

No. 25-886

IN THE
Supreme Court of the United States

KENNETH GENALO, Director of the New York Field
Office of U.S. Immigration and Customs
Enforcement, ET AL.,

Petitioners,

v.

KEISY G.M.,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICI CURIAE* SCHOLARS OF
EARLY IMMIGRATION DETENTION
IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST¹

Amici curiae are expert scholars in immigration law, particularly the historical development and practice of immigration detention and release. *Amici* have published scholarship on these topics. *Amici* are:

- Paulina D. Arnold, Assistant Professor of Law at the University of Michigan Law School;
- Lindsay Nash, Professor of Law at the Benjamin N. Cardozo School of Law

Amici submit this brief to assist the Court in understanding pre-adjudication detention and release in the early immigration system. These aspects of the early federal immigration system have been widely misunderstood—including by this Court—due to the terse statutory text, the dearth of published decisions applying that text, and the failure to consider critical administrative records from this pre-Code of Federal Regulations era. But the administrative documents that memorialized agency interpretation and implementation of its detention and release authority prior to the institution of a formal Code of Federal Regulation show that historically detention pending deportation proceedings was virtually always accompanied by the possibility of some form of release. Because prior accounts have overlooked this evidence, *Amici* offer this brief to correct the historical record and better inform this Court’s constitutional analysis.

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The United States argues that the right to a bond hearing for detained noncitizens awaiting deportation proceedings is “manifestly not” one that is “objectively, deeply rooted in this Nation’s history and tradition.” Gov’t Br. 31-32. Instead, the United States characterizes a bond hearing as “a matter of legislative grace.” *Id.* at 32. For support, the United States invokes this Court’s historical account in *Demore v. Kim*, 538 U.S. 510 (2003), which suggested longstanding sanction of immigration detention without an opportunity for bail. Gov’t Br. 31-32 (citing *Demore*, 538 U.S. at 523 n.7).

That account is wrong. Our Nation’s history and tradition is one in which the possibility of bail or other release went hand-in-hand with detention pending deportation proceedings. The historical record reveals a consistent pattern: Whenever the federal government acquired authority to detain suspected noncitizens pending deportation proceedings, the relevant adjudicators—whether federal judges or administrative officials—understood themselves to possess, and regularly exercised, the power to release those detainees.

SUMMARY OF ARGUMENT

I. Pre-adjudication detention—meaning detention during the period after an allegedly removable noncitizen has been arrested but before the relevant adjudicator has finally determined whether the noncitizen should in fact be ordered removed—played a vanishingly small role in early federal deportation proceedings. At this time, there were two parallel deportation schemes, only one of which authorized pre-adjudication detention at all. The first scheme—under the

Chinese exclusion laws—assigned deportation proceedings to federal courts. Although these courts authorized the arrest of people while they considered whether or not to issue an order of deportation, they also consistently concluded that they had a corresponding inherent power to release on bail prior to a final order of deportation.

The second scheme, under a slightly later set of “general” immigration laws (not targeted specifically at Chinese people), assigned a different type of deportation proceedings to an administrative process. But in the nineteenth-century, administrative deportation procedure did not permit pre-adjudication detention at all; arrest and detention were authorized only after the agency made a final determination that the noncitizen should be deported.

A. Deportation proceedings playing out in federal courts under the Chinese exclusion laws included the possibility of pre-adjudication detention. But those courts recognized their corresponding authority to grant pre-adjudication release. Federal courts across the country consistently concluded they could grant bail while they adjudicated someone’s deportation case despite Congress’s silence on the matter. So accepted was their release authority that, when the government called it into question in a 1910 case, the presiding court responded that the practice had existed “since the passage of the first exclusion act” and noted it had never before encountered any opposition to it. Courts conceived of their bail power as “inherent” and “incident[al] to the power to hear and determine cases,” as required by basic principles of justice, and as implicit in Congress’s decision to legislate against a backdrop of existing judicial bail authority.

B. The first “general” immigration provision that permitted deportation from the interior—as opposed to the constitutionally distinct context of exclusion at the border—was the contract-labor law of 1888. That law was understood to permit a noncitizen to be “taken into custody” only after a government official had already made a final determination that the noncitizen should be deported, meaning it authorized post-adjudication arrest, not pre-adjudication arrest or detention. When Congress expanded administrative deportation authority in 1891 to cover certain people who had entered in violation of its restrictions or become public charges, it provided no additional power to detain in connection with deportation. When enforcing the 1891 Act, federal immigration officials sometimes relied on the cooperation of private and state institutions like almshouses and mental asylums, but federal officials had no power to require state institutions to detain or release noncitizens.

II. Pre-adjudication detention in the administrative deportation system did not begin until the twentieth century—and it brought with it pre-adjudication release.

A. Following this Court’s decision in *Yamataya v. Fisher*, 189 U.S. 86 (1903), which mandated due process in deportation proceedings, administrative immigration authorities began providing pre-adjudication hearings, which separated the decision to authorize an arrest from the decision to order a person deported and created a period of pre-adjudication detention. But virtually as soon as immigration authorities began holding people in pre-adjudication detention, they concluded they were empowered to release them as well. Officers were directed to release those charged

as deportable on their own recognizance or on “parole” to their attorney or employer. By 1906, officials’ regular practice was to determine whether an accused should be held in detention or released while an administrative officer adjudicated her case.

