Nos. 19-896 & 20-322

IN THE

Supreme Court of the United States

TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Petitioners,

v.

ANTONIO ARTEAGA-MARTINEZ,
Respondent.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Ninth Circuits

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling 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

Based on a statute that in general terms permits bail for noncitizens with removal orders, *see* 8 U.S.C. § 1231(a)(6) (individuals may be "released" or "may be detained"), the government claims the power to imprison noncitizens indefinitely without an adversary hearing, without the approval of an independent decisionmaker, and without showing that the people it wants to detain are dangerous or flight risks. To save this statute from serious constitutional doubts, the courts below interpreted it as requiring a bond hearing before an immigration judge after six months of detention, with the burden on the government to demonstrate flight risk or danger to the community. Without that construction, Section 1231(a)(6) would plainly violate the Due Process Clause, and the government's contrary arguments should be rejected.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Our legal tradition has long protected citizens and noncitizens alike from bodily confinement without the approval of an independent decisionmaker. At the Founding, English common law gave "aliens" the same safeguards against arbitrary detention as subjects. Aliens were among "the people" of England, entitled to the protections of the law "during [their] residence in this realm." 1 William Blackstone, *Commentaries on the Laws of England* 366, 370 (1791 ed.). They were expelled from England only under the same terms and procedures that subjects were: as criminal punishment for "breaches of the law of the land." W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 34 (1890). And because there was no civil deportation, the common law did not recognize anything resembling preventive detention of aliens in aid of that authority.

Consistent with those principles, the Fifth Amendment established that no "person" (not "citizen") may be deprived of liberty without due process of law. Later, the ratification of the Fourteenth Amendment removed any possible doubt that where the Constitution uses the word "person," it must be taken literally.

Since then, this Court has consistently affirmed that due process safeguards against incarceration and other liberty deprivations apply to all people in the United States "without regard to any differences of . . . nationality." *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted). Those safeguards do not diminish or evaporate in the face of immigration measures. Despite noncitizens' vulnerability to a form of detention and expulsion from which citizens are exempt, they are fully shielded by the Fifth Amendment against the risk of erroneous decisions made in the course of immigration enforcement efforts. When liberty is threatened, the Due Process

Clause protects "all persons, aliens and citizens alike." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). The government's "plenary authority" to establish immigration policies, *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020), does not absolve it from observing "the most exacting" due process standards, rather than some "more permissive form," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018), when bringing that authority to bear on a specific "person," U.S. Const. amend. V.

When the government seeks to imprison someone as a preventive measure without a criminal conviction, the minimum requirements of procedural due process are well established: a fair hearing before an impartial decisionmaker with the burden of persuasion on the government. Only with those safeguards has this Court sanctioned pretrial detention of arrestees to ensure their presence at trial or the safety of others, the involuntary commitment of people with dangerous mental illnesses, and the confinement of defendants for any substantial period after being found incompetent to stand trial or not guilty by reason of insanity. In each of these contexts, the government must persuade an independent decisionmaker of the need for detention after a hearing.

The same process is due whether or not the person at risk of wrongful detention is a citizen, and whether or not the government is exercising its immigration powers. Noncitizens have the same liberty interest as citizens in freedom from physical confinement. And the government's broad authority over immigration does not alter the equation: as precedent confirms, the immigration context does not trigger deviation from the procedural baseline that is required whenever the "grave consequences" of a significant liberty deprivation are threatened. *Chaunt v. United States*, 364 U.S. 350, 353 (1960). Whether the government is enforcing

immigration measures or other laws, the constitutionality of preventive detention "must be evaluated in precisely the same manner." *United States v. Salerno*, 481 U.S. 739, 749 (1987).

Arguing to the contrary, the government relies on *Carlson v. Landon*, 342 U.S. 524 (1952), and *Demore v. Kim*, 538 U.S. 510 (2003), but it misunderstands those decisions. They establish, as a matter of "substantive due process," *id.* at 515, that Congress may authorize or require detention without bail (1) of specific classes of noncitizens whom Congress has deemed especially dangerous, (2) when Congress has spoken clearly, (3) based on abundant legislative findings, (4) the detention is limited in duration, and (5) adequate guardrails are in place to prevent the abuse of this authority, including review by a neutral decisionmaker. None of those factors is present here. And in their absence, the government offers no basis for denying Respondents the procedural safeguards that are normally due before it imprisons a person without trial.

ARGUMENT

I. Under English Common Law at the Founding, "Aliens" Were Entitled to Due Process and Were Not Detained Without the Approval of an Independent Decisionmaker.

Our legal tradition has long safeguarded the right to be free of bodily detention without the judgment of a neutral decisionmaker, and it has long afforded that right to citizens and noncitizens alike.

