining that term, *id.* at 1223 n.134, but, conspicuously, the Amendment then framed the rights to equal protection and due process "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).

That was no accident: the Amendment's Framers extensively discussed "the rights of aliens as 'persons.'" Neuman, *supra*, at 941; *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); *id.* at 1090. They aimed "to align" the standards governing the states and the federal government, as they already understood the Fifth Amendment to be "a guarantee to all within the United States—not just to citizens." Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 729-30 (1995). By confirming not only that formerly enslaved persons were citizens, "but also that even non-citizens within the United States had due process rights," the Fourteenth Amendment "resolved

debate over both of these issues … unequivocally rejecting the Alien Friends Act and *Dred Scott*." Rosenfeld, *supra*, at 730, 728. The Supreme Court embraced that view of the Fourteenth Amendment, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and, at the first opportunity, the Fifth, *Wong Wing*, 163 U.S. at 238.

As history confirms, when the Framers used the word *person* instead of *citizen*, they "intended what they have said." *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).

C. The government claims that noncitizens in removal proceedings are entitled only to whatever process Congress provides, but the Fifth Amendment guarantees certain procedural safeguards whether or not they are statutorily mandated—as precedent makes clear.

Long ago, the Court held that due process requires noncitizens to receive notice and an opportunity to be heard before removal. *Kaoru Yamataya*, 189 U.S. at 100-101. "Deportation without a fair hearing," the Court has stressed, "is a denial of due process." *United States ex rel. Vajtauer v. Comm'r of Immigr.*, 273 U.S. 103, 106 (1927); *see Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) (granting habeas relief because hearing that unduly limited evidence "was not a fair hearing"). Because "the liberty of an individual is at stake" in removal, "the procedure by which he is deprived of that liberty" must "meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

Going further, the Court held that the government must "establish the facts supporting deportability by clear, unequivocal, and convincing evidence," even though "Congress ha[d] not addressed itself to the question of what degree of proof is required in deportation proceedings." *Woodby v. INS*, 385 U.S. 276, 284 (1966). The Court also has held that due-process restrictions on detention apply even after noncitizens have exhausted the procedures supplied by Congress and have received a final removal order. *Zadvydas*, 533 U.S. at 690-96.

The Fifth Amendment's independent role is also why the Court has held that the void-for-vagueness doctrine, "an 'essential' of due process," functions the same way in removal proceedings that it does in criminal prosecutions. *Dimaya*, 584 U.S. at 155 (plurality op.). Indeed, the Court "long ago held that the most exacting vagueness standard should apply in removal cases," forbidding "a more permissive form" of this safeguard in immigration enforcement. *Id.* at 156.

Even when addressing a wartime statute that the Court concluded "largely preclude[s] judicial review" (the Alien Enemies Act), the Court unanimously held that noncitizens targeted under the statute are "entitled to judicial review as to questions of interpretation and constitutionality of the Act," as well as to whether they are properly subject to it. *J.G.G.*, 604 U.S. at 672 (quotation marks omitted). Despite the absence of any statutory provision, the Fifth Amendment entitles those individuals to "notice and an opportunity to challenge their removal." *Id.* at 673.

D. The government cites just one case, *DHS v. Thuraissigiam*, for its claim that in the removal context the process due is "coextensive" with the procedures provided by Congress. But *Thuraissigiam* establishes nothing of the sort. It addressed a noncitizen who was apprehended while trying to make his initial entry into the country—not someone residing here like Petitioner. And the Supreme Court has long been clear that a noncitizen "on the threshold of initial entry stands on a different footing" under the Fifth Amendment than noncitizens already living here. *Mezei*, 345 U.S. at 212.

Because foreigners lack entitlement to "the privilege of entry," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), they have no liberty interest to protect in their "initial admission," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). And individuals detained at ports of entry are "regarded as stopped at the boundary line," even if they are technically being held on U.S. soil. *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958); *cf. Verdugo-Urquidez*, 494 U.S. at 271 (mere presence inside the border resulting from involuntary custody does not "indicate any substantial connection with our country" as required to make someone part of "the people" under the Fourth Amendment).

Under this fundamental distinction, it is only the category of individuals seeking initial entry for whom "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of

law." *Kaoru Yamataya*, 189 U.S. at 98. In contrast, the government may not deny "notice" or "an opportunity to be heard" to "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." *Id.* at 101.

