No. 26-50183

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ignacio Sosnava Rodriguez,

Petitioner – Appellee

v.

Sylvester M. Ortega, in his official capacity as Director of the San Antonio Field Office of ICEs Enforcement and Removal Operations; Markwayne Mullin, Secretary, U.S. Department of Homeland Security; Todd Wallace Blanche, Acting 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, Acting 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.

Miguel Vergara, in his official capacity as the 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
No. 1:26-cv-000273
No. 1:26-cv-00309
No. 1:26-cv-00384

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Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed non-governmental persons may 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.

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INTRODUCTION

As this Court rightly held, Congress in §1225 mandated detention for all those that illegally entered the United States and were never admitted. *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026). By mandating detention, §1225 represents a congressional judgment that both flight risk and dangerousness are completely irrelevant as to whether applicants for admission should be detained under §1225(b)(2) during the pendency of their removal proceedings.

It is black-letter law that procedural "due process does not entitle [petitioners] to a hearing to establish a fact that is not material under the [governing] statute." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). And that is precisely what Petitioners seek here—a hearing on factors that Congress, in exercising its extensive powers to regulate immigration, deliberately made immaterial. Petitioners' due process claims are thus necessarily *substantive* in nature, but they do not remotely satisfy the exacting standard required for such claims.

Rather than attempting to satisfy the actual test for substantive due process claims, Plaintiffs' answering brief rests on a fundamental sleight of hand. While branding (A.B.1) the government of engaging in a "radical reimagining of the most fundamental liberty interest—freedom from

imprisonment," that "reimagining" accusation is best directed at a mirror. Petitioners were free from imprisonment in their home country. They can rapidly be free there again if they would voluntarily depart the United States. As the Seventh Circuit rightly observed, "[a]n alien in [Petitioners'] position can withdraw [their] defense of the removal proceeding and return to [their] native land, thus ending [their] detention immediately. [They] ha[ve] the keys in [their] pocket." *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999). So if Petitioners actually desire to be "free[] from imprisonment," they need only ask—the Government will happily allow them to return to their home countries where they could enjoy the freedom from detention they did before their illegal entries.

But what Petitioners actually seek is radically different. They were utterly without legal basis to enter the U.S. They did so anyway. And in so doing, they committed the *crime* of illegal entry. *See* 8 U.S.C. §1325(a). Yet despite having no lawful entitlement whatsoever to enter the United States, Petitioners assert they have a "fundamental liberty interest" to be released into the United States. The Due Process Clause, in other words, entitles them to a hearing on whether they can continue to enjoy the fruits of their criminal acts—*i.e.*, continued freedom within the United States. Petitioners' claims

are akin to those of a thief claiming a due process right to a hearing as to whether he can retain "his" pilfered property. No such right exists.

Petitioners attempt to circumvent those governing substantive due process standards by pointing to their generalized interest in "freedom from detention" as being *sui generis*. But substantive due process demands a "careful description of the asserted fundamental liberty interest" being asserted. *Dep't of State v. Munoz*, 602 U.S. 899, 910 (2024). If Petitioners would depart voluntarily from the United States, they could be free from detention tomorrow. This Court thus must analyze Petitioners' asserted "fundamental liberty interest" for what it specifically is: a putative entitlement to being at liberty in a country they illegally entered and have no right to remain within. No such right is "objectively, deeply rooted in this Nation's history and tradition." *Id.* And while Petitioners rely extensively on *Zadvydas v. Davis*, 533 U.S. 678 (2001) as supporting such a fundamental right to a bond hearing evaluating flight risk and dangerousness, *Zadvydas* does not mandate hearings on those two factors as a prerequisite to continued detention. And if the lack of bond hearings on flight risk/dangerousness is constitutionally sufficient for §1231, it suffices for §1225 too.

Moreover, Petitioners' argument (A.B.2) that the entry fiction does not apply—*i.e.*, that they "entered the country years ago and were encountered by immigration authorities in the interior"—flirts with the boundaries of fair argument. The Supreme Court has unequivocally held otherwise. In *Kaplan v. Tod*, the Supreme Court applied the entry fiction doctrine to an alien who had been *lawfully* present in the United States for *nine years* and was undisputedly in the interior of the United States—where she lived with her naturalized-citizen father. 267 U.S. 228, 230-31 (1925). But the Supreme Court *still* applied the entry fiction to hold that, because she was never *admitted* (rather than being paroled), for due process purposes she must be "regarded as stopped at the boundary line." *Id.*

The only difference between the *Kaplan* plaintiff and Petitioners is that the former had been *lawfully* paroled into the United States, instead of illegally barging past its borders, as the latter (euphemisms aside) did. Allowing Petitioners to fare constitutionally better by virtue of committing the crime of illegal entry is as legally flawed as it is morally perverse.

