No. 20-1828

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARVIN DUBON MIRANDA, *et al.*,

Petitioners-Appellees,

v.

MERRICK B. GARLAND, *et al.*,

Respondents-Appellants.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES' PETITION FOR REHEARING *EN BANC*

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

ARGUMENT 4

I. The Due Process Clause Protects Noncitizens as Fully as Citizens, Imposing a Heightened Burden on the Government Before It Deprives Any Person of a Significant Liberty Interest 4

II. The Panel Misread *Demore v. Kim* 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. Texas,
441 U.S. 418 (1979)....................6, 7

Bell v. Wolfish,
441 U.S. 520 (1979)....................6

Bridges v. Wixon,
326 U.S. 135 (1945)....................7

Carlson v. Landon,
342 U.S. 52 (1952)....................5

Chaunt v. United States,
364 U.S. 350 (1960)....................6

Cooper v. Oklahoma,
517 U.S. 348 (1996)....................2, 7

Demore v. Kim,
538 U.S. 510 (2003)....................2, 9, 10, 11

Dubon Miranda v. Garland,
34 F.4th 338 (4th Cir. 2022)....................1

Fong Yue Ting v. United States,
149 U.S. 698 (1893)....................5

Foucha v. Louisiana,
504 U.S. 71 (1992)....................7, 8

Goldberg v. Kelly,
397 U.S. 254 (1970)....................6

Gonzales v. Landon,
350 U.S. 920 (1955)....................6

Harisiades v. Shaughnessy,
342 U.S. 580 (1952)....................8

TABLE OF AUTHORITIES – cont'd

Page(s)

Hernandez-Lara v. Lyons,
10 F.4th 19 (1st Cir. 2021)....................6, 10, 11

In re Winship,
397 U.S. 358 (1970)....................7

Jackson v. Indiana,
406 U.S. 715 (1972)....................7

Jordan v. De George,
341 U.S. 223 (1951)....................8

Kaoru Yamataya v. Fisher,
189 U.S. 86 (1903)....................5

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953)....................4, 5

Mathews v. Diaz,
426 U.S. 67 (1976)....................2, 4

Matter of Adeniji,
22 I. & N. Dec. 1102 (BIA 1999)....................10, 11

Nielsen v. Preap,
139 S. Ct. 954 (2019)....................9, 10

Plyler v. Doe,
457 U.S. 202 (1982)....................4

Reno v. Flores,
507 U.S. 292 (1993)....................7

Santosky v. Kramer,
455 U.S. 745 (1982)....................6, 7

Sessions v. Dimaya,
138 S. Ct. 1204 (2018)....................2, 7, 8

TABLE OF AUTHORITIES – cont'd

Page(s)

Singh v. Holder,
638 F.3d 1196 (9th Cir. 2011) 9

United States v. Salerno,
481 U.S. 739 (1987) 6, 8, 10

United States v. Verdugo-Urquidez,
494 U.S. 259, (1990) 4

Velasco Lopez v. Decker,
978 F.3d 842 (2d Cir. 2020) 5, 7, 10

Wong Wing v. United States,
163 U.S. 228 (1896) 2, 4, 5, 7

Woodby v. INS,
385 U.S. 276 (1966) 6, 7

Zadvydas v. Davis,
533 U.S. 678 (2001) 2, 3, 5, 7

STATUTES AND CONSTITUTIONAL PROVISIONS

8 U.S.C. § 1226(a) 11

8 U.S.C. § 1226(c) 9

U.S. Const. amend. V 4, 11

U.S. Const. art. I, § 2, cl. 2 4

INTEREST OF *AMICUS CURIAE*[1]

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

INTRODUCTION

The panel decision in this case is frank: "aliens are not subject to the same due-process protections as ordinary citizens." *Dubon Miranda v. Garland*, 34 F.4th 338, 345 (4th Cir. 2022). Based on that rationale, the panel decision allows immigration officials to incarcerate for months, or years, any person they believe to be deportable—even when they cannot persuade an immigration judge that the person is dangerous or a flight risk.

