In the United States Court of Appeals for the Fifth Circuit

No. 26-50183

IGNACIO SOSNAVA RODRIGUEZ,

Petitioner-Appellee,

v.

SYLVESTER M. ORTEGA, in his official capacity as Director of the San Antonio Field Office of ICEs Enforcement and Removal Operations; MARKWAYNE MULLIN, Secretary, U.S. Department of Homeland Security; PAMELA BONDI, U.S. Attorney General; CHARLOTTE COLLINS, in her official capacity as Warden of the T. Don Hutto Detention Center; DEPARTMENT OF HOMELAND SECURITY; DOJ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,

Respondents-Appellants.

No. 26-50219

ALEJANDRO VILLEGAS ANGEL,

Petitioner-Appellee,

v.

MARKWAYNE MULLIN, Secretary, U.S. Department of Homeland Security; TODD WALLACE BLANCHE, Acting U.S. Attorney General; MIGUEL VERGARA, San Antonio Field Office Director for Enforcement and Removal; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE GENERAL COUNSEL,

Respondents-Appellants.

No. 26-50221

MIGUEL ANGEL GOMEZ ALVARADO,

Petitioner-Appellee,

v.

MIGUEL VERGARA, in his official capacity as the Acting Director of San Antonio Field Office for U.S. Immigration and Customs Enforcement; TODD LYONS, in his capacity as the Acting Director for the U.S. Immigration and Customs Enforcement; MARKWAYNE MULLIN, Secretary, U.S. Department of Homeland Security,

Respondents-Appellants.

On Appeal from the United States District Court for the Western District of Texas

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

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: April 24, 2026

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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 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

Imprisonment without trial deviates from the norm of physical liberty protected by the Due Process Clause. And *mandatory* imprisonment without trial—detaining people regardless of whether they are found dangerous or a flight risk—is an extraordinary measure that the Constitution permits in only the narrowest circumstances. Yet as this Court interprets it, 8 U.S.C. § 1225(b) now requires the government to incarcerate every noncitizen resident who qualifies as an "applicant for admission," denying them even a bond hearing to determine if the confinement is justified. The Fifth Amendment prohibits the federal government from subjecting any "person" to such an arbitrary deprivation of the most basic form 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.

Noncitizens have the same constitutional protection against arbitrary imprisonment that citizens do. The Due Process Clause covers "all persons within the [nation's] territorial jurisdiction, without regard to … nationality." *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted). It protects "all persons, aliens and citizens alike." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

That settled understanding reflects the Constitution's original meaning. Under the Founding-era common law, "aliens" enjoyed the same protections against liberty deprivations as citizens. Visting aliens were regarded as among "the people" of England, 1 William Blackstone, *Commentaries on the Laws of England* 366, 370 (1791), and these aliens, just like natural-born subjects, could challenge unlawful detention and other injuries to their persons and property in court. Because there was no deportation, the common law did not allow anything resembling preventive detention of aliens in aid of deportation. Instead, aliens were seized and expelled only in the same way that subjects were—as a criminal punishment.

The Founders understood the common law's protections for noncitizens, and the Fifth Amendment established that no "person" (not "citizen") could be deprived of liberty without due process of law. James Madison, the Fifth Amendment's author, specifically championed noncitizens' constitutional right to be free from any "arbitrary and unusual process." *Madison's Report on the*

Virginia Resolutions (1800), *reprinted in* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 559 (Jonathan Elliot ed., 1836). Later, the Fourteenth Amendment removed all doubt that where the Constitution uses the word "person," it protects citizens and noncitizens alike. And for nearly all of American history, the government has lacked the power to detain noncitizens without bail. The mandatory detention scheme for "criminal aliens" approved in *Demore v. Kim*, 538 U.S. 510 (2003), is a novel and limited departure from the nation's history and tradition.

Although detention may be used to effectuate removal, "the 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), "whether their presence here is lawful, unlawful, temporary, or permanent," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). And preventive detention is a "carefully limited" exception to the "norm" of physical liberty under that Amendment. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (citation omitted). As such, it generally is permitted only when the need for a person's detention is shown in a fair hearing before a neutral decisionmaker.