Finally, Petitioners' reliance on the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) fails. Because Petitioners' claims sound in *substantive* due process (and fail as such), *Mathews* does not apply. And even if procedural due process was at issue, the well-established entry fiction

precludes Petitioners from relying on the Due Process Clause to acquire additional procedural rights beyond those provided by Congress. But even if the *Mathews* balancing test applies, Petitioners' claims fail under it.

This Court should reverse.

ARGUMENT

I. Petitioners' Claims Fail As A Matter Of Substantive Due Process.

The district courts held that *procedural* due process entitles Petitioners' to a bond hearing to assess whether they are flight risks or dangerous. O.B.15-19. But those decisions are incompatible with *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), which holds that claims, like Petitioners', that seek a hearing to adjudicate facts irrelevant under the statutory scheme sound in *substantive* due process. O.B.25-26. Nothing in Petitioners' answering brief allows them to escape *Doe*'s framework. And Petitioners' claims fail under the governing tests of substantive due process claims.

A. Petitioners' Claims Sound in Substantive Due Process.

1. *Doe* dictates that Petitioners' claims sound in substantive due process. That case held that "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." 538 U.S. at 8. If "the facts

they seek to establish in that hearing" are *not* relevant to the statutory scheme, but instead the claim is that the Due Process Clause *makes them* relevant, then the claim "'must ultimately be analyzed' in terms of substantive, not procedural, due process." *Id.* at 7-8 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion)).

This analytical framework is confirmed by *Washington v. Harper*, 494 U.S. 210 (1990). *Harper* involved a Washington regulation allowing the State to subject a psychiatric patient to "involuntary treatment" with "antipsychotic drugs … only if he (1) suffers from a 'mental disorder' and (2) is 'gravely disabled' or 'poses a likelihood of serious harm' to himself, others, or their property." *Id.* at 215. The regulation entitled the patient to certain procedures (including a hearing) to test whether those criteria were met. *Id.* at 215-16.

In reviewing the State court's decision, the Supreme Court noted that "[t]he Washington Supreme Court gave its primary attention to the procedural component of the Due Process Clause," but "did more than establish judicial procedures for making the factual determinations called for by [the regulation]"; "[i]t required that a different set of determinations than those set forth in the [regulation] be made as a precondition to medication

without the inmate's consent." *Id.* at 219-20. Thus, the Court explained, the State court's "decision … has both substantive and procedural aspects":

> [T]he substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient.

Id. at 220. The Court separately evaluated each due process theory—first rejecting the "*substantive* standards are deficient," *id.* at 227, and then rejecting the State court's holding that additional *procedures* were required, *id.* at 228-36.

Here, the facts Petitioners "seek to establish" at a bond hearing—that they are not flight risks or dangerous—are *not* "relevant" under §1225(b)(2)(A), because Congress has, as a policy choice, *mandated* detention regardless of flight risk or dangerousness. That is necessarily a *substantive* due process claim, because it seeks to substitute Petitioners' preferred substantive policy for Congress's.

2. Petitioners say that *Doe* is inapplicable because "[t]he interest Doe sought to protect bears little resemblance to the fundamental right to physical liberty Petitioners assert." A.B.32; *see also id.* at 33 (similar). That makes no sense. Because due process is not a freestanding vehicle to oppose every government action, in all procedural due process cases, the plaintiff

must show that he has been "deprived" of "life, liberty, or property" without constitutionally adequate procedures. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). To be sure, what procedures are required may vary depending on the nature of the liberty interest at stake, *Harper*, 494 U.S. at 220, but the strength of the liberty interest does not alter the character of a procedural due process claim (and Petitioners cite no case suggesting it does).

That is why *Doe* deemed "it unnecessary" to decide whether Doe had been "depriv[ed] of a liberty interest" and resolved the case "even assuming, *arguendo*, that respondent has been deprived of a liberty interest." 538 U.S. at 7. The existence and magnitude of the liberty interest at stake was simply irrelevant to *Doe*'s holding that the claim was necessarily substantive in nature. So if a plaintiff's claim is that due process entitles him to a hearing, he must show that the things he wishes to establish in the hearing "are relevant under the statutory scheme," *id.* at 8—regardless of the specific liberty interest at stake. Here, flight risk and dangerousness are simply not relevant to §1225(b)(2)(A); therefore, Petitioners have no *procedural* due process right to a hearing to assess those factors. O.B.50-55.

