No.

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

EDWIN OMAR FLORES TEJADA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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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 that the alien is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. William P. Barr, Attorney General; Chad F. Wolf, Acting Secretary of Homeland Security; and James McHenry, Director of the Department of Justice Executive Office for Immigration Review (EOIR), were appellants in *Aleman Gonzalez* v. *Barr* and *Flores Tejada* v. *Godfrey*. David W. Jennings, San Francisco Field Office Director, U.S. Immigration and Customs Enforcement (ICE); Tracy Short, Chief Immigration Judge, EOIR; David O. Livingston, Sheriff, Contra Costa County; and Kristi Butterfield, Facility Commander, West County Detention Facility, Contra Costa County, were appellants in *Aleman Gonzalez*. Tony H. Pham, Senior Official Performing the Duties of the Director of ICE; Elizabeth Godfrey, Seattle Field Office Director, ICE; and Lowell Clark, Warden, Northwest Detention Center, were appellants in *Flores Tejada*.*

Respondents were appellees in the court of appeals. Esteban Aleman Gonzalez and Eduardo Gutierrez Sanchez, for themselves and on behalf of a class of similarly situated individuals, were appellees in *Aleman Gonzalez*. Edwin Omar Flores Tejada and German Ventura Hernandez, for themselves and on behalf of a class of similarly situated individuals, were appellees in *Flores Tejada*.

Arturo Martinez Baños was a plaintiff in the district court in *Baños* v. *Asher*.

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* Chief Immigration Judge Tracy Short is substituted for Acting Chief Immigration Judge Christopher A. Santoro. Senior Official Performing the Duties of the Director of ICE Tony H. Pham is substituted for Acting Director of ICE Matthew T. Albence. See Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Aleman Gonzalez v. *Whitaker*, No. 18-cv-1869 (June 19, 2020)

United States District Court (W.D. Wash.):

Baños v. *Asher*, No. 16-cv-1454 (Apr. 4, 2018)

United States Court of Appeals (9th Cir.):

Aleman Gonzalez v. *Barr*, No. 18-16465 (Apr. 7, 2020)

Flores Tejada v. *Godfrey*, No. 18-35460 (Apr. 7, 2020)

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The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. In accordance with this Court's Rule 12.4, the Acting Solicitor General is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals in *Aleman Gonzales* (App., *infra*, 1a-66a) is reported at 955 F.3d 762. The order of the district court (App., *infra*, 67a-93a) is reported at 325 F.R.D. 616.

The opinion of the court of appeals in *Flores Tejada* (App., *infra*, 94a-105a) is reported at 954 F.3d 1245. The order of the district court (App., *infra*, 106a-110a) is not published in the Federal Supplement but is available at 2018 WL 1617706. The report and recommendation of the magistrate judge (App., *infra*, 111a-125a) is not published in the Federal Supplement but is available at 2018 WL 3244988. An additional order of the district court (App., *infra*, 126a-128a) is not published in the Federal Supplement but is available at 2017 WL 9938446. An additional report and recommendation of the magistrate judge (App., *infra*, 129a-157a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Aleman Gonzales* and *Flores Tejada* were entered on April 7, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 158a-163a.

STATEMENT

A. Detention Under Section 1231(a)

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, contains a series of provisions authorizing the detention of aliens in connection with their removal from the United States.[1] The provision at issue in this case, 8 U.S.C. 1231(a), authorizes the detention of aliens who have been "ordered removed" from the country. 8 U.S.C. 1231(a)(1)(A). Section 1231(a) establishes a 90-day "removal period" during which the government ordinarily secures the removal of an alien who has been ordered removed. *Ibid.* The paragraph that governs detention *during* the removal period, 8 U.S.C. 1231(a)(2), provides:

> During the removal period, the [Secretary of Homeland Security] shall detain the alien. Under no circumstance during the removal period shall the [Secretary] release an alien who has been found inadmissible [on certain criminal or terrorism grounds] or deportable [on certain criminal or terrorism grounds].

The paragraph that governs detention of an alien *after* the removal period, 8 U.S.C. 1231(a)(6), provides:

> An alien ordered removed who is inadmissible[,] * * * removable [on certain criminal, national security, or other grounds,] or who has been determined by the [Secretary of Homeland Security] to be a risk

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[1] Many of the provisions at issue in these cases refer to the Attorney General, but Congress has separately transferred the enforcement of those provisions to the Secretary of Homeland Security. *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019); see 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

The Department of Homeland Security (DHS) has adopted regulations governing the process that U.S. Immigration and Customs Enforcement (ICE) follows in making the discretionary decision whether to detain an alien beyond the removal period under Section 1231(a)(6). See 8 C.F.R. 241.4. The regulations accord the alien an opportunity to submit information that he believes provides a basis for release and to have the assistance of an attorney or other representative. See 8 C.F.R. 241.4(h)(2).

2. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court considered how long discretionary detention of a former lawful permanent resident alien beyond the initial 90-day period could last while the government attempted to find a country that would accept the return of the alien. The Court acknowledged that Section 1231 "literally" sets no time limit for such detention. *Id.* at 689. The Court stated, however, that a "statute permitting indefinite detention" of such an alien "would raise a serious constitutional problem." *Id.* at 690. The Court also reasoned that the "basic purpose" of detention under Section 1231 is "effectuating an alien's removal," and that once that basic purpose can no longer be served because the designated country of removal will not accept the alien's return, "continued detention is no longer authorized by statute." *Id.* at 697, 699.

The Court accordingly "read an implicit limitation into the statute" for the detention of such aliens. *Zadvydas*, 533 U.S. at 689. Specifically, the Court concluded that discretionary detention beyond the initial 90-day period may last only for "a period reasonably

necessary to bring about that alien's removal from the United States." *Ibid.* The Court identified a six-month period as presumptively reasonable. *Id.* at 701. The Court held that, after that time, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing," or else release the alien. *Ibid.*; see *Clark* v. *Martinez*, 543 U.S. 371, 377-386 (2005) (applying *Zadvydas*'s statutory interpretation to an alien who had not been admitted to the United States).

The Government has adopted regulations implementing *Zadvydas*. See 8 C.F.R. 241.13. Under those regulations, an alien whose detention under Section 1231(a) has continued for six months "may submit a written request" containing "the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Officials in the Headquarters Post-Order Detention Unit of ICE then determine whether, as the alien claims, there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. 241.13(e)-(g).[2]

3. In *Diouf* v. *Napolitano* (*Diouf II*), 634 F.3d 1081 (2011), the Ninth Circuit read a further requirement into Section 1231(a). In the court's view, "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" *Id.* at 1086 (citation omitted). "To address

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[2] The Court stated in *Zadvydas* that it was not considering "terrorism" or other "special circumstances" that may call for "heightened deference to the judgment of the political branches with respect to matters of national security." 533 U.S. at 696; see 8 C.F.R. 241.14(d).

those concerns," the court "appl[ied] the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge [(IJ)], for aliens facing prolonged detention." *Ibid.* In particular, the court held that aliens detained for more than 180 days are generally "entitled to release on bond unless the government establishes that the alien is a flight risk or will be a danger to the community." *Ibid.* The court recognized a narrow exception to that holding: "If the 180-day threshold has been crossed, but the alien's release or removal is imminent, DHS * * * [is not] required to afford the alien a [bond] hearing." *Id.* at 1092 n.13.

In reaching that conclusion, the Ninth Circuit acknowledged that Section 1231(a)(6) does not "*expressly*" refer to "release on bond." *Diouf II*, 634 F.3d at 1089. The court explained, however, that it had already held that bond is at least "authorized" under Section 1231(a)(6). *Ibid.*; see *Diouf* v. *Mukasey* (*Diouf I*), 542 F.3d 1222, 1234 (9th Cir. 2008). The court concluded that, because the text implicitly *authorized* bond, the court could properly invoke constitutional avoidance to *require* a bond hearing before an IJ after six months of detention. *Diouf II*, 634 F.3d at 1089.

B. Detention During Withholding-Only Proceedings

The INA provides that, if an alien reenters the United States illegally after previously having been removed under an order of removal, DHS may reinstate the prior removal order. See 8 U.S.C. 1231(a)(5). The reinstated order "is not subject to being reopened or reviewed," and the alien "is not eligible and may not apply for any relief" from the order. *Ibid.*

Notwithstanding those general restrictions, an alien subject to a reinstated removal order may seek withholding of removal under 8 U.S.C. 1231(b)(3) and withholding or deferral of removal under regulations implementing the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). A request for those forms of protection does not challenge the validity of the underlying order of removal, but rather seeks to prevent the United States from executing that order of removal to a specific country where the alien claims a risk of persecution or torture. See *ibid.* For an alien whose final order of removal has been reinstated but who is found to have a reasonable fear of persecution based on protected grounds or of torture, the determination whether that alien is entitled to those forms of protection is made in "withholding-only" proceedings before an IJ, with a right of appeal to the Board of Immigration Appeals. See 8 C.F.R. 208.16, 1208.16.

On June 15, 2020, this Court granted a petition for a writ of certiorari in *Albence* v. *Guzman Chavez*, No. 19-897, in order to resolve a circuit conflict about which provision of the INA governs the detention of an alien whose removal order has been reinstated and who has been placed in withholding-only proceedings: 8 U.S.C. 1231(a) (the provision discussed above) or 8 U.S.C. 1226 (a separate provision that authorizes the detention of aliens pending decisions on whether they are to be ordered removed). See Pet. at 14-15, *Guzman Chavez*, *supra* (No. 19-897). The Ninth Circuit, the court that

heard these cases, has held—correctly, in the government's view—that Section 1231(a) governs the detention of such aliens. See *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 829-837 (2017), cert. denied, 139 S. Ct. 411 (2018).

