
**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 San Antonio Field
Office of ICE’s Enforcement and Removal Operations, et al.
Respondents–Appellants.

CONSOLIDATED WITH

No. 26-50219

Alejandro Villegas Angel,
Petitioner–Appellee,

v.

Markwayne Mullin, in his official capacity as Secretary of the U.S. Department
of Homeland Security et al.
Respondents–Appellants.

CONSOLIDATED WITH

No. 26-50221

Miguel Angel Gomez Alvarado,
Petitioner–Appellee,

v.

Michael Vergara, in his official capacity as Acting Director of San Antonio
Field Office for U.S. Immigration and Customs Enforcement, et al.
Respondents–Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS
Nos. 1:26-cv-384, 1:26-cv-309, 1:26-cv-273

**BRIEF OF *AMICI CURIAE* IMMIGRANT LEGAL SERVICES
PROVIDERS, IMMIGRATION LAW PROFESSORS, AND
IMMIGRATION CLINIC DIRECTORS**

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CERTIFICATE OF INTERESTED PARTIES

Amici Immigrant Legal Services Providers, Immigration Law Professors, and Immigration Clinic Directors, through their undersigned counsel, submit this Certificate of Interested Parties to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the group of persons and entities fully listed as *amici* at the end of this brief, in addition to those listed in the briefs of Petitioners-Appellees and Respondents-Appellants, have an interest in the outcome of this case as described in the fourth sentence of 5TH CIR. R. 28.2.1. Organizational *amici* are all nonprofit organizations. Neither organizational nor individual *amici* represented in this brief have a financial interest in this litigation. Fatma Marouf and Denise Gilman are counsel for *amici*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED: September 11, 2026

s/ Denise Gilman

Denise Gilman

Attorney of Record for Amici Curiae

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STATEMENT OF INTEREST OF AMICI¹

Amici are nonprofit legal services organizations, law school clinic directors and immigration law professors who have a strong interest in this case because they assist immigrants and their families in their immigration proceedings, including in connection with immigration detention, and teach immigration law, including the constitutional and administrative frameworks governing immigration detention.² They bring extensive experience with immigration law, the immigration system, and the practice of immigration law.

Amici include legal services providers American Gateways, Catholic Legal Immigration Network, Inc. (CLINIC), and Refugee and Immigrant Center for Education and Legal Services (RAICES), as well as law school immigration clinic directors and immigration law professors, based in Texas and Louisiana. These *amici* provide direct representation to noncitizens in removal proceedings, including detained individuals, as well as engage in legal education, impact litigation, and policy reform efforts. *Amici* have substantial expertise in immigration detention.

¹ All parties consented to the filing of this brief. No party or its counsel had any role in authoring this brief. No person or entity—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

² A complete list of *amici* is provided at the end of this brief.

All *amici* have direct familiarity with the reality that many immigrants currently detained under 8 U.S.C. § 1225(b)(2) are long-term residents of the United States with significant ties to this country, who have no history of endangering public safety, and who have a strong interest in appearing for their immigration proceedings. *Amici* provide the Court with important context for evaluating the constitutional questions presented and underscore the impacts of unjustified liberty deprivations.

“[A] Constitution of Government once changed from Freedom, can never be restored. Liberty once lost is lost forever.”

John Adams Letter to Abigail Adams (July 7, 1775)

INTRODUCTION

As now interpreted, 8 U.S.C. § 1225(b)(2) requires hundreds of thousands, if not millions, of non-citizens to be held in physical custody in jail-like facilities during their immigration proceedings, without justification based on flight risk or danger, and without review of the deprivation of liberty. *See Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025); *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026); Appellants’ Supp. Br. at 2 (detention under the statute is “without regard for [the] individual degree of dangerousness or risk of flight”).

