No. 20-16245

In the United States Court of Appeals for the Ninth Circuit

AROLDO ALBERTO RODRIGUEZ DIAZ,

Petitioner-Appellee,

v.

MERRICK B. GARLAND, *et al.*,

Respondents-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

CONSTITUTIONAL PROVISIONS AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

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 gives immigration officials a stunning amount of power: the authority to continue incarcerating for months, or years, any person they accuse of being a removable noncitizen, without ever bearing the burden of persuading a neutral decisionmaker that the person is a safety threat or flight risk. The panel based this startling holding on its conclusion that "the private interest of a detained alien under § 1226(a) is lower than that of a detained U.S. citizen." Op. 40. That conclusion flouts the text and history of the Fifth Amendment, as well as longstanding precedent recognizing the basic procedural safeguards the Amendment extends to every person. 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 its preparation or submission. Counsel for all parties have consented to the filing of this brief.

The text and history of the Due Process Clause make clear that citizens and noncitizens share the same protections from arbitrary and unjustified imprisonment. The Framers derived the concept of due process from English common law, the standards of which supplied the original measure of what the Clause permits. And in the Founding era, the common law gave "aliens" the same safeguards against unjustified detention and other liberty deprivations as subjects. Aliens could bring suit to challenge detention and other injuries to their person or property just like subjects, and they were seized and expelled from England only on the same terms—as punishment for crimes. Because there was no deportation, the common law did not recognize anything resembling preventive detention of aliens in aid of deportation. Indeed, with one wartime exception, no form of detention applied only to aliens, or applied differently to aliens and subjects.

Consistent with those principles, the Fifth Amendment established that no "person" (not "citizen") may be deprived of liberty without due process of law. The Founders were familiar with the common law's protections for noncitizens, and the ratification of the Fourteenth Amendment later removed any possible doubt that where the Constitution uses the word "person," it protects citizens and noncitizens alike. Since then, the Supreme Court has consistently affirmed that the Fifth Amendment's procedural safeguards apply equally to all people in the United States. While noncitizens are uniquely vulnerable to immigration measures, the

Due Process Clause shields them from unwarranted liberty deprivations arising from those measures to the same extent it shields citizens in comparable contexts. The authority to enforce immigration laws does not absolve the government from observing "the most exacting" due process standards, rather than some "more permissive form," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018), when bringing that authority to bear on a specific "person," U.S. Const. amend. V.

Contrary to this precedent and the Fifth Amendment's text and history, the panel decision systematically downgrades noncitizens' liberty interest in freedom from arbitrary imprisonment—the heart of what the Due Process Clause protects—based on rationales that crumble under scrutiny. The panel's overarching mistake was to ignore established due process principles that place a heightened burden on the government to justify significant liberty deprivations, in immigration enforcement as elsewhere. Instead, the panel drew dubious inferences from the unique circumstances addressed in *Demore v. Kim*, 538 U.S. 510 (2003), and *Carlson v. Landon*, 342 U.S. 524 (1952). But nothing in those cases implies that noncitizens may be relegated to a watered-down version of due process whenever they are in removal proceedings, particularly when a critical liberty deprivation like prolonged incarceration is at stake. The panel's flawed holding demands reconsideration.

ARGUMENT

I. Under the Due Process Clause, Noncitizens Have the Same Liberty Interest as Citizens in Freedom from Arbitrary Imprisonment.

A. The Framers knew how to distinguish citizens from noncitizens. Only "a Citizen" may hold congressional office, U.S. Const. art. I, § 2, cl. 2; *id.* § 3, cl. 3, and only a "natural born Citizen" may be president, *id.* art. II, § 1, cl. 5. But the Framers established that no "person" may 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'"); Alexander M. Bickel, *The Morality of Consent* 38 (1975) (the Constitution never uses "citizens" interchangeably with "people").

Because the Framers "employed words in their natural sense" and "intended what they have said," *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), the protections of the Due Process Clause "are universal in their application to all persons within the [nation's] territorial jurisdiction, without regard to ... nationality," *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (quotation marks omitted); *see District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."). The Clause thus protects "all persons, aliens and citizens alike," *Mathews v. Diaz*, 426 U.S. 67, 78 (1976), and

grants noncitizens "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).

