UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26-50183

Ignacio Sosnava Rodriguez,
Petitioner-Appellee,
v.
Sylvester M. Ortega, in his official capacity as Director of the San Antonio Field Office of ICE Enforcement and Removal Operations; Markwayne Mullin, Secretary, U.S. Department of Homeland Security; Todd Wallace Blanche, U.S. Attorney General; Department of Homeland Security; DOJ Executive Office for Immigration Review,

Respondents-Appellants

CONSOLIDATED WITH

No. 26-50219

Alejandro Villegas Angel,
Petitioner-Appellee,
v.
Markwayne Mullin, Secretary, U.S. Department of Homeland Security; Todd Wallace Blanche, U.S. Attorney General; Miguel Vergara, San Antonio Field Office Director for Enforcement and Removal; United States Department of Homeland Security; United States Immigration and Customs Enforcement; Executive Office for Immigration Review, Office of the General Counsel,

Respondents-Appellants

CONSOLIDATED WITH

No. 26-50221

Miguel Angel Gomez Alvarado,
Petitioner-Appellee,
v.
Michael Vergara, in his official capacity as Acting Director of San Antonio Field Office for U.S. Immigration and Customs Enforcement; Todd Lyons, in his capacity as the Acting Director for the U.S. Immigration and Customs Enforcement; Markwayne Mullin, Secretary, U.S. Department of Homeland Security,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS
Nos. 1:26-cv-384, 1:26-cv-309, 1:26-cv-273

PETITIONERS-APPELLEES' SUPPLEMENTAL BRIEF

Stephanie E. Norton
Gracie Willis
Yulie Landan
NATIONAL IMMIGRATION PROJECT
1763 Columbia Road NW
Suite 175 #896645
Washington, DC 20009

Rebecca Cassler
Suchita Mathur
Michelle Lapointe
AMERICAN IMMIGRATION COUNCIL
2001 L Street NW, Suite 500
Washington, DC 20036

Patricio Garza Izaguirre
GARZA & NARVAEZ, PLLC
7600 Chevy Chase Drive, Suite 118
Austin, TX 78752

CERTIFICATE OF INTERESTED PERSONS

Petitioners-Appellees certify that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioners-Appellees

- Ignacio Sosnava Rodriguez, Petitioner-Appellee;
- Alejandro Villegas Angel, Petitioner-Appellee;
- Miguel Angel Gomez Alvarado, Petitioner-Appellee;

Counsel for Petitioners-Appellees

- Patricio Garza Izaguirre, Garza Narvaez PLLC, Counsel for Petitioner-Appellee Alejandro Villegas Angel;
- Stephen A. Lagana, Law Offices of Stephen Lagana, Attorney for Petitioner-Appellee Miguel Angel Gomez Alvarado;
- Stephanie E. Norton, Gracie Willis, Yulie Landan, National Immigration Project of the National Lawyers Guild, Counsel for Petitioners-Appellees;
- Rebecca Cassler, Michelle Lapointe, Suchita Mathur, American Immigration Council, Counsel for Petitioners-Appellees.

/s/ Rebecca Cassler
Rebecca Cassler
Counsel for Petitioners-Appellees

STATEMENT REGARDING ORAL ARGUMENT

En banc oral argument is scheduled for September 24, 2026.

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INTRODUCTION

This appeal confronts the government's radical reimagining of the right to physical liberty, one of the few rights enumerated in the Constitution. After routine traffic stops, immigration authorities arrested three men ("Petitioners"), all fathers of U.S.-citizen children, without criminal history, who have been living in this country for over a decade after entering without inspection. Ignoring settled Supreme Court precedent, Respondents assert that *no* procedural protections are needed to ensure Petitioners' civil detention prevents flight risk or danger—the only valid justifications for immigration detention the Supreme Court has recognized.

Faced with the great weight of authority against it, Respondents turn to baseless arguments that the panel already rejected: that detention did not infringe Petitioners' enumerated right to liberty and thus need only satisfy rational basis review; that Petitioners' claims are foreclosed by inapposite cases where Congress made narrow, evidence-based dangerousness findings; and that the "entry fiction," which has never been applied to arrest and detention of those already in the United States, bars Petitioners' procedural due process claims. Ultimately, Respondents ask this Court to hold that Congress can legislate away the Due Process Clause, allowing for imprisonment without justification or review. The Court should reject that invitation.

STATEMENT OF THE ISSUE

Whether the district courts correctly concluded that the Due Process Clause does not permit Petitioners' mandatory detention under 8 U.S.C. §1225(b)(2)(A) without meaningful, individualized review of whether that detention serves a constitutionally permissible purpose, where Petitioners entered the United States without inspection and were encountered years later in the country's interior?

STATEMENT OF THE CASE

I. Due Process and Immigration Detention

All people in the United States, including noncitizens, are entitled to due process before the government may deprive them of their core constitutional right to physical liberty. From common-law tradition, to the Founding, to this day, this principle has remained constant.

A. Early Protection Against Arbitrary Deprivation of Physical Liberty

The Due Process Clause protects, at a minimum, "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855). Freedom from unjustified physical restraint has always been guaranteed. *Holmes v. Jennison*, 39 U.S. 540, 556 (1840) ("The right of personal liberty has existed ever since the first creation of man, and is incident to his nature."). This bedrock principle originates in the Magna Carta, *Kerry v. Din*, 576 U.S. 86, 91 (2015) (plurality opinion), which gave rise to the common-law understanding that "the liberty of a man[']s person" against imprisonment was "more precious to him, than all the rest that follow," 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 46 (1642). Equally settled at common law was that all people, noncitizens and citizens alike, were entitled to due process, including the core right to liberty. *See* 1 William Blackstone, *Commentaries* *366 (1765) (defining "the people" of England to include "aliens").

The Framers incorporated these principles into the Fifth Amendment's protection of all "person[s]" from deprivations of "liberty" without "due process of law," U.S. Const. amend. V, recognizing that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny," The Federalist No. 84 (Alexander Hamilton). *See also* 5 Annals of Cong. 1956 (1798) (Rep. Gallatin) (underscoring that the Due Process Clause "speaks of persons, not of citizens"); 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 2d ed. 1836) 541 (Thomas Jefferson explaining that summarily imprisoning noncitizens would be "contrary to the Constitution[']s]" dictate that "'no person shall be deprived of liberty without due process of law'"); *Holmes*, 39 U.S. at 556 ("That the [Due Process Clause] embraces every person within the limits and jurisdiction of the whole Union, will not be denied.").

B. Statutory Framework for Immigration Detention and Its Constitutional Limits.

The late 1800s saw the advent of the modern immigration legal regime, introducing civil proceedings to expel noncitizens already present in the country and to turn away, or "exclude," rather than "admit," people seeking to physically enter the country.[1] *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588 n.15 (1952). These two groups were subject to distinct types of proceedings; statutes eventually labeled the former "deportation proceedings" and the latter "exclusion proceedings." *Hing Sum*, 602 F.3d at 1100–01. Courts soon recognized that civil proceedings resulting in removal from the United States, as well as any related detention, implicate interests protected by the Due Process Clause, requiring "'due process of law' as understood at the time of the adoption of the Constitution." *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903).

Historically, it was understood that where detention was authorized during deportation proceedings, there was also the possibility of release. Lindsay Nash, *Resurrecting Immigration Releases*, 135 Yale L.J. 1533, 1563–76, 1584–90, 1597–1607 (2026). Individualized review of detention was the norm. *See id.* at 1595–96 n.294 & 296, 1606 (noting early administrative release decisions were based on

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[1] "Admission" and "admitted" mean "lawful entry … into the United States after inspection and authorization by an immigration officer." 8 U.S.C. §1101(a)(13)(A); *see Hing Sum v. Holder*, 602 F.3d 1092, 1100–01 (9th. Cir. 2010) (this definition reflects term's "settled meaning[]" in immigration law).

individualized facts and citing sources showing consideration of flight risk); *e.g.*, *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (detention was "generally employed only as to security risks or those likely to abscond"); *Colyer v. Skeffington*, 265 F.17, 78 (D. Mass. 1920) (ordering release after finding agency set unreasonably high bail, where no evidence of flight risk or danger), *rev'd on other grounds sub nom. Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922); *Jouras v. Allen*, 222 F. 756, 757, 759 (8th Cir. 1915) (ordering release where no evidence of flight risk or danger); *Matter of Patel*, 15 I.&N. Dec. 666, 666 (BIA 1976) ("A [noncitizen] generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk." (citations omitted)).[2]

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (1996), which reshaped much of immigration law and created the detention framework in effect today. IIRIRA did away with the distinction between exclusion and deportation proceedings, creating one unified "removal proceeding." *See Vartelas v. Holder*, 566 U.S. 257, 261–63 (2012); *Torres v. Barr*, 976 F.3d 918, 927–28 (9th Cir. 2020) (en banc).

[2] In 1988, Congress for the first time enacted a carveout to the availability of release pending deportation proceedings for a narrow subset of people with aggravated felony convictions. *See Resurrecting Immigration Releases* at 1553.

IIRIRA set out detention provisions at 8 U.S.C. §§1225(b), 1226 (both governing detention during removal proceedings) and 1231(a) (post-removal-order detention). Section 1226 requires individualized review of detention and access to release with or without bond, unless one's criminal history triggers mandatory detention under §1226(c); as recently construed by this Court, §1226 applies only to previously admitted noncitizens, *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 502–08 (5th Cir. 2026), *pet. for cert. filed sub nom. Buenrostro-Mendez v. Blanche* (U.S. July 10, 2026) (No. 26-43). Section 1225(b)(2), which mandates detention without individualized review or access to release on bond, applies to all unadmitted noncitizens, including both people detained at the border with limited ties to this country and people detained in the interior, no matter how long they have been here. *Id*.