This same misconception underlies Petitioners' cursory treatment of *Reno v. Flores*, 507 U.S. 292 (1993), and *Michael H. v. Gerald*, 491 U.S. 110.

See A.B.33 n.13; O.B.28. *Michael H.*, in particular, dispenses with Petitioners' suggestion that these cases are different because the Court *first* "rejected" the liberty interest and then "also rejected the … related claim that procedural due process required before those interests could be infringed." A.B.33 n.13. In *Michael H.*, the Court *first* held that the plaintiff's challenge sounded in substantive (rather than procedural) due process and subsequently addressed whether the liberty interest satisfied that doctrine. *Id.* at 121. Critically, *Michael H.* categorically forecloses Petitioners' argument that they may use procedural due process to challenge the substance of the statute. *E.g.*, A.B.22 ("[T]hey have a fundamental liberty interest that the government may only deprive them of if constitutionally adequate procedures demonstrate detention is *substantively* valid" (emphasis added)); *id.* at 48 ("Petitioners' requested additional procedural protections [] ensure the deprivation of their strong liberty interests was justified."). There, the Court deemed the plaintiff's challenge to be a substantive due process claim *even though* the challenge was framed in terms of a right to a "hearing on whether, in the particular circumstances of his case, California's policies would best be served by giving him parental rights." *Michael H.*, 491 U.S. at 120. Even so, the Court treated the claim for what it was: a substantive due process claim. *Id.* at 120-21.

Petitioners thus grossly mischaracterize the Government's interpretation of *Doe* as advocating "a general principle that statutes dictate the reach of the Due Process Clause." A.B.34. Nothing in *Doe* displaces the role of due process in testing the substantive criteria of statutory enactments and ensuring the adequate procedures to ensure that an alien falls within those criteria. What a petitioner cannot do, however, is use *procedural* due process to evade the exacting standards of the substantive-due-process framework—as Petitioners seek to do here.

The cases Petitioners cite are entirely consistent with the Government's position. A.B.34-36. Petitioner says that *Foucha v. Louisiana*, 504 U.S. 71 (1992), "required a civil commitment hearing in which the government proved not just danger, but also the *extra-statutory* criterion of present mental illness…." *Id.* at 80 (emphasis added). True—but as a matter of *substantive* due process. *Id.* *Foucha* never held that a plaintiff had a *procedural* due process right to a hearing to evaluate "extra-statutory criterion." A.B.34.

The same is true for the Supreme Court's decision in *Landon v. Plascencia*, 459 U.S. 21 (1982), and *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1952). The only due process issue in *Landon* was what procedures were required to evaluate whether a lawful permanent resident effected an

"entry." *Landon*, 459 U.S. at 32-36. The alien never challenged the *substantive criteria* of the statute and, unlike in *Doe*, the procedures were being requested to establish "facts … relevant under the statutory scheme." *Doe*, 538 U.S. at 8. The same is true of *Kwong Hai Chew* which, in any event, merely applied the canon of constitutional avoidance and never addressed the constitutional question. 344 U.S. at 602-03.

The same goes for this Court's decision in *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010). Petitioner says this case "distinguish[ed] *Doe*" from cases where "sex-offender conditions are not tied solely to individuals' prior convictions, which are necessarily subject to 'process [that] meets constitutional muster." A.B.35-36. Whatever distinction Petitioners are trying to draw does them no good. *Meza* addressed whether the procedures made available by state law were constitutionally adequate to establish that a person had engaged in sexual assault. 607 F.3d at 396-97, 399, 401-11. The alien in that case did not seek a hearing to consider facts that were irrelevant under State law governing when a defendant must register as a sex offender or engage in sex offender therapy. That aligns perfectly with *Doe*.[1]

[1] Petitioners argue that courts "regularly decline to apply *Doe* where such conditions implicate fundamental liberty interests." A.B.35. They cite only one out-of-circuit district court case—*Bleeke v. Server*, 2010 WL 299148 (N.D. Ind. Jan. 19, 2010)—and that case concluded that the facts the

B. Flight Risk and Dangerousness Are Not Relevant to §1225(b)(2)(A).

Unable to avoid *Doe*, Petitioners make the astounding argument that their due process claims satisfy *Doe*'s limitations on procedural due process claims because, they say, "flight risk and danger are central to [§1225(b)(2)(A)]." A.B. 38; *see also id.* at 36. That is so, they say, because preventing flight and danger is the "purpose" of immigration detention (including under §1225(b)(2)(A)). A.B.37, 38.