That result flouts constitutional text, ignores longstanding Supreme Court precedent, and contradicts the views of virtually every judge to have addressed this question. This Court should vacate the panel decision and rehear the case.

[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. Counsel for all parties have consented to the filing of this brief.

Contrary to the panel's view, the safeguards of the Due Process Clause apply "without regard to any differences of . . . nationality," *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted), protecting "aliens and citizens alike," *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Thus, "in removal cases" as elsewhere, the government must observe "the most exacting" due process standards, not "a more permissive form." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

Moreover, the Supreme Court has repeatedly prescribed an elevated standard of proof—clear and convincing evidence—before *any* person may be deprived of *any* significant liberty interest, whether or not that person is a citizen, and whether or not the government is enforcing immigration laws. Due process calls for this "heightened burden of proof" whenever the "interests at stake" are "particularly important," *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quotation marks omitted), and noncitizens have the same critical interest in "freedom from detention" as citizens, *Zadvydas v. Davis*, 533 U.S. 678, 694-95 (2001).

Ignoring this precedent, the panel relied primarily on a misreading of *Demore v. Kim*, 538 U.S. 510 (2003), which upheld a regime of categorical detention for a specified class of "criminal aliens," *id.* at 513. But *Demore* did not hold, or even suggest, that the Fifth Amendment's procedural safeguards apply with less force to noncitizens. It held instead, as a matter of "substantive due

process," *id.* at 515, that Congress can mandate detention without bail during immigration proceedings where (1) the law covers only a specific group of people whom Congress has deemed especially dangerous, (2) Congress's judgment is supported by abundant legislative findings, (3) Congress has spoken clearly, (4) the detention is sharply limited in duration, *and* (5) adequate guardrails are in place to prevent abuse of this authority.

That combination of factors is missing here. And Congress's power to withhold bail from the most serious criminal offenders—under the conditions specified in *Demore*—does not imply that executive officials may presumptively detain *all* noncitizens where bail is available.

Demore thus offers no basis for relegating noncitizens to a watered-down version of the Due Process Clause. Unlike the panel decision, *Demore*'s carefully limited holding acknowledges the principle that, for citizens and noncitizens alike, preventive detention is constitutionally legitimate only "in certain special and narrow nonpunitive circumstances 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). In concluding that "alien status itself," *id.* at 692, provides such a justification, the panel departed from Supreme Court precedent, the consensus of other courts, and the text of the Constitution.

ARGUMENT

I. The Due Process Clause Protects Noncitizens as Fully as Citizens, Imposing a Heightened Burden on the Government Before It Deprives Any Person of a Significant Liberty Interest.

The Framers knew how to distinguish citizens from noncitizens. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (only "a Citizen" may be elected to Congress). But they established that no "person" shall be deprived of life, liberty, or property without due process of law. *Id.* amend. V; *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("the Fifth Amendment . . . speaks in the relatively universal term of 'person'"). This safeguard, therefore, "is not confined to the protection of citizens," but is "universal in [its] application to all persons within the [nation's] territorial jurisdiction, without regard to any differences of . . . nationality." *Wong Wing*, 163 U.S. at 238 (quotation marks omitted).

Because the term "person" is "broad enough to include any and every human being within the jurisdiction of the republic," a noncitizen "is entitled to the same protection under the laws that a citizen is entitled to." *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (1982) (quotation marks omitted). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection," *Diaz*, 426 U.S. at 77, and "may not be deprived of his life, liberty or property without due process of law," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

To be sure, the government may deport noncitizens, *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893), and may utilize detention to effectuate that goal, *Carlson v. Landon*, 342 U.S. 524, 538 (1952). But while noncitizens are vulnerable to a form of detention from which citizens are exempt, they are entitled to the full benefit of the Fifth Amendment when the government attempts to exercise that power over them. Immigration laws, like other laws, are "subject to . . . the paramount law of the constitution." *Id.* at 537 (quoting *Fong Yue Ting*, 149 U.S. at 713); *see INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *Zadvydas*, 533 U.S. at 695.

