

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 CONSTITUTIONAL ACCOUNTABILITY
CENTER AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

Constitutional Accountability Center (CAC) is a think tank and public interest law firm 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**

Prolonged imprisonment without trial sharply deviates from the norm of physical liberty under the Due Process Clause. That is why the government must show the need for a person's detention under a heightened standard in order to exercise this power. The text and history of the Due Process Clause offer no basis for singling out immigration detention as the lone exception to that rule. On the contrary, the idea that noncitizens could be imprisoned for years on end to facilitate removal is antithetical to the common-law principles the Clause was meant to preserve.

1. Under common law, noncitizens in England had the full protection of the laws and could employ legal process to safeguard their persons, property, and liberty. While they could not exercise political rights like officeholding or have any permanent ownership of land (because their allegiance to the monarch was only temporary), they otherwise had the same rights as subjects. By the Founding era, it was long established

¹ No counsel for a party authored this brief in whole or in part, and no counsel, party, or person other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

that noncitizens had equal access to the courts to protect their rights and interests. As long as they did not qualify as alien enemies—a categorically distinct class whose rights were temporarily suspended during wartime—noncitizens could bring the full range of personal actions recognized at law. Indeed, the courts expressly refused to limit their access to legal process based on nationality.

Noncitizens' access to legal process gave them the same protections as subjects not just against private parties, but also against injury by the Crown. And in criminal prosecutions, noncitizens likewise received the same legal protections as citizens.

Far from restricting noncitizens' access to process, the common law made special accommodations to ensure it. Noncitizens were exempt from giving security for the costs of their suits. Statutes of limitations were tolled while they remained outside the country. And noncitizens even could demand a jury half-composed of foreigners.

Significantly, noncitizens enjoyed the same protections as citizens from arbitrary and prolonged detention. They were equally entitled to bail and the writ of habeas corpus, which by the eighteenth century were fundamental pillars of English liberty. Each of the landmark statutes that later inspired the American Constitution—the Petition of Right, the Habeas Corpus Act, and the Bill of Rights—took aim at obstructions and delays causing people to languish unnecessarily in prison. And each of these safeguards protected noncitizens as fully as citizens. The Habeas Corpus Act, for instance, which protected “all persons” detained for alleged crimes, ensured that no one would be detained before trial for more than three to six months without bail.

The common law also did not single out noncitizens for any confinement resembling mandatory immigration detention. England had no immigration laws, and the last expulsion of foreigners was more than two centuries before the Founding. Removal was exclusively a criminal punishment (“transportation”), imposed on citizens and noncitizens alike. Any detention associated with removal, therefore, could occur only after a final judgment in an individual prosecution. Thus, neither statute nor common law authorized preventive detention of noncitizens in connection with deportation. Needless to say, there was no authority for *mandatory* detention, much less prolonged mandatory detention.

After independence, American states adopted these common-law rules, including their protections for noncitizens. As in England, noncitizens had the same access to legal process as citizens. They were given the same safeguards in criminal prosecutions. Bail and habeas corpus protected them just as fully from arbitrary and prolonged detention. All told, a noncitizen was “indisputably entitled to the full protection of the laws in every matter that respects his personal liberty.” 2 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States*, app. 98 (1803).

Early Americans also recognized that even where detention without trial was permissible, safeguards against *prolonged* detention were needed for both citizens and noncitizens. The nation’s first treaty placed a three-month limit on the detention of foreign sailors whom the treaty made removable. And early American courts, enforcing the obligations of extradition, consistently limited detention to a “reasonable” period, after which prisoners were discharged.

2. The Due Process Clause was understood to secure the established procedural safeguards of the common law. It aimed to prevent arbitrary deprivations—including by legislatures—of certain core interests, above all physical liberty free from imprisonment or restraint. Determining whether legislation violated due process, this Court wrote, required consulting the “settled usages and modes of proceeding existing in the common and statute law of England.” *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855). And those settled practices generally forbade deprivations of personal rights without adjudication by a neutral magistrate. Deviations from that norm were acceptable only in areas where the common law had long sanctioned such departures. But the common law did not sanction detention of noncitizens pending civil removal—to say nothing of prolonged detention without opportunity for bail.

The short-lived, never-enforced, and historically repudiated Alien Friends Act does not suggest otherwise. Even this infamous law did not authorize arrest before an order to depart, nor detention to facilitate removal. And while some of the Act’s proponents claimed that noncitizens lacked constitutional rights, those claims were ably refuted by the Fifth Amendment’s author, James Madison, as well as by others, based on common-law principles and the text of the Constitution.

That text provides no basis for denying noncitizens in removal proceedings their due-process rights against arbitrary or prolonged detention. The Constitution distinguishes citizens from noncitizens with precision in several places. But the Due Process Clause’s universal protection of every “person” echoes the categorical language of the landmark English statutes that inspired the Framers.

ARGUMENT

I. The Common Law that Informed the Due Process Clause Protected Noncitizens as Fully as Citizens from Arbitrary and Prolonged Detention.

While Founding-era common law distinguished “subjects” from “aliens,” visiting aliens had the same legal protections for their personal liberty as subjects, including freedom from arbitrary and prolonged detention. Although some privileges of citizenship were withheld from aliens until naturalization, none involved imprisonment, punishment, physical liberty, or access to legal process. Indeed, the common law even made special accommodations to ensure noncitizens had access to fair legal proceedings and equal protection of their personal liberty. These common-law standards were faithfully applied in America throughout the Founding era, protecting noncitizens as fully as citizens from arbitrary or unreasonably prolonged detention.