These principles were reaffirmed—not renounced—in *Thuraissigiam*. That decision relied on the "century-old rule regarding the due process rights of an alien *seeking initial entry*," and applied "[t]he same" rule to someone who "was apprehended in the very act of attempting to enter this country." *Thuraissigiam*, 591 U.S. at 139-40, 118 (emphasis added). It did not matter that "he succeeded in making it 25 yards into U.S. territory before he was caught." *Id.* at 139. "Like an alien detained after arriving at a port of entry," he remained "'on the threshold.'" *Id.* at 140 (quoting *Mezei*, 345 U.S. at 212). In those circumstances, the Court held, he "cannot be said to have 'effected an entry.'" *Id.* (quoting *Zadvydas*, 533 U.S. at 693); *see id.* at 107 ("Congress is entitled to set the conditions for an alien's lawful entry" and "an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause").

Thuraissigiam is off-point here for another reason: it addressed admission, not detention. The habeas petitioner in that case requested only "a new opportunity to apply for asylum and other applicable forms of relief" and "made no mention of release from custody." *Id.* at 115 (quotation marks omitted). He "did

not ask to be released," but instead "sought entirely different relief: vacatur of his removal order and an order directing [DHS] to provide him with a new … opportunity to apply for asylum." *Id.* at 117-18 (quotation marks omitted). Rather than argue that he was wrongly deprived of his physical liberty, he argued that the governing statute "violate[d] his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding." *Id.* at 138. Simply put, he sought a chance at legalized admission, not release from detention.

In rejecting this claim, *Thuraissigiam* merely reconfirmed that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*." *Id.* at 139 (emphasis added) (quoting *Landon*, 459 U.S. at 32). But despite the government's near-plenary authority to decide whom "to admit or exclude," *id.*, it has never had comparable authority to decide whom to incarcerate—as the next sections discuss.

II. Supreme Court Precedent Does Not Allow Categorical Detention of Every Person Who Entered the Country Without Inspection.

The government cites *Demore v. Kim* for the notion that "statutory provisions denying bond during administrative removal proceedings do not violate the due process clause." Appellant Br. 47. That grossly misconstrues *Demore*, which concerned "a special rule for aliens who have committed certain dangerous crimes." *Preap*, 586 U.S. at 396. *Demore* permitted Congress to require a "brief period" of mandatory detention for "a subset of deportable criminal aliens" whom

Congress deemed especially dangerous based on extensive findings, and who were convicted after receiving the "full procedural protections" afforded in criminal prosecutions. *Demore*, 538 U.S. at 513, 521, 525 n.9. It comes nowhere near supporting the mandatory detention of every person who enters the country without inspection.

Demore rejected a facial challenge to 8 U.S.C. § 1226(c), a statute 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.'" *Preap*, 586 U.S. at 398 (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). Upholding the statute, *Demore* emphasized the extensive legislative findings that supported it—repeatedly citing the evidence Congress gathered about this particular group of noncitizens.[3]

Critical to *Demore*, therefore, was Congress's determination that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight,"

[3] *See, e.g.*, *Demore*, 538 U.S. at 518 (citing Senate hearing and Senate report); *id.* at 519 (citing DOJ and House reports); *id.* at 521 (referencing "studies presented to Congress"); *see also id.* at 518 ("Congress' investigations showed"); *id.* ("[o]ne study showed"); *id.* (citing additional Senate report); *id.* at 518-19 (citing additional House hearing that referenced 1986 study); *id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected.").

Demore, 538 U.S. at 520, justifying a special rule for this subgroup. As the Court stressed, "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large." *Id.* at 528. And "[i]t was following those Reports that Congress … require[d] the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521; *see Velasco Lopez v. Decker*, 978 F.3d 842, 850 n.7 (2d Cir. 2020) (*Demore* "focused on the heightened risk posed" by the "narrow class of noncitizens" affected).

Demore also hinged on the "very limited time of the detention at stake," 538 U.S. at 529 n.12, which the Court understood to be a "brief period," *id.* at 513, lasting "roughly a month and a half in the vast majority of cases," *id.* at 530. Indeed, the Court distinguished the *Zadvydas* decision based on the "much shorter duration" of the detention periods it considered in *Demore*. *Id.* at 528.

None of the factors on which *Demore* relied to uphold Section 1226(c) supports mandatory detention under Section 1225 of anyone who enters without inspection. That policy "does not apply narrowly to a small segment of particularly dangerous individuals," but instead reaches "broadly" to include people the government seeks to remove "for many and various reasons." *Zadvydas*, 533 U.S. at 691 (quotation marks omitted). Unlike with "criminal

aliens" under Section 1226(c), Congress made no determination that every person who enters without inspection should categorically be presumed dangerous or a flight risk. Much less did Congress marshal the depth of evidence supporting such a determination to which the Court deferred in *Demore*. Detention under Section 1225 is not contingent on prior convictions "secured following full procedural protections" of the criminal justice system. *Demore*, 538 U.S. at 525 n.9. And the government has not shown that detention here averages only a "brief period" of a "month and a half." *Id.* at 513, 530 (citation omitted).