At the time of the Founding, the common law regarded "aliens" who were present within English territory as owing "a local and temporary allegiance," 9 William Holdsworth, *A History of English Law* 97 (1926), and in return possessing most of the rights and privileges of England's "natural born" subjects. As

Edward Coke explained in a seminal decision, when an alien "is within England, he is within the King's protection; therefore so long as he is there, he oweth unto the King a local obedience or ligeance." *Calvin's Case*, 7 Co. Rep. 1a (1608), *reprinted in* 1 *The Selected Writings and Speeches of Sir Edward Coke* (Steve Sheppard ed., 2003).

Blackstone later echoed this principle, explaining that an alien owes a "temporary" and "local" allegiance "for so long time as he continues within the king's dominion," in exchange for which the king "affords his protection to an alien . . . during his residence in this realm." Blackstone, *supra*, at 370; *see United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) ("Such allegiance and protection" were "not restricted to natural-born subjects" but extended to aliens "so long as they were within the kingdom.").

By the eighteenth century, aliens could "maintain personal actions," 1 Edward Coke, *Institutes of the Laws of England* § 198 (1794 ed.), and "could own personal property just as a subject," Holdsworth, *supra*, at 97; *see Pisani v. Lawson*, 133 Eng. Rep. 35 (C.P. 1839) (surveying precedent). They could protect their interests through actions for trespass or to recover debt, *see* Holdsworth, *supra*, at 97, for assault and battery, and even for defamation, *Tirlot v. Morris*, 1 Bulstr. 134 (1688) (quoted in *Pisani*, 133 Eng. Rep. 35). They could also "challenge Executive and private detention" through the writ of habeas corpus, including to contest "the erroneous application" of statutes. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

Indeed, Blackstone classified aliens as among "the people" of England. Blackstone, *supra*, at 366. As long as their allegiance remained in force through their territorial presence, aliens were "the king's subjects." *Id.* at 371. Their rights were "more circumscribed" in a

few ways, being "acquired only by residence here, and lost whenever they remove," but in describing the "principal lines, whereby [aliens] are distinguished from natives," Blackstone mentioned just three: aliens could have no permanent ownership of land, *id.* at 371-72, could not hold office, *id.* at 374, and were "subject to certain higher duties at the custom-house," *id.* at 372.

The common law's extension of personal liberties to aliens had roots in Magna Carta, which guaranteed foreign merchants the right to freely "move about" in England, so long as their home nation was at peace. Magna Carta 1215, ¶ 41, *Avalon Project*, https://avalon.law.yale.edu/medieval/magframe.asp; *see* 1 Matthew Hale, *History of the Pleas of the Crown* 93 (1736) (although the text refers to merchants, "under that name all foreigners living or trading here are comprised" and are "under the king's protection").

A more well-known provision of Magna Carta, "often seen as the origin of the concept of due process," Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1295-96 (1975), decreed that "[n]o freemen shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land," Magna Carta 1215, *supra*, ¶ 39. Similarly influential was an early statute providing that "no Man of what Estate or Condition that he be" could be "taken nor imprisoned . . . without being brought in Answer by due Process of the Law." Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340 (1987) (citing 28 Edw. 3, ch. 3 (1354)). That measure sought to ensure "an opportunity to answer personally before a court." *Id.*

Notably, the common law of the eighteenth century did not recognize anything resembling preventive detention of aliens in aid of deportation, for there was

no such thing as deportation. "England had nothing like modern immigration restrictions," and "the word 'deportation' apparently was not to be found in any English dictionary." *Thuraissigiam*, 140 S. Ct. at 1973 (quotation marks omitted); *see Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) (Parliament did not pass deportation legislation until 1793). In theory, aliens were "liable to be sent home," Blackstone, *supra*, at 260, but in reality "[t]here is very little historical evidence" of that occurring, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 322 (2008); *see* Craies, *supra*, at 33-36 (finding no clear examples of expulsion from the sixteenth through eighteenth centuries).

As a result, aliens were expelled from England only on the same terms as subjects were—as punishment for crimes, *see* Markowitz, *supra*, at 323-24—and only with the same procedural safeguards. The criminal penalty of "banishment" applied to aliens and subjects alike. Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 469 (2021). The similar penalty of "transportation," *i.e.*, removal "for a period of years," *id.*, was likewise reserved for "convicted criminals, whether subject or alien," Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115, 130 (1999); *see Fong Yue Ting*, 149 U.S. at 709. Because there was no method of expulsion "to which English men and women were also not subject," Bleichmar, *supra*, at 130, the expulsion of aliens "was restricted to the cases provided by statute, viz. breaches of the law of the land. And in this respect they really stood in no different position from subjects." Craies, *supra*, at 34.

