No.

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

ANTONIO ARTEAGA-MARTINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
JOHN J. W. INKELES
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an alien who is detained under 8 U.S.C. 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge by clear and convincing evidence that the alien is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Petitioners (respondents-appellants below) are Matthew T. Albence, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement; Clair Doll, in his official capacity as Warden, York County Prison; Simona Flores, in her official capacity as Field Office Director, U.S. Immigration and Customs Enforcement; and Chad F. Wolf, in his official capacity as Acting Secretary, Department of Homeland Security.[*]

Respondent (petitioner-appellee below) is Antonio Arteaga-Martinez.

RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

Arteaga-Martinez v. *Doll*, 18-cv-1742 (Nov. 7, 2018)

United States Court of Appeals (3d Cir.):

Arteaga-Martinez v. *Warden York County Prison*, 19-1054 (Aug. 20, 2019)

---

[*] Former Secretary of Homeland Security Kirstjen Nielsen was a respondent in the district court and an appellant in the court of appeals. She was replaced in the court of appeals by Acting Secretary Kevin McAleenan and, after the court of appeals' judgment, by Acting Secretary Chad F. Wolf. Former Acting Director of U.S. Immigration and Customs Enforcement Ronald D. Vitiello was a respondent in the district court and an appellant in the court of appeals. He was replaced in the court of appeals by Acting Director Matthew T. Albence, then by Acting Director Mark A. Morgan, and then again by Acting Director Matthew T. Albence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No.

MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

ANTONIO ARTEAGA-MARTINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court (App., *infra*, 3a) is unreported. The report and recommendation of the magistrate judge (App., *infra*, 4a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2019. On November 12, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 18, 2019.

On December 10, 2019, Justice Alito further extended the time to and including January 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 8a-16a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the detention of an alien who "is ordered removed." 8 U.S.C. 1231(a)(1)(A). It provides that the government "shall" detain the alien during an initial 90-day "removal period." 8 U.S.C. 1231(a)(6). It further provides that the government "may" detain the alien beyond that initial period if the alien poses a "risk to the community," is "unlikely to comply with the order of removal," or falls within certain other categories specified in the statute. *Ibid.* The Department of Homeland Security (DHS) has adopted regulations governing the process that U.S. Immigration and Customs Enforcement (ICE) must follow in making the detention decision. See 8 C.F.R. 241.4; see pp. 12-14, *infra*.

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court considered how long discretionary detention beyond the initial 90-day period may last when the country to which the alien has been ordered removed has not yet accepted the alien's return. The Court acknowledged that the statute "literally" set no time limit for such detention. *Id.* at 689. The Court stated, however, that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. The Court also reasoned that the "basic purpose" of detention under Section 1231 is "effectuating an alien's removal," and that once that basic purpose can no longer

be served because the designated country of removal will not accept the alien's return, "continued detention is no longer authorized by statute." *Id.* at 697, 699.

The Court accordingly "read an implicit limitation into the statute." *Zadvydas*, 533 U.S. at 689. Specifically, the Court concluded that discretionary detention beyond the initial 90-day period may last only for "a period reasonably necessary to bring about that alien's removal from the United States." *Ibid.* The Court identified a six-month period as presumptively reasonable. *Ibid.* The Court held that, after that time, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing," or else release the alien. *Id.* at 701.

The Government has adopted regulations implementing this Court's decision in *Zadvydas*. See 8 C.F.R. 241.13. Under those regulations, an alien whose detention under Section 1231 has continued for six months "may submit a written request" containing "the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Officials in the Headquarters Post-Order Detention Unit of ICE then determine whether, as the alien claims, there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. 241.13(e)-(g).

2. In *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018), the Third Circuit read a further requirement into Section 1231—an implicit requirement that the alien be afforded a bond hearing before an immigration judge after he has been detained for six months. *Id.* at 211. The court determined "that

it *may* be the case that the Due Process Clause prohibits its prolonged detention under § 1231(a)(6) without a bond hearing." *Id.* at 223. The Third Circuit then "invoke[d] the canon of constitutional avoidance" to hold that Section 1231(a)(6) "implicitly requires a bond hearing after a prolonged detention." *Id.* at 219, 223. The Third Circuit emphasized that Section 1231(a)(6) "uses the word 'may' to describe the detention authority rather than 'shall,'" and noted that, in *Zadvydas*, this Court had "already determined that the text of § 1231(a)(6) is ambiguous as to the due process protections that it provides." *Id.* at 223.