The Due Process Clause of the Fifth Amendment requires protection against unlawful deprivations of liberty under this mandatory detention scheme to guarantee the core constitutional right to physical freedom. U.S. Const. amend. V. The Due Process Clause of the Constitution requires both: (1) special justification for physical deprivation of liberty; and (2) sufficient procedural protections to ensure that sufficient justification exists in a particular case. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (liberty is presumptive and civil detention exceptional and permissible only with special governmental justification and “strong procedural protections”); *Foucha v. Louisiana*, 504 U.S. 71, 78-80 (1992) (civil detention must serve an important governmental purpose and adequate

procedural protections must be in place to ensure justification exists); *United States v. Salerno*, 481 U.S. 739, 746-50 (1987) (same). Neither is present under the recently-adopted expansive interpretation of 8 U.S.C. § 1225(b)(2) that imposes mandatory detention on all persons within the United States who entered and remain without admission, regardless of their time in the United States, their ties to this country, or their circumstances. The statute as now interpreted sweeps into detention an extremely broad range of non-citizens who share few unifying characteristics at all and certainly not characteristics demonstrating flight risk or danger justifying a deprivation of liberty. Additional process is therefore constitutionally required to assess whether legitimate justification for detention exists in individual cases under the statute. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

ARGUMENT

I. MANDATORY DETENTION OF NONCITIZENS UNDER 8 U.S.C. § 1225(b)(2) IMPLICATES CORE LIBERTY INTERESTS.

A. Mandatory Immigration Detention is a Severe Restriction on Physical Liberty.

After the expansion of mandatory detention under 8 U.S.C. § 1225(b)(2) beginning in the summer of 2025, immigration detention numbers skyrocketed. To date in fiscal year 2026, more than 350,000 noncitizens have been detained in total;

approximately 65,000 individuals are detained on any particular day.³ The length of detention has also increased,⁴ with an average of approximately 50 days in detention during 2023-2024 increasing to approximately 70 days in detention in 2026.⁵ By the end of June 2026, more than 2,000 noncitizens had been detained for more than a year; in comparison, fewer than 450 individuals had been detained for more than a year in June 2024.⁶ Texas and Louisiana have the most noncitizens in immigration detention.⁷

Detention under 8 U.S.C. § 1225(b)(2) covers a wide range of non-citizens within the United States without formal admission. Nothing about the broad

³ DHS/ICE, Immigration Detention Management FY 2026, Detention FY26, <https://www.ice.gov/detain/detention-management>; *cf.* DHS/ICE, Immigration Detention Management FY 2024, Detention FY24, <https://www.ice.gov/detain/detention-management> (277,913 noncitizens detained in all of fiscal year 2024 and 37,684 persons in detention on a particular day at the end of fiscal year 2024).

⁴ The length of time in detention is referenced to demonstrate the extent of the liberty deprivation rather than to suggest that the Due Process Clause applies only to prolonged detention.

⁵ DHS/ICE, Immigration Detention Management FY 2026, ICLOS and Detainees, <https://www.ice.gov/detain/detention-management>; DHS/ICE, Immigration Detention Management FY 2023, ICLOS and Detainees, <https://www.ice.gov/detain/detention-management>; DHS/ICE, Immigration Detention Management FY 2024, ICLOS and Detainees, <https://www.ice.gov/detain/detention-management>.

⁶ DHS/ICE, Immigration Detention Management FY 2026, ICLOS and Detainees, <https://www.ice.gov/detain/detention-management>; DHS/ICE, Immigration Detention Management FY 2024, ICLOS and Detainees, <https://www.ice.gov/detain/detention-management>.

⁷ Transactional Records Access Clearinghouse (TRAC), Immigration Detention Quick Facts, <https://tracreports.org/immigration/quickfacts/detention.html>.

category of individuals impacted suggests that the group as a whole presents a flight risk or danger to the community. The vast majority (over 70%) of persons in detention have no criminal conviction, demonstrating a lack of danger.⁸ Also, many of those in mandatory detention were apprehended while attending their Immigration Court proceedings or reporting for check-ins with Immigration and Customs Enforcement (“ICE”), demonstrating no risk of absconding.⁹ Appellants point to no data suggesting that the non-citizen population subject to detention under the new interpretation of 8 U.S.C. § 1225(b)(2) presents any particular risk of absconding from their immigration proceedings; nor was any data relating to flight risk for this group raised at the time that Congress adopted the provision.¹⁰

⁸ *Id.*

⁹ AILA, *Policy Brief: ICE Arrests at Immigration Courts* (Aug. 1, 2025), <https://www.aila.org/policy-brief-ice-arrests-at-immigration-courts>; National Immigration Project, *What’s Happening with Immigration Court Arrests and Bonds* (June 2025), https://nipnlg.org/sites/default/files/2025-06/2025_NIPNLG-Courthouse.pdf.