That is clearly not what *Doe* means. The reason "current dangerousness" was irrelevant to "the statutory scheme" in *Doe* was because the Connecticut law *itself* made sex offender registration depend solely on "the fact of previous conviction." 538 U.S. at 4, 7 (citing Conn. Gen. Stat. §§ 54-257, 54-258 (2001)). That is why *Doe* refers to "the statutory scheme," rather than "the statute's purpose." 538 U.S. 1. Moreover, if Petitioners' strained reading were correct and a statute's "purpose" were the touchstone, *Doe* would have come out the other way. After all, the "purpose" of requiring persons "previous[ly] convict[ed]" of a sex offense to register as sex offenders was surely motivated by a belief that they are "currently dangerous." *Id.* at 4. Nonetheless, the Court held

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defendant wished to test at a hearing *were* relevant to the statutory scheme. *Id.* at *12.

that "current dangerousness" was not "material to the [] statutory scheme." *Id*.

Petitioners also suggest that the parole authority in §1182(d)(5)(A) makes flight risk and dangerousness relevant to §1225(b)(2)(A). A.B.38. But Section 1182 is an entirely different statute; the fact that flight risk and dangerousness are relevant to whether the Executive may exercise that distinct statutory power does not make those factors relevant to §1225(b)(2)(A). That is true even though aliens subject to §1225(b)(2)(A) may obtain parole under §1182(d)(5)(A). Critically, parole is *entirely* within the Executive's discretion; the Executive is under no obligation either to *consider* an alien detained under §1225(b)(2)(A) for parole, or to *grant* any alien parole. *See* 8 U.S.C. §1182(d)(5)(A) ("The Secretary of Homeland Security may … in his discretion parole into the United States….").

Finally, Petitioners' theory proves far too much. If they are correct that flight risk and dangerousness are "relevant" to a statutory detention scheme, within *Doe*'s meaning, because their prevention is a "purpose" of detention, then aliens subject to *any other* immigration detention statute—including §1226(c)—would likewise have a procedural due

process right to a bond hearing to assess flight risk and dangerousness. The Supreme Court has rejected that position. *Demore*, 538 U.S. 510.

C. Petitioners' Substantive Due Process Challenges to Their Mandatory Detention Fail Under Rational Basis Review.

Petitioners' claims thus sound in *substantive*, not procedural, due process. And because Petitioners cannot satisfy the substantive-due-process test for triggering strict scrutiny, their claims here fail because §1225(b)(2)(A) easily passes rational basis review. O.B.32-36.

1. Petitioners do not even pretend to be able to satisfy the standard for identifying a fundamental right and triggering heightened scrutiny. *See* O.B.32-33. They assert a "fundamental liberty interest" in "freedom from imprisonment," A.B.22, relying on a series of cases addressing civil detention of U.S. citizens, A.B.23 (citing *Addington v. Texas*, 441 U.S. 418 (1979), *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *United States v. Salerno*, 481 U.S. 739 (1987)). But that is hardly a "careful description of the asserted fundamental liberty interest." *Munoz*, 602 U.S. at 910. The Supreme "Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens," *Demore v. Kim*, 538 U.S. 510, 522 (2003) (collecting cases), so any right to "freedom from detention" must be tailored to the immigration context. But even that

is not sufficiently specific: Petitioners' liberty interest is not in "freedom from imprisonment," because they can achieve that end by departing voluntarily: "[A]n alien detained under [§1225(b)(2)(A)] 'has the keys in his pocket' and can 'end[] his detention immediately' by withdraw[ing] his defense … and return[ing] to his native land." *Parra*, 172 F.3d at 958. Thus, the "fundamental right" Petitioners actually posit is a right for *illegal aliens* to be at liberty *in the United States* pending their removal proceedings.

Indeed, Petitioners' sleight of hand here—trying to leverage a general freedom from detention into a freedom to be at liberty *inside the United States*—is much like the failed attempt at issue in *Munoz*. There, to trigger strict scrutiny the plaintiff tried to define the right at too high a level of generality: *i.e.*, the "fundamental right to marriage." 602 U.S. at 910. That did not suffice; as the Supreme Court instead recognized the claimed right for what it was: the purported "right to *reside with her noncitizen spouse in the United States*." *Id.* (emphasis in original). Similarly, Petitioners cannot rely on the abstract interest in freedom from detention generally. Instead, as in *Munoz*, the "where" matters: the asserted right here is thus freedom from detention "*in the United States*." *Id.*

That purported right also is indisputably not "objectively, deeply rooted in this Nation's history and tradition," *Munoz*, 602 U.S. at 910—and

Petitioners do not seriously contend that it is. As the Court explained in *Demore*, 538 U.S. 510, "prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings." *Id.* at 523 n.7. And that practice is reflected in "th[e] Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Id.* at 526.