A. Noncitizens had the same access to legal process as citizens to defend their personal liberty.

1. Generally, a subject was someone “born within the dominions of the crown of England,” 1 William Blackstone, *Commentaries on the Laws of England* 366 (1791), while an alien was anyone born elsewhere, *id.*; see *Calvin’s Case*, 77 Eng. Rep. 377, 383 (K.B. 1608). Birth within the king’s dominions conferred an implicit allegiance to the king and a reciprocal right to his protection, *id.*, but this bond was not restricted to subjects. It encompassed aliens, too, “so long as they were within the kingdom.” 1 Blackstone, *supra*, at 368-69. A visiting foreigner owed a “temporary” and “local” allegiance “for so long time as he continue[d]

within the king’s dominion,” and in return the king “afford[ed] his protection to an alien ... during his residence” there. *Id.* at 370; accord *Calvin’s Case*, 77 Eng. Rep. at 383; 1 Edward Coke, *Institutes of the Laws of England* § 199 (1794); Thomas Wood, *An Institute of the Laws of England* 23 (1724); Joseph Chitty, *Treatise on the Law of the Prerogatives of the Crown* 12-13 (1820).²

Being under the king’s “protection” meant being “aided or protected by the king’s law, or the king’s writ.” Coke, *supra*, § 199; see *id.* (quoting Latin maxim that “the king protects the law, and the law protects the right”). Anyone falling under this “general protection,” alien or subject, could thus employ legal process to defend “the safety of his person ... from violence, unlawful molestation or wrong.” *Id.*; see 1 Matthew Bacon, *A New Abridgement of the Law* 84 (1736) (“suing is but a consequential right of protection”).

The common law’s protection of noncitizens’ rights traced back at least to Magna Carta, which guaranteed safe entry and exit from England to foreign merchants (unless their home nation was at war), “with the right to tarry there and to move about.” Magna Carta 1215, ¶ 41, *Avalon Project*, <https://avalon.law.yale.edu/medieval/magframe.asp>. Just as a freeman could be punished only “in accordance with the gravity of the offense,” and “saving always” his livelihood, a foreign merchant could only be punished “in the same way, saving his ‘merchandise.’” *Id.* ¶ 20.

According to Matthew Hale, while Magna Carta refers specifically to merchants, “under that name all foreigners living or trading here” were “under the

² Quotes from historical sources have been changed to modern American spelling and capitalization throughout this brief.

king's protection." 1 *History of the Pleas of the Crown* 93 (1736); see 9 William Holdsworth, *A History of English Law* 96 (1926) ("the rules made for the alien merchant soon became the rules for all aliens"); *Calvin's Case*, 77 Eng. Rep. at 402; see also 28 Edw. 3, c. 3 (1354) (extending Magna Carta's rights for "freemen" to any man "of what estate or condition that he be").

2. While the full scope of noncitizens' rights remained unsettled in the Middles Ages, see Holdsworth, *supra*, at 92-94, it was clear by the Tudor era that they could "acquire a property in goods, money, and other personal estate," "trade as freely as other people," and "dispose of [their] personal estate." 1 Blackstone, *supra*, at 372; *accord Alien*, 73 Eng. Rep. 852, 852 (K.B. 1547).

Most critically, noncitizens could employ legal process to protect their rights and interests equally with citizens: they "could bring personal actions ... just as a subject." Holdsworth, *supra*, at 97; see Coke, *supra*, § 198 ("an alien may trade and traffic, buy and sell, and therefore of necessity he must be of ability to have personal actions"). Courts expressly refused to limit their access to legal process based on nationality. Thus, the Court of Common Pleas rejected a defendant's request to dismiss a foreigner's debt-recovery suit, because "notwithstanding he is an alien, yet he shall be received in all personal actions." *An Alien*, 73 Eng. Rep. 6, 7 (C.P. 1545). The King's Bench likewise held that "an alien may bring an action personal, and shall be answered without being disabled, because he is an alien born." *Alien*, 73 Eng. Rep. at 852.³

³ These and other common-law authorities distinguished "alien enemies" (whose nation was at war with England) from "alien friends" (all other aliens). See 1 Blackstone, *supra*, at 372; Coke,

By the early seventeenth century, it was obvious that legal process was available to noncitizens across the full range of personal actions. Approving a noncitizen's defamation suit against a citizen, the King's Bench ruled that visiting aliens "clearly" could bring such actions—indeed, they could bring "all actions personals whatsoever, as actions of debt, and the like," as well as "for an assault and battery." *Tirlot v. Morris*, 80 Eng. Rep. 828, 828-29 (K.B. 1611).

