No. 20-322

In the Supreme Court of the United States

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

Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, *ET AL.*,

Respondents.

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

Petitioners,

v.

EDWIN OMAR FLORES TEJADA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an alien who is detained under 8 U.S.C. § 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the alien is a flight risk or a danger to the community.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

In two class actions against various officials (hereinafter, the "Government"), aliens detained under 8 U.S.C. § 1231(a)(6) seek bond hearings to terminate their detention pending removal. The named class representatives all have reinstated removal orders (that is, they returned to the United States illegally after removal pursuant to an order of removal) and are in withholding-only removal proceedings. *See* Pet. at 27-28. With that summary, IRLI adopts the facts stated by the Government. *See* Pet. at 8-13, 27-28.

By way of background, removal under 8 U.S.C. § 1231 involves a 90-day "removal period" that generally begins at the later of finality of the removal

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[1] *Amicus* files this brief with all parties' written consent and ten days' notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

order (including any judicial review) and the alien's release from incarceration for any crimes. 8 U.S.C. § 1231(a)(1)(A)-(B). During the removal period, the alien's detention is mandatory, *id.* at § 1231(a)(2), but after that period aliens are subject to Government supervision to ensure their availability for subsequent removal proceedings. *Id.* at § 1231(a)(3). With respect to certain inadmissible or criminal aliens, however, the Immigration and Nationality Act, 8 U.S.C. §§1101-1537 ("INA") authorizes detention beyond the removal period at the Government's discretion:

> An alien ordered removed who is inadmissible …, removable under [various INA sections because of criminal convictions, national security, or other reasons] or who has been determined … 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 paragraph (3).

8 U.S.C. § 1231(a)(6). An alien who illegally reenters the United States after having been removed would be inadmissible for purposes of § 1231(a)(6), even with no criminal record. *See* 8 U.S.C. § 1182(a)(6)(A)(i).

Although the INA allows detention of inadmissible and criminal aliens, 8 U.S.C. § 1231(a)(6), the Ninth Circuit ordered bond hearings after six months' detention based on Circuit precedent—namely, *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011)—that purports to implement *Zadvydas*. In *Zadvydas*, this Court relied on the canon of constitutional avoidance to read § 1231 to

include an implied bond-hearing requirement when—as in that case—it appeared unlikely that any country would take the alien. *See* 533 U.S. at 690. The majority held that circumstance to convert a utilitarian detention to ensure the alien's readiness and availability for removal—the INA's "basic purpose [of] effectuating an alien's removal," *id.* at 697—into something punitive. *Id.* at 690. Significantly, the two aliens at issue both were resident aliens under removal for crimes. *See* 533 U.S. at 684-86.

In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), this Court rejected the Ninth Circuit's effort to impose a bond-hearing requirement on alien detentions under INA provisions worded similarly to § 1231(a)(6). In doing so, this Court held that the avoidance canon did not apply where the INA did not support a plausible reading that a court could reach to avoid constitutional doubt. *Id.* at 843. With respect to *Zadvydas*, *Jennings* found that decision to be a "notably generous application of the constitutional-avoidance canon." *Id.*

<u>SUMMARY OF ARGUMENT</u>

The Court should grant review if only to reject the lower courts' application of *Zadvydas*'s indefinite-detention rationale, based on a situation in which no country would accept the alien, to removals that merely take longer than six months but are proceeding to a removal endpoint. *See* Section I.A. In addition, this Court should reconsider the entire *Zadvydas* enterprise for several interrelated reasons: (1) different rights are implicated with respect to the *Zadvydas* petitioners, who were former lawful

permanent residents ("LPRs") in removal, and the class representatives here, who are recidivist illegal border crossers; (2) *Zadvydas* began with petitions for writs of *habeas corpus*, which are *as-applied* challenges that do not and cannot decide *facial* constitutional claims; and (3) this Court today must read the INA as cabined by the post-*Zadvydas* regulations, not the INA that *Zadvydas* found ambiguous circa 2001. *See* Section I.B.

In addition to being erroneous, the lower-court decisions here split with the Sixth Circuit on an issue on which the nation must speak with one voice. *See* Section II.A. Having the judiciary compel early release into the United States undercuts not only the Executive's authority to negotiate aliens' return to their home countries but also Congress's intent that lax immigration enforcement not attract illegal immigration in the first place. *See* Section II.B. The Constitution does not arbitrarily set a six-month presumption for release, without considering the difficulties of repatriation during the COVID-19 pandemic, and thus the six-month presumption, at minimum, should be reconsidered. *See* Section II.C.

These cases are ideal vehicles to resolve these important issues. First, unlike similar cases pending before this Court, the class structures in this case will prevent mootness if *Albence v. Guzman Chavez*, No. 19-897 (U.S.), holds that § 1231(a)(6) does not apply to reinstated removal orders in withholding-only proceedings. *See* III.A. Finally, the issues presented here are purely legal, without any factual disputes that might impede this Court from resolving the question presented. *See* Section III.B.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS ARE ERRONEOUS.

Amicus IRLI agrees with the Government that the Ninth Circuit erred in holding that § 1231 implicitly requires a bond hearing after six months of detention. *See* Pet. at 14-22. On an issue of this importance, that error alone justifies this Court's review.

A. Courts should not extend protections against *indefinite* detentions to *every* detention.

The Ninth Circuit panel majority felt bound by the *Diouf* circuit precedent implementing *Zadvydas*, with no revision from this Court's supervening *Jennings* decision. Given the split in circuit authority on this question, *see* Pet. at 22, 25, it is clear that this Court must now clarify the respective bounds of *Zadvydas* and *Jennings* for immigration detentions in ongoing removal proceedings.