C. ***Aleman Gonzalez* v. *Barr***

1. Respondents Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez are natives and citizens of Mexico. App., *infra*, 70-71a. They were previously removed from the United States under orders of removal, later reentered the United States unlawfully, and then had their prior removal orders reinstated. *Ibid.* They were found to have a reasonable fear of persecution based on protected grounds or torture, were placed in withholding-only proceedings, and were detained under Section 1231(a). *Ibid.* They sought bond hearings, but immigration judges denied their motions. *Ibid.*

Aleman and Gutierrez then brought this suit in the Northern District of California to challenge their detention without bond hearings. The district court certified a class consisting of "all individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, [ICE], * * * and have been or will be denied a prolonged detention bond hearing before an Immigration Judge" (except for certain aliens who are already members of classes certified in two other cases). App., *infra*, 72a; see *id.* at 72a-84a. Notably, that definition covers "all" aliens detained under Section 1231(a)(6)—not just those who, like Aleman and Gutierrez, are subject to reinstated removal orders and have been placed in withholding-only proceedings. *Id.* at 72a.

The government acknowledged that, in *Diouf II*, the Ninth Circuit had held that an alien detained under Section 1231(a) ordinarily is entitled to a bond hearing before an IJ after six months of detention. See App., *infra*, 86a. The government argued, however, that this Court's subsequent decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), had superseded *Diouf II*. See App., *infra*, 86a. In *Rodriguez*, this Court reversed the Ninth Circuit's decision that another provision of the INA, 8 U.S.C. 1226(a), required periodic bond hearings after every six months of detention. See 138 S. Ct. at 847. The Court explained that "[n]othing in § 1226(a)'s text * * * even remotely supports the imposition" of that requirement. *Id.* at 847-848. In imposing such a requirement, the Ninth Circuit had invoked the canon of constitutional avoidance, but this Court explained that constitutional avoidance "'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction,'" and that simply "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Id.* at 842-843 (citation omitted). The government argued in this case that *Rodriguez*'s reasoning rejecting a six-month bond-hearing requirement under Section 1226 also forecloses a six-month bond-hearing requirement under Section 1231(a). App., *infra*, 89a.

The district court, as relevant here, rejected the government's contention that *Rodriguez* had superseded *Diouf II*. App., *infra*, 86a-91a. The court acknowledged that *Rodriguez* "is in tension with *Diouf II*," but concluded that the two cases are "not clearly irreconcilable" and that *Diouf II* accordingly remained binding on it. *Id.* at 91a. Relying on *Diouf II*, the court issued a

preliminary injunction prohibiting the government "from detaining [respondents] and the class members pursuant to section 1231(a)(6) more than 180 days without * * * providing each a bond hearing before an IJ as required by *Diouf II*." *Id.* at 92a.

2. A divided panel of the court of appeals affirmed. App., *infra*, 1a-66a.

The court of appeals concluded that it remained bound by its previous decision in *Diouf II* because that decision was not "clearly irreconcilable" with *Rodriguez*. App., *infra*, 24a. The court noted that *Diouf II* involved detention under Section 1231(a), while *Rodriguez* involved detention under Section 1226(a). *Id.* at 42a. The court perceived a "material difference" between the two statutes, because *Zadvydas* had already read Section 1231(a)(6) to require certain additional procedures after six months of detention if it is not reasonably likely that the alien can be removed in the reasonably foreseeable future. *Ibid.* The court also distinguished *Diouf II* from *Rodriguez* on the ground that *Rodriguez* rejected a requirement to hold periodic bond hearings after every six months of detention, whereas *Diouf II* merely required a single bond hearing after the first six months of detention. *Id.* at 37a-38a.

In reaching those conclusions, the court of appeals "recognize[d] some tension" between *Diouf II* and *Rodriguez*," App., *infra*, 4a; acknowledged that the government's arguments were "not without some appeal," *id.* at 30a; and stated that some "aspects of *Diouf II*" gave it "pause in light of" *Rodriguez*, *ibid.* In the end, however, the court concluded that it was "not free to overrule the prior decision of a three-judge panel merely because [it] sense[d] some tension [between]

that decision and the decision of an intervening higher authority." *Id.* at 52a.