A century later, any attempt to frustrate legal process based on a plaintiff's nationality was "plainly ill," for "an alien-friend may bring a personal action." *Hoppen v. Leppett*, 95 Eng. Rep. 305, 305 (K.B. 1737); *accord* Bacon, *supra*, at 83; Wood, *supra*, at 23. So clear was this rule that William Blackstone conceded the point while representing a defendant sued by a foreigner—acknowledging that even alien *enemies* could sue in some circumstances. *Ricord v Bettenham*, 97 Eng. Rep. 1071, 1073 (K.B. 1765); *see id.* at 1075 (Lord Mansfield agreeing, and granting judgment for the alien plaintiff); *see also Ricord*, 96 Eng. Rep. at 326 ("As to the alienage. That is not of course an objection.").

supra, § 198; *Calvin's Case*, 77 Eng. Rep. at 397 ("Every alien is either a friend that is in league, &c., or an enemy that is in open war, &c."). This fundamental distinction traced to early English history, *see* 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 444-46 (1895), resting on the notion that war between two kingdoms meant war between every subject of those kingdoms. *See Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950). The special legal disabilities of alien enemies were thus "imposed temporarily as an incident of war and not as an incident of alienage." *Id.*; *accord* 1 James Kent, *Commentaries on American Law* 62 (1826) (legal remedies are "suspended" for alien enemies during war); 3 Joseph Story, *Commentaries on the Constitution of the United States* 571 (1833) (same). Except where otherwise noted, this brief refers to alien friends when discussing noncitizens.

By securing equal access to legal process, noncitizens “gained the same protection as that accorded to subjects, not only against private persons, but also against the king and his servants.” Holdsworth, *supra*, at 97-98. That was because challenges to injury by the Crown were litigated as ordinary actions against the officers responsible. *Id.* at 98. The injuries “for which the courts [could] give no remedy” were thus “limited in respect to alien friends ... in just the same way as ... in respect to subjects.” *Id.*

Far from restricting noncitizens’ access to legal process, the common law made numerous special accommodations to ensure it. For instance, although litigants might have to give security for the costs of suit, courts recognized that noncitizen plaintiffs “perhaps cannot find security in a strange country.” *Real v. Macky*, 93 Eng. Rep. 1130, 1130 (K.B. 1743). To avoid “shutting up our courts from foreigners,” judges refused to saddle noncitizens with this requirement. *Id.*; accord *Lamii v. Sewell*, 95 Eng. Rep. 610, 610 (K.B. 1750) (“[a] foreigner is not bound to give security for costs,” because that would lead to “excluding foreigners from obtaining justice in our courts”).

To ensure that aliens received fair trials, the law even granted them “the benefit of a jury composed wholly or in part of aliens.” Pollock & Maitland, *supra*, at 448. Since the fourteenth century, noncitizens were entitled to demand a jury of one-half noncitizens (a jury *de medietate linguae*) in “all manner of inquests.” 28 Edw. 3, c. 13; see *Symons v. Spinosa*, 73 Eng. Rep. 802 (K.B. 1577); *W.D.’s Case*, 73 Eng. Rep. 683 (K.B. 1571); *Abbot v. Executors*, 73 Eng. Rep. 59, 61-62 & n.180 (K.B. 1537).

Another way the common law ensured noncitizens’ access to legal process was by tolling statutes of limitations while they remained outside of England. As

one court observed in a contract suit: “If the plaintiff ... doth not come to England in fifty years, he still hath six years after his coming into England, to bring his action.” *Strithorst v. Graeme*, 95 Eng. Rep. 980, 981 (C.P. 1770).

The common law thus bent over backward to ensure that legal process was available to noncitizens on equal terms with citizens. As Blackstone said from the bench: “The King’s Courts should be as open to them as to natives.” *Melchart v. Halsey*, 96 Eng. Rep. 434, 435 (C.P. 1770).

3. In criminal matters, too, noncitizens received the same legal process as citizens. *E.g.*, Coke, *supra*, § 198 (“[a]n alien that is condemned in an information, shall have a writ of error to relieve himself,” and likewise in similar matters). Indeed, here too the law made special accommodations to guarantee fairness for noncitizens, making a jury *de medietate linguae* available in criminal cases. See 28 Edw. 3, c. 13; *W.D.’s Case*, 73 Eng. Rep. at 683; *Sherley’s Case*, 73 Eng. Rep. 315, 316 (K.B. 1556) (noting that this right was statutorily abrogated for treason prosecutions). This process was still in use in the 1700s. *E.g.*, *Trial of John Loppenburg*, Old Bailey Proceedings (Oct. 15, 1740), <https://www.oldbaileyonline.org/record/t17401015-66?text=Loppenburg>; *Proceedings in the Case of Bernard Kenty Massip*, Old Bailey Proceedings (May 17, 1727), <https://www.oldbaileyonline.org/record/t17270517-39?text=Kenty%20Massip>.

Instead of diminishing noncitizens’ capacity to protect their liberty, therefore, the law went out of its way to give them “every indulgence which a British subject could enjoy.” *Trial of Francis Henry de la Motte*, Old Bailey Proceedings (July 1781), <https://www.oldbaileyonline.org/record/t17810711-1?text=Motte>.

4. In some respects, to be sure, noncitizens had “more circumscribed” rights than citizens. 1 Blackstone, *supra*, at 371. But none of the three “principal lines, whereby they are distinguished from natives,” *id.* at 360, involved detention or access to legal process.

Most notably, noncitizens could have no permanent land ownership, because that would require “an allegiance, equally permanent ... to the king,” not merely the temporary allegiance owed during their residence. *Id.*; see Coke, *supra*, § 199; Bacon, *supra*, at 83. Relatedly, noncitizens could not hold office. See 1 Blackstone, *supra*, at 372. And they were conventionally “subject to certain higher duties at the custom-house.” *Id.* at 306, 360.