¹⁰ See U.S. Gov’t Accountability Off., *Immigration Courts: Actions Needed to Track and Report Noncitizens’ Hearing Appearances*, GAO-25-106867 (Dec. 19, 2024), <https://www.gao.gov/products/gao-25-106867> (noting that the government does not collect reliable data on non-appearance at Immigration Court hearings and also finding low rates of in absentia orders of removal, including 9% for those represented by counsel); see also U.S. Office of Inspector General, U.S. Immigration and Customs Enforcement’s Award of the Family Case Management Program Contract (Redacted) (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf> (99% compliance rate for ICE check-ins and 100% compliance for court hearings in the Family Case Management Program).

There can be no doubt that the detention experienced by these noncitizens involves a loss of physical liberty. Despite being categorized as civil for constitutional purposes, immigration detention “mimics the criminal incarceration system and holds detained individuals in punitive, prison-like conditions.”¹¹ Detention centers have hardened perimeters (e.g., razor wire and double gates) and interiors (cells or bunks, cinderblock walls, locked doors, and guard stations behind one-way glass).¹² Detention has serious negative impacts on mental and physical health.¹³ Deaths in detention are not infrequent and often result from inadequate medical care.¹⁴ The number of deaths in immigration detention has increased from

¹¹ Altaf Saadi et al., *Duration in Immigration Detention and Health Harms*, 8 JAMA Network Open e2456164 (2025), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2829506>.

¹² See, e.g., Sarah Lopez, *Immobilized Immigrants*, (June 18, 2024), <https://inquest.org/immobilized-immigrants/> (noting that the architecture of immigration detention centers is very similar to prisons in the criminal context); Dora Schriro, *Immigration Detention Overview and Recommendations*, DHS/ICE, at 2 (Oct. 6, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (“the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons”).

¹³ See Saadi et al., *supra* note 11.

¹⁴ Akash Pillai et al., *Deaths and Health Care Issues in ICE Detention Centers Under the Second Trump Administration*, KFF (March 25, 2026), <https://www.kff.org/racial-equity-and-health-policy/deaths-and-health-care-issues-in-ice-detention-centers-under-the-second-trump-administration/>; NPR, *It's the Deadliest Year for People in ICE Custody in Decades; Next Year Could be Worse* (Oct. 23, 2025), <https://www.npr.org/2025/10/23/nx-s1-5538090/ice-detention-custody-immigration-arrest-enforcement-dhs-trump?emci=1f5d8397-eeb4-f011-8e61-6045bded8ba4&emdi=1c491bb0-dfb5-f011-8e61-6045bded8ba4&ceid=7643803>.

just five in 2021 to 35 to date in fiscal year 2026.¹⁵ Detention also involves physical separation of detained persons from their family, community, and legal counsel.¹⁶

Nor can it be said, as Appellants urge, that detained individuals have a choice whether to remain in confinement or end their detention. *See* Appellants' Supp. Br. at 35. To leave detention by conceding removability, detained individuals must give up claims to remain in the United States which they are entitled to pursue under the federal immigration law. Many of those in detention are seeking to avoid deportation based on a likelihood of torture or other persecution in their home country or to prevent exceptional and extremely unusual hardship to U.S. citizen or Lawful Permanent Resident immediate family members or to ensure family unity.¹⁷ In exchange for release from detention, they would be obliged to accept a likelihood of torture or serious harm to the health and well-

¹⁵ *See* DHS/ICE, Detainee Death Reporting, <https://www.ice.gov/detain/detainee-death-reporting>.

