

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

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JORFRANK ALEXANDER LUGO-SOLET,

*Petitioner-Appellant,*

v.

MARKWAYNE MULLIN, et al.,

*Respondents-Appellees.*

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*On Appeal from the United States District Court  
for the Eastern District of Missouri*

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

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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*<sup>1</sup>

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 have been 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.

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<sup>1</sup> 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. Moreover, because there was no civil 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 affirmed 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 importantly, for nearly all of American history, the government has lacked the power to detain noncitizens without bail. The mandatory detention scheme approved in *Demore v. Kim*, 538 U.S. 510 (2003), is a novel departure from the nation’s history and tradition—one that is limited to the unique class of “criminal aliens” addressed in that decision.

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 has argued that noncitizens challenging their detention who were not legally admitted to the United States can claim only

whatever protections from imprisonment the immigration statutes provide. *See* Respondents-Appellants Br. 3, *Morozov v. Warden*, No. 26-2113 (8th Cir. July 16, 2026) [hereinafter “Morozov Br.”]. 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 against arbitrary imprisonment. The supposed authority to the contrary on which the government is now relying, *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), has nothing to do with detention. The petitioner there was not seeking release from detention but rather another chance for legal admission. *Thuraissigiam* merely reconfirmed that “an alien seeking initial admission to the United States ... has no constitutional rights *regarding his application*.” *Id.* (emphasis added) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

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). It permitted 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 legal admission.

On the contrary, as *Demore* itself implies, the 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 present 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 Petitioner does here, is not contingent on 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 comports with the original meaning of the Due Process Clause. 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). In the Founding era, aliens could bring actions to protect their personal and property rights just like subjects. 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” through habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

The common law did not recognize anything resembling preventive detention of aliens in connection with 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*—which is “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.<sup>2</sup>

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<sup>2</sup> 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. History has confirmed that due process shields noncitizens from arbitrary detention, even if such a right initially could have been doubted.

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, invoked constitutional text and the common law to defend 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,”

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

and therefore were shielded 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 as well, *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.” Morozov 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.” *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 of the 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, even 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). Likewise, noncitizens who exhaust the procedures supplied by law and receive a final removal order are still protected against arbitrary detention by the Fifth Amendment. *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.). And 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 claims that *Thuraissigiam* is to the contrary, but that decision has nothing to do with detention or with due process protections for physical liberty. As the Court repeatedly underscored, *Thuraissigiam* involved only an alleged right *to seek lawful admission*, not the right to freedom from arbitrary physical confinement. The petitioner there requested “a new opportunity to apply for asylum” and “made no mention of release from custody.” 591 U.S. 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 in *Thuraissigiam* sought a chance at legalized admission, not release from detention. Rejecting that claim, the Court merely reconfirmed that “an alien seeking initial admission to the United States ... has no constitutional rights *regarding his application*.” *Id.* at 139 (emphasis added) (quoting *Plasencia*, 459 U.S. at 32).

The government’s other two cases are no better. *See* Morozov Br. 35-36. 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 never said that only lawfully admitted people have due process rights. The Court has consistently and explicitly held the opposite. *See 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.**

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,” *Morozov Br. 3* (quoting *Glucksberg*, 521 U.S. at 728), is absurd.

**B. Mandatory immigration detention is a historical outlier.**

The government has invoked the nation’s history and tradition in defending its new detention policy, but it has the history entirely wrong. Detaining noncitizens without bail is the novelty here—a modern deviation from the nation’s deeply rooted traditions.

At the Founding, there was no immigration removal system, and hence no detention of any kind comparable to modern pre-removal detention. *See supra* at 8. Even the short-lived Alien Act did not authorize such detention. Instead, coercive action to effectuate removal was permitted only after a person had received an order to leave the country and had failed to comply. *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 the federal government imposed 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 prohibited bail only for people who *already* had been ordered deported, *see* 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 immigration detention in the twentieth century, it almost simultaneously developed a system of pretrial release. *Id.* at 1587-88. The 1907 bail legislation referenced by the government, *see* Morozov Br. 24, simply allowed the authorities, “for the first time, to require a monetary commitment ... as a condition of release,” Nash, *supra*, 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” who were denied bail. *Id.*

In sum, for nearly all of our history, imprisoning and denying the possibility of bail to noncitizens who had not yet been shown to be removable was unheard of.

**C. *Demore* permits the denial of bail only to noncitizens whom Congress deemed categorically dangerous by virtue of their serious criminal convictions.**

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.”<sup>3</sup>

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

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<sup>3</sup> 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.”).

explained, Congress had evidence “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. The government has tried to excise part of this sentence to obscure *Demore*’s—and Congress’s—focus on criminal aliens. *See* Morozov Br. 26 (quoting this sentence but surgically replacing the term “criminal aliens” with “aliens”). That effort only highlights that *Demore*’s rationale—deference to Congress’s informed judgment concerning noncitizens convicted of dangerous crimes—does not apply here. *See Demore*, 538 U.S. at 521 (“Congress ... require[d] the Attorney General to detain *a subset of deportable criminal aliens* pending a determination of their removability.” (emphasis added)).

Simply put, *Demore* “focused on the heightened risk posed” by the “narrow class of noncitizens” affected, *Velasco Lopez v. Decker*, 978 F.3d 842, 850 n.7 (2d Cir. 2020), upholding “a special rule for aliens who have committed certain dangerous crimes,” *Preap*, 586 U.S. at 396. *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 untrammelled 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.<sup>4</sup>

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<sup>4</sup> The government has sometimes cited a third case to support mandatory immigration detention, *Reno v. Flores*, 507 U.S. 292 (1993), but *Reno* involved

**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. 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,

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“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 recognized 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. 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 (emphasis added) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). 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 reverse.

Respectfully submitted,

Dated: August 24, 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 6,349 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 August, 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 Eighth Circuit by using the appellate CM/ECF system on August 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 August, 2026.

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