2. Petitioners' substantive due process claim is thus subject to rational basis review, and *Demore* and the cases on which it relied make crystal clear that mandatory detention is consistent with due process without individualized assessments for flight risk or dangerousness. 538 U.S. at 514; *Flores*, 507 U.S. at 306 (recognizing Congress' "authority to detain aliens suspected of entering the country illegally pending their deportation hearings"); *see* O.B.33.

Trying to evade *Demore*, Petitioners mischaracterize it as a "narrow exception" (A.B.25) to a requirement of individualized assessments for flight risk or dangerousness, because it recounted the "voluminous record" before Congress demonstrating criminal aliens' dangerousness and flight risk. A.B.25-26-29. Even if Petitioners were correct (and they are not) that *Demore* is somehow limited to "criminals," it would do them no good. Despite Petitioners' attempts to euphemize their conduct, each of them

concededly committed a criminal offense by evading immigration officials and entering the country. A.B.47 n.21 (citing 8 U.S.C. §1325). That criminal act, and their subsequent years of remaining in this country while evading immigration authorities and never trying to obtain lawful status, demonstrates each Petitioners' proclivity *and ability* to break the law and evade immigration proceedings.

In reality, Petitioners grossly misread *Demore*. To be sure, *Demore* noted the evidence that "failure to detain" criminal aliens inhibited their deportation, 538 U.S. at 519, but the Court's *legal analysis* did not turn on the evidentiary record. Instead, the Court based its holding on established precedent recognizing Congress's sweeping power to regulate in the context of immigration, *id*. at 521-22, and "th[e] Court's longstanding view that the Government may constitutionally detain deportable aliens"—not just criminal aliens—"during the limited period necessary for their removal proceedings," *without* individualized assessments of flight risk or dangerousness, *id*. at 523-26 (discussing *Carlson v. Landon*, 342 U.S. 524 (1952) and *Reno v. Flores*, 507 U.S. 292 (1993)).

Indeed, *Demore*'s reliance on *Carlson* and *Reno* refutes Petitioners' argument that *Demore* requires a voluminous evidentiary record to justify alien detention pending removal proceedings absent an individualized

assessment. *Carlson* addressed the "detention of aliens who were deportable because of their participation in Communist activities," and the Court held that the Government would detain those aliens, without an individualized assessment, solely "*by reference to the legislative scheme*." 342 U.S. at 543 (emphasis added); *see Demore*, 538 U.S. at 524-25 (discussing same). That was true, moreover, even though one of the aliens in *Carlson* had "a specific finding of nondangerousness." *Demore*, 538 U.S. at 525. And *Reno* emphasized that Congress may employ "reasonable presumptions *and generic rules*" when legislating with respect to aliens. 507 U.S. at 305 (emphasis added).

The Eighth Circuit has correctly rejected Petitioners' cramped reading of *Demore* in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024). There, the court of appeals addressed a due process challenge to the duration of detention under §1226(c). *Id.* at 930-31. Relying on *Demore*, *Banyee* held that "[t]he rule has been clear for decades" that "'detention during deportation proceedings is constitutionally valid.'" *Id.* at 931 (quoting *Demore*, 538 U.S. at 523) (alterations omitted). But while Petitioners themselves cite *Banyee* (A.B.12), they do not explain how their arguments could be reconciled with it.

If this were not enough, *Zadvydas* itself—a precedent on which Petitioners pervasively rely—disproves Petitioners' theory that a statutory detention mandate satisfies due process only if Congress has built an extensive record that counts as "a sufficiently individualized assessment for the 'subset of'" of aliens covered. A.B.26-27.

Zadvydas addressed a due process challenge to the length of detention under §1231, which authorizes the detention of many aliens with final orders of removal until their removal occurs. 8 U.S.C. §1231(a)(1)(A), (2)(A), (6). The Supreme Court concluded that *indefinite* detention would raise due process concerns, and so it read into §1231 a "reasonableness" limitation on the length of detention and adopted a presumption that detention becomes unreasonable after 6 months. 533 U.S. at 688-701. Critically, *Zadvydas* never questioned the constitutionality of detention without a bond hearing under §1231, even though §1231—unlike §1226(c)—is not limited to criminal and national security threat aliens. Indeed, even as construed by *Zadvydas*, §1231 does not *ever* require a bond hearing—only an assessment of the individualized prospect of removal. Thus, *Zadvydas* directly contradicts Petitioners' theory that immigration-based detention always requires individualized consideration of flight risk and dangerousness.

