No. 19-896

In the Supreme Court of the United States

TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

ANTONIO ARTEAGA-MARTINEZ

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

REPLY BRIEF FOR THE PETITIONERS

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Respondent defends (Br. 23-38) the Third Circuit's conclusion that 8 U.S.C. 1231(a)(6) entitles a noncitizen to a bond hearing after six months of detention. He also argues in the alternative (Br. 19-22) that, under *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), a noncitizen who has been detained for six months while pursuing withholding of removal is entitled not just to a bond hearing but to outright release. Neither argument is sound as a matter of statutory text or precedent. And neither is necessary to avoid serious constitutional doubts. To the contrary, the regulations adopted by the Department of Homeland Security (DHS) provide all the process the Constitution requires. The government has the discretion to grant additional procedural rights, such as bond hearings—but neither the Constitution nor the statute compels it to do so.

A. Respondent's Defense Of The Third Circuit's Bond-Hearing Regime Is Unpersuasive

1. Respondent's defense of the Third Circuit's bond-hearing regime rests (Br. 23-34) on the canon of constitutional avoidance. But this Court has explained that the interpretation of a statute should begin with its text and that the canon of constitutional avoidance applies only if that text is ambiguous. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 972 (2019). Respondent's efforts to establish ambiguity lack merit.

a. Respondent's analysis of the text inserts (Br. 29) a bond-hearing requirement that the text does not contain. Respondent infers (*ibid.*) that requirement from the portion of Section 1231(a)(6) that allows DHS to detain noncitizens who pose a flight risk or a danger to the community—a standard that, according to respondent, "echo[es]" the traditional inquiry at bond hearings. But Section 1231(a)(6) goes beyond authorizing DHS to detain noncitizens who pose a flight risk or danger to the community; it also authorizes DHS to detain noncitizens who are "inadmissible" or "removable" on specified grounds. 8 U.S.C. 1231(a)(6). In any event, the references to community safety and flight risk simply specify grounds for detention. They do not require the use of any given procedure, such as a bond hearing, to determine whether those grounds exist.

This Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), underscores the flaws in respondent's argument. In *Rodriguez*, the Ninth Circuit had held that Section 1226(a)—which provides that DHS "may" detain a noncitizen pending a decision on removal and "may release" the noncitizen on "bond," 8 U.S.C. 1226(a)(2)(A)—required periodic bond hearings every six months. 138 S. Ct. at 847. This Court rejected that

reading, observing that "[n]othing in [the] text * * * even remotely support[ed]" that requirement. *Ibid.* If the phrase "may release * * * on * * * bond" in Section 1226(a) does not support a bond-hearing requirement, the "bond-related language" that respondent detects (Br. 30) in Section 1231(a)(6) cannot support a bond-hearing requirement either. Respondent has no answer to this point.

Respondent also infers (Br. 30) a bond-hearing requirement from Section 1231(a)(6)'s requirement that DHS supervise noncitizens whom it chooses to release after the removal period (*i.e.*, after three months of detention). That inference, too, is flawed. A requirement to continue supervising noncitizens who are released after three months does not imply a requirement to grant bond hearings to noncitizens who remain detained after six months.

Respondent, finally, infers (Br. 30) a bond-hearing regime from the "common-law backdrop against which Congress enacted the statute." But there was no such common-law backdrop. The common law did not regulate immigration, removal, or detention pending removal. See *Demore* v. *Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment). And "prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings." *Id.* at 523 n.7 (majority opinion). The common law thus furnishes no background rule that noncitizens who have been ordered removed from the country must receive bond hearings after six months of detention.

b. After adding a bond-hearing requirement that the statutory text does not contain, respondent rewrites the substantive standard that the statute does contain. Section 1231(a)(6) allows DHS to detain a noncitizen if the

noncitizen is (1) inadmissible, (2) removable for specified reasons, (3) a danger to the community, or (4) a flight risk. Yet respondent argues (Br. 35-36) that only the third and fourth grounds can support detention for more than six months.*

