No. 26-426

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

D.V.D., ET AL.,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank 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

The political branches have given vital protections to noncitizens who are subject to removal from this country, shielding them from being sent to any nation in which they would likely face persecution or torture. To help protect those rights, federal law requires hearings before removals to "third countries." *See* Resp. Br. 30-40. But even if the laws did not include that mandate, the Fifth Amendment's Due Process Clause would prohibit the government from denying people these critical statutory entitlements without effective notice or a meaningful hearing. Because the Department of Homeland Security's policy does exactly that, it is unconstitutional.

1. Effective notice and a meaningful opportunity to be heard are the foundational requirements of due process. "Parties whose rights are to be affected are entitled to be heard," *Baldwin v. Hale*, 68 U.S. 223, 233 (1864), and "no man shall be condemned in his person

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

or property without notice, and an opportunity to make his defence," *Boswell's Lessee v. Otis*, 50 U.S. 336, 350 (1850).

"The right to prior notice and a hearing" is thus "central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). "[A]t a minimum," the Due Process Clause "require[s] that deprivation of life, liberty or property" be accompanied by "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

These baseline requirements apply "in the context of removal," *A.A.R.P. v. Trump*, 605 U.S. 91, 95 (2025) (quoting *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025), which involves "issues basic to human liberty and happiness and . . . perhaps to life itself," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). Indeed, effective notice and a meaningful hearing are required for any significant deprivation of liberty or property, including the deprivation of rights that are "a statutory creation of the State." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). When the government establishes new rights and interests through legislation, as here, due process ensures "that the state-created right is not arbitrarily abrogated." *Vitek v. Jones*, 445 U.S. 480, 489 (1980) (quotation marks omitted).

2. For many Respondents, DHS's policy offers no hearing whatsoever on whether, in violation of federal law, the country chosen for their removal is one where they will face torture or persecution. With respect to this critical question, the policy relies entirely on blanket assurances from foreign governments "without . . . further procedures." Pet. Br. 9 (quoting policy).

This complete denial of any opportunity to be heard violates the most basic requirement of due process. Given the vast range of interests that the Constitution protects from deprivation without a hearing, it is astonishing for DHS to claim that it can deny people any chance to be heard on the dispositive legal question of whether they will be tortured or persecuted in the country to which it plans to send them.

This Court recently made clear that noncitizens are owed "notice and an opportunity to challenge their removal" even under a wartime statute "which largely preclude[s] judicial review." *J.G.G.*, 604 U.S. at 672-73 (quotation marks omitted). If due process guarantees effective notice and a meaningful hearing to ensure compliance with the Alien Enemies Act, *see A.A.R.P.*, 605 U.S. at 94-95, it certainly guarantees no less here.

Making the lack of any hearing even less excusable, the "interests at stake" here are "particularly weighty," *id.* at 95, because an erroneous decision could result in persecution, torture, or death. "Given the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking." *Turner v. Rogers*, 564 U.S. 431, 445 (2011). Even *delaying* a hearing until after a liberty or property deprivation occurs is permissible only in "extraordinary situations," *James Daniel Good*, 510 U.S. at 53 (quotation marks omitted), where a post-deprivation hearing is sufficient. But no such backstop protects people who are removed to a country where they are persecuted or tortured. That decision is irrevocable.

In claiming the power to deny Respondents any hearing whatsoever, DHS relies almost entirely on *Munaf v. Geren*, 553 U.S. 674 (2008). But the myriad reasons for deferring to executive judgments in that case are absent here. *Munaf* held that when the

political branches have remained silent on the matter, courts should not use their equitable discretion to create new forms of habeas relief in order to vindicate a new substantive due process right: one that involves second-guessing decisions to transfer military detainees to foreign governments for the enforcement of their own laws—in a wartime context where judicial interference would disrupt "ongoing military operations." *Id.* at 689.

Far from inviting the judiciary to intrude on matters entrusted to the political branches, *see id.* at 702, Respondents are trying to vindicate the very choices the political branches inscribed into law. And their request for a hearing requires no innovations in habeas or substantive due process. Nor does it risk interfering with a foreign sovereign's authority over its own territory or with U.S. military operations. In short, *Munaf* does not remotely suggest that an agency's reliance on foreign-government assurances becomes judicially unassailable simply because the agency decides to make such assurances the cornerstone of its statutory implementation policy.

3. Where DHS's policy ostensibly does allow for hearings, the process it offers is merely "a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). But "process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315.