These statutory changes did not alter the constitutional framework that continued to guarantee liberty. In *Zadvydas v. Davis*, which involved review of §1231(a), the Supreme Court echoed the Founders by reiterating that "the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. 678, 693 (2001). It held that because immigration detention implicates the right to physical liberty enumerated in the Due Process Clause, it must be limited to "certain special and 'narrow'" circumstances where a "special justification … outweighs the 'individual's constitutionally protected interest in avoiding physical restraint,'" and must also include "strong procedural protections." *Id*. at 690–91 (citations omitted). The only justifications the Court identified are "ensuring the appearance of [noncitizens] at future immigration proceedings" and "[p]reventing danger to the community." *Id*. at 690 (citation omitted).

The Court in *Buenrostro-Mendez* made no constitutional ruling. Multiple circuit courts, like the Fifth Circuit panel in this case, have since concluded that detaining certain noncitizens apprehended within the United States under §1225(b)(2)(A) without any individualized review violates due process. *See* Op.3–4; *Buele Morocho v. Warden Phila. FDC*, No. 26-1150, 2026 WL 2546223, at *8–10 (3d Cir. Aug. 28, 2026); *Lopez-Campos v. Raycraft*, 175 F.4th 713, 732–34 (6th Cir. 2026); *see also Barbosa da Cunha v. Freden*, 175 F.4th 61, 93–96 (2d Cir. 2026) (emphasizing "grave constitutional concerns"); *Cirrus Rojas v. Olson*, 183 F.4th 909, 930–31 (7th Cir. 2026) (same); *Santillan Quiroz v. Mullin*, 180 F.4th 1226, 1249–50 (10th Cir. 2026) (same).

II. Factual Background

Ignacio Sosnava Rodriguez is a Mexican citizen who entered the United States without inspection more than two decades ago. ROA.26-50183.80. He is the father of U.S.-citizen children and resides with his family in Elgin, Texas. ROA.26-50183.80, 120.

Alejandro Villegas Angel is a Mexican citizen who entered the United States without inspection fifteen years ago. ROA.26-50219.10. He has two young U.S.-citizen daughters. ROA.26-50219.7. His older daughter has autism and a speech impairment and relies on him for essential support. ROA.26-50219.10. He lives with his family in Texas, where he built his family home. ROA.26-50219.10.

Miguel Angel Gomez Alvarado is a Honduran citizen who entered the United States without inspection fourteen years ago. ROA.26-50221.6. He and his wife have a two-year-old U.S.-citizen son. ROA.26-50221.17, 20. He lives and attends church in Central Texas. ROA.26-50221.19, 24, 27.

No Petitioner has any criminal history. ROA.26-50183.121–22; ROA.26-50219.11; ROA.26-50221.89.

Each Petitioner was arrested in late 2025 or early 2026 by immigration officials following a traffic stop. ROA.26-50183.80; ROA.26-50219.11, ROA.26-50221.69. All three were detained at T. Don Hutto Detention Center and placed in removal proceedings for being present in the United States without admission or parole under 8 U.S.C. §1182(a)(6)(A)(i). ROA.26-50183.80; ROA.26-50219.11, ROA.26-50221.69.

Each Petitioner seeks cancellation of removal based on their lengthy residence in the country and the harm their removal would cause to their qualifying U.S.-citizen children. ROA.26-50183.80; ROA.26-50219.11; ROA.26-50221.7.

No Petitioner was afforded any process to determine whether their detention prevented flight risk or danger to the community.

III. Procedural History

Mr. Sosnava Rodriguez, Mr. Villegas Angel, and Mr. Gomez Alvarado filed habeas petitions on February 4 (amended February 13), February 18, and February 6, 2026, challenging the application of §1225(b)(2)(A) to their specific circumstances; the district courts granted those petitions on February 25, March 3, and March 2, 2026, respectively. ROA.26-50183.3, 127–134; ROA.26-50219.3, 71–86; ROA.26-50221.2, 79–94.

The district courts weighed the three factors articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and found that each Petitioner's mandatory detention under §1225(b)(2)(A) without individualized review violated due process. ROA.26-50183.130–132; ROA.26-50219.81–83; ROA.26-50221.88–91. As relief, the district courts ordered each Petitioner released and enjoined their re-detention absent a hearing where Respondents prove dangerousness or flight risk. ROA.26-50183.132–33; ROA.26-50219.83–86; ROA.26-50221.91–93.

After Mr. Sosnava Rodriguez, Mr. Villegas Angel, and Mr. Gomez Alvarado were released, on February 27, March 3, and March 2, respectively, the government noticed appeal in all three cases. ROA.26-50183.135–137; ROA.26-50219.91–93; ROA.26-50221.95–97.

The Court granted Respondents' motion to consolidate and expedite these appeals on April 6, 2026. Dkt. 27. A panel of this Court heard argument on April 29, 2026, Dkt. 148. On July 2, 2026, a majority of the panel affirmed the judgments below. Op.1–4 (Judge Southwick, authoring, joined by Judge Graves).

The majority rejected Respondents' reimagining of the entry fiction as relevant to all noncitizens present without admission, concluding that "[e]ntry and residence, not legal admission, dictate the extent of the Constitution's application," such that procedural due process principles fully apply to Petitioners. Op.9–15. The majority also rejected Respondents' argument that Petitioners' claims sound only in substantive, not procedural, due process, explaining that where the core constitutional right to liberty is at stake, litigants may assert a procedural due process claim to determine whether deprivation of liberty is justified by a "competing state interest," not merely authorized by statute. Op.16–20 (citation omitted). Finally, the majority held that liberty can only be infringed where there is a sufficiently compelling justification, noting the Supreme Court has identified two such justifications for immigration detention: preventing flight risk or danger. Op.20–28. Recognizing that Congress did not have evidence before it categorically justifying detention without individualized review of all "applicants for admission" subject to §1225(b)(2)(A), the majority concluded that procedures to determine whether

Petitioners' detention is valid must be available. Op.28–31. The panel held that under *Mathews*, more process was due. Op.31–33.

The majority then sua sponte adopted a circuit-wide rule requiring that all noncitizens detained under §1225(b)(2)(A) receive a bond hearing within 90 days, Op.33–37; Judge Graves would have required a shorter timeframe, Op.39–43 (Graves, J., concurring).

Judge Wilson dissented, adopting Respondents' positions on all key issues. Op.44–71 (Wilson, J., dissenting).

On July 10, 2026, this Court sua sponte ordered rehearing en banc and vacated the panel opinion. Dkt. 174, 176. The same day, Respondents moved to stay the judgments below for the first time. Dkt. 178, 192-1. The Court granted Respondents' motion on July 21, 2026, in a per curiam published order. Dkt. 199.

SUMMARY OF ARGUMENT

This case involves as-applied due process challenges to detention under §1225(b)(2)(A) brought by noncitizens living in and with significant ties to the United States. The district courts granted narrow relief grounded in the Due Process Clause and decades of Supreme Court jurisprudence. The courts below applied the proper due process framework to Petitioners' individualized, fact-specific challenges to §1225(b)(2)(A) and correctly determined that their mandatory detention without any process violated the Fifth Amendment. Respondents' arguments urging reversal are contrary to binding Supreme Court precedent and would permit Congress to re-write the Constitution.

Due process is required if "there exists a liberty or property interest which has been interfered with by the [government.]" *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Freedom from physical restraint is an enumerated constitutional right. The Due Process Clause requires a compelling government purpose for its deprivation.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court has already found that the government cannot deprive noncitizens of their physical liberty without a "sufficiently strong special justification" and without constitutionally adequate procedures to ensure that justification applies. *Zadvydas*, 533 U.S. at 690, 692; *see also Washington v. Harper*, 494 U.S. 210, 220 (1990). Here, there was neither.

Respondents' arguments to the contrary rest on a foundational error. They claim Petitioners' detention does not implicate any *implied* fundamental liberty interest and thus need only be justified by a rational basis. That is wrong. Petitioners' right to physical liberty is expressly *enumerated* in the Constitution. Decades of settled Supreme Court precedent affirms this and dictates that noncitizens can only be deprived of their physical liberty based on a sufficiently compelling justification: preventing flight risk or danger to the community.

Respondents have never argued that Petitioners themselves present these risks, and the district courts did not find any justification for their detention. And while in other contexts the Supreme Court has approved the detention of a narrow subset of noncitizens without individualized review based on a robust legislative record establishing a categorical risk of flight or danger, this is not one of those contexts. The §1225(b)(2)(A) congressional record contains no evidence of any such determination as to individuals living without incident in the country for years. Without any individual or categorical justification, Petitioners' detention was impermissibly arbitrary.

Moreover, Petitioners were entitled to individualized process to assess whether they presented a flight risk or danger. *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), does not dictate otherwise. *Doe* is a sex-offender registration case that did not involve deprivation of physical liberty, and Doe provided no reason why requiring him to register was substantively unconstitutional. Doe was therefore not entitled to extra-statutory process to assess constitutionally irrelevant facts. Petitioners' detention, by contrast, implicates an enumerated right and requires a constitutionally valid justification and adequate procedures regardless of the statutory scheme. Otherwise, Congress could mandate detention for no reason and no process would ever be required.

The "entry fiction" also has no place in this case. All three Petitioners indisputably "entered" the United States, so they have due process rights beyond what Congress has provided. A long line of Supreme Court caselaw forecloses Respondents' argument that noncitizens who effected an "entry," albeit unlawfully, have no procedural due process rights. And even where it does apply, the entry fiction only limits procedural rights regarding admission. It does not curb noncitizens' ability to challenge unconstitutional detention.

Applying the framework in *Mathews v. Eldridge*, the district courts correctly held that Petitioners' detention without any individualized review to ensure it serves a constitutionally valid purpose violated due process. This Court should affirm based on the facts of Petitioners' cases. It need not adopt any sweeping holding or bright-line rule to do so, and it should reject Respondents' invitation to eliminate the due process rights of every person detained under §1225(b)(2)(A) in this Circuit.

