No. 22-2252

In the United States Court of Appeals for the Eighth Circuit

NYYNKPAO BANYEE,

Petitioner-Appellee,

v.

MERRICK B. GARLAND, Attorney General of the United States, et al.,

Respondents-Appellants.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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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 fulfilling the progressive promise of the Constitution's text and history. CAC seeks to uphold constitutional protections for noncitizens and 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

For citizens and noncitizens alike, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)); *see Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Furthermore, "the mere invocation of a legitimate purpose" is not enough to justify an incursion into the "core of the liberty protected by the Due Process Clause." *United States v. Neal*, 679 F.3d 737, 740 (8th Cir. 2012); *Schall v. Martin*, 467 U.S. 253, 269 (1984). Instead, the duration of any preventative detention must "bear some reasonable relation" to that purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

Despite this precedent, the panel held that detaining a noncitizen for *any amount of time* is constitutionally valid when "deportation is still on the table." Op.

[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 its preparation or submission. Counsel for all parties have consented to the filing of this brief.

7. By the panel's logic, immigration officials can use 8 U.S.C. § 1226(c) to incarcerate a noncitizen for years without ever persuading a neutral decisionmaker that the person is dangerous or a flight risk. This is wrong for three reasons.

First, contrary to the panel's view, the due process standards that govern preventative detention in the non-immigration context also govern in the immigration context. While the government interests at stake affect the due process calculus, the same principles apply, which is why the Supreme Court has drawn upon decisions from the non-immigration context when assessing the due process rights of noncitizens in immigration proceedings. In other words, when bringing its immigration authority to bear on a specific "person," U.S. Const. amend. V, the government must observe "the most exacting" due process standards, not "a more permissive form." *Sessions v. Dimaya*, 584 U.S. 148, 157 (2018) (plurality opinion).

Second, in and out of the immigration context, preventative detention can become unconstitutionally prolonged even when it serves a valid purpose. Thus, the Supreme Court has held that even if the government is operating in good faith to promote a valid objective, preventative detention cannot be "excessive in relation to the regulatory goal [it aims] to achieve," *Salerno*, 481 U.S. at 747, and there must be "a 'reasonable fit' between governmental purpose ... and the means chosen to advance that purpose," *Reno v. Flores*, 507 U.S. 292, 305 (1993).

Finally, the panel wrongly interpreted the three Supreme Court decisions on which it relied. It distilled those cases to mean that "[d]etention during deportation proceedings [i]s … constitutionally valid." Op. 4 (quoting *Demore v. Kim*, 538 U.S. 510, 523 (2003)). But none of those cases gave constitutional blessing to *any* period of detention during deportation proceedings, regardless of its length. Instead, in each case, the Court emphasized the "brief period" of detention at issue, *Demore*, 538 U.S. at 513, directly conflicting with the panel's reasoning, which excludes detained noncitizens from due process protections whenever deportation proceedings are pending. This Court should rehear the case.

ARGUMENT

I. Preventative Detention Is Governed by the Same Due Process Standards in the Immigration Context as in Other Contexts.

Despite the government's broad power over immigration, the Fifth Amendment "entitles [noncitizens] to due process of law in deportation proceedings." *Flores*, 507 U.S. at 306. To be sure, Congress "may make rules as to aliens that would be unacceptable if applied to citizens," Op. 4 (quoting *Demore*, 538 U.S. at 522; *Mathews v. Diaz*, 426 U.S. 67, 78 (1976)), but that does not mean that noncitizens are entitled to a diminished form of due process. Instead, as the Court explained in *Diaz*, this simply reflects the fact that citizens are exempt from "the power to deport." *Diaz*, 426 U.S. at 80. "In the enforcement of [immigration] policies," however, "the Government must respect the procedural safeguards of due

process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). That is why "an 'essential' of due process" like the void-for-vagueness doctrine applies in removal proceedings just as in criminal prosecutions. *Dimaya*, 584 U.S. at 155. The government "cannot take refuge in a more permissive form" of this due process safeguard in the immigration context. *Id.* at 157; *see also Bridges v. Wixon*, 326 U.S. 135, 152 (1945) (in deportation proceedings, noncitizens must be "afford[ed] due process of law"); *Woodby v. INS*, 385 U.S. 276, 277 (1966) (clear-and-convincing standard applicable in deportation proceedings).