Judge Fernandez dissented. App., *infra*, 56a-66a. He emphasized this Court's admonition in *Rodriguez* that constitutional avoidance comes into play only "after the application of ordinary textual analysis," when "the statute is found to be susceptible of more than one construction." *Id.* at 59a (quoting *Rodriguez*, 138 S. Ct. at 842). He observed that, in *Diouf II*, the Ninth Circuit identified neither "a textual ambiguity in the statute regarding a bond hearing requirement" nor "any plausible basis in the statutory text for such a hearing." *Ibid.* He therefore concluded that "*Diouf II*'s application of the constitutional avoidance canon without first analyzing the text of the statute or identifying a relevant ambiguity is clearly irreconcilable with [*Rodriguez*]." *Ibid.*

D. *Flores Tejada* v. *Godfrey*

1. Arturo Martinez Baños and German Ventura Hernandez are natives and citizens of Mexico, and Edwin Flores Tejada is a native and citizen of El Salvador. App., *infra*, 130a n.2. Like the named plaintiffs in *Aleman Gonzales*, Martinez, Ventura, and Flores were previously removed from the United States under orders of removal, later reentered the United States unlawfully, and then had their prior removal orders reinstated. *Id.* at 136a-137a; 2017 WL 368338, at *1. They were found to have a reasonable fear of persecution based on protected grounds or of torture, were placed in withholding-only proceedings, and were detained under Section 1231(a). *Ibid.* They alleged that the government had failed to provide them with individualized bond hearings before IJs. App., *infra*, 97a-98a.

Martinez brought this suit in the Western District of Washington to challenge his detention without a bond

hearing. 2017 WL 2983060, at *1. An amended complaint later named Flores and Ventura as additional plaintiffs. *Ibid.* The district court later dismissed Martinez's claims as moot because Martinez had by then been released from custody. *Id.* at *5. Later still, the court also dismissed Ventura's claims as moot because Ventura had by then been removed to Mexico. App., *infra*, 127a-128a, 145a-146a. The court certified a class consisting of "all individuals who (1) were placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the [Western District of Washington] after having a removal order reinstated, and (2) have been detained for 180 days (a) without a custody hearing or (b) since receiving a custody hearing." *Id.* at 98a-99a (brackets and citation omitted).

The district court, adopting the magistrate judge's report and recommendation, granted the class partial summary judgment. App., *infra*, 106a-110a; see *id.* at 111a-125a. Like the district court in *Aleman Gonzalez*, the district court in *Flores Tejada* rejected the government's contention that *Rodriguez* superseded *Diouf II*. *Id.* at 107a-109a. The court entered a permanent injunction requiring the government to provide class members initial bond hearings before an IJ after six months of detention and periodic bond hearings every six months thereafter. See *id.* at 99a-100a.

2. A divided panel of the court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 94a-105a.

The court of appeals first explained that its analysis in *Aleman Gonzalez*, decided the same day as *Flores Tejada*, "appl[ies] equally here." App., *infra*, 100a. In particular, the court repeated *Aleman Gonzalez*'s conclusion that "*Diouf II*'s construction of § 1231(a)(6) to

require an individualized bond hearing for an alien subject to prolonged detention is not clearly irreconcilable with [*Rodriguez*]." *Ibid.* The court accordingly "affirm[ed] the judgment and injunction's requirement that the Government must provide class members with an individualized bond hearing after six months of detention." *Id.* at 101a.

The court of appeals then concluded that the district court had erred by requiring not only an initial bond hearing after six months of detention, but "additional statutory bond hearings every six months" thereafter. App., *infra*, 101a. The court of appeals noted that *Diouf II* did not require "additional bond hearings every six months." *Ibid.* And the court found "no support" in "the statutory text" of Section 1231(a)(6) "to plausibly construe the provision as requiring *additional* bond hearings every six months." *Id.* at 103a-104a. The court accordingly "reverse[d] and vacate[d] the judgment and permanent injunction * * * in this regard," and remanded the case for consideration of the class's constitutional claims. *Id.* at 104a.

Judge Fernandez concurred in part and dissented in part. App., *infra*, 105a. He agreed with the court "to the extent that it vacate[d] the judgment and permanent injunction and remand[ed] for further proceedings on Plaintiffs' constitutional claims." *Ibid.* But for the reasons stated in his dissent in *Aleman Gonzalez*, he dissented from the opinion "to the extent that it affirm[ed] the district court's judgment and le[ft] the permanent injunction in place." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals invoked the canon of constitutional avoidance to hold that Section 1231(a)(6) generally entitles an alien to a bond hearing before an IJ after

six months of detention. That decision lacks a plausible basis in the text of Section 1231(a)(6), which says nothing about IJ bond hearings, or six-month time limits. The decision conflicts with *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), in which this Court reversed a decision of the Ninth Circuit invoking constitutional avoidance to impose a bond-hearing requirement on a different statutory provision that likewise said nothing about bond hearings. The question presented also is the subject of a circuit conflict: the Third and Ninth Circuits have both held that Section 1231(a)(6) generally requires a bond hearing after six months of detention, whereas the Sixth Circuit has rejected such a requirement.

In *Albence* v. *Arteaga-Martinez*, No. 19-896 (filed Jan. 17, 2020), the government filed a petition for a writ of certiorari presenting the same question that is presented in these cases. This Court may be holding the petition in that case pending its decision in *Albence* v. *Guzman Chavez*, cert. granted, No. 19-897 (June 15, 2020). As shown below, however, the rationales for holding the petition in *Arteaga-Martinez* do not apply to the petition in these cases. The Court should therefore grant review in these cases now.

A. The Court Of Appeals' Decision Is Wrong

1. Section 1231(a)(6) provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in [8 U.S.C. 1231(a)(3)].

8 U.S.C. 1231(a)(6). The court of appeals read that text to require the government to release an alien after six months of detention, unless it accords the alien a bond hearing before an IJ at which it proves that the alien is a flight risk or a danger to the community.

The court of appeals' interpretation adds requirements that the statute does not contain. The statutory text says nothing at all about six-month time limits, bond hearings before IJs, or requirements that the government prove at such bond hearings that the alien poses a risk of flight or a danger to the community. That should be the end of the matter, for a court's task "is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

The court of appeals justified its interpretation by invoking the canon of constitutional avoidance—*i.e.*, the proposition that a court should read a statute, if possible, to avoid serious constitutional doubts. *Diouf* v. *Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011). But constitutional avoidance is a tool for choosing "between competing *plausible* interpretations of a statutory text." *Rodriguez*, 138 S. Ct. at 843 (citation omitted). In the absence of statutory ambiguity, constitutional avoidance is "irrelevant." *Nielsen* v. *Preap*, 139 S. Ct. 954, 972 (2019). Section 1231(a)(6) contains no ambiguity on the point in dispute here: it contains no text suggesting that the government must hold a bond hearing before an IJ in order to detain an alien for more than six months. Constitutional avoidance therefore has no application here.

2. The court of appeals' decision not only has no basis in the plain text of the statute, but also conflicts with this Court's decision in *Rodriguez*. In *Rodriguez*, this

Court considered questions of statutory interpretation concerning detention of aliens under multiple provisions of the INA. The Court's decision is complex, but two aspects of the decision are relevant here.

First, in *Rodriguez*, the Ninth Circuit had invoked the principle of constitutional avoidance to read the statutory provisions at issue there to impose a series of "implicit limitations" on detention. 138 S. Ct. at 842. This Court rejected that approach, observing that "[t]hat is not how the canon of constitutional avoidance works." *Id.* at 843. The Court explained that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* at 842 (citation omitted). The Court noted that, "[i]n the absence of more than one plausible construction, the canon simply has no application." *Ibid.* (citation and internal quotation marks omitted). "Spotting a constitutional issue," the Court emphasized, "does not give a court the authority to rewrite a statute as it pleases." *Id.* at 843.

Second, in Part III-C of its opinion, the *Rodriguez* Court specifically addressed the Ninth Circuit's holding that Section 1226(a), a statute that authorizes detention of aliens during administrative proceedings to determine whether they are to be ordered removed, 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." 138 S. Ct. at 847. The Court noted that "[n]othing in § 1226(a)'s text * * * even remotely supports the imposition of either of those requirements." *Ibid.* Nor, the Court added, "does § 1226(a)'s text even hint that the length of detention prior to a bond hearing

must specifically be considered in determining whether the alien should be released." *Id.* at 848.

The court of appeals' decisions in *Diouf II* and the cases that are the subject of this certiorari petition conflict with both of those aspects of *Rodriguez*. Neither in *Diouf II* nor in these cases did the Ninth Circuit engage in "ordinary textual analysis" and find that Section 1231(a)(6) was "susceptible of more than one construction" before turning to constitutional avoidance. *Rodriguez*, 138 S. Ct. at 842 (citation omitted). The court instead treated the constitutional issue it spotted as a license "to rewrite a statute as it please[d]," *id.* at 843—repeating the very error that this Court condemned in *Rodriguez*.

In addition, *Rodriguez*'s reasoning for refusing to read Section 1226(a) to contain an unstated bond-hearing requirement applies to Section 1231(a)(6) as well. In these cases, as in *Rodriguez*, "[n]othing in [Section 1231(a)(6)'s] text * * * even remotely supports the imposition of [bond-hearing] requirements." 138 S. Ct. at 847. In fact, reversal in these cases follows *a fortiori* from *Rodriguez*'s interpretation of Section 1226(a). Section 1226(a) provides that the government "may release the alien on * * * bond." 8 U.S.C. 1226(a)(2)(A). Section 1231(a)(6), by contrast, says nothing at all about bond. If Section 1226(a) cannot plausibly be read to contain a requirement of bond hearings before an IJ, Section 1231(a)(6) certainly cannot be so read.

3. The court of appeals' contrary rationales lack merit. In both *Diouf II* and these cases, the court stated that Section 1231(a)(6) "may be construed to *authorize* release on bond." App., *infra*, 26a (emphasis added); see *Diouf II*, 634 F.3d at 1089. The question in these cases, however, is not whether Section 1231(a)(6)

authorizes DHS to release aliens on bond; the question is whether it *requires* bond hearings before an IJ after six months of detention. Section 1226(a) authorizes release on bond—in fact, it expressly provides that the government "may release the alien on * * * bond," 8 U.S.C. 1226(a)(2)(A)—yet this Court held in *Rodriguez* that it could not plausibly be read to require bond hearings every six months. So too, even granting the court of appeals' premise that Section 1231(a)(6) authorizes release on bond, Section 1231(a)(6) does not require IJ bond hearings after six months of detention.

The court of appeals next sought to distinguish *Rodriguez* on the ground that it involved the imposition of a requirement to hold periodic bond hearings every six months, whereas these cases involve the imposition of a requirement to hold "a single bond hearing" after six months of detention. App., *infra*, 38a. But that distinction makes no legal difference. Section 1231(a)(6) says nothing about periodic bond hearings, initial bond hearings, or any other kind of bond hearings. The text thus provides no foothold for judicial imposition of any kind of bond-hearing requirement, regardless of the frequency of the hearings imposed.

Finally, the court of appeals invoked this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), see App., *infra*, 40a-45a, but *Zadvydas* does not support the decision below. In *Zadvydas*, this Court stated that Section 1231(a)(6) would raise constitutional concerns if read to authorize indefinite or permanent detention of an alien who had previously been admitted to the United States because the country of removal would not accept the alien's return. 533 U.S. at 690-696. In order to address that constitutional concern, the Court read Sec-

tion 1231(a)(6) to allow detention only as long as the detention continued to serve "its basic purpose [of] effectuating an alien's removal." *Id.* at 697. In particular, the Court held that detention under Section 1231(a)(6) must end once "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

The Ninth Circuit did not suggest in either *Diouf II* or these cases that the question presented here raises the constitutional concern identified in *Zadvydas*—namely, open-ended detention because of the refusal of other countries to accept the alien. The court instead believed that it had spotted a *different* constitutional concern than the one identified in *Zadvydas*. See *Diouf II*, 634 F.3d at 1085-1086. In particular, the court believed that, even where detention continues to serve the immigration purpose of ensuring the availability of the alien for removal and of protecting against flight risk and danger to the community in the meantime, the detention might nonetheless violate due process at some point if, in the court's view, it becomes unduly "prolonged." *Id.* at 1086. And the court suggested that *Zadvdydas* authorized it to construe Section 1231(a)(6) to impose whatever procedural requirements it believed were needed to address those concerns.

But *Zadvydas* granted the court of appeals no such authority. The Court in *Zadvydas* analyzed "statutory purpose" and the "implic[ations]" of the text, 533 U.S. at 682, 697, and, after doing so, "detected ambiguity" regarding the permissibility of open-ended detention, *Rodriguez*, 138 S. Ct. at 843. Only after finding such an ambiguity did the Court read the statute to prohibit detention of the aliens there once "it has been determined that there is no significant likelihood of removal in the

reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. And even that decision, the Court later explained, represented a "notably generous application of the constitutional-avoidance canon." *Rodriguez*, 138 S. Ct. at 843. In *Diouf II* and these cases, by contrast, the court of appeals engaged in no meaningful analysis of the text at all. If they had, they would have been forced to conclude that Section 1231(a)(6) contains nothing—and therefore no ambiguity—with respect to bond hearings before IJs. Put simply, *Zadvydas* does not grant courts a "license to graft [new procedural requirements] onto the text" of Section 1231(a)(6). *Ibid.*

4. Applying Section 1231 as written would not leave aliens unprotected from continued detention with no prospect of release. As an initial matter, Section 1231(a)(6) provides that DHS "may" detain the alien beyond the 90-day removal period. 8 U.S.C. 1231(a)(6). Federal regulations set forth a framework for the exercise of that discretion. See 8 C.F.R. 241.4. Under that framework, ICE may release the alien if the alien demonstrates to the satisfaction of the responsible official that he will not pose a danger to the community or a significant risk of flight pending the alien's removal from the United States. 8 C.F.R. 241.4(d)(1). The relevant DHS field office conducts an initial review at the outset of detention, and a review panel at ICE headquarters periodically conducts further reviews. See 8 C.F.R. 241.4(i)(3), (k)(1)-(2). During those reviews, officials must decide whether to release or detain the alien on the basis of both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as the likelihood that "the alien is a significant flight risk" or that he would "[e]ngage in future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii).

And the alien may submit information that he believes provides a basis for release; may be assisted by an attorney or other representative; and may, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2), (i)(3).

Quite apart from those regulations, this Court held in *Zadvydas* that Section 1231 "does not permit indefinite detention." 533 U.S. at 689. It stated that, if detention lasts for more than six months, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. Federal regulations set out a separate set of "special review procedures" in light of *Zadvydas*. 8 C.F.R. 241.13(a). Under those procedures, an eligible alien "may submit a written request for release," together with "whatever documentation" he wishes "in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Adjudicators at ICE headquarters must then review the alien's case, allow the alien to respond to the government's evidence, allow the alien to submit additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately, "issue a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d)-(e). The regulations expressly provide that those special review procedures supplement rather than supplant the discretionary framework discussed in the preceding paragraph. 8 C.F.R. 241.13(b).

In short, the statute and the regulations already provide extensive protections to aliens detained under Sec-

tion 1231. The Ninth Circuit had no warrant for imposing yet more procedures that neither Congress nor the relevant agencies have adopted.

B. The Question Presented Warrants This Court's Review

1. This Court should grant review because the decision of the court of appeals conflicts with the Court's decision in *Rodriguez*. In *Rodriguez*, the Court reversed a decision of the Ninth Circuit that had invoked constitutional avoidance to interpret Section 1226(a), a provision that expressly refers to bond but that does not expressly require bond hearings, to require bond hearings. In *Diouf II* and in these cases, the Ninth Circuit repeated essentially the same error, but with respect to a different provision of the INA that says nothing at all about bond. The dissent in these cases correctly perceived that *Rodriguez* and *Diouf II* are "clearly irreconcilable." App., *infra*, 56a. And even the panel majority was forced to acknowledge that the two decisions are, at a minimum, in "tension." *Id.* at 52a.

This Court also should grant review because the question presented now is the subject of a circuit conflict. On the one hand, in *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (2018), the Third Circuit agreed with the Ninth Circuit's decision in *Diouf II* that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (*i.e.*, 180 days) of custody." *Id.* at 226. Like the Ninth Circuit, the Third Circuit invoked "constitutional avoidance" to conclude that Section 1231(a)(6) "implicitly requires a bond hearing after prolonged detention." *Id.* at 219, 223.

On the other hand, in *Martinez* v. *LaRose*, No. 19-3908, 2020 WL 4282158 (July 27, 2020), the Sixth Circuit recently declined to "impos[e] a general rule that aliens

detained under § 1231(a) must receive a bond hearing after a specific lapse of time." *Id.* at *7. The court explained that it was "reluctant to graft a bond-hearing requirement onto a statute absent language supporting such a requirement" and that "a bond requirement would be out of place" under *Rodriguez*. *Ibid.* Citing *Diouf II* and *Guerrero-Sanchez*, the court explicitly acknowledged that its decision conflicted with the decisions of "the Third and Ninth Circuits." *Ibid.*

2. The practical importance of the question presented underscores the need for this Court's review. Section 1231 governs the detention of aliens who have been ordered removed from the United States. The question presented affects the procedures available to that substantial population.

In addition, the United States has an overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163 (1993). The Ninth Circuit's revision of Section 1231 compromises that interest by providing a new mechanism for detained aliens with final orders of removal to obtain release over DHS's objection. Because those released aliens have already been ordered removed from the United States, they would have a strong incentive to abscond in order to avoid removal.

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

Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,831, 33,838, 33,841 (July 16, 2019). And this Court has recognized that those burdens are currently "overwhelming our immigration system." *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1967 (2020) (citation omitted). The Ninth Circuit has added to those administrative burdens. As detailed above, federal regulations already set forth two separate frameworks for reviewing an alien's continued detention under Section 1231: periodic reviews to determine whether the government should exercise its discretion to continue to detain the alien, and special reviews to determine whether the alien is entitled to release under *Zadvydas*. The Ninth Circuit has layered a third framework atop those two sets of procedures.

Finally, the Ninth Circuit's decision impermissibly intrudes on the responsibility of the political branches. This Court has observed that immigration policy is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). In these cases, the Legislative Branch has granted the Executive Branch the discretion to detain certain aliens who have been ordered removed from the United States. See 8 U.S.C. 1231(a)(6). And the Executive Branch has adopted regulations governing the exercise of that discretion—regulations under which an alien obtains periodic reviews before immigration officials in DHS rather than a bond hearing before an IJ. See 8 C.F.R. 241.4. The Ninth Circuit articulated no sound justification for imposing further requirements found

neither in the text of the statute nor in the applicable regulations.

C. The Court Should Grant Review Rather Than Hold The Petition For *Guzman Chavez* Or *Arteaga-Martinez*

On January 17, 2020, the government filed petitions for writs of certiorari in two cases relating to detention of aliens under Section 1231: *Arteaga-Martinez*, No. 19-896, and *Albence* v. *Guzman Chavez*, cert. granted, No. 19-897 (June 15, 2020). *Guzman Chavez* presents the question whether the detention of an alien who is subject to a reinstated removal order and who has been placed in withholding-only proceedings is governed by Section 1231(a)(6) or instead by Section 1226. Pet. at I, *Guzman Chavez*, *supra* (No. 19-897). *Arteaga-Martinez*, a case from the Third Circuit, presents essentially the same question as these cases: whether an alien detained under Section 1231 is entitled to a bond hearing before an IJ after six months of detention. Pet. at I, *Arteaga-Martinez*, *supra* (No. 19-896).[3] The Court granted re-