"Merely invoking the fact that a case is raised in the immigration context," therefore, "does nothing to address much less to abrogate due process principles." *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020). While a noncitizen's "ultimate right to remain in the United States is subject to alteration," "it does not follow that he is thereby deprived of his constitutional right to procedural due process." *Kwong Hai Chew*, 344 U.S. at 601. Despite its power to "expel aliens," the government may not "disregard the fundamental principles that inhere in 'due process of law' . . . when executing the provisions of a statute involving the liberty of persons." *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). That is why due process continues to shield noncitizens from wrongful detention even after they

receive a final removal order. *Zadvydas*, 533 U.S. at 690-96; *Wong Wing*, 163 U.S. at 238.

Accordingly, in the immigration context as elsewhere, the Supreme Court "has repeatedly reaffirmed" that "due process places a heightened burden of proof on the State" where the individual interests at stake are "particularly important." *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (quotation marks omitted). The clear-and-convincing standard is required in proceedings to deport, *Woodby v. INS*, 385 U.S. 276, 277 (1966), to denaturalize, *Chaunt v. United States*, 364 U.S. 350, 353 (1960), to expatriate, *Gonzales v. Landon*, 350 U.S. 920, 921 (1955), to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), and to discontinue essential welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970). Thus, across "various civil cases," immigration and otherwise, the government must satisfy an elevated burden before interfering with "particularly important individual interests." *Addington v. Texas*, 441 U.S. 418, 424 (1979).

In particular, due process typically requires this heightened standard for preventive detention. A person detained without a conviction "suffers significant liberty deprivations." *Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021). Only by satisfying a heightened burden, therefore, may the government detain criminal defendants to ensure their presence at trial, *Bell v. Wolfish*, 441 U.S. 520, 536 (1979), or protect the safety of others, *United States v. Salerno*, 481 U.S. 739,

741 (1987). So too before it may detain people found incompetent to stand trial, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), judged not guilty by reason of insanity, *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992), or afflicted with dangerous mental illnesses, *Addington*, 441 U.S. at 433.

The "claim that these precedents are inapplicable in an immigration context is unpersuasive." *Velasco Lopez*, 978 F.3d at 856. The Supreme Court has repeatedly drawn on precedent from other contexts when assessing the due process rights of removable noncitizens. *E.g.*, *Zadvydas*, 533 U.S. at 690; *Reno v. Flores*, 507 U.S. 292, 314 (1993); *Woodby*, 385 U.S. at 285 & n.18; *Wong Wing*, 163 U.S. at 235. Conversely, it has drawn on immigration precedent when establishing what process is due before other serious liberty deprivations. *E.g.*, *Cooper*, 517 U.S. at 362-63 & n.19; *Addington*, 441 U.S. at 432; *Santosky*, 455 U.S. at 756; *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. And where "the liberty of an individual is at stake," "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (addressing deportation).

This is why "an 'essential' of due process" like the void-for-vagueness doctrine applies the same in removal proceedings as in criminal prosecutions. *Dimaya*, 138 S. Ct. at 1212. Indeed, the Court "long ago held that *the most exacting vagueness standard* should apply in removal cases." *Id.* at 1213 (emphasis added); *see Jordan v. De George*, 341 U.S. 223, 231 (1951) ("We do this in view of the grave nature of deportation."). As a result, the government "cannot take refuge in a more permissive form" of this due process safeguard in the immigration context. *Dimaya*, 138 S. Ct. at 1213.

In short, for noncitizens no less than citizens, "liberty is the norm," and detention without trial "is the carefully limited exception." *Foucha*, 504 U.S. at 83 (quoting *Salerno*, 481 U.S. at 755).

II. The Panel Misread *Demore v. Kim*.

Demore permits a limited departure from the procedures normally required for preventive detention. Deferring to congressional judgment, the Court allowed detention without bail of certain "criminal aliens," based on a categorical presumption about their dangerousness and flight risk, obviating the need for individual hearings. Contrary to the panel's misinterpretation, however, *Demore* did not arrive at that result by concluding that noncitizens in immigration proceedings have only second-tier due process rights. The Court made clear that its holding was driven by a specific combination of factors not present here.