With the lone exception that, "during the time of war," foreigners from a warring nation were transformed from "alien-friends" into "alien-enemies," who suffered numerous temporary disabilities, Blackstone, *supra*, at 372, there was no other form of civil or criminal detention that applied only to aliens. Nash, *supra*, at 470-73. Thus, under the "settled usages and modes of proceeding existing in the common and statute law of England," *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855), detention required a hearing before an independent decisionmaker, for aliens and subjects alike. The common law offered no precedent for singling out aliens to receive any less protection of their physical liberty.

II. The Framers Ensured that Citizens and Noncitizens Share the Same Right to Fair Procedures Before Being Deprived of Liberty.

A. The Framers knew how to distinguish citizens from noncitizens. *See, e.g.*, U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3 (only "a Citizen" may hold congressional office); *id.* art. II, § 1, cl. 5 (only a "natural born Citizen" may be president). But they established in the Fifth Amendment that no "person" may be deprived of life, liberty, or property without due process of law. *Id.* amend. V; *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("the Fifth Amendment . . . speaks in the relatively universal term of 'person'"); Alexander M. Bickel, *The Morality of Consent* 38 (1975) ("the Constitution says citizens rarely, and people most of the time, and never the two interchangeably").

Because the Framers "employed words in their natural sense" and "intended what they have said," *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), the terms of the Due Process Clause are not "confined to the protection of citizens," but rather "are universal in their

application to all persons within the [nation's] territorial jurisdiction, without regard to any differences of . . . nationality," *Wong Wing*, 163 U.S. at 238 (quotation marks omitted).

B. Despite the clarity of this text, some proponents of the Alien and Sedition Acts claimed "that aliens were not entitled to constitutional protections against summary removal," as authorized by the Alien Act, "because they were not 'parties' to the Constitution." Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 Conn. L. Rev. 743, 759 (2013). On this view, the Constitution was a "compact . . . made between citizens only." 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834).

Opponents of the legislation, however, defended noncitizens' constitutional rights in terms that would later be vindicated by the Fourteenth Amendment and this Court. Under the common law, Representative Livingston explained, noncitizens "residing among us, are entitled to the protection of our laws." *Id.* And in this regard, "the Constitution expressly excludes any . . . . distinction between citizen and alien." *Id.* "Unless . . . an alien is not a 'person,' . . . we must allow that all these provisions extend equally to aliens and natives." *Id.* at 2013; *see id.* at 1956 (Rep. Gallatin) (the Due Process Clause "speaks of persons, not of citizens").

In a similar vein, James Madison and Thomas Jefferson authored resolutions promulgated by the Virginia and Kentucky legislatures condemning the statutes after their passage. According to Kentucky, imprisoning noncitizens based on a presidential order under the Alien Act would be "contrary to the Constitution, one amendment to which has provided, that 'no person shall be deprived of liberty without due process of law.'" *The Virginia Report of 1799–1800, Together*

with Several Other Documents 164 (1850). Madison also published a lengthy critique of the legislation, explaining that noncitizens were "under a local and temporary allegiance, and entitled to a correspondent protection," including "rights under the Constitution." *Id.* at 205-06. Therefore, they could not be subjected to "any arbitrary and unusual process." *Id.* at 208.[2]

C. The short-lived Alien Act "left no permanent traces in the constitutional jurisprudence of the country." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1288 (1833). Because the federal government did not restrict immigration until the late nineteenth century, however, and the Bill of Rights did not govern the states, this Court long had no opportunity to confirm noncitizens' constitutional rights. "It was not until the *Dred Scott* decision and its subsequent rejection in the form of the Fourteenth Amendment" that things changed. Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 732 (1995).

In *Dred Scott*, Justice Taney drew on the "social contract reading of the Constitution" earlier espoused by the Alien Act's proponents, Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 940 (1991), to limit the Constitution's protections as being "privileges of the citizen," *Dred Scott v. Sandford*, 60 U.S. 393, 449 (1857); *see* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1223 (1992).

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[2] Consistent with common law, critics did not oppose wartime detention of "alien enemies," *i.e.*, subjects of the warring nation, and they supported separate legislation addressing that "obviously and so essentially distinct" class of persons. *The Virginia Report*, *supra*, at 203; *see Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (disabilities of alien enemies "are imposed temporarily as an incident of war and not as an incident of alienage").

"The first sentence of the Fourteenth Amendment consciously overruled *Dred Scott*'s holding that blacks could never be 'citizens.'" *Id.* at 1223 n.134. But strikingly, after beginning with a definition of "citizens," the Amendment "then frames the right to equal protection" and due process "in terms of 'person' rather than 'citizen.'" Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 810 n.32 (2013). That was no accident: the debates involved extensive discussions of "the rights of aliens as 'persons'" and the "mistreatment of the Chinese on the Pacific coast." Neuman, *supra*, at 941. Senator Howard explained that the Amendment would "disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). In the House, Representative Bingham did the same. *Id.* at 1090.