Resisting that rule, the government argues that noncitizens who came to the United States unlawfully can claim only whatever process the immigration statutes provide. But it is settled that the Due Process Clause protects all persons "who

have once passed through our gates, *even illegally*." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (emphasis added). The government 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 "deprived of his liberty" without an opportunity to be heard regarding "the matters upon which that liberty depends." *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

Physical presence, not immigration status, entitles people to these constitutional safeguards. The government's supposed authority to the contrary, *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), 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. Moreover, the petitioner in *Thuraissigiam* was seeking a chance for legal admission, not release from detention. *Thuraissigiam* merely reconfirmed that "an alien seeking initial admission to the United States … has no constitutional rights *regarding his application*." *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added)).

Nor does *Demore v. Kim* support detention without bail under Section 1225(b). 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," *Demore*, 538 U.S. at 513, 521, whom Congress deemed especially risky based on extensive findings, and who already received the "full procedural protections" of a criminal trial, *id.* at 530. None of the factors on which *Demore* relied justifies denying bond hearings to everyone who entered the country without inspection.

On the contrary, as *Demore* implies, mandatory detention of every "applicant for admission," 8 U.S.C. § 1225(b)(2)(A), found within this country violates due process. Congress has not designated this group categorically dangerous in legislation to which courts could reasonably defer. And across diverse civil contexts, the government may imprison people without a criminal trial only when an impartial decisionmaker agrees on the need for a person's detention.

The Fifth Amendment offers no basis for carving out immigration detention as the lone exception to that rule. 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," as Petitioners do here, does not depend on having any "right to enter or remain in a country," *Thuraissigiam*, 591 U.S. at 117. The government's broad discretion over immigration policy does

not give it carte blanche to lock up noncitizens without trial or even a bond hearing.

ARGUMENT

I. The Due Process Clause Protects Noncitizens from Arbitrary Detention.

A. The Framers knew how to distinguish citizens from noncitizens. Only a "citizen," for instance, may be elected to Congress. U.S. Const. art. I, § 2, cl. 2. But the Framers chose to establish 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'").

Thus, "all persons, aliens and citizens alike, are protected by the Due Process Clause," and that protection applies "[e]ven [to] one whose presence in this country is unlawful." *Diaz*, 426 U.S. at 77-78. Due process shields those within "our geographic borders," *Zadvydas*, 533 U.S. at 693, including 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," the implementation of that power must comply with the "paramount law of the

constitution." *Carlson v. Landon*, 342 U.S. 524, 534, 537 (1952) (quotation marks omitted). The government, therefore, cannot "disregard the fundamental principles that inhere in 'due process of law'" when attempting to remove people who 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, "the Government must respect the procedural safeguards of due process" in "the enforcement of these policies." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Regardless of a noncitizen's "ultimate right to remain in the United States," his "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953).

B. The Supreme Court's recognition of noncitizens' due process rights reflects the Framers' original understanding. The concept of due process came from English common law, *see Kerry v. Din*, 576 U.S. 86, 91-92 (2015) (Scalia, J.), and the "settled usages" of common law provided the original standards for the Due Process Clause, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855). Those standards gave "aliens" the same protection 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). Like subjects, aliens 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). And they could "challenge Executive and private detention." *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

The common law did not recognize anything resembling preventive detention of aliens in aid of deportation. Civil deportation did not even exist in the Founding era. *Thuraissigiam*, 591 U.S. at 123. Instead, banishment and expulsion were criminal punishments that applied to aliens no differently than 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 subjects, aliens had only a few specifically defined legal disabilities. Blackstone's *Commentaries*—"usually a satisfactory exposition of the common law," *Thuraissigiam*, 591 U.S. at 117 (quotation marks omitted)—mentions just three ways that aliens were "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 choice of "person" over "citizen" reflects that backdrop, as well as the Amendment's roots in Magna Carta, which protected foreigners' freedom "to go out of and come into England safely and securely and stay and travel throughout." Magna Carta 1225, ¶ 30, *National Archives*, https://www.nationalarchives.gov.uk/education/resources/magna-carta/magna-carta-1225-westminster/; *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").