While immigration detention triggers core due process rights, it also implicates government interests that require some deference to legislative judgments. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952). In upholding 8 U.S.C. § 1226(c) against a substantive due process facial challenge, *Demore* permitted Congress to require detention without bail, for a short period, of a particular class of noncitizens whom Congress deemed especially dangerous based on extensive findings, and who had already been convicted of serious offenses after receiving all the procedural safeguards of criminal prosecutions. *See Demore*, 538 U.S. at 513 ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that [such] persons . . . be detained for the brief period necessary for their removal proceedings.").

In *Demore*, therefore, Congress had "mandated" detention of a subset of noncitizens "who were thought to pose a heightened risk." *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019). And Congress did so through an unequivocal command. *See* 8 U.S.C. § 1226(c)(1), (2).

Upholding Congress's choice, *Demore* went out of its way to stress the extensive legislative findings supporting that choice—repeatedly discussing the evidence Congress gathered about the gravity of the problem and how to

ameliorate it. *See Demore*, 538 U.S. at 518-21 (citing findings of multiple reports, hearings, investigations, and studies). That evidence indicated "that permitting discretionary release . . . would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large." *Id.* at 528; *see id.* ("The evidence Congress had before it certainly supports the approach it selected.").

Critical to *Demore*, therefore, was Congress's clear legislative determination that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," *id.* at 520, justifying "a special rule for aliens who have committed certain dangerous crimes," *Nielsen*, 139 S. Ct. at 959; *cf. Salerno*, 481 U.S. at 742, 754-55 (applying similar deference to Congress's "considered response" to the "compelling" problem of dangerous felony defendants).

Demore also "focused on the heightened risk posed" by this "narrow class of noncitizens." *Velasco Lopez*, 978 F.3d at 850 n.7. Those individuals "had already been convicted (beyond a reasonable doubt) of committing certain serious crimes," *Hernandez-Lara*, 10 F.4th at 35, "following the full procedural protections our criminal justice system offers," *Demore*, 538 U.S. at 513. Their convictions "reflect[ed] personal activity that Congress considered relevant to future dangerousness." *Id.* at 525 n.9 (quotation marks omitted).

Demore further relied on the procedural safeguards in place to mitigate the risk of erroneous detention. Anyone claiming to be wrongly detained was

"immediately provided" a hearing to determine whether they were "properly included in a mandatory detention category." *Id.* at 514 & n.3 (citing *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999)). That hearing would be conducted by "an Immigration Judge." *Joseph*, 22 I. & N. Dec. at 799.

Finally, *Demore* repeatedly emphasized "[t]he very limited time of the detention at stake," confining its holding to this "brief period," which the Court (erroneously) believed to be only "a month and a half in the vast majority of cases." 538 U.S. at 529 n.12, 523, 530; *see also id.* at 513, 526, 528.

Unlike the panel, therefore, the Supreme Court did not casually dismiss noncitizens' rights in *Demore*. Its decision hinged on the deference given when Congress speaks clearly on immigration matters in light of extensive findings—and on the safeguards and limits in place that tempered Congress's choice. It was this combination of factors, not a broad pronouncement that noncitizens have inferior due process rights, that overcame the "liberty interest" of "criminal aliens" in freedom from detention. *Id.* at 515.

"The circumstances here are quite different." *Hernandez-Lara*, 10 F.4th at 36. Congress has not mandated the government's policy of presumptive detention. *See* 8 U.S.C. § 1226(a). No legislative findings support that (non-existent) mandate. Detention is not limited to a narrow class of persons deemed especially

dangerous. And nothing suggests that detention is anywhere near as short as the "brief" period contemplated in *Demore*.

Where the factors underlying *Demore* are absent, as here, the requirements of procedural due process are clear: the government must meet a heightened burden before depriving any "person," U.S. Const. amend. V, of the physical liberty that lies at the heart of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

/s/ Brianne J. Gorod

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: July 21, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,592 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amici curiae* 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.

Executed this 21st day of July, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

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 Fourth Circuit by using the appellate CM/ECF system on July 21, 2022.

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

Executed this 21st day of July, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae