No. 19-897

In the Supreme Court of the United States

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

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. 1231, or instead by 8 U.S.C. 1226.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 19-987

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

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

The court of appeals held that the detention of an alien who is subject to a reinstated order of removal, and who has been placed in withholding-only proceedings, is governed by 8 U.S.C. 1226 rather than 8 U.S.C. 1231. In the petition for a writ of certiorari (at 14-15), the government explains that the court's decision deepens a circuit conflict on an important and recurring issue: The Second and now the Fourth Circuits have held that Section 1226 governs the detention of an alien in withholding-only proceedings, while the Third and Ninth Circuits have held that Section 1231 does so.

In their brief in opposition, respondents do not deny that the question presented is the subject of a circuit conflict. They also do not deny that the question presented is recurring and important. Nor, finally, do they suggest that this case suffers from any vehicle problems

that would preclude the Court from reaching the question presented if it were to grant review.

Respondents nonetheless advance three arguments for denying review: that the decision below is correct, that the Court denied review on the same question in another case last Term, and that review would be premature. None of those arguments is sound.

A. The Decision Below Is Wrong

Respondents principally contend (Br. in Opp. 8-18) that the decision below is correct on the merits. But that contention is more appropriately presented to this Court on plenary review. Even if the court of appeals' decision were correct, it would still warrant review, because two circuits have adopted the opposite position. In any event, respondents' arguments on the merits are unconvincing.

Respondents principally argue that Section 1226—which governs detention "pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. 1226(a)—"is concerned with concrete, practical outcomes," not simply with "whether the alien is *theoretically* removable." Br. in Opp. 8 (citation omitted). That argument is incorrect. The statutory text focuses on whether "a decision on whether the alien is to be removed" is still "pending," not on whether the government has acquired the "practical" ability to remove the alien. The term "practical," although prominent in the court of appeals' decision and in respondents' argument, appears nowhere in the statutory text. In any event, an alien who is subject to a reinstated order of removal is not simply "theoretically removable." By the terms of the statute, such an alien has been ordered removed, and his order of removal "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5).

Respondents also argue that the text and structure of Section 1231 show that that provision governs a person's detention only at the point when the statutory removal period begins, and that the removal period in turn begins when, "as a practical matter, 'the government has the authority to execute a removal.'" Br. in Opp. 10 (quoting Pet. App. 19a). Section 1231, however, specifically provides that the removal period begins "on the latest of the following:" (1) the "date the order of removal becomes administratively final," (2) if the removal order is stayed pending judicial review, "the date of the court's final order," and (3) if the alien is detained or confined except under an immigration process, "the date the alien is released from detention or confinement." 8 U.S.C. 1231(a)(1)(B). All of those dates have passed in this case, and Section 1231 accordingly has now become applicable. See Pet. App. 40a-41a & n.3 (Richardson, J., dissenting). There is no sound basis in the text for the contention that, even when those dates have passed, the removal period still does not begin until the government acquires the "practical" authority to execute the removal.

Finally, respondents contend that the removal period under Section 1231 cannot begin until an alien's order of removal is "administratively final," and that an order cannot be administratively final while withholding-only proceedings remain pending. Br. in Opp. 17 (quoting 8 U.S.C. 1231(a)(1)(B)(i)). That is incorrect. This case involves aliens who have already been removed from the United States pursuant to a final order of removal, who have reentered the United States, and who have had that previous order of removal reinstated. As Judge Richardson explained: "That reinstatement does not create a new or second order of removal. It simply

reinstates the prior order. * * * The order was final then and is final now." Pet. App. 37a. The pendency of withholding-only proceedings does not detract from the finality of that initial order. *Ibid.*

B. This Court's Denial Of Certiorari In *Padilla-Ramirez* v. *Culley* Does Not Support Denial Of Certiorari Here

Respondents next argue (Br. in Opp. 18-19) that this Court should deny review here because it denied review on the same question in *Padilla-Ramirez* v. *Culley*, 139 S. Ct. 411 (2018). That is mistaken.