Instead, hearings "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). At a minimum, this requires "notice reasonably calculated, under all the circumstances, to apprise interested parties . . . and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. As this Court held with respect to Alien Enemies Act detainees, for instance, notice "must be afforded within a reasonable time and in

such a manner as will allow them to actually seek habeas relief," *J.G.G.*, 604 U.S. at 673, which required providing "sufficient time and information to reasonably be able to contact counsel, file a petition, and pursue appropriate relief," *A.A.R.P.*, 605 U.S. at 95. Simply put, notice and a hearing must serve their purpose of actually enabling the affected person to challenge the government's decision.

Every facet of DHS's process is designed instead to foreclose any chance of success. The policy requires incarcerated people to proactively assert a fear of harm in countries they may know nothing about and then, within 24 hours or less, to marshal enough evidence about the conditions in that country to demonstrate a likelihood of persecution or torture, by a preponderance of the evidence, with no appeal. That is an obvious charade. No one who wanted to give Respondents a real chance to vindicate their rights would stack the deck against them in this way.

As this Court has made clear, due process is not satisfied by notice "devoid of information" about how to exercise one's rights or challenge the government's decision. *Id.* And it requires that a hearing take place "sufficiently after the notice to permit the [person] to prepare," *Vitek*, 445 U.S. at 494, with "due regard for the practicalities and peculiarities of the case," *Mullane*, 339 U.S. at 314, including "the capacities and circumstances of those who are to be heard," *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (quotation marks omitted). Respondents are imprisoned foreigners, many of whom lack legal counsel or any outside assistance. A single day is a patently unreasonable timeframe in which to require them to put together a factual and legal case that satisfies "the same standard" they "ultimately must satisfy to obtain relief on the merits." Pet. Br. 44. Here, too, "notice roughly 24

hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster." *A.A.R.P.*, 605 U.S. at 95.

DHS's invocation of the procedures governing expedited removal only underscores the shortcomings of its policy. Under expedited removal, people fearing persecution are given (1) significantly more time to make their case, (2) the benefit of an extremely low standard of proof, and (3) up to *three* levels of review, including de novo review by a neutral decisionmaker. *See DHS v. Thuraissigiam*, 591 U.S. 103, 109-11 (2020). Exactly how this comparison helps DHS is a mystery.

4. DHS devotes the last pages of its brief to the "entry fiction" doctrine, arguing that some Respondents "have no due-process rights beyond what the political branches have chosen to provide." Pet. Br. 45. That discussion is both irrelevant and unpersuasive.

As DHS concedes, many Respondents are not even conceivably subject to the entry fiction. And if DHS's policy violates their constitutional rights, it must be set aside under the APA. Whether other Respondents have diminished due process rights is beside the point. DHS's argument is also incompatible with both *J.G.G.* and *A.A.R.P.* Like this case, they involved classes that included noncitizens who were not lawfully admitted. But this Court held that *all* class members were entitled to constitutionally adequate notice and an opportunity to challenge their removal. *See J.G.G.*, 604 U.S. at 673; *A.A.R.P.*, 605 U.S. at 97-98.

More fundamentally, DHS's argument depends on a radical expansion of the entry fiction that is unrelated to its purpose. The entry fiction is designed to preserve Congress's authority over whom to allow into the country, *see Thuraissigiam*, 519 U.S. at 139, and it

has never applied beyond the context of admission decisions. But the legal protections that Respondents seek to vindicate exist precisely for the benefit of people who will *not* be admitted. Allowing DHS to arbitrarily deprive them of those protections would, instead of preserving Congress's sovereign authority over immigration, subvert that very authority.

ARGUMENT

I. By Denying People Any Meaningful Opportunity to Assert Their Statutory Rights Against Persecution and Torture, DHS's Policy Violates the Due Process Clause.

"Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence." *Baldwin v. Hale*, 68 U.S. 223, 233 (1864). This elemental safeguard is at the core of due process, which protects noncitizens "in the context of removal proceedings." *A.A.R.P. v. Trump*, 605 U.S. 91, 94 (2025) (quoting *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025)). And as DHS acknowledges, federal law unequivocally entitles noncitizens to protection from removal to any country where they would likely face persecution or torture. *See* Pet. Br. 6-7. DHS therefore may not deprive people of those statutory entitlements without constitutionally adequate notice and a hearing. But DHS's policy provides neither.

A. Effective notice and a meaningful opportunity to be heard are the central pillars of due process.

In order "to secure the individual from the arbitrary exercise of the powers of government," *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819), and guard against "the mistaken or unjustified deprivation of life,

liberty, or property," *A.A.R.P.*, 605 U.S. at 94 (quotation marks omitted), the Due Process Clause demands observance of certain "fundamental requirements of fairness," *Morgan v. United States*, 304 U.S. 1, 19 (1938). "No principle is more vital" to this safeguard "than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence." *Boswell's Lessee v. Otis*, 50 U.S. 336, 350 (1850).

