

Nos. 26-50183, 26-50219, 26-50221

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*

**EN BANC 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: September 11, 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.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS.....	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. The Due Process Clause Protects Noncitizens as Fully as Citizens from Arbitrary Detention.....	5
II. Presence in the United States, Not Immigration Status, Confers Due Process Rights Against Arbitrary Detention	13
III. Detention Without Bond Under 8 U.S.C. § 1225(b) Violates Due Process	17
A. The <i>Glucksberg</i> test does not apply	17
B. Mandatory immigration detention is a historical outlier	18
C. <i>Demore</i> does not support denying bail to every noncitizen who entered without inspection	20
D. Due process requires a hearing to assess the need for a person’s detention	24
CONCLUSION.....	29
CERTIFICATE OF SERVICE	1A
CERTIFICATE OF COMPLIANCE.....	2A

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>A.A.R.P. v. Trump</i> , 605 U.S. 91 (2025).....	28
<i>Addington v. Texas</i> , 441 U.S. 418 (1979).....	25, 27, 28
<i>Bank of Columbia v. Okely</i> , 17 U.S. 235 (1819).....	9
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979).....	24
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945).....	13
<i>Calvin’s Case</i> , 77 Eng. Rep. 377 (K.B. 1608).....	9
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952).....	6, 22, 23
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960).....	25
<i>Chin Yow v. United States</i> , 208 U.S. 8 (1908).....	26
<i>Christie v. Filleul</i> , 96 Eng. Rep. 775 (C.P. 1779)	7
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996).....	27

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>Demore v. Kim</i> , 538 U.S. 510 (2003).....	3, 4, 5, 20-23
<i>Dep’t of State v. Muñoz</i> , 602 U.S. 899 (2024).....	17
<i>DHS v. Thuraissigiam</i> , 591 U.S. 103 (2020).....	4, 5, 7, 14, 15, 26
<i>Dred Scott v. Sandford</i> , 60 U.S. 393 (1857).....	12
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	17, 24, 25, 26
<i>Galvan v. Press</i> , 347 U.S. 522 (1954).....	6
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	25
<i>Gonzales v. Landon</i> , 350 U.S. 920 (1955).....	25
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	1, 9, 10
<i>In re Ah Tai</i> , 125 F. 795 (D. Mass. 1903)	18
<i>In re Winship</i> , 397 U.S. 358 (1970).....	28

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>INS v. Nat’l Ctr. for Immigrants’ Rts., Inc.</i> , 502 U.S. 183 (1991).....	23
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	7
<i>Jackson v. Indiana</i> , 406 U.S. 715 (1972).....	25
<i>Jones v. United States</i> , 463 U.S. 354 (1983).....	26
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950).....	8
<i>Kaoru Yamataya v. Fisher</i> , 189 U.S. 86 (1903).....	1, 4, 6, 13, 14, 16
<i>Kaplan v. Tod</i> , 267 U.S. 228 (1925).....	16
<i>Kerry v. Din</i> , 576 U.S. 86 (2015).....	7, 9, 17
<i>Kwock Jan Fat v. White</i> , 253 U.S. 454 (1920).....	13
<i>Kwong Hai Chew v. Colding</i> , 344 U.S. 590 (1953).....	6
<i>Lamii v. Sewell</i> , 95 Eng. Rep. 610 (K.B. 1750).....	8

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>Landon v. Plasencia</i> , 459 U.S. 21 (1982).....	4, 15, 16
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976).....	5, 14, 16
<i>Matter of Patel</i> , 15 I. & N. Dec. 666 (BIA 1976)	19
<i>Melchart v. Halsey</i> , 96 Eng. Rep. 434 (C.P. 1770)	8
<i>Murray’s Lessee v. Hoboken Land & Improvement Co.</i> , 59 U.S. 272 (1855).....	1, 7, 9, 10
<i>Nielsen v. Preap</i> , 586 U.S. 392 (2019).....	4, 20
<i>Nishimura Ekiu v. United States</i> , 142 U.S. 651 (1892).....	15
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	23, 24, 28
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	25, 28
<i>Sessions v. Dimaya</i> , 584 U.S. 148 (2018).....	11, 14
<i>Shaughnessy v. United States ex rel. Mezei</i> , 345 U.S. 206 (1953).....	3, 6, 14, 16