Respondent asserts (Br. 36) that the first and second grounds of detention apply only "between the initial removal period (90 days) and the presumptive release threshold (180 days)," while the third and fourth grounds continue to apply even after that threshold. That just rewrites the text in a different way. Section 1231(a)(6) authorizes DHS to detain a noncitizen who fits into any of the four categories "beyond the removal period"—not just between the end of the removal period and some purported point of presumptive release. Moreover, as this Court has explained, "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all * * * categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). There is no plausible textual basis for holding that the first two grounds of detention expire after six months but that the remaining two grounds last beyond six months.

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* Respondent is presumably driven to that reading because he is inadmissible and thus subject to detention without regard to whether he poses a flight risk or a danger to the community. An "alien present in the United States without being admitted * * * is inadmissible." 8 U.S.C. 1182(a)(6)(A)(i); see C.A. App. 282 (charging respondent with being present without being admitted). An "alien * * * who * * * has been ordered removed" also "is inadmissible" for at least "10 years." 8 U.S.C. 1182(a)(9)(A)(ii); see C.A. App. 284 (noting that respondent was removed in 2012).

c. Respondent's revision of the statutory text does not end there. Even though Congress has granted power to implement Section 1231(a)(6) to the Secretary of Homeland Security, respondent would transfer the power to conduct bond hearings under that provision (and thus to assess flight risk and community safety) to immigration judges in the Department of Justice (DOJ).

Respondent invokes (Br. 32) a grandfathering provision, 8 U.S.C. 1103(g)(1), under which immigration judges could continue to perform functions they performed before the creation of DHS. But, before the creation of DHS, Section 1231(a)(6) was implemented by the Immigration and Naturalization Service, not immigration judges. See *Detention of Aliens Ordered Removed*, 65 Fed. Reg. 80,281, 80,293 (Dec. 21, 2000). Because immigration judges did not hold bond hearings under Section 1231(a)(6) when DHS was created, the argument that they *retained* that function under Section 1103(g)(1) is unfounded.

d. Finally, respondent contends (Br. 32) that DHS must justify continued detention by clear and convincing evidence. Respondent makes no effort to ground that requirement in the statutory text. He instead argues (*ibid.*) that federal courts have the power to set standards of proof when Congress has not done so. But this Court has explained that the power to set standards of proof belongs to Congress and the courts play a gap-filling role only when Congress remains silent. See *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981).

Congress has not remained silent here. It required proof by clear and convincing evidence in several other provisions of the statute, but not in Section 1231(a)(6). See, *e.g.*, 8 U.S.C. 1154(a)(2)(A)(ii), 1158(a)(2)(B), 1229a(c)(3)(A). That pattern of disparate inclusion and exclusion implies that Section 1231(a)(6) does not re-

quire proof by clear and convincing evidence. See *Russello* v. *United States*, 464 U.S. 16, 22 (1983). In addition, in *Rodriguez*, this Court refused to require proof by clear and convincing evidence at bond hearings under Section 1226(a), observing that "[n]othing in [the] text * * * even remotely support[ed]" that requirement. 138 S. Ct. at 847. That reasoning applies equally to Section 1231(a)(6).

2. Even if Section 1231(a)(6), standing alone, were ambiguous with respect to the procedures it required, the rule of construction in 8 U.S.C. 1231(h) would defeat respondent's claim. Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

Respondent protests (Br. 36) that DHS did not cite Section 1231(h) below. But there would have been little point to invoking Section 1231(h) below, given that the Third Circuit had already held in a published opinion that Section 1231(a)(6) requires bond hearings after six months of detention. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018). In any event, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 246 n.2 (2000) (citation omitted); see *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). The government thus may argue here that Section 1231(h) supports its reading of Section 1231(a)(6).