B. Even after Congress enacted express bail authority in the Immigration Act of 1907, immigration officials continued to exercise their inherent release authority alongside their statutory bail authority. And they made no secret of it. Starting at least as early as 1908, widely circulated reports, appellate court opinions, regulations, and legislative materials showed that administrative immigration officials recognized and frequently used this power to release without requiring a surety or cash bond. And by at least 1920, they had publicly shared their view of this power as inherent and constitutionally required. Administrators’ understanding and use of this broad release authority continued through the 1940s, and the authority to release without bond was ultimately codified—with the authority to impose other conditions of release—in the Internal Security Act of 1950.

III. This history exposes the error in *Demore*’s analysis.

A. The *Demore* Court summarily concluded that pre-adjudication detention without bail had longstanding judicial approval based on the absence of an explicit pre-1907 statutory release provision and its assumption that the Court generally approved of a nineteenth-century pre-adjudication immigration detention practice in *Wong Wing v. United States*, 163 U.S. 228 (1896). But when *Wong Wing* was decided, federal courts handling deportation cases under the Chinese exclusion laws regularly released noncitizens on bail.

And the general administrative deportation regime did not authorize pre-adjudication detention at all—immigration officers were authorized to make civil deportation arrests only *after* the agency made a final determination that the noncitizen should be deported. *Demore*’s understanding of the history and tradition of pre-adjudication bail in nineteenth-century immigration enforcement is thus wrong.

B. *Demore* also misread this Court’s decision in *Carlson v. Landon*, 342 U.S. 524 (1952), as endorsing a twentieth-century mandatory no-bail detention scheme for certain categories of noncitizens. But *Carlson* recognized the constitutionality only of the discretionary denial of bond to a limited number of people based on individualized facts, including an alleged noncitizen’s perceived dangerousness and consideration of any hardship that pre-adjudication detention would impose on the noncitizen and the noncitizen’s family. *Carlson* did not approve a categorical no-bond rule.

IV. The United States’ statutory citations do not support its position.

The United States’ reliance on the notorious Alien Enemies Act is wholly inapposite. Most—all but two—of the remaining pre-1907 detention statutes the United States cites did not concern pre-adjudication immigration detention. Instead, they authorized detention at the border (rather than the interior), detention after a final order of deportation (rather than during proceedings), or both—rendering them inapt historical comparators.

Only two pre-1907 statutes cited *did* authorize detention before an order of deportation. But it was widely understood that such pre-adjudication

detention came with the possibility of release. If there is any history and tradition bearing on the right to seek release during the pendency of a person's deportation proceedings, it is one in which pre-adjudication detention always included the potential for release.

ARGUMENT

I. THERE IS NO NINETEENTH CENTURY ANALOGUE FOR MANDATORY PRE-ADJUDICATION IMMIGRATION DETENTION WITHOUT THE POSSIBILITY OF RELEASE.

The United States' historical analysis hinges on *Demore's* observation that "prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings." *Demore*, 538 U.S. at 523 n.7; see Gov't Br. 31-32. But every form of pre-adjudication detention in the pre-1907 federal deportation system came with the potential for release. In the pre-1907 immigration system, there were two deportation schemes. One, adopted as part of the Chinese exclusion laws, was venued in and adjudicated by federal courts. The other, created through the adoption of an increasingly broad "general" immigration scheme, provided for deportation based on adjudication by the relevant cabinet Secretary. In deportation proceedings under the Chinese exclusion laws in federal courts, litigants had the opportunity to seek and obtain bail or other release from a neutral adjudicator. And early records reveal that, until the twentieth century, the administrative immigration enforcement scheme did *not* permit pre-adjudication detention before a final order of deportation; instead, the Secretary authorized officers to "take

custody” only after making a final determination that the noncitizen should be deported.

A. In Chinese Exclusion Law Deportation Cases, Courts Consistently Exercised Pre-adjudication Release Authority.

In the nineteenth century, the only deportation scheme that permitted pre-adjudication detention was the one under the Chinese exclusion laws. This set of laws provided for the deportation of “any Chinese person found unlawfully within the United States” through proceedings to be filed in and adjudicated by federal courts. Chinese Exclusion Act of 1882, § 12, 22 Stat. 58, 59-61; Act of Sep. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479.² They also provided for the initial filing of charges, detention commenced by arrest (generally based on a judicially issued warrant), proceedings before a judge, and some fact-finding before the court decided whether to issue a deportation order. *Id.*

Although the Chinese exclusion laws were silent as to any pre-adjudication release authority, federal courts across the country nonetheless consistently concluded they could grant bail prior to the final order of deportation.³ As one Montana court recounted in

² See Chinese Exclusion Act of 1882, § 12, 22 Stat. at 59-61 (requiring that the accused be brought “before some justice, judge, or commissioner of a court of the United States”); *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902) (explaining that in this context, a commissioner was considered to be a “quasi judicial officer, and in these hearings he act[ed] judicially”).

³ Deportation orders under the Chinese exclusion laws were not considered “final . . . while an appeal from the decision of the commissioner [was] pending.” *In re Ah Tai*, 125 F. 795, 798 (D. Mass. 1903).

1904, “the practice in California, Idaho, and Oregon has been and is to admit Chinese persons to bail pending an investigation into the lawfulness of their residence within the United States, and before any order for deportation has been made.” *In re Lum Poy*, 128 F. 974, 975 (C.C.D. Mont. 1904). Across the country in Massachusetts, another court observed that “[i]n this and other districts,” including Maine, Vermont, and Southern New York, “bail has been taken.” *In re Ah Tai*, 125 F. 795, 796 (D. Mass. 1903). And another court related the well-accepted practice of admitting alleged Chinese nationals in Chinese exclusion law deportation cases to bail in New Jersey, New York, Massachusetts, Vermont, California, Idaho, Oregon, and Montana. *United States v. Yee Yet*, 192 F. 577, 579 (D.N.J. 1911).

So accepted was federal courts’ pre-adjudication release authority that when the government called it into question in a 1910 case, the court responded that the practice had existed “since the passage of the first exclusion act” and noted that it had never before encountered any opposition to it, nor had the government identified a single case “holding that the court has no power to admit to bail” while adjudicating deportation proceedings. *In re Chin Wah*, 182 F. 256, 258 (D. Or. 1910), *aff’d sub nom. Chin Wah v. Colwell*, 187 F. 592 (9th Cir. 1911).

Courts in these cases understood their bail power as “inherent” and “incident[al] to the power to hear and determine” cases. *In re Chin Wah*, 182 F. at 258; *see also, e.g., United States v. Fah Chung*, 132 F. 109, 112-113 (S.D. Ga. 1904) (rooting power in the ancient common law); *In re Ah Tai*, 125 F. at 796-797 (relying on

“inherent” bail authority); *United States v. Long Lee Foo*, 108 P. 488, 489-490 (Ariz. 1910) (same).

Other courts explained the power as required by basic principles of justice. *See, e.g., In re Lum Poy*, 128 F. at 976 (finding inability to grant bail would create a “great hardship” on the alleged Chinese person and prejudice the ability of one claiming to be a U.S. citizen to prove his case); *Fah Chung*, 132 F. at 113 (recognizing justice would require bail in some circumstances but declining it in that case); *In re Chin Wah*, 182 F. at 257-258 (finding that courts have an inherent prerogative to grant bail in proceedings that so closely resemble criminal proceedings and have such significant consequences and noting that the denial of bail would be a “substantial denial of justice” for those who turned out to be U.S. citizens).

Courts also noted that Congress eliminated bail for certain Chinese people facing exclusion at the border (as opposed to deportation from the interior), *see* Act of May 5, 1892, ch. 60, § 5, 27 Stat. 25, 25, and for those who had already been ordered deported, *see* Act of Nov. 3, 1893, ch. 14, § 2, 28 Stat. 7, 8. The courts reasoned that, in denying bail in some contexts, the exclusion laws “impliedly recogniz[e] that [noncitizens] may be admitted to bail at another stage.” *In re Ah Tai*, 125 F. at 797; *see also In re Lum Poy*, 128 F. at 975-976 (noting that although Congress eliminated courts’ authority to grant release of those facing exclusion, deportation proceedings are distinct); *In re Chin Wah*, 182 F. at 258-259 (same).

These decisions reflect widespread recognition of courts’ authority to grant pre-adjudication release in deportation proceedings under the Chinese exclusion laws.

B. Pre-adjudication Detention Was Not Part Of The Early Federal Administrative Immigration Scheme.

The Chinese exclusion laws represent the only deportation scheme that permitted pre-adjudication detention in this era. The other deportation scheme, under the “general” immigration laws, which applied to allegedly deportable noncitizens of all countries of origin found in the interior and involved administrative enforcement and adjudication, did not provide for pre-adjudication detention at all.

1. The 1888 Contract-Labor Law. In 1888, Congress adopted a statute enforceable against certain contract laborers found in the interior. The law vested the Secretary of the Treasury Department with the power to authorize arrest and deportation. Act of Oct. 19, 1888, ch. 1210, § 13, 25 Stat. 565, 566-567. A noncitizen contract laborer found in the interior could “be taken into custody and returned to the country from whence he came” on the Treasury Secretary’s determination that the “immigrant has been allowed to land contrary to” contract-labor statutes. *Id.*

Until at least 1893, the agency did not use this statute to take custody of anyone. Lindsay Nash, *Resurrecting Immigration Releases*, 135 Yale L.J. 1533, 1572 (2026). After the issue was raised with the Treasury Secretary, the Secretary issued an 1894 circular outlining a process in which the Secretary would determine whether a person should in fact be ordered deported *prior to arrest*. *Id.* at 1571-72. Only if the Secretary decided to order someone deported would the Secretary simultaneously “order and direct that said alien contract laborers shall be taken into custody and returned to the country whence they came.”

Letter from J.G. Carlisle, Sec’y, Treasury Dep’t, to Treasury Dep’t & Bureau of Immigr. (Jan. 30, 1894), *reprinted in* H.R. Doc. No. 53-247, at 18 (1894); *see, e.g.*, App.4a.

The 1888 contract-labor law was thus understood to permit federal authorities to “take[] into custody” only those the Secretary had already ordered deported; not people in the interior who were merely suspected of violating immigration laws.