At the Founding, then, no form of detention applied only to aliens, or applied differently to aliens than to subjects. Under the common law's "settled usages," *Murray's Lessee*, 59 U.S. at 277, aliens had the same claim to physical liberty and legal process that citizens did.[2]

[2] The lone exception was 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 are "imposed temporarily as an incident of war and not as an incident of

C. Were there any doubt at the Founding that noncitizens are entitled to due process, constitutional liquidation and the amendment process dispelled it.

Despite the Fifth Amendment's clear text, some proponents of the 1798 Alien Act—a "notorious" and "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)—claimed that noncitizens lacked constitutional rights "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, the Constitution was a "compact … made between citizens only." 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834).

Opponents of the Alien Act, however, defended noncitizens' rights in terms later vindicated by history. The Fifth Amendment, they stressed, "speaks of persons, not of citizens," so "[u]nless … an alien is not a 'person,'" its protections "extend equally to aliens and natives." *Id.* at 1956, 2013. In this regard, "the Constitution expressly excludes any …. distinction between citizen and alien." *Id.* at 2012. James Madison explained that noncitizens 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

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alienage"); 4 *Elliot's Debates* 554 (James Madison distinguishing alien enemies as "obviously and so essentially distinct" from other aliens).

from any "arbitrary and unusual process." 4 *Elliot's Debates* 546, 556-57, 559; *see id.* at 556 ("it does not follow, because aliens are not parties to the Constitution, … they have no right to its protection"). Thomas Jefferson likewise wrote that summarily imprisoning 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.

The short-lived Alien 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). But a citizens-only account of constitutional rights was later 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), defining 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,'" *id.*, but then framed its equal protection and due process guarantees "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 federal government, as they already understood the Fifth Amendment as "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," "rejecting the Alien Friends Act and *Dred Scott*." *Id.* at 730, 728. The Supreme Court embraced that view of the Fourteenth Amendment, *see Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and—at the first opportunity—the Fifth Amendment, *see Wong Wing*, 163 U.S. at 238.

II. Presence in the United States, Not Immigration Status, Confers Due Process Rights.

According to the government, noncitizens who enter the country without permission can claim only "whatever process is expressly conferred by Congress." Appellants Br. 3 (quotation marks omitted). Wrong: the Fifth Amendment protects everyone present in this country, regardless of immigration status, from arbitrary imprisonment.

Even when noncitizens arrive "surreptitiously, clandestinely, unlawfully, and without any authority," the government lacks "absolute, arbitrary power" to

deprive them of liberty. *Kaoru Yamataya*, 189 U.S. at 87, 101. Denying such individuals an opportunity to be heard would violate the Constitution. *Id.* at 101. "Deportation without a fair hearing," for instance, "is a denial of due process." *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 due to absence of "a fair hearing"). Whenever "the liberty of an individual is at stake," citizen or noncitizen, 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).

To illustrate, before federal statutes specified the degree of proof required in deportation proceedings, due process already required the government to establish its case by clear and convincing evidence. *Woodby v. INS*, 385 U.S. 276, 284 (1966). Noncitizens who exhaust the procedures supplied by law and receive a final removal order are still protected against arbitrary detention. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238. The void-for-vagueness doctrine, "an 'essential' of due process," limits the application of vague statutes in removal proceedings the same way it does in criminal prosecutions. *Dimaya*, 584 U.S. at 155 (plurality op.). Even under a wartime statute with virtually no protections—the Alien Enemies Act—the Fifth Amendment entitles noncitizens to "notice and an opportunity to challenge their removal." *J.G.G.*, 604 U.S. at 672-73.

These due process rights do not require lawful admission. Due process shields all those "who have once passed through our gates, *even illegally*." *Mezei*, 345 U.S. at 212 (emphasis added). It thus protects noncitizens who entered "surreptitiously, clandestinely, [and] unlawfully," *Kaoru Yamataya*, 189 U.S. at 87, or whose presence is "unlawful" or "transitory," *Diaz*, 426 U.S. at 77.