B. The Fifth Amendment's history confirms the plain meaning of its text. The Framers derived the concept of "due process of law" from English common law, Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340-41 (1987), and the common law's "settled usages and modes of proceeding" provided the original standards for the Due Process Clause, *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855). Those settled usages gave all people, regardless of nationality, the same freedom from unjustified imprisonment.

In the Founding era, the common law regarded "aliens" who were present in England as owing a "temporary" allegiance, in exchange for which the king "affords his protection to an alien ... during his residence in this realm." William Blackstone, 1 *Commentaries on the Laws of England* 370 (1791 ed.); *see Calvin's Case*, 7 Co. Rep. 1a (1608) (while an alien "is within England, he is within the King's protection"); *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) ("Such allegiance and protection" were "not restricted to natural-born subjects" but encompassed aliens "so long as they were within the kingdom."). Aliens were thus among "the people" of England, Blackstone, *supra*, at 366, although that status was "acquired only by residence here, and lost whenever they remove," *id.* at 371.

Accordingly, aliens had the same procedural rights as English subjects, and their substantive rights were "more circumscribed" in just three main ways: they could not hold office, could not bequeath land, and paid "higher duties at the custom-house." *Id.* at 371-72, 374. Aliens could, however, maintain personal actions to protect their property and other interests, *id.*; *see* 1 Edward Coke, *Institutes of the Laws of England* § 198 (1794 ed.), such as trespass or assault and battery suits, *Pisani v. Lawson*, 133 Eng. Rep. 35 (C.P. 1839). They could also "challenge Executive and private detention" through habeas corpus. *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

Significantly, the common law did not recognize anything resembling preventive detention of aliens to aid deportation, for there was no deportation. "England had nothing like modern immigration restrictions," and "the word 'deportation' apparently was not to be found in any English dictionary." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1973 (2020); *see Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893). In theory, aliens were "liable to be sent home," Blackstone, *supra*, at 260, but there is "very little historical evidence" of that occurring, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 322 (2008); *see* W.F. Craies, *The Right of Aliens to*

Enter British Territory, 6 L.Q. Rev. 27, 34 (1890) (finding no clear examples of deportation from the sixteenth through eighteenth centuries).

As a result, aliens were expelled from England only on the same terms that subjects were—as criminal punishment. Markowitz, *supra*, at 323-24. The penalties of "banishment" and "transportation" (temporary banishment) applied to aliens and subjects alike. Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 469 (2021); *see Fong Yue Ting*, 149 U.S. at 709. Both punishments were reserved for "convicted criminals, whether subject or alien." Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immigr. L.J. 115, 130 (1999). Thus, the seizure of aliens and their removal from the country were "restricted to the cases provided by statute, viz. breaches of the law." Craies, *supra*, at 34. "And in this respect they really stood in no different position from subjects." *Id.*

No form of detention applied only to aliens, therefore, or applied differently to aliens than to subjects, Nash, *supra*, at 470-73; Bleichmar, *supra*, at 130, with the lone exception that, during war, visitors from an enemy nation could temporarily be detained as "alien-enemies," Blackstone, *supra*, at 372. *But see Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (restrictions on alien enemies were "imposed temporarily as an incident of war and not as an incident of

alienage"). Under the common law's "settled usages and modes of proceeding," *Murray's Lessee*, 59 U.S. at 277, aliens had the same entitlement to physical liberty and legal process as citizens.

C. Despite this history and the Fifth Amendment's clear text, some proponents of the 1798 Alien Friends Act (part of the infamous Alien and Sedition Acts) claimed that noncitizens lacked any constitutional protections "because they were not 'parties' to the Constitution." Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 Conn. L. Rev. 743, 759 (2013). On this view, advanced in the fevered atmosphere of near-war with France, the Constitution was a "compact ... made between citizens only." 8 Annals of Cong. 2012 (1798) (Joseph Gales ed., 1834).

Opponents of the legislation, however, defended noncitizens' right to due process in terms that would later be vindicated by the Fourteenth Amendment and the Supreme Court. Under the common law, they explained, noncitizens "residing among us, are entitled to the protection of our laws." *Id.* And on this subject, "the Constitution expressly excludes any .... distinction between citizen and alien." *Id.*; *see id.* at 1956 (the Clause "speaks of persons, not of citizens"); *id.* at 2013 ("Unless ... an alien is not a 'person,' ... we must allow that all these provisions extend equally to aliens and natives.").