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>Taylor v. Carpenter</i> , 23 F. Cas. 742 (C.C.D. Mass. 1844)	9
<i>Tirlot v. Morris</i> , 80 Eng. Rep. 828 (K.B. 1611).....	7
<i>Trump v. J.G.G.</i> , 604 U.S. 670 (2025).....	6, 14, 28
<i>Vajtauer v. Comm’r of Immigr.</i> , 273 U.S. 103 (1927).....	13
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	24, 25, 27
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990).....	10
<i>United States v. Villato</i> , 2 U.S. 370 (C.C.D. Pa. 1797).....	9
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649 (1898).....	7
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	17, 18
<i>Wilkinson v. Leland</i> , 27 U.S. 627 (1829).....	9
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896).....	1, 2, 5, 10, 16, 26, 28

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>Woodby v. INS</i> , 385 U.S. 276 (1966).....	13, 25, 28
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	1, 5, 6, 16, 22, 24, 26-28
 <u>CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE MATERIALS</u>	
Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476	18
Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565.....	18
Act of May 5, 1892, ch. 60, 27 Stat. 25	19
Act of Nov. 3, 1893, ch. 14, 28 Stat. 7	19
An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798).....	11
8 Annals of Cong. (1798) (Joseph Gales ed., 1834).....	11
<i>Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (Jonathan Elliot ed., 1836)	3, 9, 12
Habeas Corpus Act, 31 Car. 2, c. 2 (1679)	10
Immigration & Nationality Act of 1952, ch. 477, 66 Stat. 163	19
Magna Carta, 25 Edw. 1, c. 29 (1297).....	16
Petition of Right, 3 Car. 1, c. 1 (1627).....	10
U.S. Const. art. I, § 2, cl. 2.....	10

TABLE OF AUTHORITIES – cont’d

	Page(s)
8 U.S.C. § 156 (1952)	22
8 U.S.C. § 1225	1, 2, 24
8 U.S.C. § 1226	5
 <u>BOOKS, ARTICLES, AND OTHER AUTHORITIES</u>	
William Blackstone, <i>Commentaries on the Laws of England</i> (1791)	1, 7, 8, 9, 16, 17
Javier Bleichmar, <i>Deportation as Punishment</i> , 14 Geo. Immigr. L.J. 115 (1999)	8
Sarah Cleveland, <i>Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs</i> , 81 Texas L. Rev. 1 (2002).....	12
Edward Coke, <i>Institutes of the Laws of England</i> (1794)	7
W.F. Craies, <i>The Right of Aliens to Enter British Territory</i> , 6 L.Q. Rev. 27 (1890)	8
William Empson, <i>On the Alien Bill</i> , 42 Edinburgh Rev. 99 (1825)	8
James Kent, <i>Commentaries on American Law</i> (1826)	9
James Madison, <i>Report on the Virginia Resolutions</i> (1800)	3, 9
Lindsay Nash, <i>Resurrecting Immigration Releases</i> , 135 Yale L.J. 1533 (2026)	18, 19
Gerald L. Neuman, <i>Whose Constitution?</i> , 100 Yale L.J. 909 (1991).....	12

TABLE OF AUTHORITIES – cont’d

	Page(s)
Jim Rosenfeld, <i>Deportation Proceedings and Due Process of Law</i> , 26 Colum. Hum. Rts. L. Rev. 713 (1995).....	12
James Morton Smith, <i>Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties</i> (1956)	11
Joseph Story, <i>Commentaries on the Constitution of the United States</i> (1833)	9, 12
St. George Tucker, <i>Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States</i> (1803).....	9

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 under the Due Process Clause. And *mandatory* imprisonment without trial 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) requires the government to incarcerate every noncitizen resident who qualifies as an “applicant for admission,” denying them even a bond hearing to determine whether their confinement serves any purpose. The Fifth Amendment prohibits the government from subjecting any “person” to such an arbitrary deprivation of the most basic form of liberty.

The Due Process Clause protects “all persons within the [nation’s] territorial jurisdiction, without regard to ... nationality,” *Wong Wing v. United States*, 163

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.

