No. 19-896

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
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Marcia Binder Ibrahim
Brock L. Bevan
LAW OFFICE OF MARCIA BINDER IBRAHIM, LLC
222 South Broad Street
Lansdale, PA 19446

Pratik A. Shah
Counsel of Record
James E. Tysse
Margaret O. Rusconi*
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

* *Licensed to practice in Virginia only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld LLP who is an enrolled, active member of the D.C. Bar; application for admission to the D.C. Bar pending.*

Counsel for Respondent

QUESTION PRESENTED

Whether an individual subject to indefinite detention under 8 U.S.C. § 1231(a)(6)—the same statutory provision that this Court found "ambiguous" in *Zadvydas v. Davis*, 533 U.S. 678 (2001)—is entitled to a bond hearing after six months while pursuing a *bona fide* withholding-of-removal claim that can take the government years to adjudicate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES:

REGULATIONS:

INTRODUCTION

The petition constitutes a blatant overreach. The government seeks review in this manifestly uncertworthy case on a piggyback theory: that this Court should grant certiorari because another concurrently filed petition presents a "closely related" question. Pet. 7. Juxtaposing the petitions makes clear that the Court should deny this one: The government does not allege any circuit split, and resolution of the antecedent question presented in the other case could render the question presented in this case moot.

Nor are there any efficiencies to be gained by considering the cases together. This Court's usual practice suggests just the opposite. The court of appeals here—in its unopposed and unpublished summary disposition—never even considered the government's argument. No court has accepted it. This Court should not be the first.

In finding an implicit bond-hearing requirement under section 1231(a)(6), the Third Circuit followed the constitutional-avoidance course that this Court charted in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Zadvydas* found the language of section 1231(a)(6) to be "ambiguous" because, among other reasons, it does not necessarily confer unlimited discretion to detain indefinitely. Like this Court, the Third Circuit avoided resolving the serious constitutional question of whether the indefinite and prolonged detention of noncitizens under section 1231(a)(6) violates due process—a concern that is in no way obviated by the government's asserted administrative procedures.

The petition should be denied.

STATEMENT

A. Legal Framework

The INA, 8 U.S.C. § 1101 *et seq*., outlines the circumstances when the government can detain certain noncitizens. Section 1231 provides that "when an alien is ordered removed," the Attorney General "shall detain the alien" for the 90-day removal period. 8 U.S.C. § 1231(a)(1)-(2). Certain classes of noncitizens ordered removed "may be detained beyond the removal period." *Id.* § 1231(a)(6).

Although section 1231(a)(6) does not impose an explicit time period before a detainee is entitled to a bond hearing, it does "contain an implicit 'reasonable time' limitation." *Zadvydas*, 533 U.S. at 682. In *Zadvydas*, this Court considered whether section 1231(a)(6) "authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period" when the country of removal will not accept the individual's return. *Id*. Although indefinite detention "would raise a serious constitutional problem," *id.* at 690, this Court noted that it "must give effect to" that interpretation if Congress clearly intended indefinite detention, *id.* at 696.

After analyzing the text of section 1231(a)(6), however, this Court found no such intent. To the contrary, it found the provision's language "ambiguous." *Zadvydas*, 533 U.S. at 697. Thus, "interpreting the statute to avoid a serious constitutional threat," this Court concluded that six months is a presumptively reasonable detention period. *Id.* at 699. After six months, if "removal is no[t] *** reasonably foreseeable, continued detention

is no longer authorized by statute" and must end. *Id.* at 699, 701.

In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), this Court considered whether *Zadvydas*'s reasoning should be extended to *different* statutes: sections 1225(b), 1226(a), and 1226(c) of the INA. Specifically, *Jennings* posed the question whether those sections could plausibly be interpreted to require "a bond hearing every six months." 138 S. Ct. at 839. Contrasting the text of sections 1225 and 1226 with that of section 1231(a)(6), this Court answered no: "*Zadvydas*'s reasoning [could not] fairly be applied." *Id.* at 843. The statutory provisions at issue in *Jennings*, the Court reasoned, are not "ambiguous" like section 1231(a)(6), but rather "preclude" the proffered interpretation. *Id.* at 844.