¹⁶ *See* Ingrid V. Eagly et al., *Access to Counsel in Immigration Court, Revisited*, 111 IOWA L. REV. 1, 28 (2025); Maria Cancian, et al., *How Many Children are Affected By Parental Immigrant Detention*, Brookings (May 13, 2026), <https://www.brookings.edu/articles/how-many-children-are-affected-by-parental-immigrant-detention/>.

¹⁷ *See* 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1255 (adjustment of status based on family petition); 8 U.S.C. § 1229b(b)(1) (cancellation of removal and grant of permanent resident status based on a showing that deportation would cause exceptional and extremely unusual hardship to a U.S. citizen or Lawful Permanent Resident spouse, child, or parent); *see also* 8 U.S.C. § 1229b(b)(2) (cancellation of removal under the Violence against Women Act).

being of loved ones. That is no choice. To be sure, immigration detention does force individuals to give up their viable claims.¹⁸ For example, 18.75% of asylum applications filed with the Immigration Courts were abandoned in December 2024, but, with the rapid expansion of detention, that number had doubled to 38.89% by February 2026.¹⁹ This result is evidence of the grave impacts caused by the deprivation of liberty involved in immigration detention; it is not evidence of an ability to freely choose to leave custody.

B. The Right to Liberty is a Foundational Constitutional Right Guaranteed to Citizens and Non-Citizens Alike.

This loss of physical freedom implicates the fundamental right to liberty explicitly protected by the Fifth Amendment to the U.S. Constitution. Pursuant to the Fifth Amendment Due Process Clause, every “person” in the United States is guaranteed “liberty.” U.S. Const. amend. V. The Supreme Court has repeatedly made clear that: “Freedom from imprisonment—from government custody,

¹⁸ Graeme Blair & David Hausman, *One Year of Immigration Enforcement under the Second Trump Administration* (April 7, 2026), <https://deportationdata.org/analysis/immigration-enforcement-first-year.html> (noting that detention increased in 2025 and that voluntary departures and returns increased by 28 times in 2025); *EOIR Table 5-1. Asylum Withdrawals by Custody Status by Fiscal Year Completed*, U.S. COMMISSION INT’L RELIGIOUS FREEDOM 670, https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/EOIR_Tables_5-7.pdf (showing detained noncitizens withdrew their asylum claims at more than double the rate of non-detained or released claimants).

¹⁹ Mobile Pathways, Asylum Navigator Dashboard, <https://www.mobilepathways.org/dashboards/asylum-navigator-dashboard>.

detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas*, 533 U.S. at 690; *see also Salerno*, 481 U.S. at 750 (calling liberty a “fundamental” right); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (citing *Foucha v. Louisiana*, 504 U.S. at 80) (“freedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause,’”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“civil commitment for any purpose constitutes a significant deprivation of liberty”). The fundamental right to liberty is not entirely without limits, but it cannot be arbitrarily taken away. *Hendricks*, 521 U.S. at 356.

The Due Process Clause, with its protection of the fundamental right to liberty, has always applied to noncitizens within the United States, including in the immigration detention context.²⁰ *Zadvydas*, 533 U.S. at 690 (interpreting a statute

²⁰ The Supreme Court’s decision in *Dep’t of Homeland Sec. v. Thuraissigiam* did not change the long-settled doctrine that individuals within the United States enjoy fundamental constitutional protections, including against arbitrary detention. 591 U.S. 103, 107 (2020). Appellants argue that the decision requires a conclusion that constitutional liberty protections do not apply to those who have not been admitted into the United States. *See* Appellants’ Supp. Br. at 56. However, *Thuraissigiam* related only to procedures due in connection with removal and status questions, not with personal physical liberty. The Court found limits on the process due in *immigration* proceedings for noncitizens who, unlike Appellees, had very recently entered the United States. But even then, the Court specifically noted that its analysis regarding constitutional protections would be different if the case involved a habeas petition involving physical liberty. *Id.* at 119-20; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (explaining that the entry fiction limits certain rights of “*excludable* [noncitizens]”—i.e. those stopped at the border—“with regard to immigration and deportation proceedings”).