U.S. 228, 238 (1896) (quotation marks omitted), or whether they are “alleged to be illegally here,” *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). By expressly prohibiting the government from depriving any “person” of their “liberty” without due process, the Clause forbids arbitrary imprisonment—including in connection with immigration enforcement. *See Wong Wing*, 163 U.S. at 238; *Zadvydas v. Davis*, 533 U.S. 678, 690-96 (2001).

That settled understanding reflects the Constitution’s original meaning. “The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting); *accord Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855). And the common law did not allow the government to imprison noncitizens without trial in order to facilitate their removal—let alone do so without the possibility of bail.

On the contrary, Founding-era common law gave “aliens” the same protections from detention and other liberty deprivations as subjects. As long as they were within the geographic borders of the realm, aliens were regarded as among “the people” of England, 1 William Blackstone, *Commentaries on the Laws of England* 366, 370 (1791), and were entitled to relief from arbitrary detention and other unwarranted deprivations of their liberty or property. Because there was no

deportation, the common law did not sanction anything resembling detention of aliens in aid of deportation, much less *mandatory* detention. Instead, aliens were seized and expelled—just like subjects—only as a criminal punishment following a trial.

The Founders were familiar with the common law’s protections for noncitizens, and the Fifth Amendment accordingly 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). And for nearly all of American history, the government has not detained noncitizens without the possibility of bail pending removal. The mandatory detention scheme for “criminal aliens” approved in *Demore v. Kim*, 538 U.S. 510 (2003), was a novel and limited departure from that historic tradition.

Ignoring this history, the government claims that noncitizens who entered the country unlawfully have only whatever safeguards 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 a hearing regarding “the matters upon which that liberty depends.” *Kaoru Yamataya*, 189 U.S. at 101.

Physical presence, not admission status, entitles people to these constitutional safeguards—consistent with the common law that informed the Due Process Clause. 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. And critically, that person 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, or for people who entered unlawfully, *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 detention for this “subset of deportable criminal aliens,” *Demore*, 538 U.S. at 513, 521, whom Congress

deemed especially risky based on extensive legislative 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. Indeed, *Demore* itself implies that detaining every “applicant for admission,” 8 U.S.C. § 1225(b)(2)(A), found within this country would be constitutionally suspect—hence its relentless focus on the unique threat posed by the “criminal aliens” at issue.

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; *accord Wong Wing*, 163 U.S. at 238; *Zadvydas*, 533 U.S. at 693. And the government’s broad power to decide who may be excluded or removed does not give it carte blanche to use imprisonment to effectuate those policies. *See id.* Under the Due Process Clause, discretion over immigration does not entail limitless power to lock up noncitizen residents of this country without trial or even a bond hearing.

ARGUMENT

I. The Due Process Clause Protects Noncitizens as Fully as Citizens from Arbitrary Detention.

A. “[A]ll persons, aliens and citizens alike, are protected by the Due Process Clause,” and that protection extends even to “one whose presence in this country is unlawful.” *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976). Due process shields

every person within “our geographic borders.” *Zadvydas*, 533 U.S. at 693; *see Mezei*, 345 U.S. at 212 (all persons “who have once passed through our gates, even illegally”).

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.” *Trump v. J.G.G.*, 604 U.S. 673 (2025) (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.), which provided the original standards for the Due Process Clause, *see Murray’s Lessee*, 59 U.S. at 277. Significantly, the common law gave “aliens” the same protection against arbitrary detention as subjects, and it did not authorize detaining aliens to facilitate removal—much less detaining them without bail.