After *Jennings*, the Third Circuit (in a case preceding this one) was confronted with the question presented here: whether section 1231(a)(6) "implicitly requires a bond hearing after prolonged detention" where an individual awaits adjudication of a petition to withhold removal under the INA or 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 ("CAT"). *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 213 (3d Cir. 2018). Relying on *Zadvydas*'s interpretation of section 1231(a)(6), the Third Circuit found such a requirement.

In *Guerrero-Sanchez*, the Third Circuit reasoned that *Zadvydas* "narrowed the *scope* of the detention that § 1231(a)(6) authorizes." 905 F.3d at 221. In

finding that section 1231(a)(6) authorized detention "only as long as reasonably necessary to remove" the noncitizen, *Zadvydas* did not say "that *** limiting construction *** is the sole constraint on detention that the Due Process Clause requires." *Id.* at 220-221 (internal quotation marks omitted). If anything, the Third Circuit explained, because "[t]he Supreme Court has already determined that the text of § 1231(a)(6) is ambiguous," *id.* at 223, the "plain text" of section 1231(a)(6) "invites [the court] to apply the canon of constitutional avoidance in order to avoid the question of whether Guerrero-Sanchez's continued detention"—which had already spanned 637 days—"violates the Due Process Clause." *Id.* at 223-224.

The Third Circuit therefore adopted the Ninth Circuit's reading of section 1231(a)(6), concluding that "an alien facing prolonged detention under [that provision] is entitled to a bond hearing before an immigration judge." *Guerrero-Sanchez*, 905 F.3d at 224 (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011)). In accord with *Zadvydas*, the Third Circuit determined that "prolonged detention" is generally six months. *Id.* at 225. At that point, the noncitizen must be "released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community" "by clear and convincing evidence." *Id.* at 224 & n.12. For "it is improper to ask the alien to share equally with society the risk of error when the possible injury to the individual—deprivation of liberty—is so significant." *Id.* (internal quotation marks and alteration omitted) (quoting *Singh v. Holder*, 638 F.3d 1196, 1203-1204 (9th Cir. 2011) (quoting *Addington v. Texas*, 441 U.S.

418, 427 (1979))).

The Third Circuit denied rehearing in *Guerrero-Sanchez* without dissent.

B. Factual Background

Respondent Antonio Arteaga-Martinez is a citizen and native of Mexico. Petition for Writ of Habeas Corpus at 5 (M.D. Pa. Sept. 4, 2018), ECF No. 1 ("D. Ct. Pet."). Over the past two decades, he has entered the United States four times. *Id*. As relevant here, upon reentering the United States in July 2012 after visiting a sick relative, Arteaga-Martinez was detained at the border, deemed inadmissible, and removed via expedited removal procedures. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A). Two months later, fearing gang reprisals in Mexico, Arteaga-Martinez returned to the United States. D. Ct. Pet. 7. In May 2018, Immigration and Customs Enforcement ("ICE") detained Arteaga-Martinez; that same day, ICE reinstated his prior removal order. *Id.*

Soon thereafter, an asylum officer determined that Arteaga-Martinez had a reasonable fear of future persecution and torture if he were returned to Mexico. D. Ct. Pet. 7. In August 2018, Arteaga-Martinez filed an application for withholding of removal under 8 U.S.C. § 1231(b)(3), and for withholding and deferral of removal under regulations promulgated to implement the United States' obligations under the CAT. *See* D. Ct. Pet. 8-9. The withholding proceedings remain pending.

C. Procedural History

In September 2018, after four months of detention, Arteaga-Martinez filed a petition for writ of habeas corpus. D. Ct. Pet. 1. He argued primarily that his reinstatement of removal was legally void "due to procedural deficiencies at the time of the issuances of the underlying expedited removal order," and therefore the court should stay removal and release him from detention. *Id*. at 2. Alternatively, Arteaga-Martinez requested "a constitutionally-adequate hearing where the government must demonstrate that [his] continued detention is justified before an Immigration Judge." *Id.* at 15.