The Third Circuit concluded, however, that "aliens detained under § 1231(a)(6) are only entitled to a bond hearing after *prolonged* detention." *Guerrero-Sanchez*, 905 F.3d at 225. The court "adopt[ed] a six-month rule" under which "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (*i.e.*, 180 days) of custody." *Id.* at 226. The court also held that, in order to prevail at the hearing, the government must show by "clear and convincing evidence" that the alien poses a risk of flight or a danger to the community. *Id.* at 224 & n.12.

3. Respondent is a citizen and native of Mexico who admits that he has entered the United States without inspection on four occasions. D. Ct. Doc. 1, at 5 (Sept. 4, 2018). He states that he first entered the United States around February 2001, but he was apprehended at the border, and he voluntarily returned to Mexico. D. Ct. Doc. 4, at 2 (Sept. 27, 2018). He states that he entered the United States again in April 2001, and that he returned to Mexico ten years later, in 2011. D. Ct. Doc. 1, at 5. He states that he entered the United States a third time in July 2012, but he was again apprehended

at the border, and was removed pursuant to an expedited-removal order under 8 U.S.C. 1225(b). D. Ct. Doc. 4, at 2. Finally, he states that he entered the United States a fourth time in September 2012. D. Ct. Doc. 1, at 5.

On May 4, 2018, ICE arrested and detained respondent. D. Ct. Doc. 4, at 2. ICE reinstated respondent's prior order of removal, in accordance with 8 U.S.C. 1231(a)(5). Section 1231(a)(5) provides that the reinstated prior order of removal is not subject to being reopened or reviewed. But respondent applied for withholding of removal under 8 U.S.C. 1231(b)(3) and withholding and deferral of removal under regulations promulgated pursuant to Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822, to implement the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T. S. 85. See D. Ct. Doc. 1, at 7. A request for those country-specific forms of protection does not challenge the validity of the underlying order of removal, but rather seeks to prevent the United States from executing that order of removal to a specific country where the alien claims a risk of persecution or torture. See 8 U.S.C. 1231(b)(3)(A); 8 U.S.C. 1231 note; *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). For an alien whose final order of removal has been reinstated but who is found to have a reasonable fear of persecution or torture, the determination whether that alien is entitled to those forms of protection is made in "withholding-only" proceedings before an immigration

judge, with a right of appeal to the Board of Immigration Appeals. 8 C.F.R. 208.16, 1208.16.

Respondent subsequently filed a petition for a writ of habeas corpus, challenging the constitutionality of his continued detention while his requests for withholding and deferral of removal were pending. See D. Ct. Doc. 1. In the district court, the government acknowledged that respondent was entitled to a bond hearing under *Guerrero-Sanchez* as of November 4, 2018—six months after the start of the detention. App., *infra*, 4a.[1] The magistrate judge issued a report and recommendation noting the government's concession and recommending that respondent be granted a bond hearing. *Id.* at 4a-7a. The district court adopted the report and recommendation and ordered that respondent "be given an individualized bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez*." *Id.* at 3a. The Third Circuit summarily affirmed, noting that "the parties do not dispute that *Guerrero-Sanchez* * * * controls." *Id.* at 1a; see *id.* at 1a-2a. Respondent has received a bond hearing, has posted bond, and has been released.