in light of the Fifth Amendment’s liberty protections to preclude indefinite immigration detention); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *id.* at 532 (Kennedy, J., concurring) (recognizing that “the Due Process Clause prohibits arbitrary deprivations of liberty” in the immigration detention context); *Carlson v. Landon*, 342 U.S. 524 (1952) (applying Due Process Clause analysis to immigration detention of noncitizens deemed to be Communists without finding a violation of the right to liberty in the case); *Wong Wing v. United States*, 163 U.S. 228 (1896) (applying the Fifth Amendment to “all persons within the territory of the United States” and concluding that noncitizens may not be deprived of liberty without due process of law); *see also Trump v. J.G.G.*, 604 U.S. 670, 672–73 (2025) (due process of law applies to noncitizens and challenges to “confinement” of noncitizens under the Alien Enemies Act fall “within the ‘core’ of the writ of habeas corpus”). The U.S. Constitution unambiguously applies to protect noncitizens’ physical freedom, including by limiting immigration detention.

To avoid the incontrovertible application of the fundamental constitutional right to liberty to noncitizens subject to immigration detention, Appellants attempt to cast the constitutional issue here as one relating to the right to bail and assert that this is not a guaranteed right. Appellants’ Supp. Br. at 34–35.²¹ This effort to

²¹ The Appellants assert that the Supreme Court’s decision in *Reno v. Flores*, addressing migrant children living in shelters, supports its position that the interest at issue here is the right to bail. 507 U.S. 292 (1993). However, *Reno v. Flores*

redirect attention away from the right to liberty must fail. The Constitution mandates the protection of liberty, requiring scrutiny into whether the detention itself is constitutionally permissible before the question of release on bail even comes into the picture.

II. OUTSIDE OF IMPRISONMENT FOR A CRIMINAL CONVICTION, THE DUE PROCESS CLAUSE PREVENTS LIBERTY DEPRIVATION WITHOUT “SPECIAL JUSTIFICATION” AND INDEPENDENT REVIEW OF THE EXISTENCE OF JUSTIFICATION FOR DETENTION.

Because liberty is a fundamental right guaranteed by the Due Process Clause, physical deprivations of liberty are strictly circumscribed to avoid arbitrary detention. *See Salerno*, 481 U.S. at 755 (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”). Thus, freedom from detention is the presumption, and a person may only be held in physical custody as punishment after a criminal conviction or through civil detention in certain narrow circumstances. *See id.*; *Foucha*, 504 U.S. at 80; *Zadvydas*, 533 U.S. at 690.

concluded that freedom was not the correct interest to analyze in that case on the grounds that the case involved children, who are always in some form of custody. *Id.* at 302. This could not be further from the situation at hand, involving adults who had been at physical liberty inside the United States before they were detained in prisonlike facilities. The *Flores* court did not endorse the idea that in the case of adult detention, the proper right to analyze is a “right to bail.”

If not based on a criminal conviction, then, deprivation of liberty must meet the requirements of civil detention to be constitutional. The Supreme Court has repeatedly reiterated that civil detention requires both: (1) the existence of a special governmental interest justifying detention, usually relating to the prevention of flight risk or danger; *and* (2) independent review of detention to ensure that the justification for detention exists in particular cases. Legitimate justification for detention is required as a substantive matter, and procedural protections must be in place to ensure that there is a substantive basis for detention in reality. Thus, for example, the Supreme Court stated in its decision in *Salerno* relating to pre-trial criminal detention, which is deemed civil:

This Court has held that the Due Process Clause protects individuals against two types of government action. So-called “substantive due process” prevents the government from engaging in conduct that . . . interferes with rights “implicit in the concept of ordered liberty.” . . . When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as “procedural” due process.

