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

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

REPLY BRIEF FOR THE PETITIONERS

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

Statute and rule—Continued: Page

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In *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), this Court reversed a decision of the Ninth Circuit that had interpreted a provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1226(a) to require periodic bond hearings after six months of detention, and to require the government to prove by clear and convincing evidence that further detention is justified—even though Section 1226(a) said nothing about bond hearings. In *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018), which the panel followed in this case, the Third Circuit interpreted a different provision of the statute, 8 U.S.C. 1231, to require bond hearings after six months of detention at which the government must prove by clear and convincing evidence that further detention is justified—even though that provision likewise says nothing about bond hearings.

As the petition for a writ of certiorari explains (at 6-18), this Court should grant review in order to correct the Third Circuit's interpretation of Section 1231—which conflicts with this Court's decision in *Rodriguez*, 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, and raises a question that is closely related to the question presented in *Albence* v. *Guzman Chavez*, No. 19-897 (filed Jan. 17, 2020). Respondent argues (Br. in Opp. 8-20) that the decision below is correct, that the question presented does not warrant this Court's review, and that this case would be a poor vehicle for resolving that question, but each of those contentions lacks merit.

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

1. "In the American system of *stare decisis*, the result and the reasoning [of a decision] each independently have precedential force, and [lower] courts are therefore bound to follow both the result and the reasoning of a prior decision [of this Court]." *Ramos* v. *Louisiana*, No. 18-5924, 2020 WL 1906545, at *22 n.6 (Apr. 20, 2020) (Kavanaugh, J., concurring in part). The Third Circuit's interpretation of Section 1231 contradicts both the result and the reasoning of this Court's decision in *Rodriguez*.

Rodriguez was a complex case that involved multiple legal issues, but the result that is most relevant here is contained in Part III-C of this Court's opinion. See *Rodriguez*, 138 S. Ct. at 847-848. In that Part, the Court rejected the contention that Section 1226(a) requires "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." *Id.* at 847. The Court explained that "[n]othing" in the statutory text "even remotely support[ed] the imposition of either of those requirements." *Ibid.* That result contradicts the Third Circuit's conclusion in this case that Section 1231 requires a bond hearing after six months of detention at which the government must prove by clear and convincing evidence that the alien's continued detention is necessary. See Pet. 9. The Third Circuit identified no sound basis for treating the text of Section 1231 any differently from the text of Section 1226 with respect to bond hearings. *Ibid.*

Quite apart from that result, *Rodriguez* reasoned more broadly that the principle of constitutional avoidance applies only "when statutory language is susceptible of multiple interpretations." 138 S. Ct. at 836. "[A] court relying on that canon still must *interpret* the statute, not rewrite it." *Ibid.* The Third Circuit contradicted that aspect of *Rodriguez* too, because it invoked constitutional avoidance to hold that Section 1231 requires a bond hearing after six months, but failed to identify any plausible textual basis for that requirement. See Pet. 9-12.

2. Respondent offers no persuasive response to those arguments. He identifies no sound basis for distinguishing the result reached in Part III-C of *Rodriguez* from the result reached by the Third Circuit here and in *Guerrero-Sanchez*; in fact, respondent does not discuss that section of *Rodriguez* at all. Respondent also discusses (Br. in Opp. 13-16) the principle of constitutional avoidance, but, in doing so, he identifies no affirmative basis in the text for imposing the requirements adopted by the Third Circuit.

Instead of addressing the portions of *Rodriguez* that are pertinent here, respondent emphasizes (Br. in Opp. 10-13) Parts III-A and III-B of the opinion. See *Rodriguez*, 138 S. Ct. at 842-847. In those sections of the opinion, however, the Court considered a separate question that is not at issue here: whether 8 U.S.C. 1225 and 1226 "contain implicit limitations on the length of detention." *Rodriguez*, 138 S. Ct. at 842. The Court acknowledged that, in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), it had read Section 1231 to contain an implicit limit on the length of an alien's detention, but concluded that "a series of textual signals distinguishe[d] [Sections 1225 and 1226] from *Zadvydas*'s interpretation of [Section 1231]." *Rodriguez*, 138 S. Ct. at 844. See, *e.g.*, Br. in Opp. 10-11 ("[*Rodriguez*] observed that sections 1225 and 1226—unlike section 1231(a)(6)—specify the duration of detention").