The government cites *Thuraissigiam* to the contrary, but it simply applied the longstanding distinction between noncitizens "at the threshold of initial entry" and those already living here. 591 U.S. at 107. 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 protectable liberty interest in their "initial admission," *Plasencia*, 459 U.S. at 32. And foreigners detained at ports of entry are "regarded as stopped at the boundary line," even if later transferred to U.S. soil. *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958); *cf. Verdugo-Urquidez*, 494 U.S. at 271 (distinguishing residence in this country from mere presence inside the border resulting from involuntary custody). Someone who already has entered and begun residing here, however, "stands on a different footing." *Mezei*, 345 U.S. at 212.

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); *see id.* at 108 (he was "caught trying to enter"). 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).

Thuraissigiam is also off-point because it involved only an alleged right to seek *lawful admission*, not freedom from physical confinement. The petitioner requested "a new opportunity to apply for asylum" 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). He argued only 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, the petitioner sought a chance at legalized admission, not release from detention. Rejecting that claim, *Thuraissigiam* merely reconfirmed that "an alien seeking

initial admission to the United States … has no constitutional rights *regarding his application*." *Id.* at 139 (quoting *Plasencia*, 459 U.S. at 32 (emphasis added)).[3]

The government's other two cases are no better. The Court did not even construe the Fifth Amendment in *Kaplan v. Tod*. The petitioner in that case challenged her deportation as statutorily unauthorized, and the Court ruled only that she "never has entered the United States *within the meaning of the law*." 267 U.S. 228, 231 (1925) (emphasis added); *see id.* at 230 (despite parole, she had not entered "within the meaning of the Act"). And *Landon v. Plasencia*, like *Thuraissigiam*, addressed the rights of a noncitizen trying to enter the country who was asserting a "right to admission." 459 U.S. at 35. The Court noted in passing that "once an alien gains admission to our country … his constitutional status changes," *id.* at 32, but it did not say that "only" lawful admission confers due process rights, as the government inaccurately claims, *see* Appellants Br. 30. The Court has consistently and explicitly held the opposite. *Mezei*, 345 U.S. at 212; *Kaoru Yamataya*, 189 U.S. at 87; *Diaz*, 426 U.S. at 77.

III. Detention Without Bond Under 8 U.S.C. § 1225(b) Violates Due Process.

A. The *Glucksberg* test does not apply.

[3] On top of that, the government misquotes *Thuraissigiam*, which refers to foreigners who have never "*acquired any domicil or residence within the United States,* nor even been admitted into the country pursuant to law." 591 U.S. at 139 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added)). The government omits the italicized language. *See* Appellants Br. 29.

The government is plainly wrong about which due process framework applies here. Challenges to bodily imprisonment are not assessed under *Washington v. Glucksberg*, 521 U.S. 702 (1997), which requires identifying a "fundamental right" that generally may not be infringed "*at all*, no matter what process is provided." *Id.* at 721. The Supreme Court has never used that test in cases involving freedom from detention, including immigration cases.

Instead, the *Glucksberg* standard gives "heightened protection" to certain *other* "liberty interests," *id.* at 720, that are "unenumerated," *Dep't of State v. Muñoz*, 602 U.S. 899, 903 (2024). Because "[i]dentifying unenumerated rights carries a serious risk of judicial overreach," *id.* at 910, courts impose a demanding "threshold requirement" of identifying a "fundamental right" that is "deeply rooted in our legal tradition," *Glucksberg*, 521 U.S. at 722; *see Kerry*, 576 U.S. at 91-93.

"Freedom from bodily restraint," however, is not an unenumerated right—it "has always been at the core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80. As Justice Scalia explained, the "personal liberty" originally safeguarded by due process centered on "the power of locomotion … without imprisonment or restraint." *Kerry*, 576 U.S. at 92 (quoting Blackstone, *supra*, at 134). Because freedom from confinement is the prototypical "liberty" that the Fifth Amendment expressly protects, *Glucksberg* is irrelevant. Indeed, the notion that the government can lock people behind bars without a trial or even a

bail hearing whenever this is "rationally related to legitimate government interests," Appellants Br. 33 (quoting *Glucksberg*, 521 U.S. at 728), is absurd.

B. Mandatory immigration detention is a historical outlier.

Because the government invokes the nation's history and tradition, it bears discussing how backward the government has its history. Detaining noncitizens without bail is the novelty here—a modern deviation from the nation's deeply rooted traditions.