As Petitioners acknowledge, §1231 applies "equally to 'particularly dangerous individuals' *and* all other noncitizens 'ordered removed for many and various reasons.'" A.B.30 (quoting *Zadvydas*, 533 U.S. at 691, 697); *see* 8 U.S.C. §1231(a)(6) (citing §1182)). And yet, *Zadvydas* deemed such detention presumptively *constitutional* even though an individual alien's flight risk or dangerousness are irrelevant to the analysis of whether such detention is and remains constitutionally permissible, and without any suggestion that a "voluminous record" (A.B.26) is required providing special justification for the detention of literally *all* aliens pending their removal.

Not that such evidence does not exist. As this Court recently recognized in *Buenrostro-Mendez*, "the Department of Justice Inspector General found in 1997 that 'when aliens are released from custody, nearly 90 percent abscond and are not removed from the United States.'" 166 F.4th at 508 (citing 62 Fed. Reg. at 10323). As the Inspector General's report states, "detention is key to deportation," and "only about 11 percent of the nondetained aliens … left the country." Office of Inspector General, INS, *Deportation of Aliens After Final Orders Have Been Issued* (Mar. 1996) ("OIG Report") at https://perma.cc/JA5M-VU8P. And "[t]hat situation exists today on a much larger scale." *Buenrostro-Mendez*, 166 F.4th at 508. Petitioners nitpick the OIG report because it "refers generally to noncitizens

with final orders," does not "disaggregate[]" data, and notes that the 11 percent rate is "attribute[able] … to several factors." A.B.29-30. They cannot, however, dispute its basic contention that "detention is key to deportation." Nor can they seriously dispute that aliens like Petitioners frequently abscond rather than present at their removal proceedings, and that this problem "exists today on a much larger scale" than it did in 1997. *Buenrostro-Mendez*, 166 F.4th at 508.

3. Petitioners' substantive due process challenge to mandatory detention under §1225(b)(2)(A) is thus foreclosed by Supreme Court precedent. That suffices to reject it. But the sweeping consequences of adopting Petitioners' due process theory further supports that outcome. Petitioners assert that mandatory detention without an individualized assessment for flight risk or dangerousness violates due process absent a "voluminous record" that (somehow) substitutes for an "individualized assessment." A.B.26-27. That theory would require the *facial* invalidation, not only of §1225(b)(2)(A), but of multiple other detention statutes. For example, §1225(b)(1) mandates detention of aliens subject to expedited removal, *see Jennings v. Rodriguez*, 583 U.S. 281, 302-03 (2018).—a category that includes aliens arriving in the United States and those present in the United States for up to two years who have not been admitted or

paroled, regardless of criminality. 8 U.S.C. §1225(b)(1). Likewise, §1231 mandates detention during the removal period of aliens subject to final orders of removal—again, regardless of criminality. *Id*. §1231(a)(2)(A). Neither statute requires an individualized assessment of flight risk or dangerousness as a predicate for detention. Under Petitioners' theory, these statutes too are facially unconstitutional—a result that cannot be squared with *Zadvydas*. *Supra*, pp. 19-20.

* * *

Ultimately, this Court should reject Petitioners' effort to facially invalidate §1225(b)(2)(A) through a substantive due process challenge disguised as a procedural due process claim. The Supreme Court's decision in *Doe* governs the claims that sound in procedural due process and Petitioners' claims do not fit. And established Supreme Court precedents dispense with their substantive due process claim. The Court need decide no more than this to decide these appeals in the Government's favor.

II. Petitioners' Claims Fail Even Under Procedural Due Process.

A. Petitioners Cannot Rely on the Due Process Clause to Mandate Additional Procedures Because They Have Never Been Admitted to the Country.

Even if Petitioners claims did sound in procedural due process, they remain meritless. As the Government has explained, for "more than a century," the rule has been that for aliens who have never "'been admitted

into the country pursuant to law,'" '"the decisions of executive and administrative officers, acting within the powers expressly conferred by Congress, are due process of law.'" *DHS v. Thuraissigiam*, 591 U.S. 103, 138 (2020) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)). Because Petitioners have indisputably never been admitted to the United States, they have no procedural due process rights beyond those afforded by the INA—which does not include a bond hearing. O.B.29-32.