"[R]ather than to create different standards for states and the federal government," the Fourteenth Amendment aimed "to align the constitutional treatment of the two," as its proponents believed that the Fifth Amendment was already "a guarantee to all within the United States—not just to citizens." Rosenfeld, *supra*, at 729-30. By confirming not only that formerly enslaved persons were citizens, "but also that even non-citizens within the United States had due process rights," the Fourteenth Amendment "resolved debate over both of these issues . . . unequivocally rejecting the Alien Friends Act and *Dred Scott*." *Id.* at 730, 728.

"The occasion thereby arose for [this] Court to declare unequivocally" that noncitizens are entitled to constitutional safeguards for "persons." Neuman, *supra*, at 941; *see Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the Fourteenth Amendment's Due Process

Clause covers noncitizens). "Applying this reasoning to the fifth . . . amendment[]," this Court then confirmed that "all persons within the territory of the United States" are "entitled to the protection" of its Due Process Clause. *Wong Wing*, 163 U.S. at 238 (citing *Yick Wo*, 118 U.S. at 369).

III. Without the Construction Given by the Courts Below, Section 1231(a)(6) Would Violate the Due Process Clause.

A. Noncitizens in the United States Are Fully Protected by the Safeguards of Procedural Due Process in Immigration Enforcement.

1. A noncitizen present in the United States is "entitled to the same protection under the laws that a citizen is entitled to," *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (1982) (quotation marks omitted), and "may not be deprived of his life, liberty or property without due process of law," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). This safeguard applies "without regard to any differences of . . . nationality," *Wong Wing*, 163 U.S. at 238 (quotation marks omitted), and it neither evaporates nor diminishes when the government is enforcing immigration laws.

Noncitizens are always "subject to the plenary power of Congress to expel them," *Carlson*, 342 U.S. at 534, but the government's "power to terminate its hospitality," *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952), is not a license to "disregard the fundamental principles that inhere in 'due process of law'" when "executing the provisions of a statute involving the liberty of persons," *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). That power remains "subject to . . . the 'paramount law of the constitution.'" *Carlson*, 342 U.S. at 537 (quoting *Fong Yue Ting*, 149 U.S. at 713);

see Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

The government's immigration authority, therefore, "is a power to be administered, not arbitrarily and secretly, but fairly and openly." *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). One result "is that no person shall be deprived of his liberty without opportunity . . . to be heard . . . in respect of the matters upon which that liberty depends." *Kaoru Yamataya*, 189 U.S. at 101. Executive officers may not "arbitrarily . . . cause an alien who has entered the country . . . to be taken into custody" without "giving him all opportunity to be heard." *Id.* "The hearing, moreover, must be a real one, not a sham or a pretense." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (quotation marks omitted).

All persons are thus entitled to a fair hearing before the government deprives them of liberty, even when the issue is whether they may remain in the United States. *United States ex rel. Vajtauer v. Comm'r of Immigr.*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing . . . is a denial of due process . . . ."); *see Kwock Jan Fat*, 253 U.S. at 464 (granting habeas relief because agency hearing that unduly limited evidence "was not a fair hearing"); *cf. Tang v. Edsell*, 223 U.S. 673, 676, 681-82 (1912) (denying relief where noncitizens "had full opportunity to present their evidence and to produce witnesses").

To be sure, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Diaz*, 426 U.S. at 79-80, but that does not imply that noncitizens have some diminished form of due process rights. As this Court explained immediately after that remark, it simply reflects the fact

that citizens are exempt from immigration measures: "The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." *Id.* at 80 (footnotes omitted). But "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

That is why the void-for-vagueness doctrine, "an 'essential' of due process," *Dimaya*, 138 S. Ct. at 1212, applies in removal proceedings. Indeed, this Court "long ago held that *the most exacting vagueness standard* should apply in removal cases." *Id.* at 1213 (emphasis added); *see Jordan v. De George*, 341 U.S. 223, 231 (1951) ("We do this in view of the grave nature of deportation."). Thus, the government "cannot take refuge in a more permissive form" of this due process safeguard in the immigration context. *Dimaya*, 138 S. Ct. at 1213. When "the liberty of an individual is at stake," due process requires adhering to the same "notions of fairness on which our legal system is founded" in immigration enforcement as it does elsewhere. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

2. The requirement of due process before a liberty deprivation applies regardless of the duration or legality of a noncitizen's presence in the United States.