Aliens owed a temporary allegiance to the monarch and were under the law’s protection “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 file suit to protect their persons, property, and liberty. *See Tirlot v. Morris*, 80 Eng. Rep. 828, 828-29 (K.B. 1611). They were entitled to the same procedures as subjects in criminal prosecutions. *See* 1 Edward Coke, *Institutes of the Laws of England* § 198 (1794). Just like subjects, they could secure release on bail, *e.g.*, *Christie v. Filleul*, 96 Eng. Rep. 775, 775 (C.P. 1779), and could employ habeas corpus to “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 removal. Indeed, deportation did not even exist in the Founding era. *Thuraissigiam*, 591 U.S. at 123. Instead, expulsion was exclusively

a criminal punishment (“transportation”) imposed on aliens and citizens alike. *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. They could not hold office or permanently own land—both of which required a permanent, not merely temporary, allegiance to the Crown—and they could be charged higher customs duties. Blackstone, *supra*, at 371-74. None of those disabilities, however, related to detention or physical liberty. By the Founding era, foreigners had not been expelled from England for more than two centuries, and there was no mechanism for doing so. *See Thuraissigiam*, 591 U.S. at 123; Craies, *supra*, at 33-36; William Empson, *On the Alien Bill*, 42 Edinburgh Rev. 99, 102 (1825). Aliens temporarily lost their legal protections only if their nation went to war with England, making them “alien enemies.” Blackstone, *supra*, at 372; *see Calvin’s Case*, 77 Eng. Rep. 377, 397 (K.B. 1608). Otherwise, they were fully capable of “obtaining justice in our courts,” *Lamii v. Sewell*, 95 Eng. Rep. 610, 610 (K.B. 1750), which were “as open to them as to natives,” *Melchart v. Halsey*, 96 Eng. Rep. 434, 435 (C.P. 1770) (Blackstone, J.).²

² The legal disabilities of alien enemies were “imposed temporarily as an incident of war and not as an incident of alienage.” *Johnson v. Eisentrager*, 339

Because the early American states generally adopted English common law, noncitizens at the Founding were likewise “clearly and indisputably entitled to the full protection of the laws in every matter that respects [their] personal liberty.” 2 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States*, app. 98 (1803). It was widely recognized that “protection to their persons and property is due,” 2 Kent, *supra*, at 62, and that they were “entitled ... to the same protection of their rights as citizens,” *Taylor v. Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844) (Story, J.). Like citizens, they could obtain release from arbitrary detention. *St. Cyr*, 533 U.S. at 301; e.g., *United States v. Villato*, 2 U.S. 370, 379 (C.C.D. Pa. 1797).

C. The Due Process Clause was designed “to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). It aimed to prevent “arbitrary exercise of the powers of government, unrestrained by the established principles of private rights,” *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819), including by Congress, *Murray’s Lessee*, 59 U.S.

U.S. 763, 772 (1950); see *Calvin’s Case*, 77 Eng. Rep. at 397; 1 James Kent, *Commentaries on American Law* 62 (1826) (legal remedies “suspended” for alien enemies during war); 3 Joseph Story, *Commentaries on the Constitution of the United States* 571 (1833) (same); 4 *Elliot’s Debates* 554 (Madison distinguishing alien enemies as “obviously and so essentially distinct” from other aliens).

at 276; *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). And central to the “personal liberty” it safeguarded was “the power of locomotion” free of “imprisonment or restraint.” *Kerry*, 576 U.S. at 92 (Scalia, J.) (quoting Blackstone, *supra*, at 134).

As shown above, there were no “common-law procedures,” *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting), by which the government could deprive noncitizens of their bodily liberty while attempting to deport them. The common law’s “settled usages,” *Murray’s Lessee*, 59 U.S. at 277, provided no authority whatsoever to detain noncitizens in connection with civil removal. Needless to say, there was no authority for *mandatory* detention.

The Fifth Amendment’s text reinforces, rather than departs from, those common-law standards. The Framers knew how to distinguish citizens from noncitizens. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (only a “citizen” may hold congressional office). But the Fifth Amendment “speaks in the relatively universal term of ‘person,’” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), echoing the landmark English statutes securing physical liberty that inspired the Framers, *e.g.*, 3 Car. 1, c. 1, § 4 (1627) (Petition of Right) (“no man of what estate or condition that he be” could be arbitrarily detained); 31 Car. 2, c. 2, §§ 1-2 (1679) (Habeas Corpus Act) (extending protection to “any person”).

The Amendment’s protections against arbitrary imprisonment, therefore, are “universal in their application to all persons within the territorial jurisdiction,

without regard to any differences of ... nationality.” *Wong Wing*, 163 U.S. at 238 (quotation marks omitted).

D. The short-lived Alien Friends 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), does not undermine noncitizens’ due-process rights against arbitrary detention.