REASONS FOR GRANTING THE PETITION

In *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), this Court reversed a decision of the Ninth Circuit that had interpreted a different provision of the INA, 8 U.S.C. 1226(a)—which said nothing about bond hearings—to

---

[1] The Third Circuit in *Guerrero-Sanchez* rejected the alien's contention that detention during withholding-only proceedings for an alien whose prior order of removal has been reinstated is governed by 8 U.S.C. 1226 rather than 8 U.S.C. 1231. That question is the subject of a separate certiorari petition in *Albence* v. *Guzman Chavez*, filed simultaneously with the petition in this case. See pp. 17-18, *infra*.

require periodic bond hearings after six months of detention at which the government must prove by clear and convincing evidence that further detention is justified. In *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018)—which was followed by the panel in this case—the Third Circuit repeated the same error, but with respect to a different provision of the INA, 8 U.S.C. 1231. That provision likewise says nothing about bond hearings after six months or about the government's bearing the burden of proof, much less by clear and convincing evidence, but the Third Circuit nevertheless imposed those requirements. And it purported to do so as a matter of statutory interpretation, not as a matter of constitutional law. The Third Circuit's approach compromises the ability of the federal government to enforce the Nation's immigration laws and to protect the integrity of the Nation's immigration system. In addition, the question in this case is closely related to the question presented in *Albence* v. *Guzman Chavez*, filed simultaneously with the petition for a writ of certiorari in this case. *Guzman Chavez* presents the question whether 8 U.S.C. 1231 or instead 8 U.S.C. 1226 governs the detention of an alien whose prior order of removal has been reinstated and who is in withholding-only proceedings—a question on which the courts of appeals are divided. This Court's review is warranted.

A. The Court Of Appeals' Decision Conflicts With This Court's Decision In *Jennings* v. *Rodriguez*

1. In *Rodriguez*, this Court considered questions of statutory interpretation concerning detention of aliens under multiple provisions of the INA—including, most relevant here, 8 U.S.C. 1226(a). Section 1226(a) authorizes the government to "detain" an alien "pending a decision on whether the alien is to be removed from the

United States." 8 U.S.C. 1226(a)(1). It further provides that the government "may release the alien" on "bond" or "conditional parole." 8 U.S.C. 1226(a)(2). "Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention," *Rodriguez*, 138 S. Ct. at 847 (citing 8 C.F.R. 236.1(d)(1), 1236.1(d)(1)), and therefore if the alien shows that his circumstances have materially changed since the prior hearing, 8 C.F.R. 1003.19(e).

The Ninth Circuit in *Rodriguez* had "ordered the Government to provide procedural protections that [went] well beyond the initial bond hearing established by [the] regulations—namely, periodic bond hearings every six months in which the [government] must prove by clear and convincing evidence that the alien's continued detention is necessary." *Rodriguez*, 138 S. Ct. at 847. This Court reversed the Ninth Circuit's judgment. It explained that "[n]othing in § 1226(a)'s text—which says only that the [government] 'may release' the alien 'on . . . bond'—even remotely supports the imposition of either of [the Ninth Circuit's] requirements." *Ibid.*

2. The Third Circuit has repeated the very interpretive error that the Ninth Circuit committed in *Rodriguez*. Section 1231(a)(6) provides that an alien subject to that provision "may be detained" if the Attorney General (now the Secretary of Homeland Security[2]) determines that the alien is a risk to the community or unlikely to comply with the order of removal. The text

---

[2] Congress has transferred from the Attorney General to the Secretary of Homeland Security the enforcement of the INA, but the Attorney General retains authority over the administration of removal proceedings under 8 U.S.C. 1229a and questions of law. See, *e.g.*, 6 U.S.C. 202(3), 251, 271(b), 542 note, and 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

says nothing about six-month time limits, bond hearings, or a requirement that the government prove by clear and convincing evidence that further detention is justified. In other words, "[n]othing in § [1231(a)(6)]'s text * * * even remotely supports the imposition of [the Third Circuit's] requirements." *Rodriguez*, 138 S. Ct. at 847.

Indeed, in one respect, the conclusion that the Third Circuit erred in this case follows *a fortiori* from *Rodriguez*. The statute in *Rodriguez* explicitly provided that the government "may release the alien on * * * bond." 8 U.S.C. 1226(a)(2). Even so, this Court held that the Ninth Circuit erred by "order[ing] the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Rodriguez*, 138 S. Ct. at 847. In contrast, the statute in this case does not explicitly provide that the government may release aliens on bond. It says nothing at all about bond.