It is settled that "aliens unlawfully present" may invoke the Fifth Amendment. *Plyler*, 457 U.S. at 212. "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection," *Diaz*, 426 U.S. at 77, including recent entrants, *Kaoru Yamataya*, 189 U.S. at 101. Due process therefore protects those "who have once passed through our gates, even illegally." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Conversely, a noncitizen "on the threshold of initial entry stands on a different footing." *Id.* Lacking any entitlement to "the privilege of entry," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), noncitizens have no liberty interest in "initial admission," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). But due process is required "once an alien enters the country." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

None of this was altered by *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020). There, this Court reaffirmed established principles concerning "the due process rights of an alien seeking initial entry" and applied "[t]he same" principles to someone apprehended immediately after crossing the border, even though "he succeeded in making it 25 yards into U.S. territory." *Id.* at 1982. "Like an alien detained after arriving at a port of entry," that person remained "'on the threshold.'" *Id.* at 1983 (quoting *Mezei*, 345 U.S. at 212); *compare Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958) (noncitizen held at port of entry "was to be regarded as stopped at the boundary line"), *with Kaoru Yamataya*, 189 U.S. at 87, 100 (noncitizen determined to be inadmissible four days after entry had become "a part of our population," protected by the Fifth Amendment).

Importantly, too, the right to be freed from unconstitutional detention, even if it results in supervised release within the United States, bestows "no additional right" to remain in this country, *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908), or to violate the terms of supervised release, *Zadvydas*, 533 U.S. at 696.

B. For Both Citizens and Noncitizens, Preventive Detention Requires a Fair Hearing Before a Neutral Decisionmaker with the Burden on the Government.

When the state seeks to imprison someone as a preventive measure without a criminal conviction, "the minimum requirements of due process," *Plasencia*, 459 U.S. at 35, are a fair hearing before an impartial decisionmaker with the burden of persuasion on the government. This is true in immigration proceedings as elsewhere.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. Incarceration, after all, is perhaps "the harshest action the state can take against the individual through the administrative process." Friendly, *supra*, at 1296. Because "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (quoting *Salerno*, 481 U.S. at 755), this Court permits the government to imprison people outside the safeguards of a criminal trial only under the most rigorous procedural standards to prevent erroneous determinations.

1. In "certain narrow circumstances," dangerous individuals "may be subject to limited confinement" without a criminal conviction, *Foucha*, 504 U.S. at 80, if there is "a constitutionally adequate purpose for the confinement," *Jones v. United States*, 463 U.S. 354, 361 (1983) (quotation marks omitted). But this Court has upheld such detention only where the burden is on the government to persuade an impartial decisionmaker of the need for it after a fair hearing. Only "[u]nder such circumstances" has this Court allowed pretrial detention of criminal defendants to ensure

their presence at trial, *Bell v. Wolfish*, 441 U.S. 520, 536 (1979), or the safety of others, *Salerno*, 481 U.S. at 741. The same requirements must be met 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 defendants for any substantial period after they are found incompetent to stand trial, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), or judged not guilty by reason of insanity, *Foucha*, 504 U.S. at 86.

These cases have all required an adversary hearing before a neutral decisionmaker—indeed, they each involved a ruling by "a judicial officer," *Salerno*, 481 U.S. at 742, or "a trial . . . before a jury," *Addington*, 441 U.S. at 420. In each context, the state has the burden of showing the need for detention, typically by a heightened standard of "clear and convincing evidence." *Foucha*, 504 U.S. at 86.

Most analogous here, this Court's approval of pretrial detention for arrestees charged with "serious felonies," based on their dangerousness, rested on the "numerous procedural safeguards" required in "a full-blown adversary hearing" where the government had to "convince a neutral decisionmaker by clear and convincing evidence" of the need for detention. *Salerno*, 481 U.S. at 755, 750. The Bail Reform Act "require[d] a judicial officer to determine whether an arrestee [should] be detained," "after a hearing pursuant to the provisions of [the Act]." *Id.* at 742. A defendant could "request the presence of counsel at the detention hearing," "testify and present witnesses in his behalf, as well as proffer evidence," and "cross-examine other witnesses appearing at the hearing." *Id.* Detention was permissible only if "no conditions of pretrial release [could] reasonably assure the safety of other persons and the community," and a judge had to "state his

findings of fact in writing, and support his conclusion with clear and convincing evidence." *Id.* (citations and quotation marks omitted). "The judicial officer [was] not given unbridled discretion in making the detention determination" because "Congress ha[d] specified the considerations relevant to that decision." *Id.* Arrestees were "entitled to a prompt detention hearing" and to "expedited appellate review of [any] detention order," while "the maximum length of pretrial detention [was] limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 743, 747.