Respondent also observes (Br. 36-37) that Section 1231(h) does not preclude him from seeking a writ of

habeas corpus when DHS purportedly lacks statutory authority to detain. This case, however, does not concern DHS's statutory authority to detain respondent. Section 1231(a)(6) plainly grants DHS such authority. This case instead concerns whether courts may "construe[] § 1231(a)(6) to include additional procedural protections during the statutorily authorized detention period." *Guerrero-Sanchez*, 905 F.3d at 221 (emphasis omitted). Congress answered that question in the negative in Section 1231(h).

Finally, respondent asserts (Br. 37) that Section 1231(h) does nothing more than "foreclose mandamus actions compelling the government to carry out certain statutory duties (*e.g.*, its duty to remove noncitizens during the removal period)." But Congress did not limit Section 1231(h) to "mandamus actions" concerning "certain" statutory duties. Congress instead provided: "*Nothing* in this section shall be construed to create *any* substantive or procedural right or benefit that is legally enforceable by *any* party against the United States or its agencies or officers or *any* other person." 8 U.S.C. 1231(h) (emphases added).

3. Unable to find support for his reading in the text, respondent turns (Br. 34-38) to this Court's decision in *Zadvydas*. Even though *Zadvydas* never referred to a "bond hearing," respondent insists that *Zadvydas* "authoritatively construed Section 1231(a)(6) as requiring * * * a bond-type determination," that this case involves the routine "application" of *Zadvydas*, and that "the government can prevail only if the Court overrules *Zadvydas*." Br. 14, 38, 42 n.7 (capitalization and emphases omitted). Each of those claims is wrong.

In *Zadvydas*, this Court held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." 533 U.S. at 699.

The Court also adopted a framework to implement that holding: If the noncitizen shows, after six months of detention, "there is no significant likelihood of removal in the reasonably foreseeable future," and the government fails to rebut that showing, the government ordinarily must release the noncitizen. *Id.* at 701. Respondent does not suggest, however, that the Third Circuit's bond-hearing regime bears any resemblance to that procedure. To the contrary, the Third Circuit's bond-hearing regime expressly imposed "*additional* procedural protections" that go beyond *Zadvydas*. *Guerrero-Sanchez*, 905 F.3d at 221 (emphasis altered).

Respondent instead repeatedly invokes (Br. 2, 5-6, 11, 16, 22-23, 29, 38) a single sentence in *Zadvydas* in which the Court stated that, "if removal *is* reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement." 533 U.S. at 700 (emphasis added). Respondent is wrong to suggest that this sentence supports the Third Circuit's bond-hearing regime. As explained above, Section 1231(a)(6) sets forth four different grounds for continuing to detain a noncitizen beyond the removal period. One of those grounds is protecting community safety. The sentence cited by respondent acknowledges that ground for detention, noting that "the risk of the alien's committing further crimes" is "a factor potentially justifying confinement." *Ibid.* But the Court's reference to *a* factor justifying detention does not somehow eliminate the other three grounds for detention included in the statute's disjunctive list (inadmissibility, removability for specified reasons, or flight risk). Furthermore, *Zadvydas* itself rebuts respondent's negative inference that community safety and, apparently, flight risk (though the cited passage does not mention that consideration)

are the *only* permissible bases for detention. On the next page of its opinion, the Court stated unambiguously that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. And even if *Zadvydas* could be read to require consideration of traditional bond factors, it does not say that the government must hold a bond hearing, that an immigration judge must preside at that hearing, or that the government must justify continued detention by clear and convincing evidence.

