No. 26-2113

In the United States Court of Appeals for the Eighth Circuit

ALEKSEI MOROZOV,

Petitioner-Appellee,

v.

WARDEN, LAWRENCE COUNTY JAIL,

Respondents,

FIELD OFFICE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES ATTORNEY FOR THE DISTRICT OF SOUTH DAKOTA,

Respondents-Appellants.

On Appeal from the United States District Court for the District of South Dakota

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC works to uphold constitutional protections for noncitizens as well as for citizens and to ensure that the Constitution is applied as robustly as its text and history require. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imprisonment without trial deviates from the norm of physical liberty under the Due Process Clause. And *mandatory* imprisonment without trial is an extraordinary measure that the Constitution permits in only the narrowest circumstances. Yet as this Court interprets it, 8 U.S.C. § 1225(b) requires the government to incarcerate every noncitizen resident who qualifies as an "applicant for admission," denying them even a bond hearing to determine whether their confinement serves any purpose. The Fifth Amendment prohibits the government from subjecting any "person" to such an arbitrary deprivation of the most basic form of liberty.

The Due Process Clause protects "all persons within the [nation's] territorial jurisdiction, without regard to … nationality," *Wong Wing v. United States*, 163

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

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U.S. 228, 238 (1896) (quotation marks omitted), or whether a person has any "right to be within the territory of the United States," *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 87 (1903). By expressly prohibiting the government from depriving any "person" of their "liberty" without due process, the Clause forbids arbitrary imprisonment—including in connection with immigration enforcement. *See Wong Wing*, 163 U.S. at 238; *Zadvydas v. Davis*, 533 U.S. 678, 690-96 (2001).

That settled understanding reflects the Constitution's original meaning. "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting); *accord Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855). And the common law did not allow the government to imprison noncitizens without trial in order to facilitate their removal from the country—let alone to do so without the possibility of bail.

On the contrary, Founding-era common law gave "aliens" the same protections from arbitrary detention as subjects. As long as they were within the geographic borders of the realm, aliens were regarded as among "the people" of England, 1 William Blackstone, *Commentaries on the Laws of England* 366, 370 (1791), and were entitled to relief from arbitrary detention and other unwarranted

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deprivations of their liberty or property. Because there was no deportation in the Founding era, the common law did not sanction anything resembling detention of aliens in aid of deportation, much less *mandatory* detention. Instead, aliens were seized and expelled—just like subjects—only as a criminal punishment following a trial.

After independence, American states adopted the common law's protections for noncitizens. As one court put it: "All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done." *Cruden v. Neale*, 2 N.C. 338, 344 (N.C. Super. L. & Eq. 1796). Those protections included the ability to secure release from wrongful detention. *E.g.*, *United States v. Villato*, 2 U.S. 370, 379 (C.C.D. Pa. 1797) (discharging noncitizen on habeas review under state law).

Consistent with this common law heritage, the Fifth Amendment established that no "person" (not "citizen") could be deprived of "liberty" without due process of law. James Madison, the Fifth Amendment's author, specifically championed noncitizens' constitutional right to be free from any "arbitrary and unusual process." *Madison's Report on the Virginia Resolutions* (1800), *reprinted in* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 559 (Jonathan Elliot ed., 1836). It was widely recognized that "protection to their persons and property is due," 2 James Kent, *Commentaries on*

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American Law 62 (1836), and indeed, that noncitizens were "entitled to the full protection of the laws in every matter that respects [their] personal liberty," 2 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States*, app. 98 (1803).

Ignoring this history and the Constitution's text, the government claims that noncitizens who were not lawfully admitted have no protection against arbitrary imprisonment except whatever procedures the immigration statutes provide. But it is settled that the Due Process Clause, of its own force, safeguards a "constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Thus, "government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections" or unless "a special justification" outweighs the individual's interest in bodily freedom. *Id.* Even where a special justification exists, such as preventing individuals from absconding during removal proceedings, the Fifth Amendment prevents the government from causing a noncitizen who "has become subject in all respects to its jurisdiction, and a part of its population" to be "deprived of his liberty" without a hearing to address "the matters upon which that liberty depends." *Kaoru Yamataya*, 189 U.S. at 101.