Once Arteaga-Martinez's time in detention had reached nearly six months, he moved the district court to hold the case in abeyance pending a bond hearing in immigration court pursuant to *Guerrero-Sanchez*. Mot. To Hold In Abeyance (M.D. Pa. Oct. 23, 2018), ECF No. 9. The government did not oppose the motion. *Id.* at 1. On the contrary, the government conceded before the magistrate judge that, at the six-month mark, "Arteaga-Martinez [would be] entitled to a bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez*." Pet. App. 4a-5a. Because all parties were in agreement, the magistrate judge recommended that the district 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." *Id.*

The government did not object. Gov't Letter (M.D. Pa. Nov. 7, 2018), ECF No. 14. The district court thus issued an order adopting the report and recommendation in its entirety, granting the habeas

petition, and ordering that Arteaga-Martinez be given an individualized bond hearing. Pet. App. 3a.

The government appealed. It argued for the first time that "[t]he district court's order granting Arteaga[-Martinez] a bond hearing before an immigration judge conflicts with Supreme Court precedent." Gov't C.A. Br. 19. Arteaga-Martinez filed a motion for summary affirmance under *Guerrero-Sanchez*. C.A. Mot. for Summ. Aff. The government "did not oppose th[at] motion," *id.* at 8, and the Third Circuit summarily affirmed, Pet. App. 1a-2a. The government did not seek rehearing.[1]

REASONS FOR DENYING THE PETITION

The government's petition is an unabashed attempt to piggyback the question presented in this case on a distinct antecedent question in a concurrently filed petition. But that is not how the certiorari process should work. No matter the deference ordinarily owed the Solicitor General, the assertion that this case is "closely related" to the other pending petition—a dubious proposition in itself—is not a ground for certiorari. That is especially true because the resolution of the other case may well obviate the need to review this one.

This case, moreover, is devoid of any of the traditional factors warranting this Court's review: There is no circuit split. The Third Circuit's holding

---

[1] Pursuant to the writ, Arteaga-Martinez received a bond hearing before an immigration judge, who ordered his release on bond pending removal. The government never filed a response to Arteaga-Martinez's motion for release on bond, and the government did not appeal the immigration judge's order.

follows from this Court's precedent interpreting the same "ambiguous" statute. And the government never raised the principal merits argument made in its petition until appeal—and, even then, the argument was neither fully briefed nor argued (let alone adjudicated). The only circuit to have grappled with the government's argument to date has rejected it. Accordingly, this premature petition should be denied.

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS

There is no conflict among the courts of appeals on the question presented, and the government does not contend otherwise. On the contrary, the government acknowledges that, "[l]ike the Third Circuit, the Ninth Circuit"—the only other court to have addressed the question—"has held that 'an alien facing prolonged detention under § 1231(a)(6)' *** 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." Pet. 14 (citing *Diouf*, 634 F.3d at 1091-1092).

In *Diouf*, the noncitizen plaintiff had been detained under section 1231(a) for nearly 18 months before he filed suit seeking immediate release. 634 F.3d at 1083. He argued that his prolonged detention violated the Due Process Clause. The district court rejected the argument that Diouf was entitled to a bond hearing, but the Ninth Circuit reversed. *Id.* at 1084. Without "procedural protections," the court of appeals explained, "prolonged detention under § 1231(a)(6) *** would raise 'serious constitutional

concerns.'" *Id.* at 1086. But, as in *Guerrero-Sanchez*, the Ninth Circuit found that it could avoid those concerns by "apply[ing] the canon of constitutional avoidance and constru[ing] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.*