As Thomas Jefferson wrote, expelling noncitizens without legal process was "contrary to the Constitution, one amendment to which has provided, that 'no person shall be deprived of liberty without due process of law.'" *The Virginia Report of 1799–1800, Together with Several Other Documents* 164 (1850 ed.). James Madison likewise explained that noncitizens were "under a local and temporary allegiance, and entitled to a correspondent protection," including freedom from "any arbitrary and unusual process." *Id.* at 205-06, 208.

D. The short-lived Alien Friends Act "left no permanent traces in the constitutional jurisprudence of the country." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1288 (1833); *see Dimaya*, 138 S. Ct. at 1229-30 (Gorsuch, J., concurring in part and concurring in the judgment) (as "a temporary war measure" that was "notorious" and "went unenforced," "it seems doubtful" that the Act "tells us a great deal about aliens' due process rights at the founding"). But because the federal government did not yet restrict immigration, the Supreme Court had no opportunity to confirm noncitizens' entitlement to due process. That changed in the wake of "the *Dred Scott* decision and its subsequent rejection in the form of the Fourteenth Amendment." Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 732 (1995).

Dred Scott v. Sanford held that constitutional rights are exclusively "privileges of the citizen," 60 U.S. 393, 449 (1857), embracing the "social contract

reading of the Constitution" earlier espoused by the Alien Act's proponents, Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 940 (1991). "The first sentence of the Fourteenth Amendment consciously overruled *Dred Scott*'s holding that blacks could never be 'citizens.'" Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1223 n.134 (1992). But conspicuously, the Amendment went on to frame its new rights to due process and equal protection "in terms of 'person' rather than 'citizen.'" Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 810 n.32 (2013).

That was no accident: congressional debates over the Amendment extensively discussed "the rights of aliens as 'persons'" and the "mistreatment of the Chinese on the Pacific coast." Neuman, *supra*, at 941. As Senator Howard explained, the Amendment would "disable a State from depriving not merely a citizen of the United States, but any person ... of life, liberty, or property without due process of law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). In the House, Representative Bingham did the same. *Id.* at 1090.

"[R]ather than … create different standards for states and the federal government," the Fourteenth Amendment aimed "to align the constitutional treatment of the two," as its proponents already understood the Fifth Amendment as "a guarantee to all within the United States—not just to citizens." Rosenfeld,

supra, at 729-30. By confirming that formerly enslaved persons were citizens and that "even non-citizens within the United States had due process rights," the Amendment "resolved debate over both of these issues," "rejecting the Alien Friends Act and *Dred Scott*." *Id.* at 730, 728.

"The occasion thereby arose for the Supreme Court to declare unequivocally" that constitutional safeguards for "persons" encompass noncitizens. Neuman, *supra*, at 941; *see Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the Fourteenth Amendment's Due Process Clause covers noncitizens). "Applying this reasoning to the fifth ... amendment[]," the Court soon confirmed that its Due Process Clause likewise protects "all persons within the territory of the United States," regardless of "nationality." *Wong Wing*, 163 U.S. at 238. Noncitizens therefore could not be imprisoned as punishment for immigration violations without the same due process safeguards as citizens. *Id.*

E. Unlike citizens, of course, noncitizens may be detained to effectuate deportation. But that does not imply they have a diminished liberty interest in bodily freedom, any more than a citizen's vulnerability to pretrial detention implies the same. Immigration detention is permissible not because it differs from pretrial detention but because of their equivalence. *Wong Wing*, 163 U.S. at 235 (approving of "detention or temporary confinement, as part of the means necessary to give effect to ... expulsion of aliens" because "[d]etention is a usual feature in

every case of arrest on a criminal charge"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (relying on similar comparison).

Despite the government's broad power over immigration, therefore, its enforcement efforts may not "arbitrarily ... cause an alien who has entered the country ... to be taken into custody" or otherwise "disregard the fundamental principles that inhere in 'due process of law.'" *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903). In immigration proceedings as elsewhere, preventive detention is allowed only "where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (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 v. Wixon*, 326 U.S. 135, 154 (1945).