Petitioners agree that aliens who are encompassed by the so-called "entry fiction" have no procedural due process rights beyond those provided by statute. A.B.40-41. They contend, however, that the relevant threshold for additional due process rights is not "admission" but physical entry and presence, and that "the 'entry fiction' does not apply to noncitizens who "are within the United States after an entry, irrespective of its legality.'" A.B.42; *see also id.* at 39, 41, 43-44. But the very case Petitioners quote states that an alien's presence in the country "pending determination of his admissibility" does not "legally constitute an entry though the alien is physically within the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). So while Petitioners may wish to draw the line at physical entry, the Supreme Court has instead drawn the line at admission: only "*once an alien gains admission* to our country and begins to develop the ties that go

with permanent residence [does] his constitutional status change[]." *Landon*, 459 U.S. at 32.[2] Put simply, an alien "does not become" entitled to greater procedural protections "by an attempt to enter, forbidden by law." *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

That much is confirmed by *Kaplan v. Tod*, 267 U.S. 228 (1925), which held that a child paroled into the care of relatives *for nearly nine years*—but never admitted—must be "regarded as stopped at the boundary line" and "had gained no foothold in the United States." *Id.* at 230-31; *see also Nishimura Ekiu*, 142 U.S. at 660 (aliens who have "no[t] even been admitted into the country pursuant to law … the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law"), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)).

Petitioners try to distinguish *Kaplan* and these other cases on the theory that they involved aliens who were paroled into the United States. A.B.44-45. That directly undercuts Petitioners' theory that physical entry is the relevant line. Aliens who are paroled into the country—like in *Kaplan*—have clearly physically entered and are present in the United States. And yet,

[2] Petitioners cite cases that identify how to "[d]etermin[e]" whether a person has effected "entry." A.B.42. Because the relevant fact is "admission," not "entry," those cases have no bearing here.

the Supreme Court held that even after years of physical presence in the country, the paroled alien has "gained no foothold in the United States." *Kaplan*, 267 U.S. at 230-31.[3]

Thuraissigiam confirms that admission"—*i.e.*, "lawful entry," not the fact of entry alone—is the governing dividing line. O.B.29. Petitioners try to limit *Thuraissigiam* to its facts because that alien "was apprehended immediately [upon] crossing the border." A.B.43-44. But *Thuraissigiam* was not so limited. It emphasized and reaffirmed the broader principle that "[a]n alien who tries to enter the country illegally is treated as an 'applicant for admission,'" and "aliens who arrive at ports of entry—*even those paroled elsewhere in the country for years pending removal*—are 'treated' for due process purposes 'as if stopped at the border." 591 U.S. at 139-40 (emphasis added). Petitioners also argue that *Thuraissigiam* is inapplicable because it "relied on the entry fiction to find [the alien's] procedural due process rights 'regarding his *admission*' were limited to what the statute provided, with no discussion of rights to physical liberty." A.B.44 (quoting *Thuraissigiam*, 591 U.S. at 140).

[3] Petitioners cite *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), but that case involved "a lawful permanent resident of the United States." *Id.* at 591. They also cite *Yamataya v. Fisher*, 189 U.S. 86 (1903), which merely employed the canon of constitutional avoidance, *id.* at 100, and, in any event, predates both *Kaplan*, *Landon*, and *Thuraissigiam*.

But the cases on which *Thuraissigiam* relied did address and involve aliens in detention. *See Shaughnessy*, 345 U.S. at 213; *Kaplan*, 267 U.S. at 229. Here the detention at issue is detention *pending removal*, which is intimately bound up with (and inextricable from) the removal proceedings themselves. In any event, the Supreme Court in *Landon* reiterated the broader principle that only "*once an alien gains admission* … [does] his constitutional status change[]." *Landon*, 459 U.S. at 32 (emphasis added).

This Court's cases do not hold otherwise. Petitioners say that *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006), "confirm[ed]" that "the entry fiction applies only to 'excludable' noncitizens." A.B.42. It did not. This Court did not apply the entry fiction in that case because the alien was asserting a Fourth Amendment excessive force claim against an immigration officer, and circuit precedent "limited the application of the 'entry fiction' to immigration and deportation matters." *Martinez-Aguero*, 459 F.3d at 623. Petitioners' claims obviously involve "immigration and deportation matters." *Id.* The other decision of this Court cited by Petitioners—*United States v. Saucedo-Velasquez*, 843 F.2d 832, 834 & n.2 (5th Cir. 1988)—did not address the entry fiction at all, much less hold it inapplicable to unadmitted aliens.

Ultimately, Petitioners' theory would constitutionalize the perverse dynamic this Court already rejected as a matter of statutory law. If, as Petitioners assert, the principle of *Thuraissigiam* applies only to aliens at the border pre-entry—not to those who deliberately evade inspection and enter unlawfully without admission—then aliens who violate federal law would enjoy *greater* constitutional protections than those who comply with it. The Constitution should not be read to allow aliens to adversely possess additional due process rights by virtue of unlawfully entering the United States—an act Petitioners concede is a criminal offense. A.B.47 n.21 (citing 8 U.S.C. §1325(a)).