3. The Third Circuit's contrary reasoning contradicts *Rodriguez* at every turn. The Third Circuit acknowledged that the statutory text does not set forth a bond-hearing requirement. The court instead decided that such a requirement was "implicit" in the statutory text. See *Guerrero-Sanchez*, 905 F.3d at 211 ("Congress implicitly intended for that provision to compel a bond hearing after prolonged detention"); *ibid.* ("§ 1231(a)(6) compel[s] an implicit bond hearing requirement after prolonged detention"); *id.* at 213 ("§ 1231(a)(6) implicitly requires a bond hearing after

prolonged detention"); *ibid.* ("§ 1231(a)(6) implicitly requires that [the alien] be afforded a bond hearing after prolonged detention"); *id.* at 219 ("the implicit bond hearing requirement of § 1231(a)(6)") (capitalization and emphasis omitted); *ibid.* ("that provision implicitly requires a bond hearing after prolonged detention").

The Third Circuit believed that Section 1231(a)(6) supported the court's imposition of "implicit" requirements because it "uses the word 'may' to describe the detention authority rather than 'shall.'" *Guerrero-Sanchez*, 905 F.3d at 223. That reasoning is unsound. The provision at issue in *Rodriguez*, Section 1226(a), also used the word "may"; it provided that "an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a) (emphasis added). If the word "may" could not support the periodic-bond-hearing and clear-and-convincing-evidence requirements in *Rodriguez*, it also cannot support such requirements here.

The Third Circuit also relied on the canon of constitutional avoidance. See *Guerrero-Sanchez*, 905 F.3d at 223. In *Rodriguez*, however, this Court explained that the canon of constitutional avoidance could not justify reading the periodic-bond-hearing and clear-and-convincing-evidence requirements into a statute that did not contain them. The Court observed that "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." 138 S. Ct. at 843. Rather, the canon "permits a court to 'choose between competing *plausible* interpretations of a statutory text." *Ibid.* (brackets and citation omitted). The Third Circuit did not identify any plausible textual basis for its bond-hearing and clear-and-convincing-evidence requirements. As a result, the canon of constitutional

avoidance could not justify the imposition of those requirements.

Finally, the Third Circuit invoked this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). See *Guerrero-Sanchez*, 905 F.3d at 223. In *Zadvydas*, this Court had held that Section 1231(a)(6) implicitly requires detention to end once "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. The Third Circuit did not maintain that *Zadvydas* itself required a bond hearing after six months to determine whether the alien would be a risk to the community or unlikely to comply with an order of removal if released. Nor did the Third Circuit maintain that a bond hearing was needed to avoid the specific constitutional concerns noted in *Zadvydas*. There, the concern was the prospect of open-ended detention because the country of removal would not accept an alien's return. See *Zadvydas*, 533 U.S. at 690-696. In those circumstances, the Court decided, detention could not extend beyond the point at which its purpose of facilitating removal could no longer be served—namely, when there was no significant likelihood of removal in the reasonably foreseeable future. *Id.* at 696-699. This case does not involve that situation.

Instead, the Third Circuit believed that it had spotted "*different* constitutional concerns" than those identified in *Zadvydas*. *Guerrero-Sanchez*, 905 F.3d at 221 (emphasis added). The court believed that, even where detention continues to serve the immigration purpose of ensuring the availability of the alien for removal when ICE is in a position to remove him and of protecting against flight risk and danger to the community in the meantime, the detention might nonetheless violate due

process at some point if, in the court's view, it becomes unduly prolonged. And the Third Circuit suggested that, just as the *Zadvydas* Court had "read an implicit limitation into the statute," 533 U.S. at 689, the Third Circuit could similarly read "additional procedural protections" into the statute, *Guerrero-Sanchez*, 905 F.3d at 221 (emphasis omitted).