Respondent also reasons, more broadly, that *Zadvydas* deemed Section 1231(a)(6) "'ambiguous'" and read the provision to incorporate "due process principles." Resp. Br. 14, 23 (citation omitted). But the Court in *Zadvydas* did not treat Section 1231(a)(6) as an empty bottle into which litigants may pour whatever requirements they believe due process demands. The Court instead identified ambiguity with respect to one issue: whether Section 1231(a)(6) authorizes the "indefinite" detention of a noncitizen who has been ordered removed but who has been rendered "unremovable" for a "long-term," "perhaps permanent" period, because no other country will accept him. *Zadvydas*, 533 U.S. at 697, 699. In that circumstance, the Court explained that, because the provision "has as its basic purpose effectuating an alien's removal," it could be read to mean that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Ibid.*

No comparable argument renders Section 1231(a)(6) ambiguous with respect to the additional requirements respondent urges the Court to impose here. Respondent seeks a bond hearing, but the statute nowhere requires bond hearings. Respondent demands a hearing before an immigration judge within DOJ, but the stat-

ute grants the power to make detention decisions to DHS. Respondent would require the government to show that he poses a danger to the community or a flight risk, but the statute expressly authorizes detention on additional grounds. Respondent would require the government to prove its case by clear and convincing evidence, but the statute includes no mention of any such requirement. And respondent reads Section 1231(a)(6) to grant him procedural rights, but Section 1231(h) provides that courts may not read Section 1231 to confer legally enforceable procedural rights.

Three additional considerations counsel against extending *Zadvydas* in the manner respondent suggests. First, "[t]o the extent that [a precedent] leaves any ambiguity," this Court "should resolve that ambiguity in the direction of the statutory text." *Apple Inc.* v. *Pepper*, 139 S. Ct. 1514, 1522 (2019). The text here plainly does not require bond hearings.

Second, this Court should read *Zadvydas* in harmony with its other related decisions, which establish that Section 1231(a)(6) does not require bond hearings. In *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271 (2021), the Court explicitly stated that a person detained under Section 1231 "is not entitled to a bond hearing." *Id.* at 2280. In *Rodriguez*, the Court made clear that courts should not require bond hearings when "[n]othing in [the statute's] text" supports imposing such a requirement. 138 S. Ct. at 847. And in cases such as *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Court has explained that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them." *Id.* at 524. The Court should not extend *Zadvydas* at the expense of those decisions.

Third, this Court has recognized that *Zadvydas* was "a notably generous application of the constitutional-avoidance canon," *Rodriguez*, 138 S. Ct. at 843, and refused to read that decision as "essentially granting a license to graft" unstated limits onto statutory text, *ibid.* Yet that is just how the Court would have to read *Zadvydas* if it were to supplement Section 1231(a)(6) with the requirements of the Third Circuit's bond-hearing regime.

B. Respondent's Alternative Theory That No Significant Likelihood of Removal Exists Is Flawed

The Third Circuit held that respondent is entitled to a bond hearing, but respondent advances (Br. 19-22) a more aggressive theory under which he would have been entitled to outright release. Specifically, he argues (*ibid.*) that, if a noncitizen has had his removal order reinstated, has applied for withholding of removal, and has been detained for six months, *Zadvydas* presumptively requires his release because there is purportedly no significant likelihood of removal. That alternative theory is not properly presented here and is wrong in any event.

1. Respondent's alternative theory is not properly presented in this case. Although "[a] prevailing party may advance any ground in support of a judgment in his favor," "[a]n argument that would modify the judgment * * * cannot be presented unless a cross-petition has been filed." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985); see, *e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013). The judgment below granted respondent "an individualized bond hearing before an Immigration Judge." Pet. App. 3a; see *id.* at 1a-2a. But respondent's alternative theory would entitle him to more than a bond hearing; it would

entitle him to release. Respondent's failure to file a cross-petition precludes him from advancing that judgment-altering argument now.

Seeking to avoid that problem, respondent contends (Br. 22 n.3) that, although his alternative theory would logically entitle him to "presumptive release," he would be satisfied with the bond hearing that he already received under the judgment below. The cross-petition requirement is not so easily evaded. This Court "has held that a cross-petition or cross-appeal must be filed" if "the *rationale* of an argument would give the [prevailing] party more than the judgment below, even though the party is not asking for more." Stephen M. Shapiro et al., *Supreme Court Practice* 6-134 (11th ed. 2019) (citing cases); see, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364-365 (1994).