For the first time in their supplemental brief, Respondents seek an advisory opinion that would foreclose due process challenges to prolonged detention under §1225(b)(2)(A), even though Petitioners only brought as-applied challenges to the constitutionality of their detention at its outset. These appeals do not present the questions that Respondents want the Court to answer; doing so would run afoul of Article III's case-or-controversy requirement.

STANDARD OF REVIEW

"In the context of a habeas corpus petition, this Court reviews the district court's determinations of law *de novo* and its findings of facts for clear error." *Venegas v. Henman*, 126 F.3d 760, 761 (5th Cir. 1997); *accord Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000).

ARGUMENT

Analyzing due process claims proceeds in two steps: (1) "whether there exists a liberty or property interest which has been interfered with by the [government]," and (2) if so, what process is due. *Thompson*, 490 U.S. at 460. The Due Process Clause prohibits deprivation of an individual's protected liberty interests unless "competing state interests" outweigh them and there are adequate procedures "for determining that the individual's liberty interest actually is outweighed in a particular instance." *Harper*, 494 U.S. at 220 (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)). "The procedural protections required … must be determined with reference to the rights and interests at stake[.]" *Id*. at 229. Here, at step one, the district courts correctly found that Petitioners were deprived of their physical liberty. ROA.26-50183.130; ROA.26-50219.81–82; ROA.26-50221.89–90. At step two, the courts correctly applied caselaw requiring that immigration detention must prevent flight risk or danger, and concluded that Petitioners' detention with no process to evaluate those factors was inadequate. ROA.26-50183.131–32; ROA.26-50219.83; ROA.26-50221.90–91. The Court should affirm those decisions.[3]

I. Petitioners Have a Constitutionally Enumerated Right to Physical Liberty, Triggering Due Process Protections.

When Respondents arrested and held Petitioners behind bars, Respondents unquestionably deprived them of the right to freedom from physical restraint enumerated in the Due Process Clause, triggering both its substantive and procedural protections.

1. "No person shall be … deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. If "liberty" means anything, it means to be free of physical restraint. *See Din*, 576 U.S. at 99 (describing freedom from physical restraint as "the expressly protected right of liberty under the original understanding

[3] Petitioners do not bring a "facial" challenge to §1225(b)(2)(A), *contra* Op.59 n.1 (Wilson, J., dissenting); that would require showing that "no set of circumstances exists under which [the statute] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners do not contest, given the wide applicability of §1225(b)(2)(A), that the statute "is constitutional in some of its applications," *United States v. Rahimi*, 602 U.S. 680, 693 (2024). Respondents' suggestion of "sweeping consequences," SB.48–49, must fail, as Petitioners' claims depend on their "particular situation," *Morrissey*, 408 U.S. at 481, including their lengthy U.S. residence after entry, family and community ties, and lack of criminal history. The success of other petitioners' claims, regardless of the statute governing detention, "could vary depending on that [individual's] history and conduct." *United States v. Daniels*, 124 F.4th 967, 977 (5th Cir. 2025), *cert. denied*, No. 24-1248, 2026 WL 1855072 (U.S. June 29, 2026).

of the term" in the Fifth Amendment); 1 Blackstone, *Commentaries* *134, *136 ("personal liberty" consists of "the power of locomotion … without imprisonment or restraint"—i.e., without "[t]he confinement of the person"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he interest in being free from physical detention" is "the most elemental of liberty interests[.]"); *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty th[e] [Due Process] Clause protects."); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 230 (5th Cir. 2020) (noting that the word "liberty" in the Due Process Clause at a minimum includes "freedom from bodily restraint" (citations omitted)); *Jauch v. Choctaw Cnty.*, 874 F.3d 425, 430 (5th Cir. 2017) ("The Constitution itself protects physical liberty.").

Here, as the district courts and panel correctly concluded, Petitioners' detention deprived them of their enumerated right to physical liberty, triggering the Due Process Clause's protections. ROA 26-50183.129–30; ROA.26-50219.76–77; ROA.26-50221.83–86; Op.21. Accordingly, contrary to Respondents' contention, SB.32, the so-called "substantive due process" test for identifying *implied* fundamental rights articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997), has no place here. That test is limited to determining, based on "this Nation's history and tradition," what "more" liberty may implicitly entail *beyond* "the absence of physical restraint." *Id.* at 719–21; *see also Dep't of State v. Muñoz*, 602 U.S. 899, 910 (2024) ("Identifying *unenumerated* rights carries a serious risk of judicial overreach[.]" (emphasis added)); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (*Glucksberg* requires a "careful description of the asserted right" because recognizing new unenumerated rights requires "judicial self-restraint" (citation omitted)).

Unsurprisingly, the Supreme Court has never applied the *Glucksberg* test to civil (including immigration) detention. And it has previously rejected attempts to redefine the right to physical liberty by its specific context, as Respondents do here, claiming each Petitioners seeks "the right of an applicant for admission detained under 1225(b)(2)(A) to a bond hearing—followed by his release into the United States if there is no determination that he presents a flight risk or is dangerous." SB.34.[4] In *Zadvydas*, the Court dismissed the government's similar proposed reframing of the right to physical liberty as the right to "liv[e] at large in this country." 533 U.S. at 690, 696 (citation omitted); *see also Lopez-Campos*, 175 F.4th at 734 (rejecting re-casting of noncitizens' "liberty interest to be free from detention" as a right "to *enter* the United States or continue to *reside* in the country after entering it"). As the panel correctly noted:

[4] Respondents' description of this right has narrowed throughout this litigation. *See* Dkt. 79 at 32 (claiming, to panel, Petitioners asserted right to "a bond hearing during the pendency of their removal proceedings"); ROI.26-50219.50 (similar); ROI.26-50221.56 (similar); ROI.26-50183.34–36 (never mentioning *Glucksberg* at all in Mr. Sosnava Rodriguez's case).

> Few of the Supreme Court's landmark liberty cases would survive such exacting scrutiny. It would be difficult to argue, for example, that there is a history or tradition of one found not guilty of a crime based on insanity's entitlement to freedom from psychiatric commitment, *see Foucha*[*v. Louisiana*, 504 U.S. 71, 80–82 (1992)], or a right of citizens acting as enemy combatants to freedom from military custody, *see* [*Hamdi*, 542 U.S. at 532].

Op.21–22.

Respondents also improperly attempt to define Petitioners' protected interest by reference to a procedure that could assess justifications for its deprivation. SB.32, 34, 36 (framing Petitioners' "substantive" request as one for "a bond hearing"). Yet Respondents recognize elsewhere that a hearing is merely process—a "vehicle" for making a "*substantive*" determination—not a substantive liberty interest itself. SB.28; *accord Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (defining a substantive right in terms of procedure would "reduce[due process] to a mere tautology"); *Jauch*, 874 F.3d at 430 (defining protected interest as "physical liberty," and evaluating its deprivation "due to an allegedly unfair procedural scheme"); *Flores*, 507 U.S. at 303–05 (*rejecting* formulation of protected interest as a right to certain process). This Court should thus reject any reframing of Petitioners' interest, as the Supreme Court has already confirmed that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (citation omitted).[5]

2. Beyond improperly invoking *Glucksberg*, Respondents also suggest Petitioners have no right to physical liberty because they can avoid detention by acquiescing to deportation. SB.34. This is "like telling detainees that they can help themselves by jumping from the frying pan into the fire. Deportation is a 'drastic measure,' often amounting to lifelong 'banishment or exile.'" *Hernandez-Lara v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021) (citations omitted); *see A.A.R.P. v. Trump*, 605 U.S. 91, 94 (2025) (per curiam) (recognizing that noncitizens threatened with summary removal faced "severe, irreparable harm"). Here, Petitioners face permanent separation from their families, including young U.S.-citizen children with severe health issues who rely on them for financial and emotional stability, ROA.26-50183.80; ROA.26-50219.7, 11; ROA.26-50221.6–7. This is precisely why Congress created cancellation of removal, the relief Petitioners seek.

Respondents' argument also ignores Petitioners' statutory right to seek this relief, 8 U.S.C. §1229b(b), in proceedings consistent with due process, *Flores*, 507

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[5] Even if *Glucksberg* applied, Respondents' methodology for describing the right at issue, SB.33–34, is faulty. "The Supreme Court has always defined the right [to physical liberty] at that level of generality," and thus there is no basis to analyze a narrower right. *Henry v. Sheriff of Tuscaloosa Cnty.*, 180 F.4th 1294, 1319 (11th Cir. 2026) (en banc); *see id.* at 1319–24 (Rosenbaum, J., concurring).

U.S. at 306, as well as their right to be present during such proceedings, *see Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 530 (5th Cir. 2013) (en banc) (plurality opinion) (federal law "contemplates a non-citizen's residence in the United States until potential deportation"); 8 U.S.C. §1229a(b) (requiring noncitizens' attendance at removal proceedings); 8 U.S.C. §1231(a)(1) (only permitting removal once removal proceedings are complete).

Respondents' position impermissibly conditions Petitioners' statutorily authorized pursuit of relief from removal in constitutionally fair proceedings on a deprivation of their liberty without due process. The government "may not impose conditions" on a benefit that "require the relinquishment of constitutional rights," even if it has "power to deny [that benefit] altogether." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593–94 (1926); *accord Dep't of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014). This principle "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). This Court should reject Respondents' attempt to force Petitioners to choose between abandoning their claims for relief from removal and their liberty.