2. The 1891 Expansion of Administrative Immigration Enforcement In The Interior. Widespread anti-immigration sentiment and perceptions that entry restrictions were underenforced led Congress to expand deportation authority in 1891. Nash, *supra*, at 1571. The 1891 law created new, broadly applicable grounds of deportability; it rendered deportable any noncitizen found in the United States within one year of entry who had violated certain entry restrictions or become a public charge from causes existing prior to landing. Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

Unlike the 1888 contract-labor provision, the 1891 Act contained no detention or arrest authority for deportation proceedings, either before or after a person was ordered deported. *Id.*; *see, e.g.*, U.S. Dep’t of Treasury, *Report of the Immigration Investigating Commission to the Honorable Secretary of the Treasury* 41 (1895) (stating that the 1891 law mandates deportation for certain noncitizens but “there is no law that provides for [the noncitizen’s] arrest and deportation”); U.S. Dep’t of Treasury, *Annual Report of the Commissioner-General of Immigration to the Secretary of the Treasury* 18-19 (1896) (same).

Enforcement of the 1891 law's deportation provisions therefore often depended on cooperation from people who were ordered deported or the voluntary assistance of state-funded institutions, which were frequently happy to defray costs by facilitating the deportation of destitute immigrants within their care. Nash, *supra*, at 1575-76; Paulina D. Arnold, *How Immigration Detention Became Exceptional*, 75 Stan. L. Rev. 261, 286-287 (2023) (summarizing state costs of confining immigrants in state-funded institutions). People in state institutions often met deportation criteria for becoming "public charge[s]" by virtue of being deemed dependent on the state. Sometimes, such institutions would send proof of a dependent noncitizen's ailment or disability to immigration authorities and then arrange for transportation to a designated port for deportation once that individual had been ordered deported. Nash, *supra*, at 1575-76.

Critically, these were non-federal institutions that formed part of states' and localities' obligations to their "poor," at the time understood to include anyone (regardless of citizenship status) unable to sustain themselves because of age or disability. *See* Arnold, *supra*, at 270-281 (discussing workhouses, almshouses, houses of refuge and mental asylums, among other institutions). People in these institutions were not in the federal government's custody or control, even if federal officials were investigating them for deportation. Nash, *supra*, at 1576.

In short, in the early federal administrative immigration scheme applicable to noncitizens in the interior, detention was extraordinarily limited. Authority to take people into custody in connection with deportation was limited to a single provision in the contract-

labor law, and even then detention was authorized only *after* the adjudicating officer made a final determination to order the person deported.

II. IN THE TWENTIETH CENTURY, THE POSSIBILITY OF PRE-ADJUDICATION RELEASE EXPANDED ALONGSIDE EXPANSION OF PRE-ADJUDICATION IMMIGRATION DETENTION.

Almost as soon as pre-adjudication immigration detention became a feature of the administrative immigration enforcement scheme, pre-adjudication release did too. Pre-adjudication release accompanied by pre-adjudication detention thus already existed when Congress adopted legislation providing for release on bond in 1907. And immigration officials continued to openly and publicly exercise this nonstatutory release power alongside their statutory bail authority until at least 1950, when this broader release authority was incorporated into the amended statutory release scheme.

Release on bail, parole, and recognizance remained widely available in the deportation system over the second half of the twentieth century until 1988. Only then did Congress adopt the first mandatory detention law. And, for much of this time, release was the default; “until the 1990s, release was the norm and detention the rare exception for noncitizens facing deportation.” Margaret H. Taylor, *Judicial Deference to Congressional Folly*, in *Immigration Stories*, 346 (David A. Martin & Peter H. Schuck eds., 2005); *see also* Arnold, *supra*, at 320 (“[M]ost people in immigration

proceedings were released pending the resolution of their case.”).⁴

**A. Even Before Congress Authorized Bail,
Immigration Officials Understood
Themselves To Have Release
Authority.**

1. The Introduction of Pre-adjudication Detention in the Administrative Scheme in the Early Twentieth Century. Congress significantly increased administrative officials’ authority in 1903, when it adopted a new law permitting them to “take[] into custody” anyone who had entered the country in violation of the 1903 Act. *See* Act of Mar. 3, 1903, ch. 1012, § 21, 32 Stat. 1213, 1218.

Were it not for this Court’s near simultaneous decision in *Yamataya v. Fisher*, 189 U.S. 86 (1903), the 1903 Act might have meant no more than an extension of what had come before: a greater capacity to detain those who had already been ordered deported. *See supra* pp. 11-12. But *Yamataya* led to significant changes in administrative deportation proceedings, including added procedural protections—and, for the first time, pre-adjudication detention—between arrest and adjudication.

Yamataya was a due-process challenge to the Treasury Department’s summary deportation proceedings. *See* 189 U.S. at 88. In a landmark holding, this Court

⁴ The mid-1990s brought a dramatic expansion of immigration laws, including a mandatory detention scheme covering even those convicted of low-level criminal offenses. *See* Taylor, *supra*, at 350-354; Arnold, *supra*, at 320-321. Due process criticisms followed from all sides, including immigration authorities. Taylor, *supra*, at 353 & n.57.

agreed constitutional due process requires that those facing deportation receive “all opportunity to be heard upon the questions involving [their] right to be and remain in the United States.” *Id.* at 101-102. Although the Court also concluded Yamataya had received all the process she was due in her case, the *Yamataya* decision marked the beginning of an “entirely new approach to due process and the separation of powers that was emerging throughout administrative law.” Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 392 (2024).

Shortly thereafter, the Treasury Department issued a new circular advising officers that, in light of *Yamataya*’s “warning,” an allegedly deportable noncitizen should be afforded a “reasonable opportunity to be heard in his own behalf.” T.D. 24379, 6 Treas. Dec. Int. Rev. 354, 354-355 (1903). Following that and other challenges to the existing administrative deportation process, the Department of Commerce and Labor⁵ began directing that at least some suspected noncitizens be provided notice of the charges and an opportunity to be heard at a pre-adjudication hearing before the record was sent to the Secretary to determine whether or not to issue a deportation order. Nash, *supra*, at 1581-82 & n.234. The use of this hearing process expanded gradually until, in 1905, the agency directed officers to provide hearings to *anyone* facing deportation. *Id.* at 1583.