"The right to prior notice and a hearing," therefore, "is central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). "For more than a century," this Court has described that right as "the central meaning of procedural due process." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) (quotation marks omitted); *e.g.*, *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("rights of personal liberty and of property" may not be "taken away without trial, [or] without notice"). The most basic requirements of due process, in short, are "notice, with reasonable time to object," followed by "a full and fair hearing." *Davidson v. City of New Orleans*, 96 U.S. 97, 105 (1878).

These requirements stem from the historic meaning of "due process of law." At the Founding, that language conveyed "the same meaning as the words, 'by the law of the land,' in *Magna Charta*." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855) (citing 2 Edward Coke, *Institutes of the Laws of England* 50 (1681 ed.)). Both phrases aimed "to secure the subject against the arbitrary action of the crown." *Dent v. West Virginia*, 129 U.S. 114, 123-24 (1889). "[D]ue process" therefore required "reasonable notice to those whose rights were implicated by state actions, followed by a meaningful opportunity to be heard in defense of one's rights." Edward J. Eberle,

Procedural Due Process: The Original Understanding, 4 Const. Comment. 339, 362 (1987).

Thus, due process has always required "that the party to be affected shall have notice and an opportunity to be heard." *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884). Whatever else these words connote, "at a minimum they require that deprivation of life, liberty or property" be accompanied by "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). This Court, therefore, has consistently enforced the rule that "no person shall be deprived of his liberty without opportunity, at some time, to be heard." *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (addressing deportation); *accord A.A.R.P.*, 605 U.S. at 94-95.

Indeed, this Court has insisted on the elemental right to a hearing across the full spectrum of liberty and property interests—often in contexts lacking the life-and-death stakes of persecution and torture. For example, no person may be deprived of "property rights" without a hearing, *Mullane*, 339 U.S. at 313, whether those rights involve a trust fund, *id.*, tax assessments for the cost of paving a street, *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385-86 (1908), radio-broadcasting permits, *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 281 (1949), employment wages, *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 339-40 (1969), or personal property that amounts to "nothing more than an assortment of household goods," *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972).

Hearings are also required to revoke a driver's license, *Dixon v. Love*, 431 U.S. 105, 112 (1977), to fire a tenure-protected government employee, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985),

to withhold Social Security benefits, *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976), and to suspend students from public schools, *Goss v. Lopez*, 419 U.S. 565, 576 (1975). So too before branding someone as a person to whom liquor sales are prohibited, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), or tarnishing an organization's reputation by associating it with Communism, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951). People in custody have the right to be heard before the government imposes restrictive conditions of confinement, *Wilkinson*, 545 U.S. at 225-26, revokes parole or probation, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), withdraws good-time credits, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or transfers them to a mental hospital, *Vitek v. Jones*, 445 U.S. 480, 487-88 (1980).

As illustrated by these cases, due process restrains the government even when it tries to abridge rights "that exist by the grace of its laws." *Mullane*, 339 U.S. at 313. In other words, it protects rights and interests that are "a statutory creation of the State." *Wolff*, 418 U.S. at 558. Legal rights and interests, after all, "are normally not created by the Constitution," but rather "by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss*, 419 U.S. at 572-73 (quotation marks omitted). "Once a State has granted [such an] interest . . . due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." *Vitek*, 445 U.S. at 488-89 (quotation marks omitted). Rights secured by due process therefore "may arise from an expectation or interest created by state laws," *Wilkinson*, 545 U.S. at 221, "including statutory entitlements," *Fuentes*, 407 U.S. at 86. As Justice Frankfurter put it: "Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing

is deemed important." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 166 (Frankfurter, J., concurring).

The statutes at issue here create important liberty interests for Respondents: protection from removals likely to result in persecution or torture. But as shown below, DHS's policy deprives Respondents of that protection without any semblance of due process.

B. The policy's reliance on blanket foreign assurances denies people their right to be heard.

Federal law protects noncitizens from removal to countries where they "may face persecution or torture." Pet. Br. 6; *see* 8 U.S.C. § 1231(b)(3); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-761, 2681-822. But when DHS relies on blanket foreign assurances to choose the countries to which Respondents will be removed, it denies them any opportunity to assert these vital statutory rights. Instead of providing notice and allowing Respondents to be heard, DHS is substituting secret pledges from foreign governments and deeming those blanket assurances "conclusive" of Respondents' rights, Pet. Br. 2, "without . . . further procedures," *id.* at 9 (quoting policy).