Even with respect to these disabilities, however, the law afforded noncitizens due process. While they could not inherit or bequeath land by law, if they “purchase[d] lands, or other estates,” only the Crown could dispossess them. *Id.* at 371; see *Progers v. Arthur*, 91 Eng. Rep. 671, 672 (K.B. 1695) (“an alien may purchase by his own account or contract, though he cannot retain against the King”). And even the Crown could not take these lands except upon “office found,” Chitty, *supra*, at 299, namely, after a legal proceeding in which alienage was established and title transferred. See *id.* (“the freehold remains in them, till on office or inquisition the same are divested and seized to the King’s use”); *Alien*, 73 Eng. Rep. at 852 (“If any alien born purchase, the King shall have it: but the purchase ought to be found by office.”).

Similarly, under nativist legislation dating to Henry VIII, foreign craftsmen could not lawfully rent lodgings in London. See 1 Blackstone, *supra*, at 372 (noting that this legislation was now “obsolete”). But if a landlord sued a foreigner to collect rent under such a lease, the foreigner could rely on the contract’s

illegality to escape its obligations. *Progers*, 91 Eng. Rep. at 672; see Bacon, *supra*, at 82.

Likewise, despite the policy of charging noncitizens higher customs fees, the monarch could waive this requirement by granting someone letters patent. Such grants, once given, were legally enforceable—binding not just the monarch but his successors. *Grant by the King*, 73 Eng. Rep. 200, 200 (Exch. 1553).

The withholding of certain privileges from noncitizens, therefore, did not imply they were any less protected by the safeguards of due process than citizens.

B. Noncitizens enjoyed the same protections as citizens from prolonged, unjustified detention.

The common law, it was said, “favors liberty, and the freedom of a man from imprisonment.” Wood, *supra*, at 16. Edward Coke called Magna Carta’s famous prohibition on arbitrary detention its most important safeguard, “because the liberty of a man’s person is more precious to him, than all the rest.” 2 Coke, *supra*, at 45. Blackstone assigned a similar prominence to “personal liberty,” for the power “to imprison arbitrarily” would mean “an end of all other rights and immunities.” 1 Blackstone, *supra*, at 135.

Noncitizens, just like citizens, shared this freedom from arbitrary imprisonment. While Magna Carta pronounced that no “freeman” could be detained except “by the law of the land,” 25 Edw. 1, c. 29 (1295), its guarantee was later amended to explicitly embrace all people: “no man of what estate or condition that he be” could be detained except “by due process of the law,” 28 Edw. 3, c. 3. Those inclusive words were recited in the landmark Petition of Right, which reasserted the nation’s freedom from arbitrary detention. See 3 Car. 1, c. 1, § 3 (1627). And when Parliament

further protected this freedom by enacting the Habeas Corpus Act, “that second *magna carta*, and stable bulwark of our liberties,” 1 Blackstone, *supra*, at 137, it forbade “any person” from improperly being “long detained in prison,” 31 Car. 2, c. 2, § 1 (1679).

These rights were vindicated primarily through bail and the writ of habeas corpus, and both remedies were available to citizens and noncitizens alike.

Bail. Bail “is as old as the law of England itself.” 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 233 (1883); see 2 Pollock & Maitland, *supra*, at 589-90; Charles S. Desmond, *Bail—Ancient and Modern*, 1 Buff. L. Rev. 245, 245 (1952). By the Founding era, “pretrial release on bail was a fundamental part of English constitutionalism.” Kellen Funk & Sandra Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1828 (2024).

Historically, the only function of pretrial detention was to ensure a person’s appearance at trial. See 4 Blackstone, *supra*, at 296-97; *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 37 (H.L. 1758). Given the infrequency of court proceedings under early common law, however, “the interval between arrest and sentence was lengthy,” and thus “a pre-trial release procedure was essential,” William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 43 (1977), or else the accused “might languish in jail for years,” Desmond, *supra*, at 246; see 1 Stephen, *supra*, at 233 (because trial “might be delayed for years,” provisional release was “of the utmost importance”).

Firm protections for pretrial liberty developed gradually in response to government abuse. Initially, refusals to grant bail and other malfeasance by local officials prompted the Statute of Westminster, which governed pretrial release into the Founding era. See 1

Stephen, *supra*, at 235-36. While bail was unavailable for the most serious crimes (e.g., treason) and in certain situations (e.g., when someone confessed), none of those categories related to nationality. *See id.*; 3 Edw. 1, c. 15 (1275).

Eventually, the Crown's oppressive habit of imprisoning without bail led to the "three great statutes" that "help[ed] fashion the American Constitution," Duker, *supra*, at 58—namely, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights.

Each of these measures took aim at obstructions and delays causing individuals to languish in prison. The Petition of Right reaffirmed the illegality of arbitrary detention in response to an infamous case of indefinite confinement. *See* 3 Car. 1, c. 1, § 5 (1627); *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). The Habeas Corpus Act targeted "procedural delay mechanisms" through which officials were "frustrating the liberties of the pre-trial period," Duker, *supra*, at 65-66, as exemplified in "a case in which the defendant was not offered bail for over two months after arrest," Funk & Mayson, *supra*, at 1828; *see* 31 Car. 2, c. 2, § 1 ("great delays have been used by sheriffs[,] jailers[,] and other officers," causing victims to be "long detained"). And the Bill of Rights targeted yet another intolerable means of prolonging detention: "excessive bail." 1 W. & M., sess. 2, c. 2 (1689).