In addition, although this Court has the discretion to consider alternative theories that were not passed upon below, it ordinarily does not do so, given its role as "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). In this case, neither the court of appeals nor the district court has passed on respondent's alternative theory. Instead of considering that theory in the first instance, this Court should allow the lower courts to consider it on remand.

Finally, respondent's theory is barred by the doctrine of exhaustion of remedies. Under that doctrine, a party ordinarily may not seek judicial relief "until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); see *Hinojosa* v. *Horn*, 896 F.3d 305, 314 (5th Cir. 2018) (noting that exhaustion has long been required in habeas corpus cases), cert. denied, 139 S. Ct. 1319 (2019). DHS has established administrative pro-

cedures to address noncitizens' claims that removal is no longer reasonably foreseeable and that they are accordingly entitled to release under *Zadvydas*. See 8 C.F.R. 241.13. Respondent may not present his claim to the courts until he has exhausted those administrative procedures.

2. In all events, respondent's alternative theory—that a noncitizen is presumptively entitled to release if his removal order has been reinstated, he has applied for withholding of removal, and he has been detained for six months—is incorrect. As an initial matter, that theory lacks any plausible basis in the statutory language: The text nowhere suggests that it creates a special rule for noncitizens whose removal orders have been reinstated, who have applied for withholding of removal, and who have been detained for six months.

Respondent's six-month rule effectively makes release contingent on a noncitizen's litigation choices and would create perverse incentives for noncitizens to prolong their withholding-only proceedings. This Court has noted that "court ordered release cannot help but encourage dilatory and obstructive tactics by aliens." *Demore*, 538 U.S. at 530 n.14 (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)) (brackets omitted). Respondent's six-month rule would encourage noncitizens to seek unnecessary continuances, to file meritless appeals, and otherwise to delay their cases, all in the hope of winning release after six months, after which their proceedings will be even further slowed and they may never return to comply with a removal order once withholding is denied (as it eventually is for the large majority of those in withholding-only proceedings, see p. 16, *infra*).

Respondent argues (Br. 19-22) that this Court's decision in *Zadvydas* supports his six-month rule, but that

is mistaken. True, *Zadvydas* recognized a presumption that Section 1231(a)(6) allows six months of detention. 533 U.S. at 701. But the Court explained that "[t]his 6-month presumption, of course, does not mean that every alien not removed must be released after six months." *Ibid.* "To the contrary," the Court held, "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Ibid.* Noncitizens in withholding-only proceedings can usually be held under that standard: In the absence of extraordinary circumstances, there will be at least a significant likelihood that the noncitizen's application for withholding will fail and that removal will follow soon afterwards. See *Martinez* v. *LaRose*, 968 F.3d 555, 566 (6th Cir. 2020).

Respondent argues (Br. 19-21) that individuals in withholding-only proceedings are unlikely to be removed in the reasonably foreseeable future because "withholding proceedings typically do not conclude for years." But the detention here, which lasts for the duration of a particular proceeding, fundamentally differs from the detention in *Zadvydas*, which lasted indefinitely because no country was willing to accept the noncitizen. See 533 U.S. at 684-685. Detention during a proceeding, unlike the detention in *Zadvydas*, has a logical endpoint: the conclusion of that proceeding.