Rodriguez shows that the Third Circuit's reliance on *Zadvydas* was misplaced. In *Rodriguez*, this Court explained that *Zadvydas* simply "detected ambiguity" with respect to a "statutory limit on the *length* of permissible detention following the entry of an order of removal" where actual removal could not be effectuated. 138 S. Ct. at 843 (emphasis added). The Court clarified that *Zadvydas* did not grant courts a common-law-type power to add new procedural requirements to the statute. *Ibid.* The Court also described *Zadvydas* as "a notably generous application of the constitutional-avoidance canon," and it rejected efforts to go "further." *Ibid.* For the reasons set out above, Section 1231 contains nothing—and therefore no ambiguity—with respect to bond hearings and a clear-and-convincing-evidence burden of proof. The Third Circuit therefore erred in reading *Zadvydas* "as essentially granting a license to graft [new procedural requirements] onto the text." *Ibid.*

4. Applying Section 1231 as written would not leave aliens unprotected from continued detention with no prospect of release. As an initial matter, mandatory detention under Section 1231 usually lasts only for 90 days. See 8 U.S.C. 1231(a)(1)-(2). After that period, continued detention of the alien becomes discretionary. See 8 U.S.C. 1231(a)(6). Federal regulations set forth a framework for the exercise of that discretion. See

8 C.F.R. 241.4. Under that framework, the relevant field office of the DHS conducts an initial review before the 90-day period of mandatory detention expires; further periodic reviews are conducted by a review panel at ICE headquarters. See 8 C.F.R. 241.4(i)(3), (k)(1)-(2). During those reviews, officials must decide whether to release or detain the alien on the basis of both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as the likelihood that "the alien is a significant flight risk" or that he would "[e]ngage in future criminal activity"). 8 C.F.R. 241.4(f)(5) and (8)(iii). During those reviews, the alien may submit information that he believes provides a basis for release; may be assisted by an attorney or other representative; and may, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2), (i)(3).

Quite apart from those regulations, this Court held in *Zadvydas* that Section 1231 "does not permit indefinite detention." 533 U.S. at 689. It concluded that, if detention lasts for more than six months, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. Federal regulations set out a separate set of "special review procedures" to implement that holding. See 8 C.F.R. 241.13. Under those procedures, an eligible alien "may submit a written request for release," together with "whatever documentation" he wishes "in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Adjudicators at ICE headquarters must then review the alien's case, allow the alien to respond

to the government's evidence, allow the alien to submit additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately, "issue a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d)-(e). The regulations expressly provide that those special review procedures supplement, rather than supplant, the discretionary framework discussed in the preceding paragraph; thus, under that framework, the government may release an alien "without regard to the likelihood of the alien's removal in the reasonably foreseeable future." 8 C.F.R. 241.13(b).

In short, the statute and the regulations already provide extensive protections to aliens detained under Section 1231. The Third Circuit had no warrant for imposing yet more procedures that neither Congress nor the relevant agencies have adopted.

B. This Court's Review Is Warranted

1. Like the Third Circuit, the Ninth Circuit has held that "an alien facing prolonged detention under § 1231(a)(6)"—which it defined as "detention [that] crosses the six-month threshold"—"is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Diouf* v. *Napolitano*, 634 F.3d 1081, 1091-1092 (2011). No other court of appeals has ordered bond hearings for aliens detained under Section 1231. In addition, the Third Circuit's decision is contrary to this Court's decision in *Rodriguez*, which rejected the Ninth Circuit's imposition of bond-hearing and clear-and-convincing-evidence requirements that had no basis in the statutory text. The Third Circuit committed essentially the same error here.

The question presented is also important. Section 1231 governs the detention of aliens who have been ordered removed from the United States. The question presented affects the procedures available to that substantial population.

In addition, the United States has an overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). The Third Circuit's revision of Section 1231 compromises that interest by providing a new mechanism for detained aliens to obtain release over DHS's objection. Because those released aliens have already been ordered removed from the United States, they would have a strong incentive to abscond in order to avoid removal. In fact, the Third Circuit's decision creates a perverse incentive for aliens to delay their withholding-only proceedings, in an effort to obtain a bond hearing and release after six months. And even where DHS has determined that the alien poses a risk to the community or a risk of flight, the Third Circuit would require DHS to prove such a risk to an immigration judge "by clear and convincing evidence," *Guerrero-Sanchez*, 905 F.3d at 224 n.12—a high evidentiary burden that, as a practical matter, DHS will often be unable to meet.

The requirements that the Third Circuit has grafted onto the statute have significant operational consequences for the government. DHS and the Department of Justice have explained that "the U.S. immigration system" already faces an "extraordinary," "extreme," and "unsustainable" administrative "strain." *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg.