Along with this new process came a new period of pre-adjudication detention. *Id.* at 1584. Between

⁵ In July 1903, immigration enforcement and adjudication responsibilities were transferred from the Treasury Department to the Department of Commerce and Labor. Act of Feb. 14, 1903, ch. 552 §§ 4, 13, 32 Stat. 825; Nash, *supra*, at 1582.

mid-1903 and February 1904, the Department of Commerce and Labor began separating the Secretary's determination of whether to authorize officers to "take[] into custody" the accused from the Secretary's determination of whether the accused should, in fact, be ordered deported. *Id.* In February 1904, the agency promulgated a binding departmental circular that instituted administrative pre-adjudication detention procedures with features resembling the pretrial procedures in analogous criminal contexts, such as a requirement that officers show probable cause and obtain a warrant issued by the Secretary prior to arrest. *Id.* at 1585. Accordingly, as a result of dramatic changes in the administrative process beginning in 1903, pre-adjudication arrest and detention were authorized in the administrative deportation scheme.

2. The Near-Simultaneous Introduction of Pre-adjudication Release. Almost as soon as it authorized pre-adjudication detention in the administrative scheme, the agency authorized pre-adjudication release. *Id.* at 1587-88. Despite the absence of any express statutory authorization, officers were directed to release people charged as deportable on a range of grounds, whether on their own recognizance or on "parole" to their attorney or employer. *Id.* at 1588; see e.g., App.7a. By 1906, the Department of Commerce and Labor had adopted a regular practice whereby the Secretary would adjudicate the question whether an accused should be held in detention pre-adjudication or released—a determination that came to be included in the warrant of arrest. Nash, *supra*, at 1588.

**B. After Congress Authorized Bail,
Administrative Officials Continued To
Exercise Release Authority
Independent Of Their Statutory Bail
Authority.**

1. The Immigration Act of 1907. The Immigration Act of 1907 serves as the fulcrum of *Demore* and the United States' historical narrative. As both point out, this was the first statutory "provision permitting bail for *any* aliens during the pendency of their deportation proceedings." *Demore*, 538 U.S. at 523 n.7; see Gov't Br. 31-32. Congress provided that "pending final disposal of the case of any alien . . . taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary." Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 898, 905.

But the 1907 bond provision did not represent, as *Demore* later assumed, the genesis of pre-adjudication release practice or power in the deportation system. As explained, *supra* pp. 7-17, courts and administrative officials adjudicating deportation cases were exercising an independent release authority well before the 1907 statute.

If anything, the 1907 statute *broadened* the available mechanisms for pre-adjudication release to include release on financial bonds. Although administrative immigration officials were already releasing noncitizens *without* bond before final adjudication of their deportation case, *see supra* pp. 11-17, administrators seemed to believe they needed explicit statutory authorization to require and recover on a financial security, *see Nash, supra*, at 1593-94. In any

event, it is clear that the statute was not the genesis of pre-adjudication release in the deportation system.

2. Agency Practice from 1907-1950. In exercising its new authority to release on bond, the agency treated bond-setting as governed by the strict terms of the 1907 statute. *Id.* But it also continued to use the inherent power to release (without bond) that it had exercised before the 1907 statute. *See supra* pp. 15-17.

Administrative records from this period reflect concern about pre-adjudication immigration detention without the possibility of release straying too close to the punitive detention outlawed by this Court in *Wong Wing*. Although this Court held that deportation itself was not punishment, *see Fong Yue Ting v. United States*, 149 U.S. 698 (1893), just a few years later in *Wong Wing* it also held that confinement at hard labor, even if conducted with immigration aims, was unconstitutional punishment without criminal process, 163 U.S. at 241.

One early example of this concern is a 1909 opinion from the Solicitor of the Department of Commerce and Labor. The Solicitor concluded that the 1907 bond statute permitted release on bond both before and after a deportation order. And he reinforced that statutory conclusion by reasoning that “to hold an alien in confinement without the privilege of bail for an indefinite period would be punishment in the most literal sense.” Letter from Charles Earl, Solic., Dep’t of Com. & Lab., to William R. Wheeler, Assistant Sec’y, Dep’t of Com. & Lab. 8 (Jan. 21, 1909). The Solicitor understood Congress’s adoption of a bail authority in 1907 to arise from Congress’s desire “to preclude the infliction of such a punishment.” *Id.*

When justifying the agency's decision to release individuals who were challenging their administrative deportation orders in federal court a few years later, the Acting Secretary expressed a similar concern. He explained that the agency made this release decision "acting on the view that the executive authority to arrest and hold an alien in confinement for the purpose of deportation should be exercised only as a means of making deportation effective," and that noncitizens are "entitled to their liberty so far as may be consistent with this end." Letter from Acting Sec'y, Dep't of Com. & Lab., to U.S. Att'y Gen. 2 (Sep. 30, 1912). Echoing the constitutional concerns in the Commerce and Labor Solicitor's 1909 opinion, the Acting Secretary continued that it was "no part of the duty of the Department to exercise its [detention] authority in such a way as to constitute its treatment of aliens a punishment" for civil immigration violations. *Id.*; see also Memorandum from Acting Comm'r Gen., Bureau of Immigr., to Sec'y of Lab., at 1 (Dec. 20, 1913) (describing releases).