This scheme violates the most basic rule of due process: "Parties whose rights are to be affected are entitled to be heard." *Baldwin*, 68 U.S. at 233. Given the enormous range of rights and interests that are protected from deprivation without a hearing, *see supra* at 9-10, it is staggering that the government claims it can deny people any chance to be heard on whether they will likely be tortured or persecuted in the country to which the government plans to send them. As shown above, "[t]he opportunity to present reasons . . . why proposed action should not be taken

is a fundamental due process requirement," *Loudermill*, 470 U.S. at 546, and "no person shall be removed from the United States without opportunity, at some time, to be heard," *A.A.R.P.*, 605 U.S. at 94 (quotation marks omitted). If a statute allows the deprivation of a person's liberty only under specified conditions, that person has a right to be heard on whether those conditions are satisfied. *See Yamataya*, 189 U.S. at 100-01.

Even *postponing* a hearing until after the effectuation of a liberty or property deprivation is permitted only in "extraordinary situations," *James Daniel Good*, 510 U.S. at 53 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)), that involve a "special need for very prompt action," *id.* at 52 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974)); *see Fuentes*, 407 U.S. at 90 (the circumstances "must be truly unusual"). Deprivations before a hearing are allowed in these extraordinary situations only because of the process afforded later. *See Loudermill*, 470 U.S. at 546 (relying on guarantee of "a full post-termination hearing"); *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (similar).

Here, no post-deprivation hearing serves as a constitutional backstop. People who are removed to a country where they will likely be tortured or persecuted are simply consigned to their fate. And "summary proceedings" like this, in which the government deprives someone of their rights or interests without a prior hearing, are forbidden if no "opportunity is afforded for a later judicial determination of the legal rights." *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931).

The irrevocable consequences of an erroneous decision here—which could result in persecution, torture, or death—also underscore that "[t]he detainees' interests at stake" are "particularly weighty."

A.A.R.P., 605 U.S. at 95. Transfer to a country where one likely will face persecution or torture is exceptional "in both its severity and its finality." *Lankford v. Idaho*, 500 U.S. 110, 126 (1991) (quotation marks omitted) (addressing capital punishment). A wrongful transfer may spell "disaster" for the victim, making the decision "a matter of obvious great moment to him." *Wolff*, 418 U.S. at 560-61 (addressing parole revocation). And "[t]he right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Wisconsin*, 400 U.S. at 437 (quotation marks omitted) (addressing public designation as an alcoholic). "Given the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking" here. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (addressing incarceration for civil contempt). "[T]he stakes are simply too high . . . and the possibility for honest error or . . . misjudgment too great" to give government employees unbridled discretion. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (addressing termination of welfare payments).

While the government may believe that its judgments concerning blanket foreign assurances are unassailable, "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *James Daniel Good*, 510 U.S. at 55 (quoting *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 170 (Frankfurter, J., concurring)). "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking." *Id.* And "accurate and just results" are unlikely to be obtained without "the equal contest of opposed interests." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981). "Secrecy is not congenial to truth-seeking," and "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the

case against him and opportunity to meet it." *Lankford*, 500 U.S. at 121 (quotation marks omitted).

DHS argues that it need not provide any notice or allow Respondents to be heard because "Congress did not specify procedures to make [CAT or withholding] determination[s] in the context of third-country removals, leaving the matter to the Executive's broad discretion." Pet. Br. 2. Even if that account of federal law were accurate, *but see* Resp. Br. 30-40, it would not satisfy due process. Not even Congress, much less DHS acting alone, can authorize the deprivation of statutory rights without constitutionally adequate process.

When a legislature creates liberty or property rights, even the legislature itself cannot sanction the arbitrary denial of those rights. *See Loudermill*, 470 U.S. at 541 ("While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest . . . without appropriate procedural safeguards." (quotation marks omitted)). Having chosen to establish protections against persecution and torture, Congress itself could not authorize DHS to deny people those protections arbitrarily or without process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (due process imposes limits when legislatures define the procedures for deprivation of statutorily created entitlements). When acting on its own initiative, therefore, DHS certainly may not deny protections to people without due process merely by citing a statutory "gap." Pet. Br. 32. Even if Congress "by direct command" could permit an arbitrary deprivation of Respondents' rights, "it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion" on the

matter. *S. Ry. Co. v. Virginia ex rel. Shirley*, 290 U.S. 190, 197 (1933).

Indeed, this Court has recently made clear—twice—that noncitizens are owed "notice and an opportunity to challenge their removal" even under a wartime statute "which largely 'preclude[s] judicial review,'" the Alien Enemies Act. *J.G.G.*, 604 at 672-73 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 163 (1948)). If due process guarantees hearings to ensure statutory compliance with *that* law, it certainly does the same here.