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[3] The questions presented differ in one respect. The Third Circuit has held as a *statutory* matter that the government bears the burden of proving its case at the bond hearing by clear and convincing evidence, and the question presented in *Arteaga-Martinez* encompasses that issue. See Pet. at I, *Arteaga-Martinez*, *supra* (No. 19-896). The Ninth Circuit, by contrast, has imposed the same burden of proof by clear and convincing evidence as a *constitutional* matter. See App., *infra*, 17a-18a, 36a-37a. The government does not seek review of that separate question at this time, in this certiorari petition. If Section 1231(a)(6) does not require six-month bond hearings in the first place—a conclusion that we submit is compelled by *Rodriguez*—there would be no occasion for this Court to decide whether the Constitution requires a particular standard of proof at such a hearing. In addition, the question whether the Constitution requires the government, rather than the alien, to bear the burden

view in *Guzman Chavez*, but may be holding the petition in *Arteaga-Martinez* pending its decision in *Guzman Chavez*. The potential rationales for holding the petition in *Arteaga-Martinez* do not, however, apply to the present petition.

1. The respondent in *Arteaga-Martinez* argued that, at the time of the government's petition in that case, the question presented was not the subject of any circuit conflict. Br. in Opp. at 8, *Arteaga-Martinez*, *supra* (No. 19-896). That observation was true at that time; only the Third and Ninth Circuits had addressed the question presented, and both of them had read Section 1231(a)(6) to impose a six-month bond-hearing requirement. See Pet. at 14, *Arteaga-Martinez*, *supra* (No. 19-896). Since then, however, the Sixth Circuit has rejected the Third and Ninth Circuits' views and has held that Section 1231(a)(6) does not require bond hearings before an IJ after six months of detention. See pp. 23-24, *supra*. The question presented thus is now the subject of a circuit conflict.

2. Next, the respondent in *Arteaga-Martinez* was subject to a reinstated removal order and had been placed in withholding-only proceedings. See Pet. at 5, *Arteaga-Martinez*, *supra* (No. 19-896). As a result, for him, the question presented in *Guzman Chavez* (whether Section 1231 applies to such aliens) was antecedent to the question presented in *Arteaga-Martinez* (whether, if Section 1231 does apply, an alien detained

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of proof concerning the alien's flight risk or danger to the community, and to do so by clear and convincing evidence, has arisen more broadly in the lower courts in cases involving constitutional challenges to pre-final-order detention under 8 U.S.C. 1225(b), 1226(a), and (c). At the present time, such a case may be a more appropriate vehicle for consideration of the burden of proof.

under it is entitled to a bond hearing after six months of detention). The respondent in *Arteaga-Martinez* accordingly argued that the Court's resolution of *Guzman Chavez* "might moot the question presented" in *Arteaga-Martinez*. Br. in Opp. at 20, *Arteaga-Martinez*, *supra* (No. 19-896). That contention might have led the Court to hold the *Arteaga-Martinez* petition for the resolution of the antecedent issue in *Guzman Chavez*.

That rationale does not apply to these cases. To be sure, the *named* respondents in these cases were subject to reinstated removal orders and were placed in withholding-only proceedings. This Court has explained time and again, however, that once a district court properly certifies a class, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by the named representative," and their claims may remain live even if the class representatives' claims become moot after certification. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 753 (1976) (brackets and citation omitted); see, *e.g.*, *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1538-1539 (2018); *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 74-75 (2013); *Sosna* v. *Iowa*, 419 U.S. 393, 399-403 (1975). The certified classes in these cases consist generally of aliens detained under Section 1231(a)(6), and are not limited to aliens who are subject to reinstated removal orders and who have been placed in withholding-only proceedings. See pp. 8-9, 12, *supra*; see also, *e.g.*, *Diouf II*, 634 F.3d at 1082-1084 (addressing the question presented in the context of an alien who had not been placed in withholding-only proceedings). The upshot is that, regardless of how this Court resolves *Guzman Chavez*, and regardless of the effect of that decision on the named respondents' claims, at least

some class members in these cases will continue to have live claims regarding whether Section 1231(a)(6) entitles them to bond hearings before an IJ after six months of detention.

3. Finally, the respondent in *Arteaga-Martinez* argued that the government had not pressed and the lower courts had not passed on the specific contention that reading Section 1231(a)(6) to require bond hearings after six months of detention would contradict *Rodriguez*. See Br. in Opp. at 17-18, *Arteaga-Martinez*, *supra* (No. 19-896). The government explained why that objection lacked force, see Cert. Reply Br. at 8-10, *Arteaga-Martinez*, *supra* (No. 19-896), but in any event, the objection is simply inapplicable here. The government specifically argued in the district courts and the court of appeals in these cases that *Rodriguez* superseded *Diouf II*, and the courts' opinions addressed that argument at length. See App., *infra*, 35a-53a, 86a-92a, 107a-109a.

In sum, none of the potential rationales for holding the petition in *Arteaga-Martinez* applies to this petition. The Court should therefore grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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