Accordingly, noncitizens are protected by the "general rule" that the government "may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749. In immigration proceedings as elsewhere, preventative detention is allowed only "where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (citation and quotation marks omitted). Because "the liberty of an individual is at stake," removal efforts must adhere to the central "notions of fairness on which our legal system is founded." *Bridges*, 326 U.S. at 154.[2]

[2] A noncitizen "on the threshold of initial entry stands on a different footing," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), because noncitizens have no liberty interest in their "initial admission," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

For this reason, the Supreme Court has repeatedly drawn on precedent from other contexts when assessing the due process rights of noncitizens in immigration proceedings. *E.g.*, *Zadvydas*, 533 U.S. at 690; *Flores*, 507 U.S. at 314; *Woodby*, 385 U.S. at 285 & n.18; *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *cf. United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) (describing Fourth Amendment protections applicable to "arrests of illegal aliens"). Conversely, the Court has drawn on immigration precedent when defining the process due for other serious liberty deprivations. *E.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 362-63 & n.19 (1996); *Salerno*, 481 U.S. at 739, 748; *Addington v. Texas*, 441 U.S. 418, 432 (1979); *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970). That is because these cases all concern the "protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual." *Cooper*, 517 U.S. at 368.

II. In Immigration Proceedings as Elsewhere, Preventative Detention May Become Unconstitutionally Prolonged Even if It Serves a Valid Purpose.

The panel held that the government could detain Banyee without a hearing for any amount of time as long as "deportation is still on the table." Op. 7. This is wrong twice over.

A. As an initial matter, the panel misunderstood the strict limits that the Supreme Court has placed on preventative detention—a "carefully limited exception" to the "norm" of liberty. *Foucha*, 504 U.S. at 83 (quoting *Salerno*, 481

U.S. at 755). As the Court has made clear, "the mere invocation of a legitimate purpose" is not enough to justify detention. *Schall*, 467 U.S. at 269. Instead, "due process requires that the … *duration of commitment* bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738 (emphasis added). There must be a "reasonable fit" between the government's "purpose" in detaining someone and the length of their detention—the "means" it chooses to advance that purpose. *Flores*, 507 U.S. at 305.

Accordingly, the Supreme Court has upheld preventative detention only where it was not "excessively prolonged ... in relation to [its] regulatory goal." *Salerno*, 481 U.S. at 747 n.4; *see, e.g.*, *id.* at 747 (emphasizing that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act"); *Schall*, 467 U.S. at 269 ("the detention is strictly limited in time"); *cf. Jackson*, 406 U.S. at 738 ("a person … cannot be held more than the reasonable period of time necessary to [determine capacity for trial]").

This requirement of proportionality prevents detention from functioning as punishment without trial. As *Salerno* recognized, a restriction on liberty can constitute impermissible punishment not only if it reflects punitive intent, 481 U.S. at 747, but also if it "appears excessive in relation to" its purpose, *id.*, as is necessarily the case when detention becomes "excessively prolonged," *id.* at 747 n.4 (detention "might become excessively prolonged, and therefore punitive"); *see*

Schall, 467 U.S. at 269 ("a legitimate purpose will not justify ... confinement amounting to punishment"); *Flores*, 507 U.S. at 303 (detention of juvenile noncitizens "is not punitive since it is not excessive in relation to that valid purpose"). Additionally, by fixing a realistic end point, the prohibition on excessive detention avoids "indefinite detention." *Zadvydas*, 533 U.S. at 690.

B. Ignoring all of this, the panel held that Supreme Court precedent establishes a "bright-line rule" that "the government can detain an alien for as long as deportation proceedings are still '*pending*.'" Op. 7 (quoting *Demore*, 538 U.S. at 527). But in each of the cases the panel cited, the Supreme Court did not address the unique problem of prolonged detention.

In *Demore*, the Court considered Hyung Joon Kim's facial challenge to § 1226(c) itself. *Demore*, 538 U.S. at 514. Kim argued that the statute violated the Due Process Clause because it "impose[d] categorical detention while prohibiting any individualized determination that detention is actually necessary to serve the government's interests." Resp. Br., *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31455525, at *12. The Court concluded that the statute survived Kim's facial challenge—meaning that it was "adequate to authorize the pretrial detention of *at least some* [persons] ... whether or not [it] might be insufficient in some particular circumstances." *Salerno*, 481 U.S. at 751 (emphasis added) (quotation marks omitted); *id.* (describing the standard applied in facial challenges

to detention statutes). To reach that conclusion, it relied heavily on Congress's extensive legislative findings about certain "criminal aliens," *Demore*, 538 U.S. at 518-21, and on the "very limited time of the detention" authorized by § 1226(c), *id.* at 529 n.12.