33,829, 33,831, 33,838, 33,841 (July 16, 2019). The Third Circuit has added to those administrative burdens. As detailed above, federal regulations already set forth two separate frameworks for reviewing an alien's continued detention under Section 1231: periodic reviews to determine whether the government should exercise its discretion to continue to detain the alien, and special reviews to determine whether the alien is entitled to release under *Zadvydas*. The Third Circuit has layered a third framework atop those two sets of procedures.

Finally, the Third Circuit's decision impermissibly intrudes on the responsibility of the political Branches. This Court has observed that immigration policy is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). In this case, the Legislative Branch has granted the Executive Branch the discretion to detain certain aliens who have been ordered removed from the United States. See 8 U.S.C. 1231(a)(6). And the Executive Branch has adopted regulations governing the exercise of that discretion—regulations under which an alien obtains periodic reviews before immigration officials rather than bond hearings before an immigration judge, and under which the alien rather than the government bears the burden of proof on the question whether the alien poses a flight risk or a risk to the community. See 8 C.F.R. 241.4. The Third Circuit articulated no sound justification for imposing further requirements found neither in the text of the statute nor in the applicable regulations.

2. In addition to warranting review in its own right, the question presented warrants review in connection with the government's petition for a writ of certiorari in *Albence* v. *Guzman Chavez* (filed Jan. 17, 2020), which the government is filing simultaneously with the certiorari petition in this case. The petition in *Guzman Chavez* presents the question whether the detention of certain aliens—those who illegally reenter the United States after having been removed, have their orders of removal reinstated, and then apply for withholding or deferral of removal—is governed by the procedures set forth in 8 U.S.C. 1231 or instead by the procedures set forth in 8 U.S.C. 1226. In the government's view, Section 1231 applies to such aliens. As the government's petition in *Guzman Chavez* explains, the Third and Ninth Circuits have held that Section 1231 governs such detentions, while the Second and Fourth Circuits have held that Section 1226 governs such detentions. See *Guzman Chavez* v. *Hott*, 940 F.3d 867, 869 (4th Cir. 2019); *Guerrero-Sanchez*, 905 F.3d at 213-219; *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 829-837 (9th Cir. 2017), cert. denied, 139 S. Ct. 411 (2018); *Guerra* v. *Shanahan*, 831 F.3d 59, 61-64 (2d Cir. 2016). Certiorari is warranted in that case because of the importance of the issue and the necessity of resolving the circuit conflict.

The question presented in *Guzman Chavez* is closely related to the question presented in this case. *Guzman Chavez* concerns which aliens Section 1231 covers, while this case concerns what procedures Section 1231 makes available to the aliens covered by that provision. As a practical matter, the category of aliens affected by *Guzman Chavez* (aliens with reinstated orders of removal seeking withholding or deferral of removal) significantly overlaps with the category of aliens affected by

this case (all aliens who have been ordered removed and whom the government has detained for more than six months). Moreover, the issues posed by both cases often come up in tandem. For instance, in *Guerrero-Sanchez*, upon which the Third Circuit relied in this case, the Third Circuit agreed with the government that the detention was governed by Section 1231 (contributing to the circuit split at issue in *Guzman Chavez*), but then held that Section 1231 contained implicit bond-hearing and clear-and-convincing-evidence requirements (raising the question presented in this case). See 905 F.3d at 213-219. Because the issues in the two cases are closely related, the government respectfully requests that the Court grant review in this case as well as *Guzman Chavez* and hear the cases in tandem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
JOHN J. W. INKELES
Attorney

JANUARY 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1054
(M.D. PA. NO. 1-18-CV-01742)

ANTONIO A. ARTEAGA-MARTINEZ

v.

WARDEN YORK COUNTY PRISON; DIRECTOR PHILADELPHIA FIELD OFFICE IMMIGRATION AND CUSTOMS ENFORCEMENT; DIRECTOR UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; SECRETARY UNITED STATES DEPARTMENT OF HOMELAND SECURITY, APPELLANTS

Aug. 8, 2019

ORDER

Present: JORDAN GREENAWAY, JR NYGAARD, Circuit Judges

Unopposed Motion by Appellee to Summarily Affirm.