Most importantly, even this infamous law did not authorize arrest before an order to leave the country—or detention to facilitate removal. *See* An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798). Indeed, the 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).

Nor does the Act’s legislative history support denying due-process rights to noncitizens. While some of the Act’s proponents claimed that noncitizens lacked rights because the Constitution was a “compact ... made between citizens only,” 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834), Madison and others ably refuted those claims by invoking constitutional text and the common law. The Fifth Amendment, they stressed, “speaks of persons, not of citizens,” so 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. 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 from any “arbitrary and unusual process.” 4 *Elliot’s Debates* 546, 556-57, 559.

The Alien Friends Act “left no permanent traces in the constitutional jurisprudence of the country.” 3 Story, *supra*, § 1288. And its citizens-only account of constitutional rights was further repudiated after it became the basis of *Dred Scott v. Sanford*, 60 U.S. 393 (1857), which applied the same “social contract reading of the Constitution” to define constitutional rights as privileges of the citizen, Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 940 (1991); see Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Texas L. Rev. 1, 22 & n.103, 92-93 (2002) (explaining connection between *Dred Scott* and the Alien Friends Act). The Fourteenth Amendment rejected *Dred Scott*’s definition of citizenship but conspicuously extended its due-process guarantee to every “person,” thus “unequivocally rejecting [both] the Alien Friends Act and *Dred Scott*.” Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 730, 728 (1995).

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

Ignoring history, common law, and constitutional text, the government claims that noncitizens who enter the country without permission can claim only whatever protections from detention are “conferred by Congress.” Appellants Supp. Br. 3 (quotation marks omitted). Wrong. The right to bodily liberty is not a matter of legislative grace, and the Fifth Amendment protects everyone present in this country, regardless of immigration status, from arbitrary deprivation of that right.

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. “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); accord *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). Whenever “the liberty of an individual is at stake,” 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) (addressing deportation).

Thus, 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). 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 that case involved an alleged right to seek *lawful admission*, not freedom from arbitrary detention. The petitioner argued only that the relevant statute “violate[d] his right to due process *by precluding judicial review of his allegedly flawed credible-fear proceeding*.” *Id.* at 138 (emphasis added). He 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). Simply put, the petitioner sought a chance at 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)).

In short, the *only* context in which the “decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law,” *id.* at 138 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)), is when such officials are making the decision whether to exclude a person from *lawful admission* into the United States. The entire discussion in *Thuraissigiam* focuses on that point alone, as the opinion expressly states: “For these reasons, an alien in respondent’s position has only those rights *regarding admission* that Congress has provided by statute.” *Id.* at 140 (emphasis added).

It is puzzling, therefore, that Judge Wilson’s panel-stage dissent conflates the right to secure release from arbitrary confinement with the (non-existent) right to obtain lawful admission. *Thuraissigiam* itself sharply distinguishes “contesting the lawfulness of restraint and securing release” from claiming a “right to enter or remain in a country.” 591 U.S. at 117. That fundamental distinction is why habeas corpus can be used to seek the former but not the latter. *Id.* Admission is a

privilege conferred by the government in its discretion; physical liberty is a “strictly natural” right, Blackstone, *supra*, at 134, protected at least since Magna Carta, 25 Edw. 1, c. 29 (1297), and expressly secured by the Fifth Amendment. As a result, even people who have been conclusively determined to lack any right to be in this country are still protected by due process from arbitrary detention. *Wong Wing*, 163 U.S. at 238; *Zadvydas*, 533 U.S. at 693.

The other two cases the government cites in support of its position are no better. The Court did not even construe the Fifth Amendment in *Kaplan v. Tod*. The petitioner there 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 a noncitizen’s “right to admission.” 459 U.S. at 35. The Court noted 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 has that effect, *see* Appellants Supp. Br. 19, as the government inaccurately claims. 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.

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 an unenumerated “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 v. Louisiana*, 504 U.S. 71, 80 (1992). 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 doing so is “rationally related to legitimate government interests,” Appellants Supp. Br. 3 (quoting *Glucksberg*, 521 U.S. at 728), is absurd.