Respondent appears to argue that, because this Court acknowledged in *Rodriguez* that Section 1226 and Section 1231 differ with respect to the limits they place on the length of detention, those provisions must also differ with respect to whether they require bond hearings. That argument is unsound, because the question whether a statute limits the length of detention is quite different from the question whether it requires a bond hearing at which the government bears the burden of proof by clear and convincing evidence. Illustrating that distinction, a five-Justice majority in *Rodriguez* concluded that the provision at issue there contains no implicit limit on the length of detention, but a broader six-Justice majority concluded that the provision contains no implicit requirement of periodic bond hearings. See *Rodriguez*, 138 S. Ct. at 836 n.*, 846-848. In the end, respondent identifies no affirmative textual basis in

Section 1231 for requiring bond hearings at which the government must prove its case by clear and convincing evidence, and *Rodriguez* makes clear that a court may not impose such requirements without textual support. *Id.* at 847-848.

3. Respondent invokes (Br. in Opp. 9) the Ninth Circuit's recent decision in *Aleman Gonzalez* v. *Barr*, 955 F.3d 762 (2020), but far from supporting respondent's position, that case confirms that the decision below is inconsistent with *Rodriguez*. In *Aleman Gonzalez*, the Ninth Circuit considered whether *Diouf* v. *Napolitano*, 634 F.3d 1081 (9th Cir. 2011)—in which the court of appeals had held that a person detained under Section 1231 is entitled to a bond hearing after six months of detention—remains good law after this Court's later decision in *Rodriguez*. *Aleman Gonzalez*, 955 F.3d at 775-776. A divided panel concluded that it did. *Ibid.* The majority "recognize[d] some tension" between *Diouf* and this Court's decision in *Rodriguez*, but concluded that the decisions were not "so fundamentally inconsistent" that *Diouf* had to be overruled. *Id.* at 766. The judges in the majority emphasized that, "as members of a three-judge panel," they were not "free to overrule the prior decision * * * even if [they] might have reached a different outcome than the prior decision in light of [*Rodriguez*]." *Id.* at 789. Judge Fernandez, in dissent, concluded that *Diouf* "is clearly irreconcilable" with *Rodriguez*, that *Rodriguez* made clear that the reasoning in *Diouf* is "no longer viable," and that, in holding otherwise, the majority was "clinging to a mode of analysis that th[is] Court has plainly held is plainly wrong." *Id.* at 790-791, 795.

The opinions in *Aleman Gonzalez* thus support the government's argument that the Third Circuit's reading of Section 1231 conflicts with this Court's decision in *Rodriguez*. Regardless of whether the conflict is sufficiently stark to satisfy the Ninth Circuit's standard for overruling panel precedent—which was the point on which the judges in *Aleman Gonzalez* disagreed—the conflict is sufficiently stark to justify this Court's intervention.

B. This Court's Review Is Warranted

Respondent argues (Br. in Opp. 8-10) that review should be denied because there is no circuit conflict on the question presented. But the government has identified (Pet. 14-18) a number of reasons to grant review here even in the absence of such a conflict. Respondent offers no persuasive response to those contentions.

First, the government has shown (Pet. 7-14) that the decision below conflicts with this Court's decision in *Rodriguez*. Under this Court's Rules, that conflict, on its own, justifies granting review. Compare Sup. Ct. R. 10(a) (review of a decision that "conflict[s] with the decision of another United States court of appeals"), with Sup. Ct. R. 10(c) (review of a decision that "conflicts with relevant decisions of this Court").

Second, the government has explained (Pet. 15-16) that the question presented is important. The Third Circuit's decision affects the procedures available to a substantial population of aliens with final orders of removal; that the decision undermines the government's overriding interest in protecting the territorial sovereignty of the United States using all of the tools made available by Congress, including detention of aliens; that the requirements that the Third Circuit has grafted onto the statute have significant operational

consequences for the federal immigration system; and that the Third Circuit's decision impermissibly intrudes on the responsibility of the political Branches. *Ibid.* Respondent offers no response to any of those contentions.

Third, the government has explained that, in addition to warranting review in its own right, the decision below warrants review in connection with the government's petition for a writ of certiorari in *Albence* v. *Guzman Chavez*, *supra*. Respondent argues (Br. in Opp. 19) that the cases have little to do with each other, but that argument is incorrect. *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. The resolution of the latter question may be relevant to the Court's consideration of the former question. Respondent claims (*ibid.*) that the interrelationship of those questions is "a paltry basis for certiorari anyway," but that is not so. When this Court "do[es] grant certiorari on a question for which there is a 'compelling reason' for [its] review, [the Court] often also grant[s] certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). That approach is all the more appropriate here, because, for the reasons discussed above, the question presented in this case *is* independently certworthy.