That is why "an 'essential' of due process" like the void-for-vagueness doctrine applies in removal proceedings just as in criminal prosecutions. *Dimaya*, 138 S. Ct. at 1212. Indeed, the Supreme 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."). 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.

Indeed, the Supreme Court has repeatedly drawn on precedent from other contexts when assessing the due process rights of noncitizens in immigration enforcement. *E.g.*, *Zadvydas*, 533 U.S. at 690; *Reno v. Flores*, 507 U.S. 292, 314 (1993); *Woodby v. INS*, 385 U.S. 276, 285 & n.18 (1966); *Wong Wing*, 163 U.S. at 235. Conversely, it has drawn on immigration precedent when defining the process due to citizens for serious liberty deprivations. *E.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 362-63 & n.19 (1996); *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Addington v. Texas*, 441 U.S. 418, 432 (1979); *In re Winship*, 397 U.S. 358, 367-68 & n.6 (1970).

Whenever "the individual interests at stake" are "particularly important," due process "places a heightened burden of proof on the State," *Cooper*, 517 U.S. at 363 (quotation marks omitted), including in immigration enforcement, *Woodby*, 385 U.S. at 277; *Chaunt v. United States*, 364 U.S. 350, 353 (1960). And as shown above, noncitizens have the same interest in bodily freedom as any other "person." U.S. Const. amend. V.

II. The Panel Grossly Undervalued the Liberty Interest at Stake.

Although the Due Process Clause protects "aliens and citizens alike," *Diaz*, 426 U.S. at 78, and although freedom from detention "lies at the heart of the liberty

that Clause protects," *Zadvydas*, 533 U.S. at 690, the panel acknowledged only that Rodriguez Diaz has a "reasonably strong" liberty interest, Op. 29, and then further diminished that interest on several grounds. None are legitimate.

First, the panel discussed the supposedly extensive process afforded to detainees under the government's § 1226(a) regulations, *id.*, but that process says nothing about the strength of the underlying liberty interest. It goes to the second *Mathews* factor—risk of an erroneous deprivation. And none of the "numerous levels of review" available here, Op. 34, requires the government to persuade a neutral decisionmaker that a detainee is likely dangerous or a flight risk.

The panel also blamed Rodriguez Diaz's prolonged detention on his continued efforts to seek immigration relief. Op. 29. That is equally irrelevant to his liberty interest in bodily freedom. And it wrongly penalizes him for seeking to avoid the "particularly severe penalty" of deportation, *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (quotation omitted), which "may result in the loss of all that makes life worth living," *Bridges*, 326 U.S. at 147 (quotation marks omitted). Forcing people to sacrifice their due process rights against expulsion to preserve their due process rights against unjustified incarceration does not accord with the Fifth Amendment's guarantee of due process.

The panel also claimed, citing no authority, that Rodriguez Diaz's liberty interests are "diminished by the fact that he is subject to an order of removal." Op.

30. That is flat wrong: The Supreme Court has expressly rejected this argument, *Zadvydas*, 533 U.S. at 696, and it recently underscored that the right to "contest[] the lawfulness of restraint and secur[e] release" is entirely distinct from "the right to enter or remain in a country," *Thuraissigiam*, 140 S. Ct. at 1969. Freedom from arbitrary imprisonment is not contingent on any right to stay in the United States, nor does its vindication bestow that "additional right." *Chin Yow v. United States*, 208 U.S. 8, 12 (1908); *see Zadvydas*, 533 U.S. at 696 (the choice "is between imprisonment and supervision under release conditions that may not be violated").

Finally, the panel downplayed the length of Rodriguez Diaz's incarceration. Op. 39. But preventive detention may not be "excessive in relation to [its] regulatory goal," *Salerno*, 481 U.S. at 747, because it must always "bear some reasonable relation to [its] purpose," *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Immigration detention, like all preventive detention, requires a "reasonable fit" between governmental purpose "and the means chosen to advance that purpose." *Flores*, 507 U.S. at 305; *see Demore*, 538 U.S. at 513, 523, 526, 530 (repeatedly emphasizing the "brief" and "limited" period of detention, understood to be "roughly a month and a half in the vast majority of cases"); *Salerno*, 481 U.S. at 747 (relying on "stringent time limitations"); *Schall v. Martin*, 467 U.S. 253, 269 (1984) ("the detention is strictly limited in time"); *Reno*, 507 U.S. at 314 (relying on former statutory requirement that deportation hearings be concluded with

"reasonable dispatch" to avoid habeas corpus); *Carlson*, 342 U.S. at 546 ("the problem of ... unusual delay in deportation hearings is not involved in this case"); *Wong Wing*, 163 U.S. at 235 (approving of "temporary" detention).