481 U.S. at 746; *see also Addington*, 441 U.S. at 426-27 (acknowledging that prevention of danger to self or others is a legitimate government interest justifying commitment on mental health grounds but requiring procedural protections to

ensure that danger exists in a given case); *Hendricks*, 521 U.S. at 357 (same in the sex offender context).²²

First, then, there must be a determination as to whether there is a special governmental interest that can justify a deprivation of physical liberty in a particular context. *See, e.g., Salerno*, 481 U.S. at 749 (the interest in preventing danger to the community may be grounds for pre-trial criminal detention); *see also Addington*, 441 U.S. at 426–27 (the danger to self or others caused by mental health conditions may justify commitment in certain instances). In connection with immigration detention, only prevention of danger to the community or flight from removal proceedings or actual removal have been recognized as valid governmental objectives justifying detention. *See Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

Second, there must be consideration of the applicability of the justification in a particular instance. The Supreme Court has repeatedly concluded, in every civil detention context and regardless of the substantive justification for detention, that physical custody is only constitutional where there is review of the need for

²² It is therefore a red herring to suggest that the constitutionality of mandatory detention must be assessed either as a substantive Due Process question or as a procedural Due Process question. *See Appellants' Supp. Br.* at 1–2. The analysis has both substantive and procedural elements.

detention in a particular case.²³ *See, e.g., Salerno*, 481 U.S. at 746. A court or other arbiter, independent of the entity engaging in the deprivation of liberty, must consider whether the relevant justification for detention exists in the specific instance. The Court has never countenanced a different rule in the immigration detention context, allowing for broad detention without justification and review. As discussed further below, the Court’s decision in *Demore*, allowing for categorical detention for a very narrow group of non-citizens with specific criminal histories, stands as a very limited exception that proves the general rule requiring review of deprivations of physical liberty. *See* 538 U.S. 510.

Thus, in the pre-trial criminal detention setting, the Court in *Salerno* permitted detention to prevent danger to the community where the statute at issue required an “adversary hearing” before a “judicial officer” in which the government bore the burden of proving danger by “clear and convincing” evidence. 481 U.S. at 750–52. Similarly, in the mental health commitment context, the Court rejected the constitutionality of commitment on dangerousness grounds where there is no “adversary hearing” at which the government bears the burden of

²³ *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1011 (2002) (analyzing multiple Supreme Court rulings on civil detention and concluding that the holdings establish that “civil detention may be imposed only where there has been at a minimum an individualized showing of necessity for detention in a fair adversarial hearing”).

showing the basis for the deprivation of liberty. *Foucha*, 504 U.S. at 81–82; *see also Addington*, 441 U.S. at 432–33 (requiring “clear and convincing” evidence of dangerousness in commitment proceedings to justify mental health commitment). Likewise, the Court has permitted physical liberty deprivation of sex offenders only where there is a commitment proceeding that requires the government to establish individual dangerousness. *See Hendricks*, 521 U.S. at 357–58. The detention of minors pursuant to a juvenile delinquency determination, which is deemed civil not criminal, also requires an adversarial hearing to determine the need for a deprivation of liberty. *See In re Gault*, 387 U.S. 1, 57 (1967).

Even to hold designated enemy combatants or terrorists in physical custody, some form of independent review of the justification based on the prevention of ongoing terroristic or hostile activities is required. In *J.G.G.*, while the Supreme Court was not asked to address detention, the Court nonetheless reaffirmed that judicial review is required on questions relating to the basis for detention of an individual non-citizen under an Alien Enemies Act designation. *See* 604 U.S. at 672 (citing *Ludecke v. Watkins*, 335 U.S. 160, 163, 172, n.17 (1948)). In *Hamdi v. Rumsfeld*, the Supreme Court also held that an adversarial habeas proceeding in federal court, including opportunities to present evidence, was required for detention of accused enemy combatants to evaluate whether detained persons were engaged in armed conflict against the United States. 524 U.S. 507, 526 (2004).

The Supreme Court’s decision in *Demore* does not eliminate the requirement of independent review of the basis for detention in connection with immigration detention. 538 U.S. 510. To the contrary, it reaffirms that immigration detention, like any other civil detention, presumptively requires a showing of a special governmental justification for the deprivation of liberty with independent review in a particular case.