In claiming the power to act without any hearing whatsoever, DHS relies almost entirely on *Munaf v. Geren*, 553 U.S. 674 (2008). But *Munaf* did not hold that an agency's reliance on foreign-government pledges is judicially unassailable simply because the agency decides to make such pledges the cornerstone of its statutory implementation policy. And the reasons for taking a hands-off approach to executive judgments in *Munaf* are absent here.

The question in *Munaf* was whether courts should use their "equitable" habeas authority, after considering "prudential concerns such as comity," to "shelter [the petitioners] from [a] sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders," during the U.S. military's wartime occupation of that country. *Munaf*, 553 U.S. at 693-94 (citation and quotation marks omitted). This Court rejected that use of discretionary judicial power because it would "interfere with Iraq's exclusive jurisdiction to punish offenses against its laws," by essentially "commanding our forces to smuggle [the petitioners] out of Iraq," which would be an "intrusion into the Executive's ability to conduct military operations abroad," *id.* at 697-98, 700 (quotation marks omitted).

Critically, the *Munaf* petitioners raised no statutory claims against their transfer to Iraqi custody, *id.* at 703, arguing instead that the substantive component of the Due Process Clause protects a "[f]reedom from unlawful transfer," *id.* at 695. And they urged the creation of an entirely new type of habeas remedy—one that, instead of securing release from custody, would prohibit inter-government transfers that could result in torture. *Id.* at 700.

All this was the backdrop for the statements about deference to executive judgments in *Munaf* that DHS quotes here out of context. For multiple reasons, those statements do not foreclose relief in this vastly different situation.

Far from inviting the judiciary to intrude on matters entrusted to "the political branches," *id.* at 702, Respondents are trying to vindicate the very choices that the political branches inscribed into law. And instead of asking for the recognition of new substantive due process rights against custody transfers, they are contesting the arbitrary deprivation of specific protections against removal guaranteed by duly enacted statutes. Granting them a hearing, moreover, risks no interference with a foreign sovereign's authority over its own territory, *see id.* at 697, nor with "ongoing military operations" by U.S. forces abroad, *id.* at 689. Finally, Respondents are not urging the courts to fashion a new form of habeas relief under their discretionary equitable authority; they are proceeding under a judicial-review statute which instructs that courts "shall" set aside unlawful agency action, 5 U.S.C. § 706(2).

The judiciary, in short, is "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Respondents are simply "request[ing] that the courts enforce a specific statutory right." *Id.*

Munaf held that courts should not second-guess executive judgments in a wartime context en route toward fashioning a new type of habeas remedy that intrudes on foreign sovereignty where the political branches have remained silent. That holding does not remotely suggest that where the branches *have* spoken, an agency can immunize itself from basic due process rules by opting to center its policy around blanket foreign-government assurances.

Aside from *Munaf* and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), which is equally unavailing,[2] DHS does not cite a single case in support of denying hearings to Respondents. In light of everything above, it should be obvious why.

C. Where the policy does not rely on blanket foreign assurances, it fails to provide effective notice or a meaningful hearing.

When a hearing is constitutionally required, it "must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). "[P]rocess which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. To ensure "a *fair* opportunity to be heard," *Hooker v. City of Los Angeles*, 188 U.S. 314, 318

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[2] Because *Kiyemba* simply implemented *Munaf*, it is unhelpful to DHS for the same reasons. *See Kiyemba*, 561 F.3d at 517, 519 (Kavanaugh, J., concurring) (explaining that the *Kiyemba* petitioners, like those in *Munaf*, relied on "a constitutional due process right against 'transfer to torture'" because they lacked "a meritorious statutory claim," and that both cases implicated the government's "interest in detainee transfers connected to 'the Executive's ability to conduct military operations abroad'" (quoting *Munaf*, 553 U.S. at 700)).

(1903) (emphasis added), hearings "must be granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). At a minimum, this requires "notice reasonably calculated, under all the circumstances, to apprise interested parties . . . and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. "The means employed must be such as one desirous of actually" achieving that goal "might reasonably adopt to accomplish it." *Id.* at 315.

DHS's policy flunks that test. It requires incarcerated people to proactively assert a fear of torture or persecution in a country they may know nothing about, and then, within 24 hours or less, to marshal enough evidence about the conditions and the government in that country to demonstrate a likelihood of being harmed, by a preponderance of the evidence, with no appeal. *See* Pet. Br. 9.

Simply describing that procedure reveals it to be a charade. "[A] person who actually desired to inform" Respondents of their rights, *Jones v. Flowers*, 547 U.S. 220, 229 (2006), and provide an honest chance to vindicate them, would never stack the deck against them like this. Multiple aspects of this policy standing alone render it unconstitutional. Combined, they make a mockery of due process.