In sum, the panel radically undervalued the liberty interest against prolonged arbitrary imprisonment. And it did so by ignoring due process precedent that consistently assigns the government a heightened burden to justify any significant liberty deprivation, including in the immigration context. *See Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011). Instead of applying that precedent, the panel drew inferences from three cases that hinged on unique circumstances not present here. But those inferences are unsound: none of these cases implies that noncitizens in removal proceedings have only second-tier due process rights.

Demore permitted Congress to require detention without bail, for a "brief period," of certain "criminal aliens" whom Congress was "justifiably concerned" were especially dangerous, and who already received all the safeguards of the criminal process. 538 U.S. at 513. Relying heavily on Congress's extensive legislative findings about this group of offenders, *id.* at 518-21, and on the "very limited time of the detention," *id.* at 529 n.12, the Court deferred to Congress's considered judgment that offering bail "would lead to an unacceptable rate of flight," *id.* at 520. Thus, *Demore* sanctioned "a special rule" for a subclass of

noncitizens "who have committed certain dangerous crimes," because Congress itself "mandated" that rule. *Nielsen v. Preap*, 139 S. Ct. 954, 959-60 (2019).

Carlson v. Landon similarly deferred to Congress's "legislative judgment of evils," 342 U.S. at 543, concerning a narrow class of noncitizens ("active alien communists," *id.* at 526), whom Congress had a "reasonable apprehension" imperiled national security and could therefore be denied bail, *id.* at 542. "What was significant in *Carlson*," therefore, was "that Congress had enacted legislation based on its judgment that such subversion posed a threat to the Nation." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 193 (1991). As in *Demore*, prolonged detention was not at issue, *Carlson,* 342 U.S. at 546, and the government had to "justify [its] refusal of bail by reference to the legislative scheme" in individual hearings, *id.* at 543; *see Demore*, 538 U.S. at 514 & n.3.

Carlson and *Demore* are the only cases approving "a special rule," *Preap*, 139 S. Ct. at 959, for detained noncitizens.[2] Both cases addressed a specific class of individuals deemed unusually dangerous by Congress, allowing their brief detention in deference to congressional judgments reflected in statutory mandates. These carefully limited holdings do not imply that noncitizens as a general matter have any less right than citizens to fair procedures before being detained. On the

[2] *Reno v. Flores* rested on the rule that juveniles, "unlike adults, are always in some form of custody." 507 U.S. at 302 (quoting *Schall*, 467 U.S. at 265).

contrary, the Supreme Court has applied the same logic to citizens in comparable circumstances. *See Salerno*, 481 U.S. at 742, 750, 754-55 (similarly deferring to Congress's "considered response" to the "compelling" problem of dangerous felony defendants, whom "Congress specifically found" were "far more likely" to endanger the community if released on bail).

Unlike in *Carlson* and *Demore*, there is no statutory mandate here, no legislative findings, and no special class of particularly dangerous noncitizens. Only after § 1226(a) was enacted did the executive branch reverse its traditional bail policy for detained immigrants, flipping the burden and requiring people like Rodriguez Diaz to prove that they are *not* threats or flight risks. *See* 8 C.F.R. § 236.1(c)(2) (1998). Nothing in *Carlson* or *Demore* implies that where Congress has authorized bail, the Fifth Amendment allows the executive branch to unilaterally adopt a policy of detaining all noncitizens without the procedural safeguards required before every other significant liberty deprivation.

CONCLUSION

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

Respectfully submitted,

/s/ Elizabeth B. Wydra
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
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

Dated: April 14, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) and Circuit Rule 29-2(c)(2) because it contains 4,151 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.

Executed this 14th day of April, 2023.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

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 Ninth Circuit by using the appellate CM/ECF system on April 14, 2023.

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 14th day of April, 2023.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amicus Curiae