B. Mandatory immigration detention is a historical outlier.

Contrary to the government’s superficial nod toward “tradition,” *id.*, detaining noncitizens without bail is the historical novelty here—a modern deviation from the nation’s deeply rooted traditions.

At the Founding, and for a century afterward, there was no immigration detention—because the federal government did not restrict immigration. Even the short-lived Alien Act did not authorize detention to effectuate removal. *See supra* at 11. And aside from that never-enforced Act, the first deportation laws were not passed until 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 of them, 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 deliberately 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, as to deportation laws outside of 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 and Judge Wilson’s dissent 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, contrary to the dissent’s suggestion. *See, e.g.*, Immigration & Nationality Act of 1952, ch. 477, § 242(a), 66 Stat. 163, 209 (authorizing prehearing bail and judicial review of bail determinations); *Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) (describing presumption of release absent danger or flight risk).³ Only in the late 1980s did Congress first mandate

³ Judge Wilson’s dissent cites the portion of the 1952 legislation dealing with the inspection of arriving aliens, which did not provide for bail, Slip op. 61, but neglects to mention the provision governing the “apprehension and deportation” of aliens who were already “in the United States,” 66 Stat. at 208, 204.

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, it was simply unheard of for the government to arrest and imprison noncitizens who lived in this country and deny them bond hearings while seeking to establish their removability.

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. “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.

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.”).

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. And 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.

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* 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.”).

In short, the same factors that supported mandatory detention in *Demore* also aligned in *Carlson*. Congress rendered a clear legislative judgment about the presumptive dangerousness of a narrow class of noncitizens, based on a “reasonable apprehension” of the unique threat they posed. *Id.* at 542. None of that applies here.⁵

⁵ The government has sometimes cited a third case to support mandatory immigration detention, *Reno v. Flores*, 507 U.S. 292 (1993), but “freedom from

D. Due process requires a 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 hearing.

For instance, a 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,

physical restraint” was “not at issue” there, *id.* at 302. *Reno* involved “alien juveniles” 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 295, 302 (citation omitted). *Reno* simply held that people “other than parents, close relatives, and guardians” are unsuitable custodians of minors. *Id.* at 313.

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 a hearing in which the government must demonstrate the need for detention.

Importantly, these decisions did not artificially narrow the right to physical liberty—as the government and Judge Wilson urge here—by asking whether there was an established right to freedom *from the particular type of detention at issue*. Cf. Slip op. 60 (stating that “the right [Petitioners] assert is the right to freedom from custody pending removal proceedings”). That framing of the issues would allow the government to invent new forms of imprisonment without trial that no one could challenge—as long as the imprisonment was “rationally related to legitimate government interests,” *id.* at 62. That is the opposite of what the Due Process Clause was designed for. *See supra* at 9-10. 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)). Freedom from being thrown into prison without justification is not “an unenumerated right.” Slip op. 60.

Indeed, due process typically requires a hearing to deprive someone of any “particularly important individual interests.” *Addington*, 441 U.S. at 424. That applies not just to the various forms of preventive detention cited above but also to removal, *Woodby*, 385 U.S. at 277, denaturalization, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), expatriation, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), and termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). And noncitizens’ vulnerability to removal does not mean they have any less interest in bodily freedom than citizens. Citizens, too, may be detained—within constitutional limits—to ensure safety or appearance at trial, as the Supreme Court noted when first approving of immigration detention. *See Wong Wing*, 163 U.S. at 235 (assuming the legitimacy of immigration detention precisely because “[d]etention is a usual feature ... of arrest on a criminal charge”).

Because the right to “contest[] the lawfulness of restraint and secur[e] release” is not contingent on “the right to enter or remain in a country,” *Thuraissigiam*, 591 U.S. at 117, noncitizens’ liberty interest in freedom from detention does not 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. Noncitizens who violate the terms of their supervised release can be reincarcerated. *Zadvydas*, 533 U.S. at 696.

For all these reasons, the government’s broad power over immigration policy does not mean it can indiscriminately imprison noncitizens without showing the need for detention in a 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 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: September 11, 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 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.

Executed this 11th day of September, 2026.

/s/ Brianne J. Gorod

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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 6,458 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 11th day of September, 2026.

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