3. Equally erroneous is Respondents' suggestion, SB.33, that Petitioners' right to liberty is diminished because "Congress may make rules as to [noncitizens] that would be unacceptable if applied to citizens," *Demore v. Kim*, 538 U.S. 510, 522 (2003) (citing *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). Congress's authority in the immigration context does not render it a due-process-free zone. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (despite government's political power over immigration, it "must respect the procedural safeguards of due process"); *A.A.R.P.*, 605 U.S. at 96 (similar); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001) ("[T]he broad power to control immigration does not imbue Congress with plenary power over [noncitizens] themselves."). And while the *Diaz* Court acknowledged that noncitizens are not "entitled to enjoy all the advantages of citizenship," it stressed that "all persons, [noncitizens] and citizens alike," even those "whose presence in this country is unlawful, involuntary, or transitory," are "protected by the Due Process Clause" from "deprivation of life, liberty, or property without due process of law." 426 U.S. at 77–78 (citations omitted); *see Santillan Quiroz*, 180 F.4th at 1250 ("[T]he Supreme Court has never said that due process protections fall away completely in the immigration context. Quite the opposite."). The Due Process Clause thus protects the deprivation of Petitioners' physical liberty.

4. Finally, because the *Glucksberg* test is inapplicable, the panel correctly found that there is "no need to consider history and tradition" here. Op.22. Nevertheless, history supports Petitioners, and Respondents distort the historical record attempting to argue otherwise.

Arbitrary detention was anathema to founding principles and remains so today. At the Founding, the Due Process Clause incorporated the English common law guarantee against arbitrary imprisonment of both citizens and noncitizens, *see supra* at 2–3; at that time, detention pending legal (particularly civil) proceedings was only employed to ensure appearance or keep the peace. 4 William Blackstone, *Commentaries* *294 (1769) (purpose of pretrial civil and criminal detention was ensuring defendant's "appearance, to answer the charge against him," and where release on bail would "answer the same intention, it ought to be taken," for defendants in "every" civil and most criminal cases); 4 William Blackstone, *Analysis of the Laws of England* 148 (6th ed. 1771) (recognizing availability of release on bail "in any Case whatsoever"). Otherwise, courts had a power and duty to order release, for "to refuse or delay" release on bail of "any person bailable" was "an offense against the liberty of the subject," in violation of "common law[,] statute[,] and the habeas corpus act." 4 Blackstone, *Commentaries* *294.

Deportation proceedings, and detention prior to those proceedings' completion ("pre-adjudication" detention), only began two centuries *after* the Founding.[6] Courts and administrators understood early statutes authorizing pre-

[6] Congress initially created two parallel schemes to deport noncitizens already in the United States. The first allowed deportation under the Chinese exclusion laws; starting in the late 1800s, these cases were adjudicated by federal courts. *Resurrecting Immigration Releases* at 1564–65. The second, more general scheme involved adjudication by agency administrators. *Id.* at 1568–1570 & n.172 (noting

adjudication detention, and later authorizing release on bail, as leaving undisturbed their inherent authority to order release where detention was unjustified.

Courts adjudicating deportation cases under the Chinese exclusion laws "consistently" recognized their inherent power to grant pre-adjudication release, even where, as Respondents note, statutes authorized detention without mentioning release, *see* SB.35–36 & n.2. *Resurrecting Immigration Releases* at 1564–68 (discussing, *inter alia*, Act of Sept. 13, 1888, ch. 1015, §13, 25 Stat. 476, 479); *see, e.g.*, *In re Ah Tai*, 125 F. 795, 795–98 (D. Mass. 1903) (ordering release on bail in deportation case arising under Act of May 5, 1892, ch. 60, §6, 27 Stat. 25, 25, and explaining this was common practice); *In re Lum Poy*, 128 F. 974, 976 (C.C.D. Mont. 1904) (similar).

Similarly, in the administrative deportation scheme, once pre-adjudication arrests started, administrators also exercised their power to release arrestees despite statutory silence. *Resurrecting Immigration Releases* at 1579 & n.219, 1587–90 (describing administrative releases following arrest pursuant to Act of Mar. 3, 1903, ch. 1012, §21, 32 Stat. 1213, 1218). Administrators described this release authority as "necessary for a constitutionally permissible detention regime." *Id.* at 1599–1606

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the first general deportation statute was the Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566, 566). At the inception of that deportation scheme, an administrator authorized arrest at the same time as removal, not before; pre-adjudication arrest and detention were not authorized until 1903–04. *Id.* at 1570, 1584.

(describing administrative rationales for release, including, *e.g.*, 1920 Labor Department Acting Solicitor opinion describing "inherent power" to release noncitizens to avoid "denying an individual a constitutional right").

Thus, from the inception of deportation proceedings, noncitizens "inside the country," like Petitioners, "were subject only to discretionary detention," with release always available. *Rodriguez Vazquez v. Bostock*, 183 F.4th 1160, 1165–66 (9th Cir. 2026). So when Congress authorized administrators to release noncitizens *on bail* in 1907, it did not create the pre-adjudication release power; it merely "empower[ed] the administrative official to fix bail," *U.S. ex rel. Heikkinen v. Gordon*, 190 F.2d 16, 20 (8th Cir. 1951), *vacated as moot sub nom. Gordon v. Heikkinen*, 344 U.S. 870 (1952)—that is, to "require a monetary commitment" as a release condition, *Resurrecting Immigration Releases* at 1592. *Contra* SB.35.

The remaining statutes Respondents cite do not undermine this history. The Chinese exclusion-era statutes that barred release on bail, SB.35–36, only applied *after* final removal orders were issued.[7] The other statutes, SB.35 n.2, merely

[7] Act of May 5, 1892, ch. 60, §5, 27 Stat. 25, 25 (barring court-ordered release on bail of "a Chinese person seeking to land in the United States, to whom that privilege has been denied"); *In re Ong Lung*, 125 F. 813, 813–14 (S.D.N.Y. 1903) (explaining §5 of 1892 Act applied where petitioner had "final" order denying admission); Act of Nov. 3, 1893, ch. 14, §2, 28 Stat. 7, 8 (barring "admi[ssion] to bail" "pending the execution" of an "order"); *In re Ah Tai*, 125 F.795 at 798 (explaining §2 of 1893 Act only applicable after final order issued).

authorized detention of people seeking entry pending border inspection and exclusion proceedings.[8]

Regardless, these relatively recent statutes have limited value "for establishing historical tradition," since constitutional rights "are enshrined with the scope they were understood to have *when the people adopted them*."[9] *United States v. Quiroz*, 125 F.4th 713, 722 (5th Cir. 2025) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022)). The arbitrary detention of a noncitizen was just as counter to the Constitution then as now.

II. Respondents Can Only Deprive Petitioners of Their Liberty for a Special Justification, But Have Never Identified One Here.

As Petitioners were deprived of a constitutionally protected liberty interest, there must be a "constitutionally adequate purpose." *O'Connor v. Donaldson*, 422 U.S. 564, 574 (1975). The only sufficiently compelling purposes for immigration detention ever identified are to prevent flight risk and danger. And here, there has

[8] Act of Mar. 3, 1891, ch. 551, §8, 26 Stat. 1084, 1085; Act of Mar. 3, 1893, ch. 206, §5, 27 Stat. 569, 570. *See also* Op.61 (Wilson, J., dissenting) (citing INA of 1952, ch. 4, §§235(a)–(b), 237(d), 66 Stat. 163, 198–99, 202, which similarly authorized detention of noncitizens "arriving at ports of the United States" for inspection and exclusion proceedings, and release on bond of certain of those noncitizens after they were ordered excluded).

[9] Similarly, dicta from *Prentis v. Manoogian*, SB.36, does little for Respondents, as the court there found that a statute authorizing release on bail *required* officials to grant bail to a noncitizen in deportation proceedings. 16 F.2d 422, 423–24 (6th Cir. 1926).

been no determination—individualized or categorical—that Petitioners' detention serves either purpose.

A. The Supreme Court Requires a "Special Justification," Not a "Rational Basis," for Immigration Detention.

Only "in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification ... outweighs the 'individual's constitutionally protected interest in avoiding physical restraint,'" and only where there are "strong procedural protections," may civil custody validly infringe a noncitizen's interest in physical liberty. *Zadvydas*, 533 U.S. at 690–91 (quoting *Foucha*, 504 U.S. at 80 and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)); *Santillan Quiroz*, 180 F.4th at 1249 (reiterating this framework for immigration detention). Respondents' proposition that immigration detention only requires a rational basis, SB.33–37, is baseless.

Despite Respondents' intimation otherwise, SB.33, 38–40, *Demore* did not apply rational basis review. Instead, the Court extensively reviewed the specific evidence Congress considered as demonstrating flight risk and danger of the narrow category of noncitizens subject to §1226(c), citing caselaw applying heightened scrutiny. 538 U.S. at 518–21, 528 (citing *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 436–37 (2002)); *see infra* at 30–33. This is a far cry from deferential rational basis review, in which a legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification,'" which "may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509

U.S. 312, 320 (1993) (citations omitted). If this were the standard the *Demore* Court applied, it would have said so rather than systematically examining Congress's evidence. 538 U.S. at 517–21. The *Flores* Court did apply rational basis review, but only after finding, in a case not about detention, but about the placement of children in licensed childcare facilities, that the right to "freedom from physical restraint" was not implicated. 507 U.S. at 298, 302–03, 310–11; *see infra* at 36–37. Respondents point to no case in which the Supreme Court has found that deprivation of physical liberty need only be reviewed for rational basis—for there is none.

B. Immigration Detention is Permissible Only If It Prevents Flight Risk or Danger.

The only "sufficiently strong special justification[s]" for immigration detention the Supreme Court has ever found are to prevent noncitizens from (1) absconding or (2) endangering the community. *Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 527–28 (§1226(c) detention "serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings"); *Carlson v. Landon*, 342 U.S. 524, 541–42 (1952) (noncitizen Communists' "support[] [for] ... the Party's philosophy concerning violence gives adequate ground for detention"); *see also Buele Morocho*, 2026 WL 2546223, at *9 (collecting cases); *Heikkinen*, 190 F.2d at 19 ("[T]he object of bail is to relieve the accused of imprisonment … and at the same time to secure [his] appearance…. [B]ail will ordinarily be granted unless … the accused will be a menace to the public security."). That pretrial detention must serve one of these two purposes has deep common law roots. *See United States v. Ogilvi*e, 153 F.4th 1098, 1110–11 (10th Cir. 2025) (relying on *Quiroz*, 125 F.4th at 718).