Earlier this month, rejecting the government's contention that *Diouf* was "clearly irreconcilable" with *Jennings*, the Ninth Circuit confirmed that *Diouf* remains good law. *Aleman Gonzalez v. Barr*, --- F.3d ---, No. 18-16465, 2020 WL 1684034, at *18 (9th Cir. Apr. 7, 2020) ("The material difference between §§ 1226(a) and 1231(a)(6) prevents us from concluding that *Jennings*'s rejection of construing § 1226(a) to require a bond hearing at six months applies to § 1231(a)(6)."); *see also Flores Tejada v. Godfrey*, --- F.3d ---, No. 18-35460, 2020 WL 1684035, at *4 (9th Cir. Apr. 7, 2020) (reiterating holding in *Aleman Gonzalez* but rejecting argument that *Diouf* required *additional* bond hearings every six months).

The government does not deny that the Third and Ninth Circuits are fully aligned on the question presented. Indeed, the Third Circuit explicitly adopted the Ninth Circuit's interpretation of section 1231(a)(6). *See Guerrero-Sanchez*, 905 F.3d at 224 ("In order to avoid determining whether Guerrero-Sanchez's detention violates the Due Process Clause, we adopt the Ninth Circuit's limiting construction of § 1231(a)(6)[.]"). No other court of appeals has addressed the question presented, let alone reached a contrary conclusion. *See id.* at 227 ("[O]ur holding today is in line with that of the Ninth Circuit, the sole

court of appeals to have also addressed this issue."). No circuit split exists.

II. THE DECISION BELOW COMPORTS, NOT CONFLICTS, WITH THIS COURT'S PRECEDENTS

The government's merits argument rests almost entirely on the notion that the Third Circuit's decision in *Guerrero-Sanchez*—and thus the court's summary decision below—conflicts with *Jennings*. But far from disclaiming *Zadvydas*, which interpreted the same statutory provision at issue here, *Jennings* invoked *Zadvydas* to explain why the two other statutes at issue in *Jennings* differ from section 1231(a)(6). The Third Circuit's interpretation of section 1231(a)(6) flows from this Court's reasoning in *Zadvydas,* and *Jennings* does not compel a different conclusion.

A. *Jennings* Distinguished "Clear" Sections 1225 and 1226 From "Ambiguous" Section 1231(a)(6)

In *Zadvydas*, this Court held that the provision at issue here—section 1231(a)(6)—is "ambiguous" regarding the due process protections it provides. 533 U.S. at 697. *Jennings*, too, recognized that "Congress left the permissible length of detention under § 1231(a)(6) unclear." 138 S. Ct. at 844. But *Jennings* carefully distinguished section 1231(a)(6) from the "clear" (*id.* at 847) provisions at issue in that case, sections 1225 and 1226 of the INA. This Court found that those provisions "differ[] materially" from section 1231 in multiple respects. *Id*. at 843.

First, *Jennings* observed that sections 1225 and 1226—unlike section 1231(a)(6)—specify the duration

of detention. "[T]he key statutory provision in *Zadvydas*," section 1231(a)(6), "failed to specify how long detention was to last." *Jennings*, 138 S. Ct. at 850; *see id.* at 844 ("Congress left the permissible length of detention under 1231(a)(6) unclear."). Sections 1225 and 1226, by contrast, "provide for detention for a specified period of time." *Id.* at 844, 846; *see also Demore v. Kim*, 538 U.S. 510, 528-529 (2003) (explaining that, unlike section 1226, "the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,'" and "*Zadvydas* distinguished [section 1231(a)(6)] *** on these very grounds").

Second, *Jennings* noted that sections 1225 and 1226—unlike section 1231(a)(6)—restrict the government's discretion to release detained noncitizens. This Court pointed out that section 1225 uses the word "shall," while section 1231(a)(6) says noncitizens "*may* be detained." 138 S. Ct. at 850 (emphasis added). That "requirement of detention [found in the word 'shall'] precludes a court from finding ambiguity [in section 1225] in the way that *Zadvydas* found ambiguity in § 1231(a)(6)." *Id.* at 844; *see also id.* at 850 ("*Zadvydas* found that the words 'may be detained' [are] consistent with requiring release from long-term detention.") (alteration in original) (internal quotation marks omitted). Although sections 1226(a) and 1226(c) also use the word "may," both have constraints missing from section 1231(a)(6). The discretionary "may" in section 1226(a) is tied, as discussed above, to the period of detention that the statute specifies. And section 1226(c) more precisely provides that the Attorney

General "may release" a noncitizen "*only if* *** certain conditions are met"—which is more akin to "an affirmative *prohibition* on releasing detained aliens under any other conditions." *Id.* at 846-847.