Respectfully,
Clerk/kr

As the parties do not dispute that *Guerrero-Sanchez v, Warden York County Prison*, 905 F.3d 219, 226 (3d Cir. 2018) controls, this appeal does not present a substantial question. Therefore, the foregoing unopposed motion by appellee to summarily affirm the November 7, 2018

order of the District Court is hereby granted. The briefing schedule is hereby stayed.

By the Court,

/s/ RICHARD L. NYGAARD
RICHARD L. NYGAARD
Circuit Judge

Dated: Aug. 20, 2019

kr/cc: John J. W. Inkeles, Esq.
Marcia B. Ibrahim, Esq.
Brock L. Bevan, Esq/

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:18-CV-342

ANTONIO ARTEAGA-MARTINEZ, PETITIONER

v.

CLAIR DOLL, ET AL., RESPONDENT

Filed: Nov. 7, 2018

ORDER

HON. JOHN E. JONES III; HON. SUSAN E. SCHWAB

1. The Report and Recommendation (Doc. 12) of Chief United States Magistrate Judge Susan E. Schwab is **ADOPTED** in its entirety.

2. The petition for writ of habeas corpus (Doc. 1) is **GRANTED** and it is **ORDERED** that the Petitioner be given an individualized bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez.*

3. The Clerk of Court is directed to **CLOSE** the file on this case.

/s/ JOHN E. JONES III
JOHN E. JONES III
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1:18-cv-01742

ANTONIO ARTEAGA-MARTINEZ, PETITIONER

v.

CLAIR DOLL, ET AL., RESPONDENTS

Filed: Nov. 6, 2018

REPORT AND RECOMMENDATION

(Judge JONES) (Chief Magistrate Judge SCHWAB)

During a status call on October 30, 2018, counsel for the respondents agreed that after November 4, 2018, Arteaga-Martinez is entitled to a bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 219, 226 (3d Cir. 2018), which held that an alien, like Arteaga-Martinez, who is subject to a reinstated removal order, is detained under 8 U.S.C. § 1231(a) and is entitled to a bond hearing before an Immigration Judge after prolonged detention, which is generally after six months of custody. Given this concession, we recommend that the Court grant the petition for a writ of habeas corpus

and order that Arteaga-Martinez be given an individualized bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez*.[1]

---

[1] In his petition, Arteaga-Martinez also challenges his reinstated removal order by attempting to collaterally challenge the 2012 expedited removal order that formed the basis of his reinstated removal order. Because at the status conference, counsel for Arteaga-Martinez did not pursue that claim and agreed that we should issue a Report and Recommendation recommending that Arteaga-Martinez be given a bond hearing, we conclude that Arteaga-Martinez has waived any such claim. Even if not waived, any such claim is without merit. With a limited exception, a challenge to a removal order is proper only in a petition for review before the Court of Appeals. *See* 8 U.S.C.A. § 1252(a)(5). The exception concerns review of expedited removal orders under 8 U.S.C. § 1225(b)(1). *See* 8 U.S.C. § 1252(e)(2) ("Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title."). But here Arteaga-Martinez does not claim that he is not an alien, that he was not ordered removed under the expedited-removal provision, or that that he was lawfully admitted for permanent residence, has been admitted as a refugee, or has been granted asylum. Thus, even assuming that he can collaterally challenge his expedited removal order, he is not entitled to habeas relief. Moreover, 8 U.S.C. § 1231(a)(5) provides that a reinstated removal order "is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under this chapter." And it has been held that "the limited habeas review of removal orders issued under § 1225(b)(1) that is authorized by § 1252(e)(2) may not be conducted in a § 1231(a)(5) reinstatement

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

---

proceeding." *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781, 782 (8th Cir. 2006).

Submitted this 6th day of Nov., 2018.

/s/ SUSAN E. SCHWAB
SUSAN E. SCHWAB
Chief United States Magistrate Judge

APPENDIX D

1. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person

---

[1] So in original. Probably should be "sentenced".

cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

2. 8 U.S.C. 1231(a) provides:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United

States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under

section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment

---

[1] See References in text note below.

[2] So in original. Probably should be "subparagraph (B),".

until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of

---

[3] So in original. Probably should be followed by a closing parenthesis.

the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with

the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.