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Physical presence, not admission status, entitles people to these constitutional safeguards against arbitrary detention—consistent with the common law that informed the Due Process Clause. The government's supposed authority to the contrary, *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), involved an effort to seek *legal admission*, not *release from detention*. The petitioner there "made no mention of release from custody" and instead sought "a new opportunity to apply for asylum." *Id.* at 115. The very reason the Court rejected his habeas petition was that "contesting the lawfulness of restraint and securing release" (which is available on habeas review) fundamentally differs from pursuing an alleged "right to enter or remain in a country" (which is not available on habeas review). *Id.* at 117; *see also Wong Wing*, 163 U.S. at 238 (applying Fifth Amendment protections against arbitrary detention to a noncitizen who already had been determined to be removable); *Zadvydas*, 533 U.S. at 693 (similar). *Thuraissigiam* merely reconfirmed that "an alien seeking initial admission to the United States … has no constitutional rights *regarding his application*." 591 U.S. at 139 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added)); *accord id.* at 140 ("an alien in respondent's position has only those rights *regarding admission* that Congress has provided by statute" (emphasis added)).

Nor does *Demore v. Kim*, 538 U.S. 510 (2003), support detention without opportunity for bail under Section 1225(b). Far from blessing the denial of

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immigration bond hearings as a general matter, *Demore* concerned "a special rule for aliens who have committed certain dangerous crimes." *Nielsen v. Preap*, 586 U.S. 392, 396 (2019). It permitted Congress to mandate detention for this "subset of deportable criminal aliens," *Demore*, 538 U.S. at 521, whom Congress deemed especially risky based on extensive legislative findings, and who already received the "full procedural protections" of a criminal trial, *id.* at 530. None of the factors on which *Demore* relied justifies denying bond hearings to everyone who qualifies as an "applicant for admission" under 8 U.S.C. § 1225(b). Indeed, *Demore* itself implies that such indiscriminate detention would be constitutionally suspect—hence its relentless focus on the unique threat posed by the "criminal aliens" at issue.

The government's broad power to decide who may be excluded or removed from this country does not give it carte blanche to imprison people in order to effectuate those policies. *See, e.g.*, *Wong Wing*, 163 U.S. at 238; *Zadvydas*, 533 U.S. at 693. Under the Due Process Clause, discretion over immigration does not entail limitless power to lock up noncitizen residents of this country without a trial or even a bond hearing.

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ARGUMENT

I. The Due Process Clause Protects Noncitizens as Fully as Citizens from Arbitrary Detention.

A. "[A]ll persons, aliens and citizens alike, are protected by the Due Process Clause," and that protection extends even to "one whose presence in this country is unlawful." *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976). The removal context does not change that. "It is well established that the Fifth Amendment entitles aliens to due process of law in the context of removal proceedings." *Trump v. J.G.G.*, 604 U.S. 673 (2025) (quotation marks omitted). Although noncitizens are "subject to the plenary power of Congress to expel them," the implementation of that power must comply with the "paramount law of the constitution." *Carlson v. Landon*, 342 U.S. 524, 534, 537 (1952) (quotation marks omitted). The government, therefore, cannot "disregard the fundamental principles that inhere in 'due process of law'" when attempting to remove people who are "alleged to be illegally here." *Kaoru Yamataya*, 189 U.S. at 94, 101.

In short, although "[p]olicies pertaining to the entry of aliens and their right to remain here" are political matters, "the Government must respect the procedural safeguards of due process" in "the enforcement of these policies." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Regardless of a noncitizen's "ultimate right to remain in the United States," his "status as a person within the meaning and

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protection of the Fifth Amendment cannot be capriciously taken from him." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953).

B. The Supreme Court's recognition that noncitizens are fully entitled to due process, regardless of their immigration status, reflects the Framers' original understanding. The concept of due process came from English common law, *see Kerry v. Din*, 576 U.S. 86, 91-92 (2015) (Scalia, J.), which provided the original standards for the Due Process Clause, *see Murray's Lessee*, 59 U.S. at 277. And significantly, the common law gave "aliens" the same protections against arbitrary detention as subjects. It did not authorize detaining aliens pending hearings to facilitate their removal from the country—much less detaining them without bail.