The Palmer raids of 1919-1920, in which Attorney General A. Mitchell Palmer ordered the mass arrest of noncitizens suspected of being communists, offer a high-profile episode. Nash, *supra*, at 1602-05; see generally Arnold, *supra*, at 309 n.373. The Department of Labor had at that point split from the Department of Commerce and retained responsibility for immigration enforcement and adjudication. Nash, *supra*, at 1602 n.328. Then-Acting Secretary of Labor Louis Post ordered many of those arrested in the Palmer raids to be released on parole, recognizance, or bond lower than the Attorney General recommended. *Id.* at 1602-1603. Although the raids were ultimately condemned by many in the legal establishment, the

releases in these highly publicized arrests brought new attention to the immigration agency's longstanding release practices. *Id.*

Aware that his actions would be heavily scrutinized, Post sought a formal legal opinion from the Department of Labor's solicitor about the scope of his release authority. *Id.* at 1603. The Solicitor responded that, independent of his statutory power to authorize release on a \$500 bond, the Secretary retained inherent power to release noncitizens on recognizance. *Id.* The opinion relied in part on the theory that failure to release could in some instances "result in denying an individual a constitutional right." *Id.* at 1604 (citation omitted).

With respect to the charge that he had violated the bond statute by releasing on recognizance (without the statutory minimum \$500 bond), Post, through counsel, laid out two related justifications. First, releasing "without money bail" was an "established practice" of the agency justified by the constitutional prohibition against excessive bail. *Id.* at 1605 (citation omitted). Second, the power to "release[] on bail without a bond" is "part of the power of the officer charged with custody" to avoid "imposing unnecessary hardship on him." *Id.* Post thus cast his release authority as inherent in the power to detain and necessary to keep that detention within constitutional limits.

As Congress and the public were well aware, the agency continued to release people pursuant to this broader, non-statutory power through the 1940s. As early as 1908, the agency used this power openly and publicly. *Id.* at 1598 & n.310 (citing widely circulated reports, published regulations, appellate opinions,

and legislative materials discussing releases on parole and recognizance). During this time, the Secretary and other agency adjudicators relied on default terms of release based on individuals' charges, but also made clear that they would depart from those defaults based on individualized facts and invited officers to raise such facts for consideration. *Id.* at 1606 & n.350.

3. The Internal Security Act of 1950. Congress amended the immigration laws in 1950 to specify that the Attorney General had discretion to *deny* bond to a suspected noncitizen pending deportation proceedings and could impose conditions when granting release on parole. Internal Security Act of 1950, ch. 1024 § 20(a), 64 Stat. 987, 1011. In so doing, it codified a type of release authority—release without a surety or monetary bond—that had been a long-established and well-known part of the administrative detention regime. Nash, *supra*, at 1598; see *Carlson*, 342 U.S. at 538 & n.31 (observing that “modest bonds or personal recognizances” were offered well before the 1950 Act went into effect).

III. *DEMORE*’S HISTORICAL ACCOUNT IS WRONG.

When evaluating the constitutionality of mandatory immigration detention in *Demore*, this Court suggested that pre-adjudication detention without the possibility of release had been “a constitutionally valid aspect” of immigration proceedings for “more than a century.” 538 U.S. at 523. But the historical assumptions on which *Demore* based that suggestion flow from a misunderstanding about how detention and release operated in the early deportation system and, as a result, a misinterpretation of *Wong Wing* and *Carlson*.

A. *Demore* Misread *Wong Wing*.

Demore misinterpreted *Wong Wing* by assuming pre-adjudication detention was permitted in the administrative deportation regime, that release was unavailable because there was no statutory bond provision applicable to that scheme, and that *Wong Wing* had endorsed this imagined scheme. See *Demore*, 538 U.S. at 523 (citing *Wong Wing*, 163 U.S. at 235); see also Gov’t Br. 32 (same). All three assumptions were incorrect.

Wong Wing did not address a no-release pre-adjudication detention scheme or discuss the constitutionality of detention without the possibility of release. In dicta, the Court suggested that “detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.” *Wong Wing*, 163 U.S. at 235. But this dicta could not have endorsed a no-bail pre-adjudication detention scheme. When *Wong Wing* was decided, federal courts handling deportation cases like *Wong Wing*’s under the Chinese exclusion laws did detain noncitizens while adjudicating their cases, but the courts also released them on bail. See *supra* pp. 8-10. Indeed, the *Demore* dissent challenged the majority’s inference on this basis. *Demore*, 538 U.S. at 559 n.15 (Souter, J., concurring in part and dissenting in part).

The *Demore* majority did not dispute the dissent’s point about federal courts’ contemporaneous bail practice under the Chinese exclusion laws. It apparently relied instead on the theory that *Wong Wing* had broadly approved pre-adjudication immigration detention during a period in which there was no opportunity for bail in the separate, general *administrative*

deportation regime. *Id.* at 523 & n.7 (responding that, before 1907, “there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings”). But, as also discussed above, *supra* pp. 11-14, during the *Wong Wing* era, the administrative deportation scheme did not include pre-adjudication detention *at all*. In the exceedingly narrow category of cases in which the Secretary authorized officials to take people into custody in connection with deportation, he did so only *after* determining the person should be deported. *Supra* pp. 11-12.