Even beyond preventive detention, due process requires a fair hearing before an independent decisionmaker, with the burden on the government, before depriving someone of *any* significant liberty interest—whether or not that person is a citizen or the government is exercising its immigration powers. Those standards are constitutionally required in removal proceedings, *Woodby v. INS*, 385 U.S. 276, 277 (1966), denaturalization proceedings, *Chaunt*, 364 U.S. at 353, expatriation proceedings, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), proceedings to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), and proceedings to discontinue essential welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970); *see Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake" are "particularly important" (quotation marks omitted)).

Thus, across "various civil cases" involving citizens and noncitizens, in immigration proceedings and elsewhere, this Court has protected "particularly important individual interests," *Addington*, 441 U.S. at 424, by insisting on the standards described above.

2. The same procedures are required to incarcerate noncitizens for any substantial period of time pending deportation. *Cf. Jackson*, 406 U.S. at 733 (allowing confinement without such safeguards only for a "reasonable period of time" to determine whether defendants might regain capacity to stand trial); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring a magistrate's neutral judgment for "prolonged detention" after arrest).

Noncitizens have the same liberty interest as citizens in freedom from physical confinement. Detention "*for any purpose* constitutes a significant deprivation of liberty." *Foucha*, 504 U.S. at 80 (quoting *Jones*, 463 U.S. at 361) (emphasis added). And noncitizens enjoy no less protection than other persons against wrongful detention. They may not be seized or imprisoned for crimes without the same procedural safeguards owed to citizens. *Wong Wing*, 163 U.S. at 238 (Fifth and Sixth Amendments); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (Fourth Amendment). This Court has never suggested they could be detained pending trial or civilly committed on weaker grounds than citizens. And they are constitutionally entitled to habeas corpus review. *St. Cyr*, 533 U.S. at 300.

Nor does their unique vulnerability to immigration detention mean that noncitizens have any less of an interest in bodily freedom. The government inflicts the same treatment on its own citizens where it wields comparable power over them, as this Court has noted. *See Wong Wing*, 163 U.S. at 235 (approving of "detention or temporary confinement, as part of the means necessary to give effect to . . . expulsion of aliens," because "[d]etention is a usual feature in every case of arrest on a criminal charge"); *Harisiades*, 342 U.S. at 591 (reasoning that because "the Due Process Clause does not shield the citizen from conscription and the

consequent calamity of being separated from family, friends, home and business . . . . it is hard to find justification for holding that the Constitution requires that [such] hardships must be spared the [noncitizen]").

Moreover, a noncitizen's liberty interest in freedom from detention is not contingent on any right to remain in the United States. As this Court recently underscored, the right to "contest[] the lawfulness of restraint and secur[e] release" fundamentally differs from "the right to enter or remain in a country." *Thuraissigiam*, 140 S. Ct. at 1969. That is why due process safeguards against unjustified detention continue to apply to noncitizens even after they receive a removal order that conclusively denies their entitlement to stay in the United States. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238.

3. Likewise, the government's broad authority to set immigration policy does not empower its officers to imprison noncitizens without—as in other contexts—convincing a neutral decisionmaker of the need for detention after a fair hearing.

Although the government has virtually unreviewable power to decide which noncitizens may remain in the country, this Court has never suggested it has comparable power to decide whom to imprison in connection with that authority. Long ago this Court squarely established that the government lacks plenary authority to use imprisonment as a deterrent in aid of its immigration policy. *Wong Wing*, 163 U.S. at 238.

Of course, the authority to deport entails a power to detain in order to achieve that end. *Carlson*, 342 U.S. at 538. But neither precedent nor logic supports the further conclusion that this power is exempt from the safeguards against unwarranted detention that

apply in every other context. Even with respect to the underlying question of whether a person may be deported, due process requires the critical safeguards discussed above. *Woodby*, 385 U.S. at 277. The ancillary power to detain in aid of deportation is surely no broader.

Indeed, because the government's detention power comes from the need to effectuate deportation and prevent harm in the interim, it has no interest at all in detaining noncitizens who are not actually flight risks or threats to safety. *See Addington*, 441 U.S. at 426 ("the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others"). Requiring a fair hearing and an impartial decisionmaker ensures that the government has the requisite interest in detaining any particular individual.

Finally, although enforcement of deportation policies may be important, so is protecting the community from people accused of "the most serious of crimes," including "crimes of violence" and "offenses for which the sentence is life imprisonment or death." *Salerno*, 481 U.S. at 747. In that effort "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, this Court upheld their preventive detention only by emphasizing the safeguards of the "full-blown adversary hearing" in which "the Government must convince a neutral decisionmaker by clear and convincing evidence" that confinement is necessary. *Id.* And that was after the government had already shown probable cause that the arrestees committed the charged felonies. *Id.*

Were there any doubt, precedent confirms that the immigration context does not trigger deviation from

the baseline procedures that are required whenever "grave consequences" of a significant liberty deprivation are threatened. *Chaunt*, 364 U.S. at 353. As discussed, this Court has demanded those procedures for deportation and denaturalization, given the "drastic deprivations" involved—requiring the government to demonstrate "that the facts alleged . . . are true" and even to satisfy an elevated standard of proof. *Woodby*, 385 U.S. at 285-86.