As William Blackstone explained, an alien, "during his residence in this realm," owed a temporary allegiance to the monarch and was therefore under the law's "protection." Blackstone, *supra*, at 370; *see United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898). Like subjects, aliens could file suit to protect their persons, property, and liberty. *See Tirlot v. Morris*, 80 Eng. Rep. 828, 828-29 (K.B. 1611). They were entitled to the same procedures as subjects in criminal prosecutions. *See* 1 Edward Coke, *Institutes of the Laws of England* § 198 (1794). Just like subjects, they could secure release on bail, *e.g.*, *Christie v. Filleul*, 96 Eng. Rep. 775, 775 (C.P. 1779), and could employ habeas corpus to "challenge Executive and private detention," *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

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The common law did not recognize anything resembling preventive detention of aliens in aid of removal. Indeed, deportation did not even exist in the Founding era. *See Thuraissigiam*, 591 U.S. at 123. Instead, expulsion was exclusively a criminal punishment ("transportation") imposed on aliens and citizens alike. *See* W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 34 (1890); Javier Bleichmar, *Deportation as Punishment*, 14 Geo. Immigr. L.J. 115, 130 (1999). This meant that any detention to facilitate expulsion could happen only after a trial and verdict.

Compared with subjects, aliens had only a few specifically defined legal disabilities. They could not hold office or permanently own land—both of which required a permanent, not merely temporary, allegiance to the Crown—and they could be charged higher customs duties. *See* Blackstone, *supra*, at 371-74. None of those disabilities, however, related to detention or physical liberty. By the Founding era, foreigners had not been expelled from England for more than two centuries, and there was not even a mechanism for such expulsion. *See Thuraissigiam*, 591 U.S. at 123; Craies, *supra*, at 33-36; William Empson, *On the Alien Bill*, 42 Edinburgh Rev. 99, 102 (1825). Aliens temporarily lost their legal protections only if their nation went to war with England, making them "alien enemies." Blackstone, *supra*, at 372; *see Calvin's Case*, 77 Eng. Rep. 377, 397 (K.B. 1608). Otherwise, noncitizens were fully capable of "obtaining justice in our

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courts," *Lamii v. Sewell*, 95 Eng. Rep. 610, 610 (K.B. 1750), which were "as open to them as to natives," *Melchart v. Halsey*, 96 Eng. Rep. 434, 435 (C.P. 1770) (Blackstone, J.).[2]

Because the early American states generally adopted English common law, noncitizens at the Founding were likewise "clearly and indisputably entitled to the full protection of the laws in every matter that respects [their] personal liberty." Tucker, *supra*, app. 98. It was widely recognized that "protection to their persons and property is due," 2 Kent, *supra*, at 62, and that they were "entitled … to the same protection of their rights as citizens," *Taylor v. Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844) (Story, J.). Like citizens, they could obtain release from arbitrary government detention through habeas corpus. *St. Cyr*, 533 U.S. at 301; *see, e.g.*, *Villato*, 2 U.S. at 379; *Lockington's Case*, 1 Brightly 269, 285 (Pa. 1813); *United States v. Williams* (C.C.D. Va. 1813) (Marshall, J.), *reported in* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2D 39, 41-42 (2003).

[2] The legal disabilities of alien enemies were "imposed temporarily as an incident of war and not as an incident of alienage." *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950); *see Calvin's Case*, 77 Eng. Rep. at 397; 2 Kent, *supra*, at 62 (explaining that legal remedies were "suspended" for alien enemies during war); 3 Joseph Story, *Commentaries on the Constitution of the United States* 571 (1833) (same); 4 *Elliot's Debates* 554 (James Madison distinguishing alien enemies as "obviously and so essentially distinct" from other aliens).