At the Founding, there was no civil deportation, and hence no deportation-related detention of any kind. *See supra* at 8. Even the short-lived Alien Act did not authorize detention until a person had been ordered to leave the country. *See* An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798). Indeed, the John Adams administration regarded the Act as inadequate because "the president was not authorized to seize and confine [noncitizens] while waiting for their departure or deportation." James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 163 (1956).

For a full century after the Founding, there was no immigration detention—because there were no immigration restrictions. Aside from the never-enforced Alien Act, the first deportation measures were passed in 1888. *See* Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566-67; Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479. One measure, the Chinese Exclusion Act, authorized detention during

deportation proceedings, but federal judges routinely granted bail. *See* Lindsay Nash, *Resurrecting Immigration Releases*, 135 Yale L.J. 1533, 1564-68 (2026); *In re Ah Tai*, 125 F. 795, 797 (D. Mass. 1903) (citing cases). Congress chose to prohibit bail only for people who *already* had been ordered deported, Act of Nov. 3, 1893, ch. 14, § 1, 28 Stat. 7, 8, or who were captured while "seeking to land," Act of May 5, 1892, ch. 60, § 5, 27 Stat. 25, 25.

Meanwhile, when enforcing deportation laws outside the Chinese exclusion context, the government did not employ pretrial detention at all—only "detention of people already determined to be deportable." Nash, *supra*, at 1576. When the government finally developed a system of pretrial detention in the twentieth century, it almost simultaneously developed a system of pretrial release. *Id.* at 1587-88. The 1907 bail legislation cited by the government simply allowed the authorities, "for the first time, *to require a monetary commitment* … as a condition of release." *Id.* at 1592 (emphasis added). But "noncitizens had already been able to seek and secure release … for years." *Id.*

Throughout the twentieth century, bail remained available pending deportation proceedings. *See, e.g.*, Immigration & Nationality Act of 1952, ch. 477, § 242(a), 66 Stat. 163, 209 (providing for release and for review of custody determinations); *Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) (describing presumption of release absent danger or flight risk). Only in the late

1980s did Congress first mandate detention pending deportation proceedings—for people convicted of "aggravated felonies." *Demore*, 538 U.S. at 521. In 1996, Congress expanded the "subset of deportable criminal aliens" denied bail. *Id.*

In sum, for nearly all of American history, imprisoning and denying bail to noncitizens who lived in this country was unheard of.

C. *Demore* does not support denying bail to every noncitizen who entered without inspection.

In *Demore v. Kim*, the Supreme Court upheld mandatory detention of "criminal aliens" under 8 U.S.C. § 1226(c). Neither *Demore*'s holding nor its reasoning supports mandatory detention of every "applicant for admission" under 8 U.S.C. § 1225(b). Rather, the case concerned "a special rule for aliens who have committed certain dangerous crimes." *Preap*, 586 U.S. at 396. *Demore* allowed Congress to require a "brief period" of mandatory detention for "a subset of deportable criminal aliens," *Demore*, 538 U.S. at 513, 521, whom Congress deemed especially dangerous, based on extensive findings, and who already received the "full procedural protections" afforded in criminal prosecutions, *id.* at 525 n.9.

The provision addressed in *Demore* "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 that provision, *Demore* repeatedly emphasized the legislative findings that supported Congress's judgment about this particular group of "criminal aliens."[4]

Critical to *Demore*, therefore, was Congress's determination that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," *Demore*, 538 U.S. at 520, justifying a special rule for this group. As the Court explained, Congress had 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.[5]

"It 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

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[4] *See, e.g.*, *Demore*, 538 U.S. at 518 (citing Senate hearing and 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); *id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected.").

[5] The government excises part of this sentence to obscure *Demore*'s—and Congress's—focus on criminal aliens. *See* Appellants Br. 35 (surgically replacing "criminal aliens" with "aliens").

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," which was believed to be "roughly a month and a half in the vast majority of cases," 538 U.S. at 529 n.12, 530; *see id.* at 528.