Third, and relatedly, *Jennings* explained that both sections 1225 and 1226—unlike section 1231(a)(6)—provide for an "express exception to detention," which this Court found "implies that there are no *other* circumstances" permitting release. 138 S. Ct. at 844, 846.

"In short, a series of textual signals distinguishes the provisions at issue in [*Jennings*] from *Zadvydas*'s interpretation of § 1231(a)(6)." *Jennings*, 138 S. Ct. at 844. And it was "[*t*]*hose differences* [that] preclude" a similar interpretation of sections 1225 and 1226. *Id.* at 843-844 (emphasis added). Thus, by *Jennings*'s own terms, there is no conflict between its interpretation of sections 1225 and 1226 and the Third Circuit's interpretation of section 1231(a)(6) in *Guerrero-Sanchez*.

B. The Third Circuit's Construction of Section 1231(a)(6) Avoids Serious Due Process Concerns

1. The Due Process Clause prohibits the government from "depriv[ing]" any person "of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). But "[f]reedom from imprisonment *** lies at the heart of the liberty th[e] [Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The

clause thus requires a hearing when detention becomes "unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

In the removal context, *Zadvydas* holds that detention becomes presumptively unreasonable after six months. 533 U.S. at 701. This Court found that "Congress previously doubted the constitutionality of detention for more than six months." *Id.* (citing filing in *United States v. Witkovich*, 353 U.S. 194 (1957)). Likewise, in *Demore*, this Court found the detention of noncitizens under section 1226(c) constitutional only after emphasizing the short-term nature of the detention at issue, where the government assured that only "in the minority of cases" were noncitizens detained as long as five months, 538 U.S. at 529-530—a statistic that the government later admitted "w[as] wrong," *Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting) ("Detention normally lasts twice as long as the Government then said it did.").

In *Zadvydas*, to avoid serious due process concerns, this Court interpreted the same "ambiguous" statutory language at issue here to hold "that an alien who has been ordered removed may not be detained beyond 'a period reasonably necessary to secure removal'"—and "that six months is a presumptively reasonable period." *Jennings*, 138 S. Ct. at 843 (quoting *Zadvydas*, 533 U.S. at 699). If removal after six months is not likely "in the reasonably foreseeable future," the Court concluded, then section 1231(a)(6) "no longer authorize[s]" continued detention (absent a contrary government showing). *Zadvydas*, 533 U.S. at 699, 701.

2. That due process framework informs the statutory analysis in the present context: for individuals seeking withholding relief (like Arteaga-Martinez), removal after six months of detention often is not likely (or even remotely possible) "in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701.

Individuals subject to a removal order can seek withholding relief only if they are found to have a "reasonable fear of persecution or torture" upon removal. 8 C.F.R. § 241.8(e); *see also id.* § 208.16(b). Such individuals are entitled to withholding proceedings before an immigration judge, with a right of appeal to the BIA. *Id.* § 208.31(g). Those proceedings often take years. *See, e.g.*, *Guzman-Chavez*, 905 F.3d at 220 (stressing that noncitizen's withholding-only claim "could take years to resolve"); *id.* at 212 (noting that first withholding proceeding was scheduled 53 months from the date originally detained).

Without the protection afforded by the Third Circuit's rule, noncitizens like Arteaga-Martinez face a dire dilemma: remain imprisoned for years while the government adjudicates your legal right to withholding relief, or submit to immediate removal despite the risk of persecution and torture. As the Third Circuit put it, prolonged and indefinite detention without a bond hearing while an individual pursues a *bona fide* withholding claim "would effectively punish [him] for pursuing applicable legal remedies." *Guerrero-Sanchez*, 905 F.3d at 220 (alteration in original).