To start, DHS deliberately tells Respondents nothing about their rights, how to protect them, or even that its choice of a third country can be contested. Any access to further process thus depends entirely on spontaneous expressions of fear by people who have not been informed that expressing their fears could have any possible effect on what happens to them. To justify that strategic omission, DHS says—without citing any authority—that it need not "solicit" objections or tell Respondents what their "options" are. Pet. Br.

45. In fact, this Court has said the opposite, condemning the inadequacy of notice "devoid of information about how to exercise due process rights to contest [one's] removal." *A.A.R.P.*, 605 U.S. at 95; *accord Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978) ("Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service.").

Beyond this threshold problem, 24 hours is a patently unreasonable timeframe in which to demand that an imprisoned noncitizen assemble a legal and factual case regarding a third country's conditions that could satisfy the policy's preponderance-of-the-evidence standard. Instead of carrying out a true "screening" to identify people who might have meritorious claims, Pet. Br. 2, the policy requires Respondents to establish their ultimate entitlement to statutory relief almost immediately upon being informed of where DHS plans to send them.

This rushed scheme fails the most basic principles of fair notice. Due process requires a hearing "sufficiently after the notice to permit the prisoner to prepare." *Vitek*, 445 U.S. at 494. Adequate notice "must afford a reasonable time for those interested to make their appearance," with "due regard for the practicalities and peculiarities of the case." *Mullane*, 339 U.S. at 314. After all, the very "purpose of notice under the Due Process Clause is to . . . permit adequate preparation for[] [the] impending hearing." *Memphis Light*, 436 U.S. at 14 (quotation marks omitted). And that means "giv[ing] the charged party a chance to marshal the facts in his defense." *Wolff*, 418 U.S. at 564; *see Trump v. Cook*, 609 U.S. 528, 557-58 (2026).

This Court reaffirmed those principles just last year, holding that the notice given to Alien Enemies Act detainees "must be afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs." *J.G.G.*, 604 U.S. at 673. In that context, "[i]n order to actually seek habeas relief, a detainee must have sufficient time and information to reasonably be able to contact counsel, file a petition, and pursue appropriate relief." *A.A.R.P.*, 605 U.S. at 95 (quotation marks omitted).

Simply put, notice must serve its purpose of allowing the recipient to challenge the government's decision. And "notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster." *Id.*

Here, DHS does not even try to explain how, as a practical matter, the average person could possibly gather the needed information and formulate a compelling legal and factual case within a day of expressing a fear of harm. This timeframe is all the more unrealistic because much of it can occur on weekends or at other times when access to counsel and other outside help is unavailable. As the district court recounted, for example, some individuals have "received fewer than 16 hours' notice before being removed, most of which were non-waking hours, none within the business day," allowing "limited, if any, ability to communicate with family or legal representatives" or to "access information that would have allowed them to determine for themselves the repercussions of being removed to [a particular country]." J.A. 60-61.

Not only that, but within this fleeting time period, Respondents must meet "the same standard" that they "ultimately must satisfy to obtain relief on the merits."

Pet. Br. 44. *But see Nelson v. Colorado*, 581 U.S. 128, 137 (2017) (striking down policy that imposed unjustified burden of proof on claimants). Instead of defending the use of this standard, DHS simply pronounces that it "does not violate due process," Pet. Br. 44, without further explanation.

Making the policy yet more unreasonable, these demanding standards and rushed deadlines are imposed on foreigners, many of whom are *pro se*, while they are imprisoned. For obvious reasons, an incarcerated person who may lack English fluency and outside assistance is even less likely to be able to achieve the Herculean task of meeting the policy's requirements in one day. But due process requires "that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Mathews*, 424 U.S. at 349 (quotation marks omitted). The government cannot simply ignore "unique information" about those to whom it owes a hearing, *Jones*, 547 U.S. at 230, when assessing whether they can realistically vindicate their rights without additional process.

This Court routinely enforces the rule that constitutionally adequate procedures must take into account the capacities of those whose rights are at stake. A "generally valid notice procedure," for instance, "may fail to satisfy due process because of the circumstances of the defendant." *Boddie*, 401 U.S. at 380. So this Court has rejected the adequacy of notice "to a person known to be an incompetent who [was] without the protection of a guardian," *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956), and to a property owner whose notice was returned undelivered, *Jones*, 547 U.S. at 223. Similarly, a procedure allowing only written submissions was held "an unrealistic option" for welfare recipients who "lacked the educational

attainment necessary to write effectively and could not afford professional assistance." *Mathews*, 424 U.S. at 345 (quotation marks omitted). And hearing procedures that may have passed muster in other contexts were found wanting where the participants were "likely to be people with little education" who were "thrust into a distressing and disorienting situation." *Lassiter*, 452 U.S. at 30. Likewise, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Boddie*, 401 U.S. at 380.