The government has similarly acknowledged that "prevent[ing] [newly arriving noncitizens and convicted criminals] from fleeing or committing crimes during their removal proceedings" are the purposes of §1225(b)(2)(A) detention. Brief for Petitioners at 13, *Jennings v. Rodriguez*, 583 U.S. 281 (2018) (No. 15-1204), 2016 WL 5404637, at *13. The Supreme Court agreed. *Jennings*, 583 U.S. at 286. Respondents offer no other possible justification for Petitioners' detention.

C. Petitioners' Detention Is Neither Individually Nor Categorically Justified.

Respondents have never contested that Petitioners personally pose no danger or flight risk. *See* Op.32. Instead, Respondents contend that individual flight risk and danger are "irrelevant" to §1225(b)(2)(A) detention, such that "some [noncitizens]"—like Petitioners—"who would otherwise attend their removal proceedings" will simply "remain detained" without recourse. *See* SB.27, 43. Respondents attempt to justify this by claiming that everyone detained under §1225(b)(2)(A) *could* be a flight risk. SB.42–43. But Respondents' effort to group this case with those where Congress had made specific, evidence-based determinations regarding a narrow group's categorical risks of flight and danger, fails.

1. In *Demore*, the Supreme Court upheld §1226(c) mandatory detention only after reviewing Congress's determination that this "limited class" of noncitizens with certain criminal convictions posed a categorical bail risk. 538 U.S. at 518. This determination was well-documented and supported by evidence: before enacting IIRIRA, Congress considered information demonstrating "INS' near-total inability to remove *deportable criminal aliens*," including studies showing this group's abscondment rates and dangerousness. *Id.* at 518–21 (emphasis added). Congress concluded that "one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain *those* aliens during their deportation proceedings" and for *that* group, detention was essential. *Id.* at 519 (emphasis added). Based on this voluminous record, Congress utilized specific criminal convictions as a categorical proxy for a finding that detention was necessary to guard against this group's danger to the community and failure to appear. *See id*. at 521. The Supreme Court stressed that this satisfied due process because "[t]hese convictions ... reflect 'personal activity' that Congress considered relevant to future dangerousness" and are "secured following full procedural protections." *Id.* at 525 n.9. The Court viewed Congress's evidence-based findings as a sufficiently individualized assessment for the "subset" of noncitizens subject to §1226(c). *Id.* at 521.

Respondents now attempt to stretch *Demore* far beyond its narrow holding to present a false dichotomy: deportation is either "practically attainable," and thus detention is always constitutionally permissible under *Demore*, or detention is indefinite, thus falling under *Zadvydas*. *See* SB.43–44. This oversimplification ignores the context of these cases and the Supreme Court's dictate that all immigration detention requires a "sufficiently strong special justification" and adequate procedural safeguards. *Zadvydas*, 533 U.S. at 690; *see also Flores*, 507 U.S. at 316 (O'Connor, J., concurring).

The Court must read *Demore*'s general expressions in context. *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821). Indeed, *Demore*'s statement that "[d]etention during removal proceedings is a constitutionally permissible part of that process," is necessarily bound to the Court's parallel recognition that detention should serve to prevent flight risk and danger. 538 U.S. at 527–28, 531; *see Lopez-Campos*, 175 F.4th at 732. That some detention is "constitutionally permissible" does not mean detention *without individualized review* is permissible in all circumstances. If that were the case, the Supreme Court would have said so in *Jennings*, rather than remanding petitioners' as-applied constitutional challenges to detention under §1226(c) and §1225(b). *Cf.* 583 U.S. at 312. *See also Oyelude v. Chertoff*, 125 F. App'x 543, 546 & n.9 (5th Cir. 2005) (cautioning against reading *Demore*'s "constitutionally permissible" language "in a vacuum," because "when read in context, [it] does not directly address the constitutionality of non-§1226(c) detentions”).

The *Demore* Court’s quotation from *Wong Wing v. United States*, 163 U.S. 228, 235 (1896), that detention is permissible “pending the inquiry into [a noncitizen’s] true character,” *see* SB.18, 39, similarly supports Petitioners. There, the Court compared immigration detention pending proceedings to pretrial detention, *see Wong Wing*, 163 U.S. at 235, which then and today encompasses a bail determination as the default, unlike Petitioners’ process-free detention. *E.g.*, 18 U.S.C. §3142; *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“From … 1789 to the present, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.” (citations omitted)).

Respondents also misleadingly quote *Demore* to suggest that the Court deemed all pre-adjudication mandatory detention justified. SB.50 (detention “pending … removal proceedings … necessarily serves the purpose of preventing [noncitizens] from fleeing” (modification in original) (quoting 538 U.S. at 527–28)). It did no such thing. The detention principle in *Demore*, limited to “deportable criminal [noncitizens],” is followed immediately by a recognition of the specific evidence regarding criminal history and high abscondment rates Congress considered in drafting §1226(c). 538 U.S. at 527–28.

Respondents similarly mischaracterize *Banyee* as "foreclose[ing] any due process challenge," SB.42, because the Supreme Court "ha[s] already done whatever balancing is necessary" as to *all* mandatory detention, SB.63 (quoting *Banyee v. Garland*, 115 F.4th 928, 933 (8th Cir. 2024)). *Banyee* reviewed detention under the same narrow statute as *Demore* (§1226(c)), and its holding is equally limited to noncitizens already convicted of specific offenses, after full criminal process. 115 F.4th at 930, 933.

2. *Carlson* also does not help Respondents. *Carlson* represents a narrow circumstance in which a targeted, evidence-based congressional finding—that Communist activity was categorically dangerous—justified discretionary individual denial of release on bail for active Party participants, satisfying the Fifth Amendment. 342 U.S. at 543–44. A "mandatory detention" statute, SB.40, was not at issue. Rather, the Attorney General directed that the petitioners be detained, concluding that, regardless of other individual risk factors, their level of Communist Party participation alone sufficed to deny release. *Carlson*, 342 U.S. at 528–34. The petitioners argued this was insufficient to demonstrate risk of danger, making their detention without flight risk, and without additional evidence of danger, unconstitutional. *See id.* at 529–30, 532.

In reversing, the Court reviewed the denials "by reference to the legislative scheme," noting that the denials were "within the framework of the Subversive

Activities Control Act," which was narrowly aimed at "eradicat[ing] the evils of Communist activity." *Id*. at 543–44. The Court considered "the legislative judgment of evils" and purpose of the Act, observing that where a noncitizen "Communist may so conduct himself" so as "to inculcate the doctrine of force and violence into the political philosophy of the American people," "*that* [noncitizen] may be detained." *Id.* (emphasis added).[10] The Court stressed that "Congress had before it evidence of resident [noncitizens'] leadership in communist domestic activities sufficient to furnish reasonable ground for action against [noncitizen] resident Communists." *Id.* at 536; *see also id.* at 541 ("Congress' understanding of [Communists'] attitude toward the use of force and violence … gives adequate ground for detention.").

Even then, the Fifth Amendment required "a reasonable apprehension of hurt from [noncitizens] charged with a philosophy of violence." *Id*. at 542. Thus, in lieu of flight risk, denial of release was appropriate only because there was "evidence of [the petitioners' Party] membership plus [their specific] personal activity in supporting and extending the Party's philosophy concerning violence." *Id.* at 541; *see also Hernandez-Lara*, 10 F.4th at 36 (noting *Carlson* petitioners had not been found to be flight risks). The Court made clear that "[o]f course purpose to injure could not be imputed generally to all [noncitizens] subject to deportation." *Carlson*,

[10] The Court also pointed out that the petitioners had multiple opportunities to challenge the denials, including through judicial review. *Id*. at 529–32, 540.

342 U.S. at 538. This reasoning supports Petitioners' position that their detention absent any finding of danger or flight risk *does* violate the Fifth Amendment.

3. For a categorical finding to stand in for individual assessment, SB.27, the Congressional record must support it. Unlike in *Demore*, *Banyee*, and *Carlson*, Congress made no categorical finding of danger or flight risk for noncitizens like Petitioners, nor did it consider any evidence that would warrant such a finding. *See generally* H.R. Rep. 104-469(I) (1996); S. Rep. 104-249 (1996); H.R. Conf. Rep. 104-828 (1996).[11] Petitioners must therefore have access to process to evaluate their flight risk and dangerousness.

The materials Respondents cite in an attempt to suggest otherwise, SB.46–48, do not help them. Congress did have before it general data relating to all noncitizens in deportation proceedings and with final deportation orders, along with rates of absconding or failing to appear for deportation. *See, e.g.*, SB.46 (citing general discussions in congressional record related to "many deportable aliens," "many aliens" in "deportation hearing[s], and "deportable aliens"). But Congress did not implement a detention scheme that mandated detention for all noncitizens in

[11] One of Congress's primary focuses in enacting IIRIRA was on—as *Demore* notes—"criminal aliens." 538 U.S. at 518–21. It used the term "criminal alien" approximately 65 times in the House Report, 41 times in the Senate Report, and 39 times in the Conference Report. There are no proposed amendments or statements in any of the Congressional records that mention a risk of danger or flight by noncitizens who entered without inspection, especially those who then develop strong ties within the United States.

deportation proceedings. To the contrary, Congress retained a permissive detention framework for release on bond for many noncitizens under §1226(a). Congress *did* consider data specific to (1) "criminal aliens," H.R. Rep. 104-469(I) at 123–24; (2) noncitizens apprehended at the border seeking asylum, *id.* at 117; and (3) noncitizens with final deportation orders, *id.* at 160–61. *See also* Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary," 104th Cong., 1st Sess. 1–2 (listing Congress's concerns, which do not include any specific issues regarding noncitizens like Petitioners). Respondents cite nothing evincing Congressional consideration of data specific to the broad group of people detained under §1225(b)(2)(A).