The existing administrative procedures the government proffers for noncitizens detained under section 1231(a)(6) (Pet. 13-14) do not come close to obviating the constitutional concerns. Agency custody reviews unreasonably place the burden of proof on long-detained noncitizens and are made by agency personnel without any judicial review—even by an immigration judge, let alone an Article III court—except in narrow circumstances inapplicable here. *See* 8 C.F.R. §§ 241.4(d)(1), 241.4(d), 241.4(h), 241.14(g). Those purported "protections," Pet. 14, create a serious "risk of an erroneous deprivation of" liberty, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—particularly when administered by non-neutral arbiters charged with advancing the government's touted goals of "diminish[ing] illegal immigration" (Pet. 15) and avoiding administrative delay (Pet. 15-16). *See Zadvydas*, 533 U.S. at 692 (expressing concern that "the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review" and noting that "[t]his Court has suggested *** that the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights'").

In light of the due process concerns for noncitizens like Arteaga-Martinez, the Third Circuit's interpretation of "ambiguous" section 1231(a)(6)—just as in *Zadvydas*—is both permissible and necessary. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575

(1988) (explaining that if a statutory construction that avoids a serious constitutional question is "reasonable," court must adopt it); *see also National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) ("The question is not whether that is the most natural interpretation ***, but only whether it is a 'fairly possible' one.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

The Third Circuit permissibly held that the government's discretionary power to detain a removable noncitizen, along with the lack of any language in section 1231 authorizing indefinite detention, implies a means of reviewing that detention through a bond hearing. The six-month mark, moreover, is an appropriate time for that hearing—the same period this Court identified in *Zadvydas*. 533 U.S. at 701. Because that construction of section 1231(a)(6) is "fairly possible," it is also required. *Crowell*, 285 U.S. at 62.[2]

---

[2] Once the Third Circuit found a bond hearing requirement, it was also appropriate for the court to set the standard of proof for that hearing. Indeed, as this Court has said, "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" *Santosky v. Kramer*, 455 U.S. 745, 755-756 (1982) (quoting *Woodby v INS*, 385 U.S. 276, 284 (1966)). And because "the individual interests at stake"—in this case, deprivation of liberty—"are both 'particularly important' and 'more substantial than mere loss of money,'" clear-and-convincing evidence is a reasonable standard to apply. *Id.* at 756 (quoting *Addington*, 441 U.S. at 424); *see id.* ("[T]he Court has deemed [the clear-and-convincing evidence standard] *** necessary to preserve fundamental fairness in a variety of government-initiated

III. THIS CASE IS A PREMATURE AND POOR VEHICLE FOR THIS COURT'S REVIEW

A. Granting Review Would Be Premature At Best

Neither *Guerrero-Sanchez* nor the unpublished summary decision below ever adjudicated the government's argument that *Jennings* forecloses the Third Circuit's interpretation of section 1231(a)(6).

This Court decided *Jennings* after appeal briefs were filed but before oral argument in *Guerrero-Sanchez*. Yet the government's supplemental pre-argument letter discussed *Jennings*'s effect on section 1226 alone—not section 1231. Gov't FRAP 28(j) Letter, *Guerrero-Sanchez*, Nos. 16-4134 & 17-1390 (3d Cir. Apr. 16, 2018). It is thus unsurprising that when *Guerrero-Sanchez* was decided months later and agreed with the government that section 1231 rather than section 1226 governed, the Third Circuit cited *Jennings* favorably without addressing any supposed tension the government now claims. Notably, when the government petitioned for rehearing en banc—more than a year after *Jennings* was decided—it did not even cite *Jennings*, let alone argue that *Jennings* precluded the panel's interpretation of section 1231(a)(6). Reh'g Pet., *Guerrero-Sanchez* (3d Cir. Mar. 1, 2019).