C. This Case Is A Good Vehicle For Deciding The Question Presented

Respondent identifies a series of reasons for which he believes that this case would be a poor vehicle for deciding the question presented. None of those contentions has merit.

Respondent first observes (Br. in Opp. 17) that this case involves an "unpublished summary decision." But the decision below applies *Guerrero-Sanchez*, and *Guerrero-Sanchez* in turn is published and precedential. This Court often grants review of unpublished decisions that apply circuit precedent contained in prior published decisions. See, *e.g.*, *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1068 (2020); *Holguin-Hernandez* v. *United States*, 140 S. Ct. 762, 765 (2020).

Respondent next suggests (Br. in Opp. 18) that the government has failed to preserve its claims because it failed to advance its contentions on the merits of the question presented "before either the magistrate judge or district court." That argument is incorrect. This Court has explained that, where a case is governed by a "squarely applicable, recent circuit precedent," and where "that precedent was established in a case to which the [petitioner] itself was privy and over the [petitioner's] vigorous objection," it is "unreasonable" to require the party to repeat its objections to the precedent "in the case immediately at hand." *United States* v. *Williams*, 504 U.S. 36, 44-45 (1992). In that circumstance, it is sufficient if the party "did not concede in the current case the correctness of [the circuit] precedent." *Id.* at 45. In this case, the government acknowledged before the magistrate judge, the district court, and the court of appeals that the Third Circuit's recent precedent in *Guerrero-Sanchez* controlled the outcome, but

it did not concede the correctness of that decision. Quite the contrary, the government's brief in the court of appeals explicitly argued, in order "to preserve the issue for further review," that *Guerrero-Sanchez* was wrong. Gov't C.A. Br. 3. Under this Court's decision in *Williams*, the government amply preserved the contention on which it seeks review.

Respondent also claims (Br. in Opp. 18) that the government failed to highlight the conflict with *Rodriguez* in *Guerrero-Sanchez* and this case and that, as a result, "the Third Circuit never was given a chance to grapple with the government's [*Rodriguez*] arguments at all." That claim conflates the government's arguments on the merits with its arguments for certiorari. The contention that a decision of a court of appeals conflicts with a decision of this Court or of other courts of appeals serves importantly to demonstrate that a case warrants certiorari, see Sup. Ct. R. 10(a) and (c), and a litigant ordinarily has no obligation to preview its arguments for certiorari in the court of appeals. In any event, in *Guerrero-Sanchez*, the government explicitly drew the Third Circuit's attention to *Rodriguez*'s holdings regarding "bond hearings" and "constitutional avoidance." Gov't Letter at 1-2, *Guerrero-Sanchez* v. *Warden York County Prison*, *supra* (No. 16-4134). And the Third Circuit's opinion explicitly discussed *Rodriguez*. *Guerrero- Sanchez*, 905 F.3d at 223-224; see *Aleman Gonzalez*, 955 F.3d at 787 ("The Third Circuit [in *Guerrero-Sanchez*] acknowledged [*Rodriguez*'s] discussion regarding the proper invocation of the canon [of constitutional avoidance]."); *id.* at 788 ("*Guerrero-Sanchez* * * * address[ed] the relationship between [the] con-

struction of § 1231(a)(6) and [*Rodriguez*], and it determined that [*Rodriguez*] does not undercut [that] construction.").

Finally, respondent argues (Br. in Opp. 19-20) that, "if this Court chooses to resolve the question presented in *Guzman Chavez*, its resolution might moot the question presented in this case." The question presented in this case, however, affects all aliens with final orders of removal who are subject to Section 1231(a)(6), not just those (like respondent) with reinstated orders of removal. To be sure, if the Court holds in *Guzman Chavez* that the detention of aliens with reinstated orders of removal, such as respondent, is governed by Section 1226 rather than by Section 1231, the Court may not need to reach the question whether Section 1231 requires bond hearings after six months of detention. Far from suggesting that this case is a poor vehicle for deciding the question presented, however, that argument simply underscores the government's observation (Pet. 18) that "the issues in the two cases are closely related" and "often come up in tandem." The possibility that a decision in one case may obviate the necessity for a decision in the other case thus confirms the propriety of reviewing and deciding both cases together.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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