Outside of *Demore*, the Supreme Court has only once permitted detention without bond hearings during removal proceedings. And that case, *Carlson v. Landon*, 342 U.S. 524 (1952), relied on the same combination of factors that were present in *Demore* but absent here.

Like *Demore*, *Carlson* upheld legislation in which Congress, supported by evidentiary findings, determined that a particular class of noncitizens was especially dangerous: "active alien communists." *Carlson*, 342 U.S. at 526. Congress gave the Attorney General "discretion," 8 U.S.C. § 156 (1952), to deny bail to members of this group. *See* 342 U.S. at 527.

The Court "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 determination—the "legislative judgment of evils," *Carlson*, 342 U.S. at 543—that *all* active foreign Communists present in the United States endangered the nation: "because of Congress' understanding of their attitude toward the use of force and violence … to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention." *Id.* at 541.

The detention in *Carlson* also directly implicated national security, calling for "heightened deference to the judgments of the political branches." *Zadvydas*, 533 U.S. at 696. "What was significant in *Carlson*," therefore, was "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' Rts., Inc.*, 502 U.S. 183, 193 (1991). This "congressional determination" was "the statutory policy that justified the detention." *Id*. at 194.

The Attorney General, moreover, was "not left with untrammeled discretion as to bail." *Carlson*, 342 U.S. at 543; *see id.* ("Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity."). Finally, "the problem of … unusual delay in deportation hearings [was] not involved" in *Carlson*. *Id*. at 546.

In sum, the same constellation of factors that supported the statute in *Demore* also aligned in *Carlson*. Congress rendered a clear legislative judgment about a particular class of noncitizens, based on a "reasonable apprehension" of their unique dangerousness. *Id*. at 542. Prolonged detention was not at issue, and detainees could contest the need for their confinement in individualized judicial hearings. *See Demore*, 538 U.S. at 514 & n.3.

Carlson and *Demore* illustrate what it takes for immigration detention without bond hearings to be compatible with due process. And none of the critical factors on which they relied exists here. Far from supporting mandatory detention of every person who enters without inspection, these decisions imply its invalidity.[4]

III. Denying Bail Hearings to Every Person Who Enters Without Inspection Violates Due Process.

Additional precedent confirms what *Carlson* and *Demore* suggest: blanket detention of every noncitizen who entered the country without inspection violates the Due Process Clause.

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[4] The government has sometimes cited an additional case to support mandatory immigration detention, *Reno v. Flores*, 507 U.S. 292 (1993), but *Reno* involved "alien *juveniles*," *id.* at 295, who had "no available parent, close relative, or legal guardian" to take them—and "juveniles, unlike adults, are always in some form of custody," *id.* at 302 (quotation marks omitted). *Reno* simply agreed that people "other than parents, close relatives, and guardians" are unsuitable custodians of minors. *Id.* at 313.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. In "certain narrow circumstances," individuals "may be subject to limited confinement" without a criminal conviction. *Foucha*, 504 U.S. at 80. But because "liberty is the norm, and detention … without trial is the carefully limited exception," *id.* at 83 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)), the government typically may imprison people without a criminal trial only by persuading an impartial decisionmaker of the need for detention after a fair hearing.

Specifically, the government must clear that hurdle in order 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 standard applies before the government may involuntarily commit people with dangerous mental illnesses. *Addington v. Texas*, 441 U.S. 418, 433 (1979). So too before it may detain individuals found incompetent to stand trial, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), or not guilty by reason of insanity, *Foucha*, 504 U.S. at 86. Each of these scenarios requires an adversarial hearing before a neutral decisionmaker in which the government has the burden of showing the need for detention.

Indeed, due process requires a fair hearing before an independent decisionmaker before depriving a person of *any* significant liberty interest—whether or not that person is a citizen or the government is exercising immigration powers. That standard is constitutionally required in removal proceedings, *Woodby*, 385 U.S. at 277, denaturalization proceedings, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), expatriation proceedings, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), proceedings to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), and proceedings to discontinue essential welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970).

Thus, across "various civil cases" involving citizens and noncitizens, in immigration proceedings and elsewhere, a fair hearing with the burden on the government is required to deprive people of "particularly important individual interests." *Addington*, 441 U.S. at 424. This standard routinely applies "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).