This Court has also emphasized the importance of a neutral decisionmaker in this context. Requiring some degree of separation between "the duties of prosecutor and judge" is "intended to ameliorate the evils from the commingling of [these] functions." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 46 (1950). "And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings," where government power is brought to bear on "a voteless class of litigants" who may be "strangers to the laws and customs." *Id.* at 46.

More broadly, this Court has repeatedly drawn on precedent from other contexts when assessing the due process rights of noncitizens in immigration enforcement. *E.g.*, *Zadvydas*, 533 U.S. at 690; *Flores*, 507 U.S. at 314; *Woodby*, 385 U.S. at 285 & n.18; *Wong Wing*, 163 U.S. at 235. Likewise, it has drawn on immigration and naturalization precedent when defining the process due for other serious liberty deprivations. *E.g.*, *Cooper*, 517 U.S. at 362-63 & n.19; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970).

Driving the point home, this Court stated expressly in *Salerno* that the constitutionality of pretrial detention "must be evaluated in *precisely the same manner* that we evaluated the laws in the cases discussed above," 481 U.S. at 749 (emphasis added),

which included both *Carlson v. Landon* and *Wong Wing*. That is because these cases all concern the "protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual." *Cooper*, 517 U.S. at 368.

C. The Government's Reliance on *Carlson* and *Demore* Is Misplaced.

Despite the above, the government claims it may indefinitely imprison people whom it wants to deport without a true adversary hearing, Pet. Br. 21, *Johnson v. Arteaga-Martinez*, No. 19-896 (touting instead a "personal interview"), without an independent decisionmaker, and without bearing the burden of showing that a detainee is dangerous or a flight risk, *id.* at 19-20. The government primarily relies on two decisions that, it says, "upheld detention in connection with removal without any individualized hearings or individualized findings at all." *Id.* at 17 (citing *Carlson v. Landon*, 342 U.S. 524 (1952), and *Demore v. Kim*, 538 U.S. 510 (2003)). But the government's account of those decisions and their implications is wrong.

Demore and *Carlson* establish, as a matter of "substantive due process," *Demore*, 538 U.S. at 515, that Congress may authorize or require the detention without bail (1) of specific classes of noncitizens whom Congress has deemed especially dangerous, (2) when Congress has spoken clearly, (3) based on abundant legislative findings, (4) the detention is limited in duration, and (5) adequate guardrails are in place to prevent abuse of this authority—including review by a neutral decisionmaker.

None of those factors is present here. And in their absence, the government offers no basis for denying Respondents the procedural safeguards that are normally due before it imprisons a person without trial.

1. *Demore v. Kim*

While detention of any kind threatens core liberties, this Court has also acknowledged the need for deference to legislative judgments on substantive questions of immigration policy. *E.g.*, *Harisiades*, 342 U.S. at 590. In some circumstances, that deference can extend to questions about detention in aid of deportation. Such deference reaches its apogee in a case like *Demore*, which upheld mandatory detention of certain noncitizens against a substantive due process challenge. But the permissibility of categorical detention under the narrow conditions outlined in *Demore* does not imply that procedural due process requirements may be watered down where those circumstances are absent.

Demore held that Congress may require detention without bail, for a "brief period," of a particular class of noncitizens ("criminal aliens") whom Congress was "justifiably concerned" were especially dangerous to release, who had already been convicted of specified crimes after receiving the safeguards of the criminal process, and to whom "individualized review [was] available" before an immigration judge. 538 U.S. at 513, 514 n.3. That decision does not support the inferences the government draws from it.

The statute challenged 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.'" *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) (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." *Id.* (emphasis added). Congress did so through an unequivocal command: the

Attorney General "*shall* take into custody" any such person. 8 U.S.C. § 1226(c)(1) (emphasis added).

Upholding that provision, this Court went out of its way to stress the extensive legislative findings that supported Congress's decision—repeatedly discussing the evidence Congress gathered about the gravity of the problem and how to ameliorate it. *See Demore*, 538 U.S. at 518-21 (citing findings of multiple reports, hearings, investigations, and studies). That evidence indicated "that permitting discretionary release . . . would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large." *Id.* at 528; *see id.* ("The evidence Congress had before it certainly supports the approach it selected.").