Finally, Respondents point to a 1996 Department of Justice Inspector General report, SB.47, which was never mentioned in the IIRIRA legislative reports and focuses on noncitizens with final removal orders, Office of Inspector General, INS, *Deportation of Aliens After Final Orders Have Been Issued* (Mar. 1996), https://perma.cc/JA5M-VU8P ("OIG Report"). It also says not that 90% of noncitizens in proceedings absconded, SB.47, but that INS deported about 11% of noncitizens ordered deported, attributing this rate to multiple factors including the government's own "failure to send surrender notices," OIG Report.

4. *Flores* is inapposite for a different reason. *Flores* involved infringement of an unenumerated interest that the Court found not constitutionally protected at all:

the "novel[]" proposed right of children "not to be placed in a decent and humane custodial institution if there is … a responsible person" temporarily available but "unwilling to become the child's legal guardian." 507 U.S. at 302–03. Although the children were in government custody, this did not infringe on their right to freedom from physical restraint, the Court held. *Id*. at 302. This was both due to the nature of the humanitarian facilities and because the petitioners were children, which meant that, in the absence of a parent or legal guardian, the government "*must* … either exercise custody itself or appoint someone else to do so." *Id.* The Court explicitly distinguished adult detention, which *does* implicate the right to "freedom from physical restraint." *Id.*

The custody scheme still required "individualized determinations" of flight risk and danger. *Id*. at 297, 313; *contra* SB.41. The Court only rejected *additional* determinations sought by the children regarding whether a private placement with a non-legal guardian was in the child's best interest. *Flores*, 507 U.S. at 313–14. On *that* question, the Court allowed reliance on "reasonable presumptions and generic rules" in furtherance of "protect[ing] the welfare of juveniles." *Id.* at 312–13. Even so, those "reasonable presumptions" were grounded in an evidence-based consideration that "state guardianship procedures" are a reliable proxy for safety. *Id.* at 312 n.7.[12]

Overall, Respondents' cases support Petitioners. *Flores* make clear that adult detention infringes the constitutional right to liberty. *See id.* at 302; *id.* at 315–16 (O'Connor, J., concurring). The detention at issue in *Demore* covered a "limited class" of noncitizens whom Congress had determined, based on evidence, presented a categorical bail risk. *Demore*, 538 U.S. at 518. Conversely, §1225(b)(2)(A) is anything but narrowly drawn, covering approximately two million noncitizens when enacted (and likely millions more today) based solely on their statutory status as "applicants for admission." *Buenrostro-Mendez*, 166 F.4th at 507. And *Carlson* made clear that flight risk and danger cannot simply be "imputed generally to all" noncitizens. *See Carlson*, 342 U.S. at 538. There must thus be an individualized inquiry into whether a permissible purpose justifies Petitioners' detention.

III. Respondents Can Only Deprive Petitioners of Their Liberty with Adequate Procedures, But Provided None Here.

In addition to requiring a "constitutionally adequate purpose," *O'Connor*, 422 U.S. at 574, the deprivation of Petitioners' liberty independently requires "constitutionally adequate procedures" to ensure such a purpose is satisfied,

[12] Thus, while *Flores* employed rational basis review, given the non-fundamental interest at stake, it was still considerably more demanding than what Respondents propose here.

Loudermill, 470 U.S. at 541; *Harper*, 494 U.S. at 220. The Supreme Court has repeatedly conditioned civil detention on individualized process, *see Addington v. Texas*, 441 U.S. 418, 426–27 (1979); *Salerno*, 481 U.S. at 747, 751; *Foucha*, 504 U.S. at 80–82; *Zadvydas*, 533 U.S. at 690, with limited exception inapplicable here, *see supra* at 30–36. Neither *Doe* nor the entry fiction forecloses Petitioners' procedural due process claim, and the *Mathews* factors strongly favor Petitioners. The absence of any individualized process thus violates Petitioners' procedural due process rights. *See Jauch*, 874 F.3d at 430, 434–35 (criminal procedure allowing defendants' pretrial detention for months without judicial review violated procedural due process).

A. *Doe* Does Not Preclude Petitioners' Procedural Claims.

Respondents argue that *Connecticut Department of Public Safety v. Doe* forecloses Petitioners' procedural due process claims because they seek process to prove facts (flight risk and danger) "irrelevant to the [statute's] application." SB.27. *Doe* is "exceptionally inapt" here, where enumerated rights are at stake such that the Constitution requires meaningful process, regardless of any statute. Op.16; *see Buele Morocho*, 2026 WL 2546223, at *9 n.29 (similar).

The plaintiff in *Doe* challenged a state law requiring registration and public disclosure of information about individuals convicted of sex offenses. He claimed that the inability to present evidence related to his *current* dangerousness before this disclosure violated his procedural due process rights. 538 U.S. at 4–6. But the law turned exclusively on the fact of a *past* conviction; the registry explicitly stated that officials had not assessed registrants' current dangerousness. *Id.* at 4–5, 7.

Crucially, Doe did not raise a "substantive challenge" to the state law—i.e., he never argued that requiring registration of non-dangerous individuals violated the Constitution. *Id.* at 7–8; *see id.* at 8–9 (Scalia, J., concurring). Even if he had, his only liberty interest turned on a reputational injury, *id.* at 6, not an enumerated constitutional right. Because Doe did not assert any statutory or constitutional basis why he could not have been placed on the registry even if additional process proved he was not currently dangerous, his procedural claim failed. *Id.* at 7–8.[13]

The reputational harm Doe asserted bears no resemblance to the enumerated right to physical liberty Petitioners assert. *See Din*, 576 U.S. at 91–92. The Supreme Court has long recognized that the Constitution requires any infringement of this right be justified by an adequate purpose (here, flight risk or danger) and supported by adequate procedures. *Supra* at 27–29, 38–39. Unlike Doe, Petitioners argue that the Constitution requires their detention under §1225(b)(2)(A) serve an adequate purpose, which it does not, and that there be adequate procedures to test that purpose,

[13] Similarly, in *Michael H.* and *Flores*, OB.20, the Supreme Court rejected the plaintiffs' assertions of implied liberty interests and rejected the need for additional process because those interests were not constitutionally protected. *Michael H. v. Gerald D.*, 491 U.S. 110, 122–27 (1989) (plurality opinion); *Flores*, 507 U.S. at 302–08. So too in *Muñoz*. 602 U.S. at 910–11.

which there were not. *Cf. Doe*, 538 U.S. at 7. No statute can limit these requirements when the core right to liberty is at stake. *Cf. id.* at 8 (Scalia, J., concurring) (statutes may eliminate non-constitutionally-protected interests). Otherwise, Congress could simply legislate away the Due Process Clause's procedural guarantees. *See Counselman v. Hitchcock*, 142 U.S. 547, 565 (1892) ("Legislation cannot detract from the privilege afforded by the Constitution."); *Collins v. Yellen*, 594 U.S. 220, 259 (2021) (statutes must yield to the Constitution). Thus, while *Doe* says that a plaintiff has no right to procedural due process to determine facts neither statutorily *nor constitutionally* relevant, that is inapposite here, where Petitioners do "simultaneously advance[]" a claim that flight risk and danger are substantively relevant. *Contra* SB.31.

Harper also supports Petitioners. In *Harper*, the state supreme court framed its analysis of the statute in procedural terms, but it imposed extra-statutory substantive requirements as part of the additional process it ordered. 494 U.S. at 220–21. The Supreme Court did not say this was prohibited; it simply recognized there was a substantive element of the holding and evaluated whether it was correct. *Id*. If the *Harper* Court had agreed that the extra-statutory factors the state court imposed were substantively required, then a procedural analysis would be necessary to assess whether existing procedures were adequate to test whether those substantive criteria had been met.

Indeed, the Supreme Court has conducted precisely this form of analysis in analogous cases. In *Foucha*, for example, a statute permitted the detention of people who had been found innocent by reason of insanity if they were dangerous. 504 U.S. at 73. The Supreme Court held that the Constitution only permits detention in that context when an individual is both dangerous *and* presently mentally ill (an extra-statutory criterion), and that the government must prove both factors in a hearing. *Id.* at 78–80. That parallels Petitioners' substantive and procedural challenges. And in *Morrissey*, a law provided that parolees were "subject, at any time, to be taken into custody and returned" to prison, without specifying any criteria for parole revocation. 443 F.2d 942, 945 (8th Cir. 1971), *rev'd*, 408 U.S. at 490. Yet the Supreme Court found that regardless of the lack of statutory criteria, as a constitutional matter a "parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole," and thus revocation is only justified where a "parolee has in fact acted in violation of" those conditions. 408 U.S. at 479; *see also id.* at 483–84. The Court then analyzed the process necessary to assess this substantive rationale in an individual case. *Id.* at 485–89. This is exactly what the district courts and panel did here.

Finally, Respondents suggest that (1) Petitioners' ability to challenge whether §1225(b)(2)(A) applies to them, and (2) the process they receive in their removal proceedings, are adequate. SB.22; *see* Op.51–52 (Wilson, J., dissenting) (similar).

The first claim impermissibly elevates the statute above the Constitution. *See supra* at 41. The second is like suggesting that mandatory pretrial detention is permissible for all defendants because they receive due process in their criminal proceedings, which is wrong. *Cf. Salerno*, 481 U.S. at 743, 747, 754 (upholding pretrial detention based on dangerousness only after a "detention hearing" with "numerous procedural safeguards"). Like criminal defendants, noncitizens have no opportunity in removal proceedings to challenge the validity of detention. *See Jennings*, 583 U.S. at 293 (explaining that immigration detention challenges are distinct from challenges to removal). And if due process in removal proceedings were sufficient to dispose of any detention challenge, the Supreme Court could have decided both *Demore* and *Jennings* on this ground without further analysis.