In this case, neither the district court nor the Third Circuit addressed whether *Jennings* is inconsistent with *Guerrero-Sanchez*. That is because

---

proceedings that threaten the individual involved with 'a significant deprivation of liberty.'").

the government never gave either court the opportunity. The government failed to make a *Jennings* argument before either the magistrate judge or district court. R. & R. at 1-2 (M.D. Pa. Nov. 6, 2018), ECF No. 12; Gov't Letter (M.D. Pa. Nov. 7, 2018), ECF No. 14. On appeal, after the government raised the *Jennings* argument in its opening brief—solely "to preserve the issue for further review," Gov't App. Br. 3—it *did not oppose* Respondent's motion for summary affirmance. Pet. App. 1a-2a. Nor did it seek rehearing en banc. The upshot is that the Third Circuit never was given a chance to grapple with the government's *Jennings* arguments at all.

The lone court of appeals to adjudicate the government's *Jennings* argument has rejected it. *See Aleman Gonzalez*, 2020 WL 1684034, at *18, *23 (reiterating that "material difference between §§ 1226(a) and 1231(a)(6)" means that *Jennings*, despite creating "some tension" with *Diouf*, does not require government's interpretation). The government is free to seek rehearing en banc in *Aleman Gonzalez* or, at least, to seek this Court's review of a decision that has actually considered its arguments. But granting certiorari at this premature stage would be a stark departure from this Court's practice. And no special justification warrants such a departure. This Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

B. The Petition Should Be Denied Regardless Of The *Guzman Chavez* Petition's Disposition

Whether or not this Court grants the government's concurrently filed petition in *Guzman Chavez*, *this* petition should be denied. For starters, the Third Circuit in *Guerrero-Sanchez*, 905 F.3d at 219, answered the same question presented in *Guzman Chavez*—whether the detention of noncitizens like Arteaga-Martinez "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," Pet. 17—by *agreeing with the government's view*. *See* Pet. 6 n.1; *see also* Pet. 17 (noting that "the Third and Ninth Circuits have held that Section 1231 governs such detentions"). The government thus did not petition on that antecedent issue in this case.

The government's description of the questions in the two petitions as "closely related" (Pet. 7, 17, 18), moreover, is overstated. *Guzman Chavez* concerns which provision of the INA (section 1226 or 1231) governs the detention of noncitizens in withholding or deferral of removal proceedings, whereas this case involves the procedures under section 1231(a)(6) for all noncitizens who have been detained longer than six months. The government contends that the issues "often come up in tandem." Pet. 17-18. But the government offers meager support for its contention, which is a paltry basis for certiorari anyway. The only example the government cites is *Guerrero-Sanchez* itself. Pet. 18.

Finally, if this Court chooses to resolve the question presented in *Guzman Chavez*, its resolution

might moot the question presented in this case. Specifically, if the Court were to hold in *Guzman Chavez* that section 1226, not section 1231, governs the detention of noncitizens in withholding proceedings, then whether section 1231(a)(6) implicitly requires a bond hearing for such noncitizens would not matter. Arteaga-Martinez, and others similarly situated, would be entitled to a bond hearing before an immigration judge under 8 C.F.R. § 1236.1(d)(1). In contrast, if the Court were to hold that section 1231 governed, the issue of what specific procedures are available to a noncitizen after prolonged detention under section 1231 can—and should—await further percolation in the courts of appeals. Either way, there is no basis for this Court to reach out and decide the question presented in this case before any court has accepted the government's merits argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Marcia Binder Ibrahim
Brock L. Bevan
LAW OFFICE OF MARCIA BINDER IBRAHIM, LLC

Pratik A. Shah
Counsel of Record
James E. Tysse
Margaret O. Rusconi*
AKIN GUMP STRAUSS HAUER & FELD LLP

* *Licensed to practice in Virginia only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld LLP who is an enrolled, active member of the D.C. Bar; application for admission to the D.C. Bar pending.*

Counsel for Respondent

April 22, 2020