The lesson: due process demands a reasonable effort to accommodate the known realities of a situation and the characteristics of the people threatened by government action. Even if a procedure is "generally valid," *id.*, the individual circumstances may demand "additional reasonable steps," *Jones*, 547 U.S. at 223, to ensure that notice and a hearing are "meaningful," *Armstrong*, 380 U.S. at 552.

Here, DHS's procedures are not "generally valid" to begin with, as they give people only a single day to establish by a preponderance that they will likely be persecuted or tortured in a country they may have never heard of. Imposing this already unrealistic burden on foreigners who are held behind bars makes the resulting "hearing" even less meaningful.

At bottom, DHS's system is designed for one thing: to make claims fail. But "empty forms" do not provide "the fair hearing essential to due process." *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 303, 300 (1937).

Adherence to established principles is especially crucial here, given "the importance of the interest[s] at stake," *Turner*, 564 U.S. at 445, which are "particularly weighty" for Respondents, *A.A.R.P.*, 605 U.S. at

95; *see supra* at 12-13. Moreover, the fact that Congress has not specified every detail of the hearings required before third-country removals take place does not give DHS free rein to trample Respondents' due process rights when designing those hearings itself. *See supra* at 14.

In place of any sustained defense of its policy, DHS likens it to the procedures for expedited removal, which apply only to arriving or recently arrived and unadmitted individuals. *See* 8 U.S.C. § 1225(b)(1)(A). That comparison merely highlights the policy's flaws. Under expedited removal, persons fearing persecution are given (1) significantly more time to make their case, (2) the benefit of an extremely low standard of proof, and (3) up to *three* levels of review, including de novo review by a neutral decisionmaker. It is hard to see why DHS thinks this comparison helps its argument.

Under expedited removal, any person who expresses a fear of persecution or an intent to apply for asylum receives a "credible fear" interview with a professionally trained asylum officer. *See DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020). The only function of this "screening interview" is "to determine whether the applicant has a 'credible fear of persecution.'" *Id.* (quoting 8 U.S.C. § 1225(b)(1)(B)(v)). Critically, therefore, "[t]he applicant need not show that he or she *is in fact eligible* for asylum—a 'credible fear' equates to only a 'significant possibility' that the alien would be eligible." *Id.* (emphasis in original) (quoting 8 U.S.C. § 1225(b)(1)(B)(v)).

Furthermore, if an asylum officer concludes that an applicant fails to clear this minimal hurdle, a supervisor reviews that determination. *See Thuraissigiam*, 591 U.S. at 110. If the supervisor agrees, "the applicant may appeal to an immigration judge, who

can take further evidence" and makes "a de novo determination." *Id.* (quotation marks omitted). There must be "an opportunity for the alien to be heard and questioned by the immigration judge," and this stage of the process alone may last up to a week. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III). "An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear," *Thuraissigiam*, 591 U.S. at 110, a low bar requiring only "a significant possibility" of asylum eligibility. Unsurprisingly, more than 75% of screenings at the time of *Thuraissigiam* "resulted in a finding of credible fear." *Id.* at 111.

Under DHS's policy, by contrast, Respondents have only a day to prove the validity of their fears—not about the place from which they just fled, but rather about a country they may know nothing about. Instead of a minimal screening standard, they are held to the same standard that governs eligibility for ultimate relief. And if an officer disagrees, there is no way to appeal. So much for that comparison.

II. The Government's Entry-Fiction Discussion Is Both Irrelevant and Unpersuasive.

DHS devotes the last pages of its brief to a puzzling invocation of the "entry fiction" doctrine, arguing that because "many" Respondents were not legally admitted, they "have no due-process rights beyond what the political branches have chosen to provide with respect to executing their removal." Pet. Br. 45. This discussion is at best a distraction.

Most importantly, as DHS concedes, many Respondents are not conceivably subject to the entry fiction, no matter its scope or implications. *See id.* If

DHS's policy violates their due process rights, it "shall" be set aside as "contrary to constitutional right." 5 U.S.C. § 706(2)(B). There is no room for the equitable discretion to which DHS vaguely gestures in asserting that vacatur of the policy was "misguided" because of the diversity in Respondents' admission status. Pet. Br. 45.