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C. The Due Process Clause was designed "to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). It aimed to prevent "arbitrary exercise of the powers of government, unrestrained by the established principles of private rights," *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819), including by Congress, *Murray's Lessee*, 59 U.S. at 276; *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). And central to the "personal liberty" the Clause safeguarded was "the power of locomotion" free of "imprisonment or restraint." *Kerry*, 576 U.S. at 92 (Scalia, J.) (quoting Blackstone, *supra*, at 134).

As discussed above, there were no "common-law procedures," *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting), by which the government could deprive noncitizens of their bodily liberty while attempting to deport them. The common law's "settled usages," *Murray's Lessee*, 59 U.S. at 277, provided no authority whatsoever to detain noncitizens in connection with civil removal. Needless to say, there was no authority for *mandatory* detention. And in the absence of any such traditional practice, the common law prohibited summary deprivations of personal rights without a hearing. *Id.* at 280.

The Fifth Amendment's text reinforces, rather than departs from, those common-law standards. The Framers knew how to distinguish citizens from

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noncitizens. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (only a "citizen" may hold congressional office). But the Fifth Amendment "speaks in the relatively universal term of 'person,'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), echoing the landmark English statutes securing physical liberty that inspired the Framers, *e.g.*, 3 Car. 1, c. 1, § 4 (1627) (Petition of Right) ("no man of what estate or condition that he be" could be arbitrarily detained); 31 Car. 2, c. 2, §§ 1-2 (1679) (Habeas Corpus Act) (extending protection to "any person").

The Amendment's protections against arbitrary imprisonment, therefore, are "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of … nationality." *Wong Wing*, 163 U.S. at 238 (quotation marks omitted).

D. The short-lived Alien Friends Act, a "notorious" and "temporary war measure" that "went unenforced," *Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J., concurring in part and concurring in the judgment), does not undermine noncitizens' due process rights against arbitrary detention.

Most importantly, even this infamous law did not authorize arrest before an order to leave the country—or detention to facilitate removal. *See* An Act Concerning Aliens, ch. 58, § 2, 1 Stat. 570, 571 (1798). Indeed, the Adams administration regarded the Act as inadequate because "the president was not authorized to seize and confine [noncitizens] while waiting for their departure or

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deportation." James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 163 (1956).

While some of the Act's proponents claimed that noncitizens lacked rights because the Constitution was a "compact … made between citizens only," 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834), Madison and others ably refuted those claims by invoking constitutional text and the common law. The Fifth Amendment, they stressed, "speaks of persons, not of citizens," so its protections "extend equally to aliens and natives." *Id.* at 1956, 2013. In this regard, "the Constitution expressly excludes any …. distinction between citizen and alien." *Id.* at 2012. Madison explained that noncitizens in the United States were "under a local and temporary allegiance, and entitled to a correspondent protection," including "rights under the Constitution," and therefore were shielded from any "arbitrary and unusual process." 4 *Elliot's Debates* 546, 556-57, 559.

The Alien Friends Act "left no permanent traces in the constitutional jurisprudence of the country." 3 Story, *supra*, § 1288. And the citizens-only account of constitutional rights offered by some of its proponents was further repudiated after it became the basis of *Dred Scott v. Sanford*, 60 U.S. 393 (1857). That decision applied the same "social contract reading of the Constitution" to define constitutional rights as privileges of the citizen. Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 940 (1991); *see also* Sarah Cleveland, *Powers*

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Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Texas L. Rev. 1, 22 & n.103, 92-93 (2002). The Fourteenth Amendment rejected *Dred Scott*'s definition of citizenship but conspicuously extended its due process guarantee to every "person," thus "unequivocally rejecting [both] the Alien Friends Act and *Dred Scott*." Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 730, 728 (1995).

II. Presence in the United States, Not Immigration Status, Confers Due Process Rights Against Arbitrary Detention.

According to the government, noncitizens challenging arbitrary detention who have not been admitted to the country can claim only "whatever process is expressly conferred by Congress." Appellant Br. 3 (quotation marks omitted). Not so. The right to bodily liberty is not a matter of legislative grace, and the Fifth Amendment protects everyone present in this country, regardless of admission status, from arbitrary deprivations of that right.