In *Culley*, the government filed a brief in opposition acknowledging that the question presented may warrant this Court's review, but arguing that *Culley* was a poor vehicle for resolving it. Specifically, the government acknowledged that "two courts of appeals" had rendered conflicting decisions: The Second Circuit had held that Section 1226 governs detention of an alien who is subject to a reinstated final order of removal and who is in withholding-only proceedings, while the Ninth Circuit had held that Section 1231(a) does so. Gov't Br. in Opp. at 12-13, *Padilla-Ramirez*, *supra* (No. 17-1568). The government explained that, "although only two courts of appeals ha[d] thus far considered the issue, review by this Court may be warranted in an appropriate case," because "[t]he question presented recurs with some frequency" and because it has important "legal and practical consequences." *Id.* at 12-13. The government argued, however, that that case was a poor vehicle for resolving the question presented, because the petitioner in that case "ha[d] been released on bond (and thus [wa]s no longer detained) for independent reasons," eliminating the "immediate practical importance" of the question presented for him. *Id.* at 13. The government also noted that the case "would become moot if

petitioner's withholding-only proceedings were completed before this Court could render any decision." *Id.* at 14 n.4.

Since *Padilla-Ramirez*, the question presented has become even more clearly deserving of this Court's review. What was then a 1-1 circuit conflict has now developed into a 2-2 circuit conflict, with the Fourth Circuit joining the Second Circuit in holding that the detention of aliens with reinstated removal orders who are in withholding-only proceedings is governed by Section 1226, and the Third Circuit joining the Ninth Circuit in holding that it is governed by Section 1231. See Pet. 6. The development of the circuit conflict also underscores the government's observation in *Padilla-Ramirez* that the question presented recurs with some frequency. See Br. in Opp. at 12, *Padilla-Ramirez*, *supra* (No. 17-1568).

In addition, unlike *Padilla-Ramirez*, this case would be an appropriate vehicle for resolving the question presented. This suit was brought on behalf of a class of aliens—not a single alien who has already been released on bond for independent reasons and whose case could become moot. See Pet. 6; see also *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975) (holding that a live controversy between a named defendant and a certified class may persist "even though the claim of the named plaintiff has become moot"). Moreover, respondents do not identify any procedural or other obstacle that would preclude the Court from reaching the question presented.

C. This Court's Review Is Warranted Now

Finally, respondents argue (Br. in Opp. 2) that "review of this issue is currently premature." In respondents' view, this Court should postpone review in order to enable "[a]dditional percolation" and "'further

study'" in the courts of appeals. *Id.* at 19 (citation omitted). Four courts of appeals, however, have already studied the question presented and have provided conflicting answers. See Pet. 14. Further, the majority and the dissent in this case have developed the arguments for and against the holding below at significant length. See Pet. App. 1a-32a; *id.* at 33a-44a (Richardson, J., dissenting). Under these circumstances, there is no merit to respondents' contention that further percolation would materially assist this Court in its consideration of the question presented.

Respondents argue (Br. in Opp. 19) that this Court should await *Martinez* v. *LaRose*, No. 19-3908 (6th Cir.) (argued Jan. 30, 2020), which they claim "presents a more attractive vehicle" than this case because it presents not only the statutory question raised here, but also the related question whether "prolonged" detention under Section 1231 "is consistent with due process." The Sixth Circuit, however, has not yet issued a decision in *Martinez*. As a result, respondents' contentions about what issues *Martinez* will ultimately present and about whether that case will prove to be a good vehicle are, at this stage, speculative and premature. Further, respondents do not suggest that this Court's consideration of the statutory question presented here is logically dependent on or intertwined with the consideration of the constitutional question that they assert is presented in *Martinez*. Indeed, all four courts of appeals to have addressed the question presented have resolved the statutory question presented here without addressing the constitutional issue that respondents identify. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 213-219 (3d Cir. 2018); *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 (2d Cir. 2016); Pet. App. 31a-32a.

Last, respondents contend (Br. in Opp. 21-22) that, because "[a]ll the Fourth Circuit's decision provides to respondents is [additional] process," the decision causes no "baleful consequences" that justify this Court's immediate intervention. The government has explained, however, that the additional process that the Fourth Circuit has required itself has significant operational consequences for an immigration system that 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); see Pet. 16. The government also has explained that the existence of a circuit conflict itself creates additional challenges, because immigration officials and immigration judges must now resolve complex questions about which circuit's precedents to apply to a given alien. See Pet. 16. In addition, the question presented determines whether Section 1226(c)—which provides for the mandatory detention of certain criminal aliens—applies to aliens who have reinstated orders of removal and are in withholding-only proceedings. Those consequences further justify this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MAY 2020