In sum, *Doe*'s limited holding has no bearing here. Where the enumerated right to liberty is implicated, the Constitution requires a valid justification for its deprivation; and where, as here, Congress has not provided one, there must be adequate procedures to ensure one exists.

B. The "Entry Fiction" Is Irrelevant.

Respondents raise something akin to the "entry fiction" to argue that because Petitioners entered without admission, they effectively remain stopped at the border, limiting their procedural due process rights to the statutory procedures Congress provided. SB.56–61. A century of precedent forecloses this argument. Respondents attempt to rewrite the history and scope of the "entry fiction" by turning it into a non-existent "admission fiction" that would justify arbitrary detention. But *no* fiction is applicable here, as Petitioners undisputedly entered the United States and they seek additional process regarding custody, not admission. The panel correctly rejected Respondents' argument as "a complete fantasy." Op.15; *accord Cirrus Rojas*, 183 F.4th at 930 n.7.

1. As "person[s]" in the United States, *see* U.S. Const. amend. V, noncitizens in this country—whether admitted or not—have constitutional due process rights. *See Diaz*, 426 U.S. at 77 (due process protects every noncitizen in the United States, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory"); *Plyler v. Doe*, 457 U.S. 202, 212 (1982) ("'all persons within the territory of the United States,' including [noncitizens] unlawfully present, may invoke" the Fifth Amendment (quoting *Wong Wing*, 163 U.S. at 238)). These protections, which exist independent of statutory rights, include the core right to liberty. *Zadvydas*, 533 U.S. at 690, 692–93; *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (executive officers may not "arbitrarily ... cause [a noncitizen] who has entered the country ... to be taken into custody" without "giving him all opportunity to be heard").

The "entry fiction" is a narrow carveout to the otherwise broad territorial application of due process principles. It applies to those whom immigration officers encounter while "seeking to enter the country," and stop "on the threshold." *See*

Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 131, 140 (2020) (citation omitted). These noncitizens may physically enter the country, for inspection, removal proceedings, or parole, but they are fictively understood not to have effected an "entry." *Id.* at 139–40. For them, the "only procedural rights" that attach to their applications for admission "are those conferred by statute." *Id.* at 131; *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 622–623 (5th Cir. 2006) (confirming entry fiction applies only to noncitizens "denied entry into the United States").

2. The entry fiction has no application to noncitizens like Petitioners, who "are within the United States after an entry, irrespective of its legality," *Leng May Ma*, 357 U.S. at 187, and therefore accorded full constitutional due process "conforming to traditional standards of fairness," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). *See also United States v. Saucedo-Velasquez*, 843 F.2d 832, 834–35 & n.2 (5th Cir. 1988) (reiterating that constitutional due process applied in deportation proceedings where noncitizen entered unlawfully).

Determining whether a person has effected an "entry" is a familiar judicial exercise. Courts ask if, after gaining physical presence in the United States, the person was stopped at the threshold or was instead free from "official restraint." *United States v. Hernandez-Adame*, 157 F.4th 662, 671 (5th Cir. 2025) (explaining that the official restraint doctrine "is the law of this circuit"); *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1133 (5th Cir. 1993) (explaining history and general applicability of this "entry" definition). In close cases, whether entry occurred requires a fact-specific examination of when and where a person was encountered. *See, e.g.*, *Ex parte Chow Chok*, 161 F. 627, 628–30, 632 (C.C.N.D.N.Y. 1908), *aff'd*, 163 F. 1021 (2d Cir. 1908).

But Petitioners' cases are not close. Petitioners crossed the border over a decade ago, established lives here, and were not "found in the very act of entering." *Id.* at 630; ROA.26-50183.80; ROA.26-50219.10; ROA.26-50221.79. There can be no question that they entered, meaning that the Constitution applies, full stop. *See, e.g.*, *United States v. Lopez-Vasquez*, 227 F.3d 476, 484 (5th Cir. 2000) (noncitizens who entered "unlawfully" are assured due process protections); *Cirrus Rojas*, 183 F.4th at 930 n.7 (entry fiction inapplicable where petitioner "lived in the United States for years and was arrested nowhere near the border"); *Buele Morocho*, 2026 WL 2546223, at *8 (similar).

3. Respondents cite no authority, other than the dissent in this case, supporting their claim that because Petitioners were not *admitted*, they lack constitutional procedural due process rights. SB.56–60; *see Barbosa da Cunha*, 175 F.4th at 86 ("no one could seriously contend that [the entry fiction] applies to" noncitizen who "has been living in the United States for decades" after entry without admission);

Op.14–15 (similar). *Thuraissigiam* is instructive, but not for the reasons Respondents claim. The Court found that Thuraissigiam had not entered because he was apprehended almost immediately upon crossing the border, at the threshold of entry, and drew a distinction between him and those with an established presence in the United States (like Petitioners), to whom the entry fiction does not apply. 591 U.S. at 107, 138–40. "To assert that *Thuraissigiam* actually eliminates [due process] rights for those with an established presence is not credible." Op.12–14.

Respondents' other cases entirely fail to support their argument. They all involved noncitizens who sought entry at ports of entry, and the Court found neither parole from the port nor detention at Ellis Island constituted entry. *See Nishimura Ekiu*, 142 U.S. at 661 (stay in mission-house pending proceedings did not give petitioner a right to admission); *Kaplan v. Tod*, 267 U.S. 228, 230–31 (1925) (temporary stay with aid society pending removal did not transform child ordered excluded into a lawfully-admitted resident with statutory path to citizenship); *Mezei*, 345 U.S. at 21315 ("harborage at Ellis Island" of noncitizen ordered excluded on national security grounds was "not an entry"); *Leng May Ma*, 357 U.S. at 186, 189–190 (petitioner paroled in at a port and later ordered excluded was ineligible for relief available only in deportation proceedings); *see also* Op.14 (finding "narrow" parole exception, which "was intended to encourage conditional release," inapplicable). Nothing in these cases dictates the outcome here, as Petitioners *have* entered.

Landon, too, arose in the port-of-entry context—the Court declined to apply the entry fiction to a lawful permanent resident returning from a brief trip, reasoning that her status accorded her constitutionally derived procedural rights. 459 U.S. at 32–34. *Landon* does not say that due process applies "only" after admission and permanent residence, *contra* SB.57–58, but that was the focus of the decision because Plasencia's status formed the basis of her specific claim. 459 U.S. at 23, 27–28.

4. Separately, even where it applies, the entry fiction is only "determinative of" admission-related procedures, *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1098 (9th Cir. 2004), not procedures regarding detention. This is because the fiction's purpose is to preserve the political branches' "plenary authority to decide" whether to "admit or exclude" noncitizens "seeking initial entry," which includes its "power to set the procedures to be followed in determining whether a[noncitizen] should be admitted." *Thuraissigiam*, 591 U.S. at 139 (citation omitted) (noting Thuraissigiam only challenged procedures for assessing credible fear within his expedited removal proceedings, not his detention). Application of the entry fiction to custody challenges makes no sense, where noncitizens have an enumerated right to be free of arbitrary custody, in contrast to their *lack* of any constitutional right to admission. *See Zadvydas*, 533 U.S. at 699 ("the rationale of a legal rule no longer being applicable, that rule itself no longer applies" (quoting 1 Edward Coke, *Institutes of* *the Lawes of England* *70b (1628)); *id.* at 703–04 (Scalia, J., dissenting) (the entry fiction only "makes perfect sense … with regard to the question of what *procedures* are necessary to prevent entry"). Moreover, "the proper use of legal fiction is to prevent injustice," such that "[n]o fiction ... shall extend to work an injury." *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 208 (1905) (quoting 3 William Blackstone, *Commentaries* *43 (1768)). The entry fiction cannot justify arbitrary imprisonment on U.S. soil.

5. Respondents remaining arguments fail. *See* SB.59–61. *Buenrostro-Mendez* only involved interpretation of IIRIRA; it did not examine entry or due process. Respondents argue the Constitution itself creates a perverse incentive and thus should be ignored. SB.60–61. But Petitioners' claims pose no threat to the statutory scheme, which already places noncitizens like Petitioners and those apprehended at the border "on equal footing" as to their right to admission. *See Torres*, 976 F.3d at 928.

That unlawful entry is a "criminal offense," SB.61, is also irrelevant. While "improper entry" is a misdemeanor, 8 U.S.C. §1325, no Petitioner has been charged. If they had, they would have received a custody hearing and been released unless no release condition could ameliorate flight risk or danger. *See* 18 U.S.C. §3142. That Petitioners could potentially have been charged with a criminal offense because of their manner of entry is yet another way in which Congress already equalized any "perverse incentive" stemming from the correct application of the entry fiction. *See Mullin v. Al Otro Lado*, 146 S. Ct. 2079, 2095 (2026).

IIRIRA eliminated "entry" as the touchstone for removal proceedings, but it did so by centering "admission," not by redefining "entry." *Hing Sum*, 602 F.3d at 1100; *United States v. Argueta-Rosales*, 819 F.3d 1149, 1159 (9th Cir. 2016) (IIRIRA retained the "firmly established" meaning of "entry" (citing, *inter alia*, *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000))). Moreover, IIRIRA did not change the black-letter law establishing that even unlawful entry is "entry" for constitutional due process purposes. Nor could it, for "a mere act of congress cannot amend the constitution." *Counselman*, 142 U.S. at 565; *Loudermill*, 470 U.S. at 541; *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012) ("[C]onstitutional question[s] [are] not controlled by Congress's choice of label.").[14]

C. The *Mathews v. Eldridge* Factors Favor Petitioners.

Where, as here, enumerated rights are implicated, "the [Supreme] Court usually has held that the Constitution requires some kind of hearing *before* the State

[14] Even if the Court were to adopt Respondents' incorrect "admission fiction" and apply it to a detention challenge, Respondents are correct, *see* SB.56–61, that the entry fiction only ever relates to *procedural* due process. *See, e.g.*, *Thuraissigiam*, 591 U.S. at 139 (explaining the entry fiction limits "procedures"); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (noncitizens who have not "entered" retain rights under the substantive component of due process); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) (similar). Respondents' arguments thus do not affect Petitioners' argument that their detention is unconstitutional because it does not serve a compelling purpose.

deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *see Foucha*, 504 U.S. at 79; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *cf. Salerno*, 481 U.S. at 750; *Addington*, 441 U.S. at 425–27.