Regardless of a noncitizen's immigration status or entitlement to remain in this country, the government lacks "absolute, arbitrary power" to deprive that person of liberty. *Kaoru Yamataya*, 189 U.S. at 87, 101. Whenever "the liberty of an individual is at stake," citizen or noncitizen, the "procedure by which he is deprived of that liberty" must "meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (addressing deportation).

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That rule derives from the Fifth Amendment, not from Congress. Regardless of whatever legislation prescribes, for instance, "[d]eportation without a fair hearing … is a denial of due process," *Vajtauer v. Comm'r of Immigr.*, 273 U.S. 103, 106 (1927); *accord Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920), and the government must even establish its case by clear and convincing evidence, *Woodby v. INS*, 385 U.S. 276, 284 (1966). The void-for-vagueness doctrine, "an 'essential' of due process," limits the application of vague statutes in removal proceedings the same way it does in criminal prosecutions. *Dimaya*, 584 U.S. at 155 (plurality op.). Even under a wartime statute with virtually no protections—the Alien Enemies Act—the Fifth Amendment entitles noncitizens to "notice and an opportunity to challenge their removal." *J.G.G.*, 604 U.S. at 672-73.

These due process rights do not require admission. They shield all people within "our geographic borders," *Zadvydas*, 533 U.S. at 693, even if their presence here is "unlawful" or "transitory," *Diaz*, 426 U.S. at 77.

The government cites *Thuraissigiam* to the contrary, but that case involved an alleged right to seek *admission*, not release from detention. The petitioner argued only that the relevant statute "violate[d] his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding." *Id.* at 138. He requested "a new opportunity to apply for asylum" but "made no mention of release from custody." *Id.* at 115 (quotation marks omitted). Instead of

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"ask[ing] to be released," he "sought entirely different relief: vacatur of his removal order and an order directing [DHS] to provide him with a new … opportunity to apply for asylum." *Id.* at 117-18 (quotation marks omitted). Rejecting that claim, *Thuraissigiam* merely reconfirmed that "an alien seeking initial admission to the United States … has no constitutional rights *regarding his application*." *Id.* at 139 (quoting *Plasencia*, 459 U.S. at 32 (emphasis added)).

The choice whether to legally admit someone is the *only* context in which the Supreme Court has held that "decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 138 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)). And the entire discussion in *Thuraissigiam* focuses on that point alone: "For these reasons, an alien in respondent's position has only those rights *regarding admission* that Congress has provided by statute." *Id.* at 140 (emphasis added).

The government clearly errs, therefore, by conflating the right to secure release from arbitrary detention with the (non-existent) right to be admitted. *See* Appellant Br. 34-36. *Thuraissigiam* itself sharply distinguishes "contesting the lawfulness of restraint and securing release" from claiming a "right to enter or remain in a country." 591 U.S. at 117. That distinction is why habeas corpus may be used to seek the former relief but not the latter. *Id.* Admission is a privilege conferred by the government in its discretion; physical liberty is a "strictly natural"

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right, Blackstone, *supra*, at 134, protected at least since Magna Carta, 25 Edw. 1, c. 29 (1295), and expressly secured by the Fifth Amendment. As a result, even people who have been conclusively determined to lack any right to be in this country are still protected by due process from arbitrary imprisonment. *Wong Wing*, 163 U.S. at 238; *Zadvydas*, 533 U.S. at 693.

In short, noncitizens who have not been admitted to the United States lack due process claims only in regard to their admission. *See Thuraissigiam*, 591 U.S. at 138-39 ("the Constitution gives the political department of the government plenary authority *to decide which aliens to admit*" (emphasis added and quotation marks omitted)). The precedent on which *Thuraissigiam* relies is similarly precise on this issue. *See Nishimura Ekiu*, 142 U.S. at 661 (describing the judiciary's limited role regarding the "the admission of aliens"); *id.* (stating that a noncitizen's release into private custody pending resolution of her case did not change her status "so far as regarded her right to land in the United States"); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("[I]t is not within the province of any court … to review the determination of the political branch of the Government *to exclude* a given alien." (emphasis added)); *Plasencia*, 459 U.S. at 32 ("[T]he power to *admit or exclude* aliens is a sovereign prerogative." (emphasis added)).