These landmark protections for pretrial liberty all safeguarded noncitizens as fully as citizens. The Petition of Right reasserted that "no man of what estate or condition that he be" could be arbitrarily detained. 3 Car. 1, c. 1, § 4. The Habeas Corpus Act protected "all persons" detained for alleged crimes, offering "more speedy relief" to "any person or persons" unjustifiably detained. 31 Car. 2, c. 2, §§ 1-2. And the Bill of Rights prohibited excessive bail across the board,

even though neighboring provisions referred specifically to “subjects.” 1 W. & M., sess. 2, c. 2 (addressing the right to petition the king).

Nor did these measures carve out any exceptions for immigration removal, because immigration removal did not exist. *See infra* Part I.C. The result was that noncitizens enjoyed the exact same protections from unwarranted pretrial detention that citizens did.

Unsurprisingly, therefore, no one seems to have questioned noncitizens’ entitlement to bail. *E.g.*, *Brind v. Torris*, 96 Eng. Rep. 710, 710 (C.P. 1777). Noncitizens were even released on bail with *other* noncitizens serving as their sureties—even when those sureties “had no considerable property in England” but swore to the value of their assets located abroad. *Christie v. Filleul*, 96 Eng. Rep. 775, 775 (C.P. 1779); *see also* *Glead v. Mackay*, 96 Eng. Rep. 565, 565 (C.P. 1774).

Habeas corpus. Noncitizens also had equal access to habeas corpus, “the most celebrated writ in the English law,” 3 Blackstone, *supra*, at 129, and “the most usual remedy by which a man [was] restored again to his liberty,” *Bushell’s Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670).

In the Founding era, “habeas corpus was available to nonenemy aliens as well as to citizens. It enabled them to challenge Executive and private detention in civil cases as well as criminal.” *INS v. St. Cyr*, 533 U.S. 289, 301-02 (2001); *e.g.*, *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *Case of the Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779). Noncitizens employed the writ in high-profile cases like *Sommersett v. Stewart*, 20 How. St. Tr. 1 (K.B. 1772), which held slavery in England unauthorized by common law.

As fashioned by courts and fortified by statute, “the writ developed into a tool for challenging executive confinement.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting). Its protections covered “all persons,” not just citizens. 31 Car. 2, c. 2, § 1 (Habeas Corpus Act). Noncitizens thus had equal access to “the highest remedy in law for any man that is imprisoned.” *Darnel’s Case*, 3 How. St. Tr. 59, 95 (Parl. 1628).

Notably, habeas corpus became intimately connected with due process of law during the seventeenth-century reforms that shaped the American Founders. See *Fay v. Noia*, 372 U.S. 391, 402 (1963). In that era, the writ became “an efficient protector of the principle that no man should be imprisoned without due process of the common law.” Holdsworth, *supra*, at 114. As a result, “due process rights have historically been vindicated by the writ of habeas corpus.” *Hamdi*, 542 U.S. at 557 (Scalia, J., dissenting); see 2 Coke, *supra*, at 54 (“[I]f a man be taken, or committed to prison ... against the law of the land, what remedy hath the party grieved? He may have an habeas corpus.”). Because “[v]indication of due process is precisely [the] historic office” of habeas corpus, *Fay*, 372 U.S. at 402, noncitizens’ access to the writ underscored their entitlement to due process as well.

Importantly, too, this era’s reforms were designed to prevent unreasonably prolonged detention, even for those accused of particularly heinous crimes. As noted, the Habeas Corpus Act was a reaction against “great delays” in responding to legal process, through which officials were keeping defendants “long detained.” 31 Car. 2, c. 2, § 1. Accordingly, the Act “established procedures to prevent long delays before a bail bond hearing was held,” Funk & Mayson, *supra*, at 1828, generally requiring judicial relief within two

days of a writ's return. Although prisoners accused of felony or treason lacked this protection, they could not be held indefinitely but had to be tried at the next court sessions or bailed. *See* 31 Car. 2, c. 2, §§ 2, 7; Holdsworth, *supra*, at 118. “[T]he practical effect of this provision was that imprisonment without indictment or trial for felony or high treason ... would not exceed approximately three to six months.” *Hamdi*, 542 U.S. at 557 (Scalia, J., dissenting); *see* Amanda L. Tyler, A “Second Magna Carta”: *The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949, 1978 (2016).

C. The common law did not single out noncitizens for any confinement resembling mandatory immigration detention.

“England had nothing like modern immigration restrictions.” *DHS v. Thuraissigiam*, 591 U.S. 103, 123 (2020). Although noncitizens, in theory, were “liable to be sent home,” 1 Blackstone, *supra*, at 260, by the time of the Founding, foreigners had not been expelled for more than two centuries. *See Thuraissigiam*, 591 U.S. at 123; *accord* W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 33-36 (1890) (noting isolated exceptions for ambassadors and priests under special doctrines). Even in the early 1800s, after England began passing deportation laws, it still lacked any means of enforcement besides criminally prosecuting individuals who failed to depart. *See* William Empson, *On the Alien Bill*, 42 Edinburgh Rev. 99, 102 (1825).

In short, neither statute nor common law authorized preventive detention of noncitizens in connection with immigration removal. Needless to say, there was no authority for *mandatory* detention.