B. *Demore* Misread *Carlson*.

Demore also mistakenly understood *Carlson* to uphold the constitutionality of a no-bail policy for allegedly communist noncitizens. See *Demore*, 538 U.S. at 524 (“Although the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail to those aliens.”). But in concluding that *Carlson* had involved a categorical no-bail policy, the Court cited the *Carlson* dissent, not the majority opinion. *Id.* (citing 342 U.S. at 559 (Frankfurter, J., dissenting)).

In fact, as the *Carlson* majority recognized, Immigration and Naturalization Service policy and practice during this time permitted the denial of bond (rescission of prior releases) in a narrow set of cases based on individualized facts, and even then provided for individualized exemptions. Telegram from W.F. Kelly, Assistant Comm’r, Enf’t Div., Immigr. & Naturalization Serv., to Dist. Dir., Chicago, Ill., (Oct. 21, 1950) (initially ordering redetention of named individuals and “all active Communists” under the Internal Security Act, but also permitting exemptions based on

certain hardships of detention); Telegram from A.R. Mackey, Acting Comm'r, Immigr. & Naturalization Serv., to All Dist. Dirs. & Officer in Charge, St. Louis, Mo., (Oct. 27, 1950) (noting the Oct. 21, 1950 order to re-detain noncitizens without bond was given "only after the cases had been examined in light of the Internal Security Act of 1950 . . . and all of the factors concerning the likelihood of the deportability [sic] and the activities of said aliens . . . as well as the factors of undue hardship which detention might impose"); Memorandum from A.R. Mackey, Acting Comm'r, Immigr. & Naturalization Serv., to Peyton Ford, Deputy Att'y Gen., (Feb. 27, 1951) (describing how, pursuant to this policy, the agency had detained 50 of the "most active" Communists).

Administrative officials therefore understood *Carlson* to affirm the discretionary denial of bond based on individualized facts, not approval of a categorical no-bond rule. Memorandum from L. Paul Winings, Gen. Counsel, Immigr. & Naturalization Serv., to Comm'r of Immigr. & Naturalization, (Apr. 28, 1952) (cautioning that *Carlson* "must not be read as a mandate for any indiscriminate denials of bail," concluding that "[e]ach case must be considered on its own facts, applying the standards enunciated by the Supreme Court in the *Carlson* case," and that "bail should be denied only in exceptional and aggravated cases").

The individualized, discretionary nature of release under the policy was well recognized by the majority and important to its holding. See *Carlson*, 342 U.S. at 541-542 (noting "[t]here is no evidence or contention that all persons arrested as deportable" under the Internal Security Act for Communist membership were denied bail and that a government filing in *Carlson*

“shows allowance of bail in the large majority of cases”). Archived memoranda from this Court confirm this understanding, indicating that at least two members of the five-member majority—Justices Jackson and Reed—disagreed with Justice Frankfurter’s view that the agency had adopted a categorical no-bail rule. Justice Jackson, for example, rejected dissenting Justice Frankfurter’s efforts to persuade him to join the four dissenting justices by explaining that Justice Frankfurter’s “assumption” was unfounded, and he saw no evidence for concluding that the Attorney General was not exercising individualized discretion. Papers of Justice Felix Frankfurter, *Letter from Robert H. Jackson, Assoc. Justice, Sup. Ct. of the U.S., to Felix Frankfurter, Assoc. Justice, Sup. Ct. of the U.S.* (Feb. 25, 1952) (noting that Justice Frankfurter’s depiction of the policy as categorical was unsupported by the record and contradicted by the Solicitor General’s representations at oral argument). The papers of Justice Reed, who authored the *Carlson* majority opinion, suggest a similar view. A handwritten response to Justice Frankfurter’s memorandum asserting that the government had adopted a policy of deeming those believed to be present Communists categorically “unbailable without individualized consideration” counters “[h]ow can this be said? If such is true, I do not know it,” believing “[j]ust the contrary.” Papers of Justice Stanley Reed, Memorandum for the Court, *Carlson v. Landon*, No. 35, and *Butterfield v. Zydok*, No. 136 (Jan. 26, 1952) (handwritten annotations), Box 163, Folder 2, University of Kentucky Libraries.

In sum, contrary to the *Demore* majority’s interpretation, neither *Wong Wing* nor *Carlson* endorsed a no-bail policy, because no such policy existed at either time.

IV. THE UNITED STATES' STATUTORY CITATIONS CONFIRM THIS HISTORY AND TRADITION.

That the government points—of all things—to the Alien and Sedition Acts as its earliest historical support only underscores the weakness of its arguments. *See Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (noting the Alien and Sedition Acts are “patently unconstitutional by modern standards”); Transcript of Oral Argument at 11:16-18, *Tyler v. Hennepin Cnty.*, No. 22-166 (U.S. Apr. 26, 2023) (Justice Barrett pointing out that “[w]e wouldn’t necessarily look to the Alien and Sedition Acts for the original meaning of the First Amendment.”). All but two of the remaining statutes cited by the United States (at 31-33 & n.7) provide for detention in the constitutionally distinct contexts of an *exclusion* proceeding for someone seeking entry at the border or detention *after* a final deportation order. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693-694 (2001) (discussing the due process distinctions between noncitizens who have not yet entered, have entered the country, and have entered the country but are subject to a final order of deportation). That renders them inapt historical comparators.