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Across this entire line of cases stretching back a century, only one decision addresses detention at all, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and it did not involve denying an individualized risk assessment or confining without bail a person apprehended inside the United States. Mezei was denied reentry to the United States because he was deemed a national security threat, and he remained marooned on Ellis Island only because no other country would accept him. *Id.* at 208-09; *see id.* at 216 (describing the case as an "exclusion proceeding grounded on danger to the national security"). The Court's approval of Mezei's "continued exclusion on Ellis Island," *id.* at 215, on these idiosyncratic facts, in a national-security context, based on an individualized assessment of his dangerousness, does not imply that due process allows the government to indiscriminately arrest and imprison without bail every noncitizen in the country who was not properly admitted.

The other two cases the government cites in support of its position are no better than *Thuraissigiam*. In *Kaplan v. Tod*, the Court did not even construe the Fifth Amendment. The petitioner there challenged her deportation as *statutorily* unauthorized, and the Court ruled only that she "never has entered the United States *within the meaning of the law*." 267 U.S. 228, 231 (1925) (emphasis added); *see id.* at 230 (despite parole, she had not entered "within the meaning of the Act"). And *Landon v. Plasencia*, like *Thuraissigiam*, addressed a noncitizen's

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"right to admission." 459 U.S. at 35. While the Court noted that "once an alien gains admission to our country … his constitutional status changes," *id.* at 32, it did not say that *only* lawfully admitted people acquire due process rights. The Court has consistently and explicitly held the opposite. *Kaoru Yamataya*, 189 U.S. at 87; *Diaz*, 426 U.S. at 77.

III. Detention Without Bond Under 8 U.S.C. § 1225(b) Violates Due Process.

A. The *Glucksberg* test does not apply.

The government is plainly wrong about which due process framework applies here. Challenges to bodily imprisonment are not assessed under *Washington v. Glucksberg*, 521 U.S. 702 (1997), which requires identifying a "fundamental right" that generally may not be infringed "*at all*, no matter what process is provided." *Id.* at 721. The Supreme Court has never used that test in cases involving freedom from detention, including immigration cases.

Instead, the *Glucksberg* standard protects certain *other* "liberty interests," *id.* at 720, that are "unenumerated," *Dep't of State v. Muñoz*, 602 U.S. 899, 903 (2024). Because "[i]dentifying unenumerated rights carries a serious risk of judicial overreach," *id.* at 910, courts impose a demanding "threshold requirement" of identifying a "fundamental right" that is "deeply rooted in our legal tradition," *Glucksberg*, 521 U.S. at 722; *see Kerry*, 576 U.S. at 91-93.

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"Freedom from bodily restraint," however, is not an unenumerated right—it "has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). As Justice Scalia explained, the "personal liberty" originally safeguarded by due process centered on "the power of locomotion … without imprisonment or restraint." *Kerry*, 576 U.S. at 92 (quoting Blackstone, *supra*, at 134). Because freedom from confinement is the prototypical "liberty" that the Fifth Amendment expressly protects, *Glucksberg* is irrelevant. Indeed, the notion that the government can lock people behind bars without a trial or even a bail hearing whenever doing so is "rationally related to legitimate government interests," Appellant Br. 3 (quoting *Glucksberg*, 521 U.S. at 728), is absurd.

B. Mandatory detention is permitted only for noncitizens whom Congress deemed categorically dangerous based on their criminal convictions.

In *Demore v. Kim*, the Supreme Court upheld mandatory detention of a select group of "criminal aliens" under 8 U.S.C. § 1226(c). Neither *Demore*'s holding nor its reasoning supports mandatory detention of every "applicant for admission" under 8 U.S.C. § 1225(b). Rather, the case concerned "a special rule for aliens who have committed certain dangerous crimes." *Preap*, 586 U.S. at 396. *Demore* allowed Congress to require detention of this "subset of deportable criminal aliens," *Demore*, 538 U.S. at 513, 521, whom Congress deemed especially

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dangerous, based on extensive findings, and who already received the "full procedural protections" afforded in criminal prosecutions, *id.* at 525 n.9.