Demore found constitutional a narrow mandatory detention provision, 8 U.S.C. § 1226(c) as written at the time, which was applicable to persons with certain serious criminal convictions. *Id.* at 518.²⁴ The Court did not permit detention without justification but instead found that Congress had already found justification for detention based on flight risk and danger as a categorical matter for the specific group of persons with these specific criminal convictions. *Id.* at 518-20. The Court emphasized that Congress had relied on a clear record of compelling evidence of flight risk and danger in doing so. *Id.* (citing evidence before Congress

²⁴ *Demore* did not consider 8 U.S.C. § 1225(b)(2), the statute at issue here, much less countenance mandatory detention of all unadmitted noncitizens under that provision. At the time of the decision in *Demore*, the statute had already been enacted, but no one believed that the provision would or could require mandatory detention for such a broad category of noncitizens and so mandatory detention under the provision was not at issue. *See, e.g.*, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (“[I]nadmissible aliens, except for arriving aliens, have available to them bond redetermination hearings before an immigration judge . . . This procedure maintains the status quo . . .”).

relating to additional crimes committed by non-citizens with criminal convictions during removal proceedings and establishing high rates of absconding among this group). Given the evidence relied on by Congress to establish a special justification for detention for all noncitizens within a narrow category, the Court concluded that independent review of detention was not necessary in individual cases for those who fit within that limited category. The specific criminal history that led to mandatory detention under the statutory provision at issue served as a categorical proxy for the need to establish individual justification for detention on flight risk or danger grounds.

The Court thus allowed detention without individualized review as an exception to the liberty presumption for a limited category of noncitizens who had already undergone criminal proceedings with full due process and had received a conviction. In providing this exception to the general rule, the Court repeatedly emphasized both the “limited” category of persons affected and the “limited” length of detention. *Id.* at 518, 522, 526, 531.²⁵ The decision thus establishes that the default constitutional standards require special justification and review of detention, with an exception applying only where the category of noncitizens

²⁵ The *Demore* decision relied on data regarding the length of removal proceedings that was later revealed to be an inaccurate underestimate. Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to the Clerk of the Supreme Court, re: *Demore v. Kim*, No. 01-1491 (Aug. 26, 2016), <https://perma.cc/3TME-FZ28>.

impacted is discrete and limited and where there is strong evidence of a special justification for detention applying across the board to that narrow group. In other words, where mandatory detention affects a broad category of noncitizens who do not all share obvious indicia of flight risk or danger, individual review is required.²⁶

Even for the narrow category of noncitizens that was at issue in *Demore*, who shared characteristics that raised across-the-board flight risk or danger concerns, the *Demore* Court still required some availability of review of detention. Justice Kennedy explained that “as applied” challenges to mandatory detention, presumably through habeas claims based on the Due Process Clause, are available where detention becomes “unreasonable or unjustified” in individual cases. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). The decision therefore in no way holds that constitutional requirements relating to civil detention, requiring special justification and review, do not apply in the immigration detention context.²⁷

²⁶ Given this standard, it is unlikely that the *Demore* court would have approved the constitutionality of mandatory detention of all unadmitted non-citizens under 8 U.S.C. § 1225(b)(2) if that provision as interpreted now had been at issue. *See* 538 U.S. at 518, 522, 526, 531.

²⁷ Similarly, the Supreme Court’s decision in *Carlson v. Landon* noted not only that categorical justification for detention existed for noncitizens deemed to be Communists on danger grounds but also that review of detention decisions was available, even if deferential. *See* 342 U.S. at 540-41.

Likely to avoid constitutional infirmity, although the issue did not come to the fore until the reinterpretation of detention under 8 U.S.C. § 1225(b)(2) in the summer of 2025, Immigration Court review of custody determinations was long the general rule. This review was the default for most noncitizens subject to immigration detention after entering into the United States. *See* 8 U.S.C. § 1226(a) (allowing for release from detention during ongoing Immigration Court removal proceedings); 8 C.F.R. § 1236.1(d) (providing for Immigration Court review of detention under 8 U.S.C. § 1226(a) except in certain limited circumstances); *Sosnava Rodriguez v. Ortega*, 180 F.4th 702, 710 (5th Cir. 2026), *reh'g granted*, *decision vacated*, 181 F.4th 608 (5th Cir. 2026) (noting that longstanding practice was to allow Immigration Court review of detention decisions); *Lopez Garcia v. Guardian*, -- F. 4th --, 2026 WL 2661092, at *5–*7 (4th Cir. 2026) (same).