In any event, the study that respondent cites does not support his assertion that withholding-only proceedings "typically" last for years. Br. 19; see *id.* at 20. The study found that the average duration of detention was 114 days (around four months) in the 4764 cases in which the immigration judge made a final decision and neither party appealed; 301 days (around 10 months) in the 1215 cases involving appeals to the Board of Immigration Appeals; 447 days (nearly 15 months) in the 84

cases involving remands to the immigration judge; and 1065 days (nearly three years) in ten cases where the noncitizen sought judicial review and the court remanded the case to the agency. See David Hausman, Immigrants' Rights Project, ACLU, *Fact Sheet: Withholding-Only Cases and Detention, An Analysis Based on Data Obtained Through the Freedom of Information Act ("FOIA")* 2 & nn.6-9 (Apr. 19, 2015). Those figures indicate that detention for noncitizens in withholding-only proceedings typically lasts for months, not years. They also suggest that cases involving remands—less than 2% of the total according to the study—result in average periods of detention of approximately 15 months or longer. But even assuming for the sake of argument that the detainees in *those* cases could raise individualized claims under *Zadvydas*, no sound basis exists to adopt respondent's categorical rule for the remaining 98% of cases.

Respondent also notes (Br. 11) that his own withholding hearing has been scheduled for 2023. But the Executive Office for Immigration Review (EOIR) has a longstanding policy of expediting and prioritizing cases involving detained noncitizens. See Memorandum from Sirce E. Owen, Acting Deputy Director, EOIR, to EOIR, *Case Management and Docketing Practices* 2 (Jan. 31, 2020). The timing of respondent's hearing reflects respondent's release from detention. If respondent had remained in detention, his hearing would almost certainly have occurred sooner.

Respondent further claims (Br. 22) that, if a noncitizen prevails on his application for withholding of removal, removal is "virtually certain never to occur." But that looks at the wrong group of people. This case concerns noncitizens who have *applied* for withholding of removal, not those who have prevailed on their applica-

tions. The government has estimated that only around 11% of noncitizens placed in withholding-only proceedings prevail on their applications. Tr. of Oral Arg. at 12, *Guzman Chavez*, *supra* (No. 19-897); see EOIR, *Adjudication Statistics*, *FY 2021 Decision Outcomes,* https://www.justice.gov/eoir/page/file/1105111/download. Even under respondent's figure, suggesting that 27% of withholding applicants in the Third Circuit were granted protection (Br. 21), noncitizens who have merely applied for withholding of removal still face a significant likelihood that their applications will be denied and that they will ultimately be removed. If the government were to detain a noncitizen who has prevailed in a withholding-only proceeding and whom it cannot remove to an alternative country, the noncitizen could raise a proper *Zadvydas* claim. But a noncitizen who has not yet prevailed may not establish such a claim based on the assumption that he might be in the minority who will receive protection.

In sum, neither the text of Section 1231(a)(6) nor *Zadvydas* supports respondent's alternative theory that noncitizens in withholding-only proceedings are entitled to release after six months of detention. If this Court entertains that theory, it should reject it.

C. Neither The Third Circuit's Bond-Hearing Regime Nor Respondent's Alternative Theory Is Necessary To Avoid Serious Constitutional Doubts

Because the text of Section 1231(a)(6) is clear, this Court could resolve the case without discussing the Constitution. Regardless, neither the Third Circuit's bond-hearing regime nor respondent's alternative theory is necessary to avoid serious constitutional doubts.

1. This Court has explained that, in general, immigration detention is constitutional if it "rationally ad-

vanc[es] some legitimate governmental purpose." *Reno* v. *Flores*, 507 U.S. 292, 306 (1993). In *Demore*, this Court applied that standard to reject a facial constitutional challenge to Section 1226(c), which requires DHS to detain certain criminal noncitizens during their removal proceedings. The Court explained that detention during removal proceedings prevents noncitizens "from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, [they] will be successfully removed." *Demore*, 538 U.S. at 528.

This case parallels *Demore*, except that it involves detention during withholding-only proceedings rather than detention during removal proceedings. As in *Demore*, the detention here serves the legitimate purpose of securing noncitizens' appearance at those proceedings.