Critical to *Demore*, therefore, was Congress's clear legislative determination that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," *id.* at 520, justifying "a special rule for aliens who have committed certain dangerous crimes," *Preap*, 139 S. Ct. at 959; *cf. Salerno*, 481 U.S. at 742, 754-55 (explaining that the Bail Reform Act "represents the National Legislature's considered response" to "a compelling interest" of the government, and declining to interfere with "this congressional determination"); *Galvan,* 347 U.S. at 529 (similarly deferring, where "[o]n the basis of extensive investigation Congress made many findings").

That is not all. *Demore* also hinged on the narrow subclass of noncitizens governed by this special rule: only those with specific types of "prior convictions, which were obtained following the full procedural protections our criminal justice system offers." 538 U.S. at 513. Those convictions "reflect[ed] personal activity that Congress considered relevant to future dangerousness." *Id.* at 525 n.9 (quotation marks omitted).

This Court further stressed the safeguards in place to mitigate risk of abuse. Anyone claiming to be wrongly detained was "immediately provided" a hearing to determine whether they were "properly included in a mandatory detention category." *Id.* at 514 & n.3 (citing *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999)). That hearing would be conducted by "an Immigration Judge." *Joseph*, 22 I. & N. Dec. at 799.

Finally, this Court also relied on "[t]he very limited time of the detention at stake," *Demore*, 538 U.S. at 529 n.12, based on its understanding that detention lasted "roughly a month and a half in the vast majority of cases," *id.* at 530; *see id.* at 528-29 (distinguishing *Zadvydas* on this basis).

Combined, these factors sufficed to overcome the liberty interest of "criminal aliens" in freedom from detention, *id.* at 515, representing the first and only time this Court has upheld mandatory detention without bail in connection with removal.

Crucially, however, *none* of those factors is present here. Section 1231(a)(6) "does not apply narrowly to a small segment of particularly dangerous individuals," but instead reaches "broadly" to include all people the government seeks to remove "for many and various reasons." *Zadvydas*, 533 U.S. at 691 (quotation marks omitted). The only trait that potentially unites these individuals is "removable status itself," which "bears no relation to a detainee's dangerousness" or flight risk. *Id.* at 692. Far from representing a clear legislative mandate—much less bolstered by robust findings—the language authorizing detention in Section 1231(a)(6) "does not necessarily suggest unlimited discretion." *Id.* at 697. Detention here is not contingent on a prior criminal conviction, with all the attendant safeguards, and there is nothing like the "individualized review [that] [wa]s available" in *Demore* before a

neutral immigration judge. 538 U.S. at 514 n.3. Finally, the detention here is "materially different" from that in *Demore* because it is "indefinite" and far exceeds the "month and a half" contemplated there. *Id.* at 528, 530 (quotation marks omitted).

2. *Carlson v. Landon*

Carlson stands for similar principles and offers even less support for the government's sweeping claims.

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

This 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, this Court deferred to Congress's considered determination—the "legislative judgment of evils," *Carlson*, 342 U.S. at 543—that *all* foreign Communists endangered national security: "because of Congress' understanding of their attitude toward the use of force and violence . . . to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention." *Id.* at 541. The legislative history was "emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Id.* at 540.

Moreover, the detention in *Carlson* directly implicated national security, calling for "heightened deference to the judgments of the political branches." *Zadvydas*, 533 U.S. at 696. "What was significant in *Carlson*," therefore, was "that Congress had enacted legislation based on its judgment that such subversion posed a threat to the Nation." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 193 (1991). This "congressional determination that the presence of alien Communists constituted an unacceptable threat to the Nation" was "the statutory policy that justified the detention." *Id*. at 194.

The Attorney General, however, was "not left with untrammeled discretion as to bail," as this Court emphasized: "Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Carlson*, 342 U.S. at 543.

Finally, "the problem of . . . unusual delay in deportation hearings [was] not involved" in *Carlson*. *Id.* at 546.

In short, the same constellation of factors that supported the statute in *Demore* also aligned in *Carlson*. Congress rendered a clear legislative judgment about a particular class of noncitizens, based on a "reasonable apprehension" of their dangerousness. *Carlson*, 342 U.S. at 542. Prolonged detention was not at issue, and detainees could contest their confinement in individualized hearings before a judge.

Here, Congress has made no determination that every person ordered removed for any reason should be deprived of the normal safeguards against erroneous detention that lie at the heart of the Due Process Clause. None of the other factors on which *Carlson* and *Demore* relied is present either. Without that rare

combination of circumstances, the government may not deny Respondents the basic protections that due process requires before a person is imprisoned without trial or subjected to other significant deprivations of liberty.

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be affirmed.

Respectfully submitted,

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