The provision addressed in *Demore* "sprang from a 'concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.'" *Preap*, 586 U.S. at 398 (quoting *Demore*, 538 U.S. at 513). "To address this problem, Congress mandated that aliens *who were thought to pose a heightened risk* be arrested and detained without a chance to apply for release on bond or parole." *Id.* (emphasis added). Upholding that provision, *Demore* repeatedly emphasized the legislative findings that supported Congress's judgment about this particular group of "criminal aliens."[3]

Critical to *Demore*, therefore, was Congress's determination that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," *Demore*, 538 U.S. at 520, justifying a special rule for this group. As the Court explained, Congress had evidence "suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable

[3] *See, e.g.*, *Demore*, 538 U.S. at 518 (citing Senate hearing and report); *id.* at 519 (citing DOJ and House reports); *id.* at 521 (referencing "studies presented to Congress"); *see also id.* at 518 ("Congress' investigations showed"); *id.* ("[o]ne study showed"); *id.* (citing additional Senate report); *id.* at 518-19 (citing additional House hearing); *id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected.").

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criminal aliens skipping their hearings and remaining at large." *Id.* at 528. "It was following those Reports that Congress … require[d] the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521.

None of the factors on which *Demore* relied supports mandatory detention under Section 1225(b). Such detention "does not apply narrowly to a small segment of particularly dangerous individuals," but instead reaches "broadly." *Zadvydas*, 533 U.S. at 691 (quotation marks omitted). Congress amassed no findings—as it did for "criminal aliens" under Section 1226(c)—that every person who was not properly admitted should be presumed dangerous or a flight risk. And detention under Section 1225 is not contingent on prior convictions "secured following full procedural protections" of the criminal justice system. *Demore*, 538 U.S. at 525 n.9.

Contrary to the government's assertion, *Carlson v. Landon*, 342 U.S. 524 (1952), did not "approve[] mandatory detention of aliens without requiring individual assessments." Appellant Br. 27. The statute in *Carlson* did not mandate detention of anyone: it gave the Attorney General "discretion" to either detain or release members of the Communist Party pending deportation hearings. 342 U.S. at 528 n.5 (quoting statute). But the Attorney General was "not left with untrammeled discretion as to bail." *Id.* at 543. Every denial of bail was subject to

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judicial review for abuse of discretion, *id.* at 540, obligating the Attorney General to "justify his refusal of bail" on an individualized basis, *id.* at 543.

In *Carlson*, the Court upheld the Attorney General's discretionary denial of bail to several "active alien communists," *id.* at 526, based on Congress's "legislative judgment," 342 U.S. at 543, that such individuals endangered the nation. "[B]ecause of Congress' understanding of their attitude toward the use of force and violence" to "accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention." *Id.* at 541; *see Demore*, 538 U.S. at 525 (explaining that *Carlson* "concluded that the denial of bail was permissible 'by reference to the legislative scheme to eradicate the evils of Communist activity'" (quoting *Carlson*, 342 U.S. at 543)).

Crucially, even this discretionary power to deny bail on an individualized basis was deemed constitutional only as applied to a narrow subgroup of noncitizens whom Congress deemed a unique threat to the nation. "Of course," *Carlon* noted, a "purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation." 342 U.S. at 538. And "[t]here [was] no evidence or contention that all persons arrested as deportable … for Communist membership [were] denied bail." *Id.* at 541-42.

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Reno v. Flores, 507 U.S. 292 (1993), is even more irrelevant here, *contra* Appellant Br. 37-38, because "freedom from physical restraint" was "not at issue," 507 U.S. at 302. *Reno* involved "alien *juveniles*" who had "no available parent, close relative, or legal guardian" to take them—and "juveniles, unlike adults, are always in some form of custody." *Id.* at 295, 302 (citation omitted). *Reno* simply approved a categorical rule that people "other than parents, close relatives, and guardians" are unsuitable custodians of minors. *Id.* at 313.