In fact, this case should be even easier than *Demore*. *Demore* involved mandatory detention; the noncitizens there had no opportunity at all to ask DHS for release. This case, in contrast, involves discretionary detention; respondent has an opportunity to seek release under the procedures established by DHS's regulations. *Demore* also involved noncitizens whose removal proceedings were still pending. This case, in contrast, involves a noncitizen who has already been ordered removed, whose right to remain in the United States has already been extinguished, and who (in his withholding-only proceedings) may obtain, at most, an order barring his removal to a particular country. In these circumstances, the risk of flight—and the government's corresponding interest in preventing flight—is magnified, and the noncitizen's interest in release is diminished. See *Guzman Chavez*, 141 S. Ct. at 2286, 2290.

2. Respondent repeats several arguments that this Court has already rejected in *Demore*. He principally relies (Br. 16-18) on *Zadvydas*. But in *Demore*, the Court explained that detention during removal proceedings "materially differe[d]" in two ways from the detention in *Zadvydas*. *Demore*, 538 U.S. at 527. First, *Zadvydas* involved noncitizens whom no other country was willing to accept and whose removal was thus "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Their detention thus no longer served a legitimate "immigration purpose." *Ibid.* *Demore*, by contrast, involved the detention of noncitizens "pending their removal proceedings." *Id.* at 527-528 (emphasis omitted). Detention during that period "necessarily serve[d]" the legitimate immigration purpose of "preventing [those] aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Second, "the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent.'" *Ibid.* (citation omitted). The period of detention in *Demore*, by contrast, had "a definite termination point": the end of the removal proceedings. *Id.* at 529. Replace "removal proceedings" with "withholding-only proceedings" and the same distinctions hold true in this case.

Respondent also invokes (Br. 24) cases addressing matters such as "pretrial detention," "detention pending juvenile delinquency determination[s]," and "civil commitment" of people with mental illness. The principal dissent in *Demore* relied on the same cases. See 538 U.S. at 548-552 (Souter, J., concurring in part and dissenting in part). The Court, however, rejected reliance on those authorities, observing that, "in the exercise of its broad power over immigration and naturalization,"

Congress may adopt detention rules "that would be unacceptable if applied to citizens." *Id.* at 522 (majority opinion) (citations omitted).

Even beyond that fundamental distinction, respondent's cases do not support his claim. Most of the cases he cites (Br. 24) *upheld* the detention at issue. See *Kansas* v. *Hendricks*, 521 U.S. 346, 371 (1997) (upholding civil commitment of sexually violent predators); *United States* v. *Salerno*, 481 U.S. 739, 750-751 (1987) (upholding pretrial detention); *Schall* v. *Martin*, 467 U.S. 253, 277 (1984) (upholding detention pending juvenile delinquency proceedings). And the remaining case, *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), involved "indefinite" detention in a psychiatric hospital. *Id.* at 82; see *ibid.* ("held indefinitely"); *id.* at 83 ("indefinite detention"). As explained above, this case does not involve indefinite detention. See p. 14, *supra*.

Finally, respondent contends (Br. 17) that detention puts him to a difficult choice: "remain imprisoned" or "submit to immediate removal." But this Court rejected an identical argument in *Demore*. The Court explained that "'the legal system is replete with situations requiring the making of difficult judgments as to which course to follow'" and that "there is no constitutional prohibition against requiring parties to make such choices." 538 U.S. at 530 n.14 (citation and ellipsis omitted).

3. Respondent has only one way to separate this case from *Demore*: the contention (Br. 15) that the detention here is "prolonged." In his view, prolonged detention—by which he means detention lasting more than six months—comports with the Due Process Clause only if "accompanied by 'adequate procedural protections.'" *Ibid.* (citation omitted). But even assuming that is so, DHS's regulations provide the necessary protections, at least as a general matter. As our open-

ing brief explains (at 3-4), a review panel at Immigration and Customs Enforcement (ICE) headquarters reviews the noncitizen's case at six months of detention; the panel considers the noncitizen's individual circumstances when deciding whether detention remains justified; and the noncitizen may submit evidence, use an attorney or other representative, and, if appropriate, seek a government-provided translator.