The two statutes that *were* understood to authorize pre-adjudication detention in connection with deportation were also widely understood to permit pre-adjudication release. If there is any history and tradition bearing on the right of an individual to a bail hearing pending deportation proceedings, it is one in which the power to release was treated as a necessary adjunct to the power to detain pending deportation adjudication.

**A. Most Of The United States' Statutory
Authorities Are Inapplicable.**

1. The Alien and Sedition Acts. The United States cites the Alien Enemies Act of 1798, ch. 66 §§ 1, 2, 1 Stat. 577-578, which authorized “alien enemies” to be “apprehended, restrained, secured and removed.” But that law is wholly inapposite. As the name suggests, it applies only to a “subject of a foreign state at war with the United States.” *Johnson v. Eisinger*, 339 U.S. 763, 769 n.2 (1950). The constitutional status of enemy aliens is *sui generis*: The “disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.” *Id.* at 772.

The United States also points to the Alien Friends Act of 1798, ch. 58, § 2, 1 Stat. 571, which authorized the President to unilaterally “order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.” This Act has been “widely condemned,” including for authorizing the executive to perform judicial acts, *Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J., concurring in part and concurring in the judgment), which perhaps explains why it was never actually used, see Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 498-503 (2021); Cox, *supra*, at 375 n.163, 442 n.420.

Most important for present purposes, the Alien Friends Act permitted the President to “cause to be arrested” any noncitizen found in the United States only *after* the President made the statutorily-required

public-safety determination and ordered the person removed. Nash, *Deportation Arrest Warrants*, at 500 & n.301; ch. 58, § 2, 1 Stat. at 571 (providing for the arrest and removal from the United States of “such of those aliens as shall *have been ordered* to depart therefrom” (emphasis added)). This plain reading of the statute is confirmed by the never-executed form order prepared for—and in a few cases signed by—President Adams. App.1a. This order required the marshal to “give notice” to the subject that “he is hereby ORDERED to depart out of the territory,” but did not authorize arrest prior to a removal order. *Id.*

Indeed, the fact that the Act provided only for post-adjudication arrest for immediate deportation was a chief complaint of Secretary of State Timothy Pickering, who worried that “an embarrassment will arise . . . out of the law itself, in its not authorizing the Executive to apprehend [and] confine, or require sureties for their going, until they can be sent off, or that they depart from the U[nited] States.” Letter from Timothy Pickering, U.S. Sec’y of State, to John Adams, U.S. President (Aug. 28, 1798), Nat’l Archives Founders Online, *available at* <https://perma.cc/9BS2-GXPT>.⁶

The Alien Friends Act was therefore similar to the 1888 contract-labor law in that it was understood to permit arrest only after a final deportation order. *See supra* pp. 11-12.

2. The 1888 Contract-Labor Law. The United States also cites the 1888 contract-labor law discussed above. *See* Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566. But, as explained, *supra* pp. 11-12, immigration

⁶ This brief does not address any additional process required for detention after the issuance of a deportation order.

authorities interpreted this provision to authorize the issuance of warrants that simultaneously ordered arrest and deportation; that is, to permit *post*-adjudication detention.

3. The Border-Exclusion and Post-adjudication Statutes. The other four authorities cited by the United States applied to exclusion from the border, post-adjudication detention, or both; none applied to pre-adjudication detention in the context of deportation from the interior. *See* Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. at 1085 (authorizing noncitizens arriving by water to be “detain[ed]” “until a thorough inspection is made”); Act of Mar. 3, 1893, ch. 206, § 5, 27 Stat. 570 (similar); Act of May 5, 1892, ch. 60, § 5, 27 Stat. 25 (disallowing bail in habeas proceedings to “a Chinese person seeking to land in the United States, to whom that privilege has been denied”); Act of Nov. 3, 1893, ch. 14, § 2, 28 Stat. 8 (disallowing bail “pending the execution of such [deportation] order”).

B. The Two Citations Relating To Pre-adjudication Detention In Deportation Proceedings Were Applied Alongside Inherent Release Authority.

Only two of the statutes cited by the United States were understood to authorize detention before a deportation order: the 1888 Chinese exclusion law and the 1903 statute applicable to administrative proceedings. *See* Act of Sep. 13, 1888, ch. 1015, § 13, 25 Stat. 479; Act of Mar. 3, 1903, ch. 1012, § 21, 32 Stat. at 1218.

But again, the relevant adjudicators in both contexts concluded they could release arrestees before issuing a deportation order. The federal courts charged with adjudicating deportation cases under the Chinese

exclusion laws widely recognized that they were empowered to grant release on bail. *See supra* pp. 8-10. Once administrative officials began holding people in pre-adjudication detention under the 1903 statute, they similarly understood that they had inherent power to release people pending deportation proceedings. *See supra* pp. 15-17.

The bottom line is that *Demore* and the United States' historical account is simply wrong. Mandatory pre-adjudication detention has no basis in history, but is instead a very modern invention. The only pre-adjudication detention permitted by the nineteenth-century deportation scheme—the only pre-adjudication detention that *Wong Wing* could have sanctioned—provided litigants the opportunity to seek and obtain bail or other release from a neutral adjudicator. And when pre-adjudication-detention authority came to the administrative deportation system in the early twentieth century, so too did pre-adjudication release. That release authority remained throughout the 1950s (including in *Carlson*) until the first mandatory-detention statute in 1988.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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