Indeed, the presumed brevity of detention under § 1226(c) was central to the Court's reasoning in *Demore*. It confined its holding to "the brief period necessary for their removal proceedings," *id.* at 523, which it believed to be "roughly a month and a half in the vast majority of cases ... and about five months in the minority of cases in which the alien chooses to appeal," *id.* at 530; *see id.* at 526 ("the limited period necessary"); *id.* at 531 ("the limited period of his removal proceedings"). It also rejected Kim's invocation of *Zadvydas* because detention authorized by § 1226(c) was "of a much shorter duration" than the period of detention at issue in that case. *Id.* at 528; *cf. Jennings v. Rodriguez*, 583 U.S. 281, 312 (2018) (explicitly declining to address constitutional claims regarding prolonged detention under § 1226(c)).[3]

Carlson similarly involved a facial challenge to a detention statute rather than prolonged detention. While not mandating detention, the statute at issue there

[3] The panel's reasoning also conflicts with *Zadvydas* itself, where the Court instructed habeas courts to consider whether detention "exceeds a period reasonably necessary to secure removal" and created a "presumptive" period in which detention authorized by 8 U.S.C. § 1231(a)(6) was reasonable. *Zadvydas*, 533 U.S at 699-701.

allowed the Attorney General to detain "active alien communists" with limited judicial review. *Carlson v. Landon*, 342 U.S. 524, 526 (1952). The petitioners argued that their detention under the statute violated the Due Process Clause when the government presented no evidence that they were unlikely to appear for deportation proceedings. *Id.* at 533-34. The Court held that Congress's findings on the dangers of communism, in connection with evidence of petitioners' "personal activity … in extending the Party's philosophy," gave the Attorney General "adequate ground" to detain them. *Id.* at 541. As in *Demore*, the Court emphasized that prolonged detention was not at issue. *Id.* at 546 ("It should be noted that the problem of ... unusual delay in deportation hearings is not involved in this case.").

The panel also misread the Court's decision in *Flores*. There, the Court considered the constitutionality of a regulation providing that minors detained by immigration officers could be released only to their close relatives or legal guardians. 507 U.S. at 302. The petitioners argued that they had a right to be placed in the custody of a different "responsible adult," or to have the government "determine in the case of each individual alien juvenile that detention in [government] custody would better serve his interests." *Id.* at 308. The Court rejected this argument, emphasizing the rule that juveniles, "unlike adults, are always in some form of custody." *Id.* at 302 (quoting *Schall*, 467 U.S. at 265). It also stressed that the government detained the plaintiff juveniles for an "inherently

limited" period, *id.* at 314, and that habeas corpus was available in the case of "excessive delay," *id.* at 314 n.10; *see also Wong Wing*, 163 U.S. at 235 (noting in dicta that "*temporary* confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid, as in the case of arrest on a criminal charge" (emphasis added)).

In other words, none of the cases the panel cited addressed the issue of prolonged confinement.[4] In fact, in each case the Court went out of its way to emphasize the relevance of the length of detention to the question of its legality, directly conflicting with the panel's conclusion that courts *must* reject a due process claim from a noncitizen detained under § 1226(c) whenever "deportation is still on the table." Op. 7.

* * *

By misreading Supreme Court precedent, the panel short-circuited the process of meaningful judicial review. Instead of deciding *how* to address Banyee's due process challenge, the panel held that it could not address it while Banyee's

[4] The panel suggested that the dissenters in *Demore* and *Flores* "advocated for the type of 'individual determination' Banyee now seeks." Op. 7. But the dissenters in those cases urged that due process required an individualized hearing before the government's *initial detention decision*—not when detention had become prolonged. *See Demore*, 538 U.S. at 551 (Souter, J., concurring in part and dissenting in part) ("Due process calls for an individual determination *before someone is locked away*." (emphasis added)); *cf. Flores*, 507 U.S. at 339-40 (Stevens, J., dissenting) ("[The statute] requires an individualized determination *as to whether detention is necessary*." (emphasis added)).

deportation is pending. If deportation alone were enough to legitimize prolonged detention without a hearing, it would render hollow the Supreme Court's focus on "the brief period" for which it approved the extraordinary measure of mandatory preventative detention under § 1226(c), *Demore*, 538 U.S. at 513, and would undermine its repeated admonition that detention "*for any purpose* constitutes a significant deprivation of liberty," *Foucha*, 504 U.S. at 80 (citation omitted) (emphasis added). The panel's reasoning thus conflicts with Supreme Court precedent and warrants *en banc* review.

CONCLUSION

For the foregoing reasons, this Court should vacate and rehear the case.

Respectfully submitted,

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Dated: December 9, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,583 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 Microsoft Word 14-point Times New Roman font.

Dated: December 9, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

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