C. Due process requires a hearing to assess the need for a person's detention.

As *Carlson* and *Demore* suggest, indiscriminate detention of every noncitizen in the United States who qualifies as an "applicant for admission," 8 U.S.C. § 1225(b)(2)(A), violates the Due Process Clause.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. In "certain narrow circumstances," individuals "may be subject to limited confinement" without a criminal conviction. *Foucha*, 504 U.S. at 80. But because "liberty is the norm, and detention … without trial is the carefully limited exception," *id.* at 83 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)), the government typically may imprison people without a criminal trial only by persuading an impartial decisionmaker of the need for detention after a hearing.

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For instance, a hearing before a neutral decisionmaker is required before the government may detain criminal defendants before trial, either to ensure their presence, *Bell v. Wolfish*, 441 U.S. 520, 536 (1979), or protect the safety of others, *Salerno*, 481 U.S. at 741. The same is required before the government may involuntarily commit people with dangerous mental illnesses. *Addington v. Texas*, 441 U.S. 418, 433 (1979). So too before it may detain people who are found incompetent to stand trial, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), or not guilty by reason of insanity, *Foucha*, 504 U.S. at 86. Each of these scenarios requires a hearing in which the government must demonstrate the need for detention.

These decisions did not artificially narrow the right to physical liberty—as the government urges—by asking whether there was an established right to freedom *from the particular type of detention at issue*. That framing of the issues would allow the government to invent new forms of imprisonment without trial that no one could challenge—as long as the imprisonment was "rationally related to legitimate government interests." Appellant Br. 3. That is the opposite of what the Due Process Clause was designed for. *See supra* at 11.

Detention "*for any purpose* constitutes a significant deprivation of liberty," *Foucha*, 504 U.S. at 80 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983) (emphasis added)), and noncitizens' vulnerability to removal does not mean they

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have any less interest in bodily freedom than citizens. *See Wong Wing*, 163 U.S. at 235 (approving of immigration detention precisely because of its similarity to pretrial criminal detention). The Supreme Court routinely draws on non-immigration precedent when defining the due process rights of noncitizens pending removal. *E.g.*, *A.A.R.P. v. Trump*, 605 U.S. 91, 94-95 (2025); *J.G.G.*, 604 U.S. at 673; *Zadvydas*, 533 U.S. at 690; *Flores*, 507 U.S. at 314; *Woodby*, 385 U.S. at 285 & n.18; *Wong Wing*, 163 U.S. at 235. Likewise, the Court repeatedly draws on immigration precedent when defining the process due to citizens. *E.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 362-63 & n.19 (1996); *Salerno*, 481 U.S. at 749; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970).

Indeed, due process typically requires a hearing to deprive someone of *any* "particularly important individual interests." *Addington*, 441 U.S. at 424. That applies not just to the various forms of preventive detention cited above but also to deportation, *Woodby*, 385 U.S. at 277, denaturalization, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), expatriation, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), and suspension of essential welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970); *see Cooper*, 517 U.S. at 363 (explaining the procedural

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safeguards required by due process in civil proceedings whenever "the individual interests at stake" are "particularly important" (quotation marks omitted)).

While the government emphasizes the significance of immigration enforcement, the Due Process Clause requires individual hearings even to detain people accused of "the most serious of crimes," including violent felonies "for which the sentence is life imprisonment or death." *Salerno*, 481 U.S. at 747. In that context, "the Government interests are overwhelming," and "Congress specifically found that [such defendants] are far more likely to be responsible for dangerous acts in the community after arrest." *Id.* at 750. Still, preventive detention requires a hearing. *Id.*

Securing release from unconstitutional detention does not confer any right to remain in the United States. *See Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908). And individuals who violate the terms of their supervised release can be reincarcerated. *Zadvydas*, 533 U.S. at 696. But due process does not allow noncitizens living in this country to be arrested and imprisoned without even a bond hearing simply because of their admission status.

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CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,234 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 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 typeface using 14-point Times New Roman font.

Executed this 16th day of September, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on September 16, 2026.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 16th day of September, 2026.

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