Expulsion from England was instead a criminal punishment imposed on citizens and noncitizens alike. As a result, any detention associated with removal could occur only after a final order in an individual prosecution.

Such expulsion was accomplished through “transportation,” a criminal sentence of removal to America or other British colonies for a term of years. See 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, 116-27 (1999); accord *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) (explaining difference between transportation and deportation). Transportation accounted for a quarter of eighteenth-century British immigration to America, prompting “virulent” colonial complaints. Bleichmar, *supra*, at 127-29. The transportation statute “did not distinguish between aliens and subjects.” *Id.* at 130; see 4 Geo. 1, c. 11 (1718).

In contrast with this “extremely visible model of expulsion as a criminal punishment for citizens and noncitizens alike, there was no practice of civil expulsion of noncitizens in England that would have shaped the Framers’ understanding.” 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, 324 (2008). Instead, the removal of noncitizens “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. Moreover, because transportation was “the direct penalty for committing a crime,” Bleichmar, *supra*, at 129, any detention to

effectuate it could occur only after completion of legal proceedings.

In short, under the legal regime that prevailed for at least two hundred years before the Founding, no method of *criminal* expulsion from the country was directed specifically at noncitizens, and no method of *civil* expulsion existed at all. Imprisoning noncitizens pending a decision about whether to deport them—let alone denying them bail—was unauthorized by statute and unknown to the common law.

D. Common-law safeguards against arbitrary detention protected noncitizens in America.

1. After independence, the American states generally adopted English common law. As in England, therefore, noncitizens had the same access to legal process as citizens: “All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done.” *Cruden v. Neale*, 2 N.C. 338, 344 (N.C. Super. L. & Eq. 1796). As common law provided, Americans understood visiting noncitizens to be under the law’s protection because they owed a “temporary and local allegiance.” *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 139 (1812) (Marshall, J.). It followed that “protection to their persons and property is due.” 2 James Kent, *Commentaries on American Law* 62 (1836).

Accordingly, unless they were alien enemies, noncitizens had “a right to sue.” 3 Story, *supra*, at 571 (1833); accord *Russel v. Skipwith*, 1 Serg. & Rawle 310, 310 (Pa. 1814); *Parkinson v. Wentworth*, 11 Mass. 26, 26 n.a (1814); *Johnson v. Harrison*, 16 Ky. 226, 226 (1816); *Wall v. Robson*, 11 S.C.L. 498, 502 (S.C. Const. App. 1820); *Taylor v. Carpenter*, 11 Page Ch. 292, 296-97 (N.Y. Ch. 1844) (“The fact that the complainants are

subjects of another government ... cannot alter the rights of the parties.”). Federal courts also recognized that “alien friends, are entitled to sue.” *Maisonnaire v. Keating*, 16 F. Cas. 513, 518 (C.C.D. Mass. 1815). As Justice Story wrote: “There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated.” *Taylor v. Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844).

Noncitizens also received the same process as citizens in criminal prosecutions. See 2 Kent, *supra*, at 63 (“if they are guilty of any illegal act, ... they are amenable to the ordinary tribunals”). Anything different does not seem to have been contemplated. Some courts even held that noncitizens, as in England, could demand juries half composed of foreigners. *E.g.*, *Respublica v. Mesca*, 1 U.S. 73, 74-75 (Pa. O. & T. 1783); see 1 Tucker, *supra*, app. 304 (“a jury, one half of which shall be aliens, is allowed, it is believed, by the laws of every state”). At the same time, some considered those mixed juries unnecessary precisely because noncitizens received the same procedural safeguards as all defendants. See *Mesca*, 1 U.S. at 75.

Noncitizens in America lacked only the discrete privileges long recognized at common law: they were “unable, as aliens, to have a stable freehold interest in land, or to hold any civil office, or vote.” 2 Kent, *supra*, at 63; see Thomas Cooley, *General Principles of Constitutional Law* 77 (1880) (the “principal differences” are that an alien “cannot own real estate” or “exercise political rights”). But they were “entitled ... to the same protection of their rights as citizens.” *Taylor*, 23 F. Cas. at 744 (Story, J.).

2. Just as in England, bail and habeas corpus protected noncitizens as fully as citizens from arbitrary and prolonged detention.

Because noncitizen defendants were prosecuted in “the ordinary tribunals,” 2 Kent, *supra*, at 63, standard bail practice applied. See Duker, *supra*, at 81 (American states “continued the system of bail as it had been known”). And that system made no citizenship distinctions. See *supra* Part I.B.1.

States that went further and enshrined bail rights in their laws used unqualified language covering all persons. *E.g.*, 12 Va. Stat. 185-86 (1785) (W. Hening ed., 1823) (“those shall be let to bail who are apprehended for any crime not punishable in life or limb”); Pa. Const. of 1776 art. 29 (“Excessive bail shall not be exacted forailable offences.”). Indeed, most states used the same inclusive formulation: “All prisoners shall beailable by sufficient sureties, unless for capital offences” Del. Const. of 1792 art. 1, § 12; see Funk & Mayson, *supra*, at 1842-43 nn.155-57. The national government used equally sweeping terms. See Northwest Ordinance of 1787 art. II, 1 Stat. 50, 52 n.(a) (“All persons shall beailable, unless for capital offences”); Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (rules for bail “upon all arrests in criminal cases”).