Detention without individualized review was tightly limited, principally affecting those subject to mandatory detention on criminal grounds under 8 U.S.C. § 1226(c) as approved in *Demore* and certain noncitizens apprehended at the border rather than within U.S. territory.²⁸ *See* 8 C.F.R. § 1003.19(h) (precluding review for

²⁸ Those apprehended at the very border have generally been treated differently than those within the U.S. territory. *See Lynch v. Cannatella*, 810 F.2d at 1373. However, there is no Supreme Court decision determining that “arriving” noncitizens in ongoing removal proceedings lack a Due Process right to review of detention. *Cf. Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206 (1953) (addressing detention at Ellis Island of a noncitizen who was ordered permanently excluded from the United States on national security grounds before entry).

“arriving” noncitizens presenting at a port of entry and for those in active expedited removal proceedings); *Yajure Hurtado*, 29 I&N Dec. at 225 n.17, 226 (recounting the change in the interpretation of the law that stripped away the availability of Immigration Court review of custody for those who were not admitted).

III. MANDATORY DETENTION UNDER 8 U.S.C. § 1225(b)(2) CONSTITUTES AN ARBITRARY DEPRIVATION OF LIBERTY UNDER THE DUE PROCESS CLAUSE UNLESS REVIEW IS PROVIDED.

Without any review of the justification for detention in particular instances, mandatory detention under 8 U.S.C. § 1225(b)(2) as now interpreted cannot then comply with the constitutional limits on civil detention. Under the current reading, detention is automatic throughout removal proceedings for an extremely broad range of non-citizens in greatly differing circumstances who share only the fact that they are apprehended after having entered the United States without formal admission and remain unadmitted. There has been no determination by Congress or any other government entity, based on evidence, that this broad group of noncitizens presents any categorical flight risk or danger that would serve as a special justification for depriving them of liberty and create an exception to the normal requirement of review. Nor is there any opportunity for independent review

by the Immigration Court of the existence of a justification for detention based on flight risk or danger in individual cases.

Appellants argue, in fact, that no individual justification based on flight risk or danger is needed. *See* Appellants' Supp. Br. at 27 ("Whether an alien is a flight risk or dangerous is irrelevant.") They assert that the only necessary review would relate to whether a person was in fact formally admitted, but that inquiry does not address any purported special justification for detention even by proxy. Entry without admission does not inherently involve flight risk or danger, and there is no general evidence of an across-the-board connection between admission and these justifications for detention. *See id.* at 2.²⁹

For detention under 8 U.S.C. § 1225(b)(2) to be constitutionally permissible, there must be review of detention that inquires into the existence of special justification based on flight risk or danger in a particular case. That review might take the form of Immigration Court custody redetermination hearings as set out by the Fifth Circuit in the original panel decision, or it might take the form of habeas consideration in the federal district courts. In either case, individualized review of

²⁹ *See, e.g.,* CATO, *Illegal Immigrant Incarceration Rates, 2010-2024* (March 2026), <https://www.cato.org/sites/cato.org/files/2026-03/BP%20198.pdf> (finding lower arrest and incarceration rates among the undocumented); *supra* note 10 (empirical evidence demonstrating high Immigration Court appearance rates with no distinction for those who entered without admission).

the justification for detention is constitutionally required and ensures that detention is not imposed in cases where it serves no legitimate purpose.

CONCLUSION

Based on the foregoing, *amici* respectfully request that the Court affirm the district courts' decisions below.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 11, 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.

/s/ Denise Gilman

Denise Gilman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 5229 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman fourteen-point font.

/s/ Denise Gilman

Denise Gilman

**CERTIFICATIONS UNDER 5TH CIR. R. 25.2.13, 5TH CIR. R. 25.2.1, AND
ANTI-VIRUS CERTIFICATION**

All privacy redactions have been made pursuant to 5TH CIR. R. 25.2.13.

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/s/ Denise Gilman

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