Respondent objects (Br. 39) that the regulations allow DHS to detain him without judicial review. But respondent overlooks the distinction between (1) DHS's determination that Section 1231(a)(6) authorizes it to detain a person and (2) DHS's exercise of discretion to detain that person. Respondent is correct that courts may not review the exercise of discretion to detain a person: Congress has deprived courts of jurisdiction to review decisions "specified * * * to be in the discretion" of the Secretary of Homeland Security. 8 U.S.C. 1252(a)(2)(B)(ii); see *Zadvydas*, 533 U.S. at 688. But courts still may review DHS's determination that Section 1231(a)(6) authorizes detention in the first place: As this Court explained in *Zadvydas*, "habeas corpus proceedings remain available as a forum for statutory * * * challenges to post-removal-period detention." 533 U.S. at 688. Contrary to respondent's assertion, then, the government's position would not give DHS "unreviewable authority" to detain noncitizens. Resp. Br. 42 (citation omitted).

Respondent also objects (Br. 39) that DHS's regulations require the detainee to bear the burden of justifying release. But that placement of the burden of proof accords with longstanding practice in related contexts. For example, when DHS detains a person under Section 1226(a) pending a decision on removal, it is the detainee who bears the burden of justifying release. See

8 C.F.R. 236.1(c)(8), 1236.1(c)(8); *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). And in *Zadvydas*, even after six months of detention, the Court required the noncitizen to bear the initial burden of providing a "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701.

Respondent further contends (Br. 31) that "the bond review * * * must be performed by a neutral party, not the jailer." But DHS's regulations already satisfy that requirement. The six-month custody review required by the regulations is not conducted by the noncitizen's "jailer"—*i.e.*, by the agent who took him into custody or by the warden in charge of his detention facility. Rather, the review is conducted by a separate set of officials in ICE's Headquarters Post-Order Detention Unit. See 8 C.F.R. 241.4(c)(2).

Respondent argues (Br. 41) that, because these adjudicators form part of the same agency that took him into custody (ICE), they "cannot be 'neutral.'" But this Court has repeatedly held that, when the adjudicator is not personally biased, an adjudication does not violate the Due Process Clause simply because the adjudicator or his agency combines enforcement and adjudicative functions. For instance, the Federal Trade Commission may hear an antitrust charge although it previously investigated that charge. See *FTC* v. *Cement Institute*, 333 U.S. 683, 700-701 (1948). A state medical board may both investigate and adjudicate charges against a doctor. See *Withrow* v. *Larkin*, 421 U.S. 35, 46-55 (1975). And Congress may vest the power to conduct deportation hearings in adjudicators who are "subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions." *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955).

Respondent next protests (Br. 40) that, "[a]pplying [DHS's] regulations, the government detains over 85% of noncitizens ordered removed but awaiting withholding adjudications." But persons in withholding-only proceedings following reinstatement of previous removal orders have, by definition, been removed from the United States, reentered the country illegally, been apprehended again, and had their earlier removal orders reinstated. That conduct itself may suggest that such persons pose a risk of flight. Despite respondent's characterization of himself as "law-abiding," Br. 26, he has entered the United States without inspection at least *four times*, see Gov't Br. 6. It is thus unsurprising that detention is found to be justified for many of the noncitizens placed in withholding-only proceedings.

Finally, respondent claims (Br. 41) that, in some cases, noncitizens have faced years of detention despite DHS's procedures. But as explained above, the study on which respondent himself relies suggests that those cases are atypical. See pp. 14-15, *supra*. If such exceptional cases arise, the affected noncitizens could bring as-applied due-process challenges to their detention. But that possibility does not support distorting the statutory text as respondent proposes.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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