The writ of habeas corpus, too, “was available to nonenemy aliens” in the colonies and “during the formative years of our Government.” *St. Cyr*, 533 U.S. at 301; *e.g.*, *United States v. Villato*, 2 U.S. 370, 379 (C.C.D. Pa. 1797) (discharging noncitizen from custody); *United States v. Williams* (C.C.D. Va. 1813) (Marshall, J.) (same), reported in Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2D 39, 41-42 (2003). Habeas was available to noncitizens both under common law, see *Lockington’s Case*, 1 Brightly 269, 285 (Pa. 1813) (Yeates, J.), and because American states typically copied the categorical terms

of England's habeas statute in their own laws, *see id.* at 276-77 (Tilghman, C.J.); Tyler, *supra*, at 1987.

All told, as St. George Tucker wrote, a noncitizen in early America was "clearly and indisputably entitled to the full protection of the laws in every matter that respects his personal liberty." 2 Tucker, *supra*, at app. 98; *see also id.* at 99-103.

3. Americans also recognized that even where detention without trial was permissible, personal liberty required safeguards against *prolonged* detention.

The nation's first treaty placed a three-month limit on the detention of foreigners alleged to be removable. After the Revolutionary War, the nation was pressured by France, "its most important ally," to reduce desertions from French naval and merchant vessels in American ports. *The Consular Convention of 1788 [Editorial Note]*, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-14-02-0055-0001>. The agreed-upon solution was a judicial process enabling French consuls to secure the arrest and removal of deserting sailors (though not passengers). But Americans insisted on two due-process safeguards.

First, they rejected France's proposal that a consul's certificate would conclusively establish a person's removability. John Jay's "famous report," *id.*, maintained that "[t]his does not comport with the genius and spirit of our constitutions ... which secure to every inhabitant and citizen the inestimable privilege of offering in our tribunals every species of legal evidence that may tend to elucidate the merits of the cause," 29 Journals of the Continental Congress 513 (July 1785).

Second, Americans demanded a strict time limit on any detention of alleged deserters. As ratified by the First Congress, the treaty ultimately provided: "if

they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty.” *United States v. Lawrence*, 3 U.S. 42, 43 (1795) (quoting treaty). Attorney General Bradford highlighted that provision before this Court as guarding against unreasonably prolonged detention. *See id.* at 45. And Congress maintained this time limit in subsequent laws and treaties. *E.g.*, Act of Mar. 2, 1829, § 1, 4 Stat. 359, 359-60; Treaty with Russia art. IX (Dec. 6, 1832), 18 Stat. 444, 448.

Early American courts also set limits on prolonged detention. Pretrial imprisonment to facilitate interstate or international extradition could last only a “reasonable” period, after which a prisoner had to be discharged. *In re Washburn*, 4 Johns. Ch. 106, 108 (N.Y. Ch. 1819) (Kent, J.). And “[w]hether such offender be a subject of the foreign government, or a citizen of this country, would make no difference.” *Id.* at 109.

Chancellor Kent, for instance, freed a prisoner after approximately sixty days, because “a reasonable time had been allowed” for the Kentucky executive to demand the prisoner, and therefore “he ought not to be detained any longer.” *People v. Goodhue*, 2 Johns. Ch. 198, 200 (N.Y. Ch. 1816); accord *People v. Schenck*, 2 Johns. 479, 479 (N.Y. Sup. Ct. 1807) (ordering detention “for three weeks” and directing that “if no application be made for the delivery of the prisoner, within that time, he must be discharged”); *Simmons v. Commonwealth*, 5 Binn. 617, 625 (Pa. 1813) (“the prisoner should be detained in jail a reasonable time, ... and if he should not be demanded within that period, ... he should then be discharged”); *State v. Howell*, 1 Charlton 120, 120 (Ga. Super. Ct. 1821) (permitting detention only “for a reasonable period”); *State v. Buzine*, 4 Del. 572, 574 (Del. O. & T. 1847) (same); *In re Fetter*,

23 N.J.L. 311, 321 (N.J. Sup. Ct. 1852) (discharging prisoner after “sufficient time had elapsed”).

Thus, even where removal-related detention was initially lawful, it ceased being so once it became “unreasonably prolonged.” *Black v. Decker*, 103 F.4th 133, 143 (2d Cir. 2024).

II. The Text and History of the Due Process Clause Forbid Prolonged Imprisonment Pending Removal Hearings Without Opportunity for Bail.

A. “The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). Prolonged mandatory detention under 8 U.S.C. § 1226(c) violates that standard.

By the Founding, due process was a venerated principle long associated with Magna Carta’s guarantee that liberty could be infringed only “by the law of the land.” 2 Coke, *supra*, at 46. It served to prevent “arbitrary exercise of the powers of government, unrestrained by the established principles of private rights.” *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819). And among the core interests it safeguarded were “personal liberty” and “the power of locomotion” free of “imprisonment or restraint.” *Kerry v. Din*, 576 U.S. 86, 92 (2015) (Scalia, J.) (quoting 1 Blackstone, *supra*, at 134). In America, due process restrained the legislature as well as the executive. *Murray’s Lessee*, 59 U.S. at 276; *accord Wilkinson v. Leland*, 27 U.S. 627, 657 (1829).