The same standard generally must be met to incarcerate noncitizens during removal proceedings. Detention "*for any purpose* constitutes a significant deprivation of liberty." *Foucha*, 504 U.S. at 80 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983) (emphasis added)). And noncitizens' vulnerability to removal does not mean they have less of an interest in bodily freedom than

citizens—for citizens too may be detained to ensure presence at trial or protect the community in the interim, as the Supreme Court noted when it first sanctioned immigration detention. *See Wong Wing*, 163 U.S. at 235 (approving of "temporary confinement, as part of … expulsion of aliens," because "[d]etention is a usual feature … of arrest on a criminal charge").

Importantly, the right to "contest[] the lawfulness of restraint and secur[e] release" differs from "the right to enter or remain in a country." *Thuraissigiam*, 591 U.S. at 117. Noncitizens' liberty interest in freedom from detention does not therefore depend on any right to live in the United States. (Nor does successfully challenging detention confer any such right, *see Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908)). That is why the Due Process Clause's safeguards against detention continue to apply to noncitizens even after they receive a final removal order. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238.

For this reason, the government's broad discretion to set immigration policy does not mean it can indiscriminately imprison noncitizens without showing the need for detention in a fair hearing. Even with respect to the underlying question of whether a person may be removed—which goes to the core of the government's near-plenary immigration authority—due process requires a fair hearing before a neutral decisionmaker. *A.A.R.P.*, 605 U.S. at 94. The ancillary power to detain in aid of deportation is surely no broader. Indeed, because the government's

detention power comes from the need to effectuate deportation and prevent harm in the interim, *Carlson*, 342 U.S. at 538, the government has no interest at all in detaining noncitizens who are not actually flight risks or safety threats, *see Addington*, 441 U.S. at 426.

Finally, although the enforcement of removal policies may be important, so is protecting the community from people accused of "the most serious of crimes," including violent offenses "for which the sentence is life imprisonment or death." *Salerno*, 481 U.S. at 747. In that context, "the Government interests are overwhelming," and "Congress specifically found that [such defendants] are far more likely to be responsible for dangerous acts in the community after arrest." *Id.* at 750. Still, preventive detention of these dangerous felony suspects requires an "adversary hearing" in which the government must "convince a neutral decisionmaker" that confinement is necessary. *Id.*

So too here. The immigration context does not allow deviation from the process required whenever the "grave consequences" of a significant liberty deprivation are threatened. *Chaunt*, 364 U.S. at 353. Instead, the Supreme Court has demanded fair hearings for both removal and denaturalization, in light of the "drastic deprivations" involved. *Woodby*, 385 U.S. at 285-86. The Court routinely draws on precedent from outside the immigration context when defining the due process rights of noncitizens in removal proceedings. *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. Just recently, the Court relied on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (addressing adequacy of notice regarding property deprivations), in concluding that noncitizens detained as "enemy aliens" are "entitled to notice and opportunity to be heard," *J.G.G.*, 604 U.S. at 673. The Court also recently relied on *Carey v. Piphus*, 435 U.S. 247 (1978) (addressing adequacy of process for student suspensions), in defining those same noncitizens' rights more concretely, *see A.A.R.P.*, 605 U.S. at 94.

Likewise, the Supreme Court repeatedly draws on precedent concerning noncitizens when defining the process due to citizens for comparably 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); *see also Salerno*, 481 U.S. at 749 (stating that mandatory detention of serious felony suspects "must be evaluated in precisely the same manner" as in earlier preventive detention cases, which included removal cases).

In the removal context, as elsewhere, due process allows a serious liberty deprivation like preventive detention only after a fair hearing before a neutral decisionmaker. The new policy of indiscriminately denying bail hearings to all people who enter without inspection is therefore unconstitutional.

An application of *Mathews v. Eldridge* leads to the same result. Freedom from incarceration ranks among the "most elemental of liberty interests," *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004), and detention separates individuals from their families, *Hernandez-Lara v. Lyons*, 10 F.4th 19, 33 (1st Cir. 2021), while often subjecting them to "conditions indistinguishable from those imposed on criminal defendants sent to prison following convictions for violent felonies," *Velasco Lopez*, 978 F.3d at 850. The risk of error—that people who are neither dangerous nor flight risks will needlessly be imprisoned for months or years—is immense, and the "obvious" remedy is "an individualized bond hearing" to "consider the noncitizen's dangerousness and risk of flight." *Black v. Decker*, 103 F.4th 133, 153 (2d Cir. 2024). Meanwhile, the government "has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight," *id.* at 154 (citation omitted), or any reason why it cannot offer the bond hearings it has provided for decades.

In sum, noncitizens living in this country may not be incarcerated during removal proceedings simply because they entered without inspection. Due process requires the government to show a need for their detention in a fair hearing.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

Dated: January 9, 2026

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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 6,415 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.

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