The district courts correctly applied the *Mathews* factors to determine what process is due, concluding that (1) Petitioners' weighty liberty interests and (2) the risk of erroneous deprivation of liberty without any process whatsoever, outweighed (3) Respondents' interest in detaining them given their lack of criminal history or indicia of flight risk. ROA.26-50183.130–31; ROA.26-50219.81–83; ROA.26-50221.88–91. Rather than substantively engaging with these factors, Respondents simply repeat the meritless assertions discussed *supra*. *See* SB.61–64. As those fail, so too does any attempt to undermine the district courts' *Mathews* balancing.

Considering the first factor, freedom from physical detention is "the most elemental of liberty interests." *Hamdi*, 542 U.S. at 529. Respondents' attempt to narrow this right out of existence, SB.32, defies Supreme Court precedent and common sense. *See supra* at 17–20. But Respondents are correct that "context matters." SB.61. Petitioners' "rights and interests" in liberty, *Harper*, 494 U.S. at 229, are heightened by their longstanding residence and substantial ties to this country. *See* ROA.26-50183.127 (Mr. Sosnava Rodriguez, approximately twenty-two years in the United States), ROA.26-50219.71 (Mr. Villegas Angel, fifteen years), ROA.26-50221.89 (Mr. Gomez Alvarado, fourteen years); *see Yamataya*, 189 U.S. at 87, 101 (emphasizing due process rights of noncitizen who entered the country unlawfully four days prior). Petitioners all have young U.S.-citizen children who depend on them. ROA.26-50219.10 (Mr. Villegas Angel has seven- and ten-year-old daughters, one with autism); ROA.26-50221.6; Decl. of Miguel Gomez Alvarado ¶7 (Dkt. 192-2) (Mr. Gomez Alvarado has two-year-old with hearing loss); ROA.26-50183.80; Decl. of Ignacio Sosnava Rodriguez ¶7 (Dkt. 192-2) (Mr. Sosnava Rodriguez has two children, one who struggles with depression and suicidal ideation); *see Landon*, 459 U.S. at 34 (ability to be with "immediate family" is a weighty interest).

Second, there is a significant risk of erroneous deprivation of Petitioners' liberty.[15] Respondents provided no process whatsoever regarding the need for Petitioners' detention, and even now, months into litigation, Respondents effectively concede there is no individualized reason for that confinement. *See* SB.43. As such, *any* additional process to evaluate dangerousness and flight risk would "minimize" the "risk of arbitrary or erroneous deprivation[] of [Petitioners'] liberty."

[15] In reprising their argument that flight risk and danger are irrelevant to the application of §1225(b)(2)(A), and thus there can be no erroneous deprivation, Respondents confuse the *Mathews* inquiry. SB.62. The second factor asks whether the interest identified in the first factor—the right to freedom from arbitrary restraint, *see supra* at 16–20—is likely to be improperly affected by existing procedures. *Mathews*, 424 U.S. at 335.

Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984). This factor also favors Petitioners.

As to the third factor, while the government has valid interests in enforcing immigration law, protecting the community, and ensuring noncitizens can be removed if so ordered, Respondents have not explained why detaining Petitioners serves these interests, nor why they cannot provide basic process to ensure these interests are satisfied. Respondents remarkably make *no argument* beyond a generalized interest in the "efficient administration of the immigration laws." SB.63 (quoting *Landon*, 459 U.S. at 34). And they even mischaracterize *Landon*, omitting the crucial qualifier that the government has a weighty interest in administering immigration laws "at the border." 459 U.S. at 34. At issue in *Landon* were the procedures for determining whether Ms. Plasencia should be *admitted*, an inquiry that has long been part of the "sovereign prerogative" to "admit or exclude." *Id.* at 32–34. Those concerns are irrelevant here, where Petitioners were encountered in the U.S. interior, years after entering, and seek only additional process regarding detention, not admissibility.

Respondents' argument that Congress's "judgment" that Petitioners be mandatorily detained must "weigh heavily," SB.63, fails. The mere fact that a law "authorize[s] confinement … does not itself establish a constitutionally adequate purpose for the confinement." *O'Connor*, 422 U.S. at 574. Moreover, Respondents "ha[ve] not argued" that providing Petitioners with process would be "unduly burdensome," *Buele Morocho*, 2026 WL 2546223, at *10, effectively conceding it would not. That makes sense, as unnecessary mandatory detention likely costs millions of taxpayer dollars per year, *see Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017); *Betancourth v. Tate*, 822 F. Supp. 3d 762, 770 (S.D. Tex. 2026), and Petitioners' detention causes "exceptionally severe consequences" by removing productive members of society from their families and communities, *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (citation omitted).

The *Mathews* analysis heavily favors Petitioners and supports the district courts' conclusion that their detention violated due process and they must be afforded individualized review of whether further detention serves a valid purpose at a hearing before a neutral arbiter.

IV. The Court Should Not Issue an Advisory Opinion on Claims Petitioners Never Raised and Respondents Waived.

For the first time, Respondents improperly request that the en banc court rule on the constitutionality of prolonged detention for those held under §1225(b)(2)(A). SB.49–55. The Court should refuse the invitation to issue an advisory opinion on a constitutional claim Petitioners do not press and Respondents have waived. *See Am. Intern. Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649, 661 & n.28 (5th Cir. 2008) (issues not raised in opening brief waived unless intervening court decision prior to supplemental brief provides "important clarification").

It is foundational that Article III of the Constitution requires a live case or controversy. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). This requirement "limits the role of the Federal Judiciary …. Federal courts do not issue advisory opinions about the law[.]" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378–79 (2024). A plaintiff must have standing "for each claim that they press." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423, 431 (2021) (citation omitted); *accord Jackson v. City of Houston*, 143 F.4th 640, 645–46 (5th Cir. 2025). "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes." *TransUnion*, 594 U.S. at 423.

Petitioners were detained just over one month (Mr. Sosnava Rodriguez), over two months (Mr. Gomez Alvarado), and one week (Mr. Villegas Angel) when they filed habeas petitions. ROA.26-50183.10; ROA.26-50221.80; ROA.26-50219.72. Petitioners disavowed any prolonged detention claim in their initial appellate briefing. Dkt.110 at 11 n.4. Respondents agree this claim is not presented. SB.50 n.4. There is no live case or controversy concerning a length-of-detention claim on which the Court can rule. *See* Op.71 (Wilson, J., dissenting).

Indeed, Respondents' argument to the contrary is that Petitioners have not "disclaimed" making such a claim on remand, and "will undoubtedly argue to this Court" that their detention is prolonged. SB.49 n.4. But Petitioners make no such argument and the facts that would inform a future constitutional analysis are unknown—precisely why the Supreme Court has held that "[f]or adjudication of constitutional issues[,] 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1974) (citation omitted). A "fundamental principle of judicial restraint" dictates that "courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (citations omitted). What hypothetically *may* occur in the future provides no basis for a constitutional ruling from this Court.

Respondents argue that absent an advisory opinion, district courts will adopt the panel decision's rationale concerning duration of detention. SB.50 at n.4. But that decision was vacated. Dkt. 174-1. Additionally, Petitioners did not raise duration-of-detention claims to the panel or request relief on that basis, and do not defend the panel's decision on those grounds.

Respondents' improper request should be denied. This is a court of "review[,] not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). There are sure to be appeals meeting Article III requirements whereby this Court can opine on prolonged detention without hypotheticals, with the benefit of factual records and legal briefing. This is not that case.

CONCLUSION

For the reasons above, the Court should affirm the decisions below.

Dated: September 9, 2026

Respectfully submitted,

/s/ Rebecca Cassler
Rebecca Cassler
Suchita Mathur
Michelle Lapointe
AMERICAN IMMIGRATION COUNCIL
2001 L Street NW, Suite 500
Washington, DC 20036
T: (202) 507-7514
rcassler@immcouncil.org
smathur@immcouncil.org
mlapointe@immcouncil.org

Counsel for Petitioners-Appellees

Patricio Garza Izaguirre
GARZA & NARVAEZ, PLLC
7600 Chevy Chase Drive, Suite 118
Austin, TX 78752
T: (512) 485-3005
patricio@garzanarvaez.com

Counsel for Petitioner-Appellee Alejandro Villegas Angel

/s/ Stephanie E. Norton
Stephanie E. Norton*
Gracie Willis‡
Yulie Landan+
NATIONAL IMMIGRATION PROJECT
1763 Columbia Road NW
Suite 175 #896645
Washington, DC 20009
T: (202) 217-4742
ellie@nipnlg.org
gracie@nipnlg.org
yulie@nipnlg.org

Counsel for Petitioners-Appellees

* *Not admitted in the District of Columbia; working remotely from Wyoming and admitted in Wyoming and New York only*
‡ *Not admitted in the District of Columbia; working remotely from Texas and admitted in Texas and Georgia only*
+*Not admitted in the District of Columbia; working remotely from New York and admitted in California only*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,999 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). It also complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced and easy-to-read typeface using Microsoft Word in 14-point size font.

/s/ Rebecca Cassler
Rebecca Cassler
September 9, 2026
Counsel for Petitioners-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2026, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

<u>/s/ Rebecca Cassler</u>
Rebecca Cassler
September 9, 2026
*Counsel for Petitioners-Appellee*s