Determining whether legislation violated due process required courts to “look to those settled usages and modes of proceeding existing in the common and

statute law of England.” *Murray’s Lessee*, 59 U.S. at 277. Those settled practices generally forbade summary deprivations of individual rights without adjudication by a neutral magistrate. *Id.* at 280. On some specific topics, however, the common-law rules differed, permitting a less robust process. For instance, summarily recovering debts from the government’s own revenue officers was long sanctioned at common law and therefore consistent with due process. *Id.* at 278.

But the common law has not long sanctioned detention of noncitizens pending civil expulsion. Still less did the common law permit such detention without possibility of bail—to say nothing of *prolonged* detention without bail. *See supra* Part I. Nothing in the common law’s settled usages and modes of proceeding, therefore, would allow someone to be imprisoned for nearly two years without a bond hearing to facilitate their expulsion from the country.

B. Constitutional text provides no basis for disregarding noncitizens’ common-law protections against unreasonably prolonged imprisonment. On the contrary, the text reinforces those protections.

Outside of the Fifth Amendment, the Constitution makes several fine-grained distinctions based on citizenship. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (congressional office requires being “seven Years a Citizen”); *id.* § 3, cl. 3 (nine years for Senate); *id.* art. II, § 1, cl. 5 (restricting the presidency to “natural born Citizen[s]”); *id.* amend. XV (protecting “[t]he right of citizens” to vote). But the Due Process Clause “speaks in the relatively universal term of ‘person.’” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Its protections, therefore, are “universal in their application to all persons within the territorial jurisdiction, without regard to any differences of ... nationality.”

Wong Wing v. United States, 163 U.S. 228, 238 (1896) (quotation marks omitted).

These choices reflect, rather than depart from, the common law, which regarded aliens as among “the people” of England, 1 Blackstone, *supra*, at 366, to whom the law’s protections were due “during [their] residence” there, *id.* at 370. The Fifth Amendment’s universal language also echoes the categorical terms of foundational English statutes securing physical liberty, including the Petition of Right, 3 Car. 1, c. 1, § 4 (“no man of what estate or condition that he be”), and the Habeas Corpus Act, 31 Car. 2, c. 2, §§ 1-2 (“any person”). Even the Constitution’s preamble speaks of “the People” (not “the Citizens”) of the United States.

Reinforcing the Amendment’s plain text, other constitutional provisions aim to ensure fairness and procedural regularity for noncitizens. Because state courts might not treat noncitizens “impartially” in suits against their own citizens, federal courts were given jurisdiction over those suits. 1 Kent, *supra*, at 322; *see* U.S. Const. art. 3, § 2, cl. 1. A noncitizen sued in state court, for instance, could obtain “the benefit of the unbiased judicatures of the United States, by removing the suit into [federal] court.” William Rawle, *A View of the Constitution of the United States of America* 30 (1829). And by providing for a “uniform” rule of naturalization, in lieu of private bills or state-by-state variation, U.S. Const. art. 1, § 8, cl. 4, the Constitution promoted “norms of procedural regularity” that “immigrants could depend upon in making the decision to come to the United States,” James Pfander & Theresa Wardon, *Reclaiming the Immigration Constitution of the Early Republic*, 96 Va. L. Rev. 359, 386 (2013).

C. The short-lived, never-enforced, and historically repudiated Alien Friends Act does not undermine

noncitizens' due-process rights against arbitrary detention.

Even this notorious law did not authorize arrest before an order to leave the country—or detention to facilitate removal. An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798). Indeed, the Adams administration regarded the Act as inadequate because “the president was not authorized to seize and confine [noncitizens] while waiting for their departure or deportation.” James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 163 (1956). In contrast, the Alien Enemies Act, consistent with the laws of war, authorized preventive detention. An Act Respecting Alien Enemies, § 1, 1 Stat. 577, 577 (1798).

Nor does the Act's legislative history imply that noncitizens were seen as lacking due-process rights at the Founding. Most of the debate was about whether the federal government had the power to expel foreigners. See Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Texas L. Rev. 1, 92 (2002). To be sure, some congressmen also claimed that noncitizens lacked *any* rights, because the Constitution was a “compact ... made between citizens only.” 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834). But the Act's opponents ably refuted those claims.

Under common law, they explained, noncitizens “residing among us, are entitled to the protection of our laws.” *Id.* at 2012. And on this point “the Constitution expressly excludes any distinction between citizen and alien.” *Id.* “Unless ... an alien is not a ‘person,’ ... these provisions extend equally to aliens and natives.” *Id.* at 2013; see *id.* at 1956 (the Due Process Clause “speaks of persons, not of citizens”). Thomas

Jefferson's Kentucky Resolutions called the Act "contrary to the Constitution," 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). James Madison's exhaustive report explained that noncitizens were "under a local and temporary allegiance, and entitled to a correspondent protection," including "rights under the Constitution," and therefore were shielded from any "arbitrary and unusual process." *Id.* at 205–06, 208.

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

At the first opportunity, this Court too held that the Fifth Amendment does not discriminate based on citizenship. *Wong Wing*, 163 U.S. at 238. In the process, the Court recognized three critical points. First, the right to release from unconstitutional detention does not require any right to remain in the United States. Second, the principles governing detention of

immigrants are the same as those governing detention of citizens. *See id.* at 235 (approving of immigration detention precisely because “[d]etention is a usual feature” in criminal cases). Third, the government’s power over immigration policy does not give it free rein to deprive people of physical liberty as a means of better effectuating that policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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