B. Petitioners' Claims Fail Even Under *Mathews*.

Petitioners argue that "it was appropriate for the district courts to apply the *Mathews* test to determine what process is due in this context." A.B.48; *see id.* at 49-54. *Mathews* requires courts to balance: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest." 424 U.S. at 335.

1. Even if that balancing applied, however, Petitioners' due process claims still fail because the Supreme Court "ha[s] already done whatever

balancing is necessary," and upheld detention *without* requiring a hearing to assess flight risk or dangerousness. *Banyee*, 115 F.4th at 933. In upholding mandatory detention under §1226(c), *Demore* rejected the argument that requiring "individualized bond hearings" is not excessively burdensome because "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." 538 U.S. at 528; *see also Zadvydas*, 533 U.S. at 680 (linking a "reasonable time" limitation" to the "likelihood of removal in the reasonably foreseeable future").

Following that precedent, the Eighth Circuit in *Banyee* rejected a theory of due process that would require a "multi-factor 'reasonableness' test," as under *Mathews*, to assess whether an alien is "dangerous or posed a flight risk." 115 F.4th at 931, 933. *Banyee* acknowledged that "deciding what process is due ordinarily requires a form of interest balancing," *id.* at 933 (citing *Mathews*, 424 U.S. 319), but held such balancing inapplicable because *Demore* and *Zadvydas* "have already done whatever balancing is necessary," *id.* It was, after all, "the lead *dissent* in *Demore* [that] advocated for … 'individual determination[s],'" but "[t]he majority opted for a bright-line rule instead." *Id.* In short, courts may not use *Mathews* to "impos[e]

procedures that merely displace congressional choices of policy." *Landon*, 459 U.S. at 35.

2. To the extent the *Mathews* factors are relevant, they do not favor Petitioners. On the first factor, Petitioners say their "private interest" in "[f]reedom from detention" favors a bond hearing to assess flight risk and dangerousness. A.B.50. But context matters: "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake *in the particular case*." *Harper*, 494 U.S. at 229 (emphasis added). And here, the strength of Petitioners' liberty interest is significantly diminished. After all, "an alien detained under §1226(c)"—or §1225(b)(2)(A)—"'has the keys in his pocket' and can 'end[] his detention immediately' by withdraw[ing] his defense … and return[ing] to his native land." *Parra*, 172 F.3d at 958.

Moreover, although Petitioners tout their "substantial ties to this country," A.B.50, that they are present at all in the United States is because they violated the U.S. immigration laws—itself a criminal offense. *See* 8 U.S.C. §1325(a); O.B. 14-18. Petitioners assert that they "were locked up in jail, under conditions indistinguishable from those imposed on criminal defendants." A.B.50. They cite no record evidence to assert this claim and there is none. Even if that were true, it is not "a problem that the jail the

government used also housed criminals. It takes more to turn otherwise legal detention into unconstitutional punishment." *Banyee*, 115 F.4th at 934.

On the second factor, there is no "significant risk of erroneous deprivation." A.B.51. Petitioners say there is because they were not given "the opportunity to present information to mitigate concerns about flight risk or dangerousness." A.B.51. But detaining aliens under §1225(b)(2)(A) without assessing flight risk or dangerousness cannot lead to an "erroneous deprivation" because flight risk or dangerousness are not prerequisites to detention under §1225(b)(2)(A), as this Court held in *Buenrostro*. *Supra*, pp. 11-13. And Petitioners do not argue that there is any risk of error that they do not satisfy the actual statutory elements; rather, they concede, "post-*Buenrostro*, they are subject to §1225(b)(2)(A)," A.B.31, even though they have not had hearings to assess those factors.

Finally, on the third factor, the Supreme Court has held that "[t]he government's interest in efficient administration of the immigration laws" is "weighty" and that courts applying *Mathews* "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon*, 459 U.S. at 34. Here, Congress has determined that aliens covered by §1225(b)(2)(A) are to be detained pending their removal proceedings—full

stop. *Buenrostro-Mendez*, 166 F.4th 494. That judgment must "weigh heavily" in any *Mathews* analysis—particularly given the Supreme Court's endorsement of mandatory detention, without bond, under other statutes in *Demore* (§1226(c)) and *Zadvydas* (§1231). *Supra*, pp. 16-22.

CONCLUSION

The Court should reverse the district courts' orders granting Petitioners a writ of habeas corpus.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 27, 2026.

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