DHS's argument is also incompatible with *J.G.G.*, which, like this case, involved noncitizens who were not lawfully admitted as well as those who were. *See* Stay Appl. 170a, *J.G.G.*, 604 U.S. 670 (No. 24A931). Although the putative class in *J.G.G.* included people who "never had lawful admission," *id.*, this Court held that *all* class members were entitled, under the Due Process Clause, "to notice and an opportunity to challenge their removal," *J.G.G.*, 604 U.S. at 673. Likewise, the putative class in *A.A.R.P.* encompassed "*[a]ll noncitizens* in custody in the Northern District of Texas" who were subject to the president's Alien Enemies Act proclamation, Resp. Suppl. Memo. 1, *A.A.R.P.*, 605 U.S. 91 (No. 24A1007) (emphasis added), with no carveout for people who lacked lawful admission. But this Court held that *all* class members were "entitled to constitutionally adequate notice prior to any removal." *A.A.R.P.*, 605 U.S. at 97-98.

Contrary to these decisions, DHS's position seems to be that, where the entry fiction applies to some members of a class, an agency may defy Congress's mandates and arbitrarily deprive the entire class of protections that the laws confer on them. Unsurprisingly, DHS cites nothing that supports this proposition.[3]

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[3] Trying to fill that gap, DHS combines two unrelated quotes from *United States ex rel. Turner v. Williams*, 194 U.S. 279

DHS's argument is even more perverse because it has no connection to the purpose of the entry fiction. That fiction serves Congress's sovereign prerogative to decide whom to allow into the country. *See Thuraissigiam*, 519 U.S. at 139 (the entry fiction protects Congress's "plenary authority to decide" whether to "admit or exclude" a noncitizen "seeking initial entry," along with the "concomitant . . . power to set the procedures to be followed in determining whether [such persons] should be admitted" (quotation marks omitted)). The doctrine enables Congress to permit temporary landings and even long-term parole within U.S. borders without giving the affected individuals any greater claim to admission than if they remained at the border. *See Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925). But those considerations are completely absent here. Respondents' entitlement to admission or continued lawful status has already been rejected—hence their removal orders. The protections they seek to vindicate exist precisely for the benefit of people who will *not* be admitted. Allowing DHS to arbitrarily deprive Respondents of those protections would, instead of preserving Congress's sovereign authority over immigration, subvert that very authority.

(1904), to create the impression that due process rights depend on lawful admission. Specifically, DHS quotes a sentence discussing due process, *see* Pet. Br. 46 (quoting *Turner*, 194 U.S. at 290), and why it does not require jury trials for deportations. DHS then quotes a sentence from a separate discussion several pages later: "An alien 'does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law.'" *Id.* (quoting *Turner*, 194 U.S. at 292). Despite what DHS implies through this juxtaposition, the second quote has nothing to do with due process rights: the "things" to which it refers are "worshipping or speaking or publishing or petitioning in [this] country." *Turner*, 194 U.S. at 292.

If all this were not enough, DHS's position hinges on significantly altering the breadth and function of the entry fiction, which has never played any role outside the context of admission decisions. This Court has consistently described the entry fiction as a limit on due process rights *relating to the determination of a person's admissibility*. For instance, when the Court first observed that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law," *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), the Court was referring to decisions regarding a person's "right to land in the United States," *id.* at 661. The entry fiction, this Court explained, limits the judiciary's review of procedures that concern the "admission" of noncitizens. *Id.* at 662.

Thus, the "century-old rule regarding the due process rights of an alien seeking initial entry" is that such a person has "only those rights *regarding admission* that Congress has provided by statute." *Thuraissigiam*, 519 U.S. at 139-40 (emphasis added). The entire line of cases establishing this rule focuses exclusively on admission: "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added). It "is not within the province of any court" to "review the determination of the political branch of the Government *to exclude* a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (emphasis added). For noncitizens subject to the entry fiction, their "*right to enter the United States* depends on the congressional will," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (emphasis added), so their "continued exclusion" cannot deprive them of any

constitutional rights, *id.* at 212. In cases not involving admission decisions, by contrast, the entry fiction has never applied. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 75 n.7, 77 (1976) (unadmitted parolees protected by due process in connection with federal benefits).

The statutes that Respondents seek to vindicate regulate the manner of *removing* noncitizens, not the manner of determining their admissibility. These laws secure vital protections that the political branches chose to confer on people whom the political branches also chose to exclude from admission. Respondents ask for nothing more than a fair opportunity to avail themselves of those protections. Regardless of their admission status, "[t]he Fifth Amendment entitles [them] to due process of law in the context of removal," *A.A.R.P.*, 605 U.S. at 95 (quoting *J.G.G.*, 604 U.S. at 673), to guard against "the mistaken or unjustified deprivation" of those critical statutory protections, *id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

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"A deportation hearing involves issues basic to human liberty and happiness and . . . perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). So does the decision whether someone is likely to be persecuted or tortured if removed to a particular country. This Court has unwaveringly insisted on effective notice and a meaningful hearing "even where less vital matters of property rights are at stake." *Id.* Those minimal protections are due here.

CONCLUSION

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

Respectfully submitted,

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