None of the factors on which *Demore* relied supports mandatory detention under Section 1225(b). Such detention "does not apply narrowly to a small segment of particularly dangerous individuals," but instead reaches "broadly." *Zadvydas*, 533 U.S. at 691 (quotation marks omitted). Congress amassed no findings—as it did for "criminal aliens" under Section 1226(c)—that every person who enters without inspection should be presumed dangerous or a flight risk. 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 "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 relied on the same combination of factors that were present in *Demore* but are absent here.

Like *Demore*, *Carlson v. Landon* upheld legislation in which Congress, supported by evidentiary findings, determined that a particular class of noncitizens—"active alien communists"—was especially dangerous. 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 Carlson*, 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, *Carlson* deferred to Congress's "legislative judgment," 342 U.S. at 543, that *all* active foreign Communists 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.

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

In short, the same factors that supported mandatory detention in *Demore* also aligned in *Carlson*. Congress rendered a clear legislative judgment about a narrow class of noncitizens, based on a "reasonable apprehension" of their unique dangerousness, *id*. at 542, and prolonged detention was not at issue. None of those factors applies here.[6]

D. Due process requires a fair hearing to assess the need for a person's detention.

As *Carlson* and *Demore* suggest, indiscriminate detention of every noncitizen in the United States who qualifies as an "applicant for admission," 8 U.S.C. § 1225(b)(2)(A), violates the Due Process Clause.

"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.*

[6] The government has sometimes cited a third 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 (citation omitted). *Reno* simply agreed that people "other than parents, close relatives, and guardians" are unsuitable custodians of minors. *Id.* at 313; *see id.* at 302 ("'freedom from physical restraint' … is not at issue").

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.

Thus, a fair hearing before a neutral decisionmaker is required before the government may detain criminal defendants before trial, either to ensure their presence, *Bell v. Wolfish*, 441 U.S. 520, 536 (1979), or protect the safety of others, *Salerno*, 481 U.S. at 741. The same is required 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 people who are 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 in which the government must demonstrate the need for detention.

Indeed, due process requires a fair hearing before an independent decisionmaker before a person can be deprived of *any* significant liberty interest—whether or not that person is a citizen or the government is exercising immigration powers. That standard applies to 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," in immigration matters and elsewhere, a fair hearing is required to deprive people of "particularly important individual interests." *Addington*, 441 U.S. at 424.

The same requirements must normally be satisfied to detain 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 any less interest in bodily freedom than citizens. Citizens, too, may be detained to ensure their presence at trial or protect the community, as the Supreme Court noted when first signaling its approval of immigration detention. *See Wong Wing*, 163 U.S. at 235 (assuming the legitimacy 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 due process protects noncitizens from arbitrary

detention even after they receive a final removal order. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238. And noncitizens who violate the terms of supervised release can be reincarcerated. *Zadvydas*, 533 U.S. at 696.

For all these reasons, the government's discretion to set immigration policy does not mean it can indiscriminately imprison noncitizens without showing the need for detention in a fair hearing. Indeed, because the government's detention power comes from the need to effectuate deportation and prevent harm in the interim, 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 felonies "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 individuals requires an "adversary hearing" in which "a neutral decisionmaker" agrees that confinement is necessary. *Id.*

The immigration context is no exception to these settled principles. The Supreme Court routinely draws on non-immigration precedent when defining the

due process rights of noncitizens pending removal, including in recent decisions. *E.g.*, *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025); *J.G.G.*, 604 U.S. at 673; *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. Likewise, the Supreme Court repeatedly draws on immigration precedent when defining the process due to citizens. *E.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 362-63 & n.19 (1996); *Salerno*, 481 U.S. at 749; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970).

In the removal context, as elsewhere, due process permits a serious liberty deprivation like preventive detention only after a fair hearing before a neutral decisionmaker. Preventive detention with no opportunity for bail is a historical aberration that has been permitted in only the narrowest of circumstances, for reasons that do not apply here. Noncitizens living in this country may not be incarcerated without bond during removal proceedings simply because they entered the country without inspection.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

Dated: April 24, 2026

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 24, 2026.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 24th day of April, 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) and 32(a)(7)(B) because it contains 6,489 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 14-point Times New Roman font.

Executed this 24th day of April, 2026.

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