Accepting the *Zadvydas* premise—namely, when no country appears likely to take an alien, indefinite detention could become punitive—in no way compels a conclusion that detention *to effect removal* is punitive. Given the confusion by the Ninth and Third Circuits on this question, it is clear that this Court should revisit this issue.

In *Jennings*, this Court focused on a few textual differences between the detention provisions there—which provided for "detention pending a decision on whether the alien is to be removed"—and § 1231(a)(6), which does not address the duration of detention. *Jennings*, 138 S.Ct. at 846 (interior quotation marks omitted). If removal remains viable—that is, if some

country may take the alien—that is a distinction without a difference. The entire point of removal proceedings under § 1231 is to remove the alien. While the removal effort is ongoing and potentially viable, detention remains within the INA's "basic purpose [of] effectuating an alien's removal." *Zadvydas*, 533 U.S. at 697. As in *Jennings*, there is no ambiguity allowing a reading incorporating a constitutionally implied safety valve for indefinite detentions.

Even if this Court found the same ambiguity that the *Zadvydas* majority found, that "notably generous" application of the constitutional-avoidance canon would have no place here. *Jennings*, 138 S.Ct. at 843. A detention that ends in removal—as most do—does not invoke the same constitutional doubt as one that has no endpoint: "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (interior quotation marks omitted). Instead, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). There would be no constitutional doubt here, even if there were statutory ambiguity.

B. This Court should reconsider or narrow *Zadvydas.*

Several features of this Court's *Zadvydas* decision warrant this Court's revisiting, or at least, narrowing that decision to its facts.

First, the aliens in *Zadvydas* were residents who lost their legal residency because of convictions for crimes. The Due Process Clause's protections may apply to such aliens, but not to illegal entrants such as the class representatives here. *Plasencia*, 459 U.S. at 32; *Mezei*, 345 U.S. at 212. Far from having formerly been lawfully present like the *Zadvydas* petitioners, these aliens were unlawfully present, were removed, and unlawfully reentered.

Judicial fiats such as the lower courts' actions here invoke the Due Process Clause to enact what appear to be personal preferences. *See Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) ("extending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]"). The federal courts have the duty to apply the Constitution, but that duty does not authorize policymaking under the guise of substantive due process.

Second, the *Zadvydas* petitioners began their cases as petitions for writs of *habeas corpus* under 28 U.S.C. § 2241 to challenge their detention beyond 90 days. *See Zadvydas*, 533 U.S. at 684 (Mr. Zadvydas), 686 (Mr. Ma). A *habeas* proceeding "authorizes the federal courts to entertain … claim[s] that [petitioners] are being held in custody in violation of

the Constitution," but "it is not a grant of power to decide constitutional questions not necessarily subsumed within that claim." *Cty. Court v. Allen*, 442 U.S. 140, 154 (1979). At most, *Zadvydas* decided the as-applied claims of former LPRs under detention pending removal with no likely prospect that a country would accept them. That holding is quite limited, and it does not apply here.

Third, because *habeas* proceedings are considered as-applied holdings, *id.*, *Zadvydas* need not apply to this new proceeding with its different facts. Prevailing in an as-applied challenge such as *Zadvydas* is simply different from prevailing in a facial challenge such as these cases. *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2665 (2011); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Because "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior quotation marks and alterations omitted), federal courts should be wary of granting the facial systemic relief that the Ninth Circuit ordered here.

Fourth, differences between facial and as-applied relief undermine not only the Ninth Circuit's decisions but also the *Zadvydas* majority's invocation of the canon of constitutional avoidance in the first place. If § 1231(a)(6) raises constitutional doubt as applied to LPRs under detention pending removal with no likely prospect that a country will accept them, that would not justify *facial* relief if the statute is entirely lawful for aliens such as the class representatives here:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to

> mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

United States v. Salerno, 481 U.S. 739, 745 (1987). It is simply inaccurate to say that the statute as seen by the *Zadvydas* majority raises *facial* constitutional doubt.

Fifth, because non-mutual estoppel is unavailable against the Government, *United States v. Mendoza,* 464 U.S. 154, 162-63 (1984), this Court must consider the INA as it stands today, not as it stood when the Court decided *Zadvydas* in 2001. In particular, this Court must consider the Government's post-*Zadvydas* regulations, 8 C.F.R. § 241.13, which narrow the ambiguity perceived by the *Zadvydas* majority. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2311-12 (2016) (relying on extant regulations to gauge the constitutionality of a statute); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987) ("regulations …. defining the statutory concept … have the force of law"). Unlike in 2001, the regulations cabin the statute's perceived constitutional doubt.[2]

II. THIS BOND-HEARING ISSUE IS IMPORTANT AND RECURRING.

Several additional factors should motivate this Court to correct the Ninth Circuit's error, even if this Court is not generally a mere error-correction court.

[2] If this Court relaxed *Zadvydas*, it is possible that the Government would relax the post-*Zadvydas* implementing regulations, but any recission would be reviewable under the Administrative Procedure Act. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1907 (2020).

City & Cty. of San Francisco v. Sheehan, 135 S.Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part).

A. Immigration requires uniformity.

Under the Constitution, "the National Government… [has the] constitutional power to 'establish [a] uniform Rule of Naturalization' and [the] inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, 567 U.S. 387, 394-95 (2012) (quoting U.S. CONST. art. I, § 8, cl. 4). "Decisions of this nature touch on foreign relations and must be made with one voice." *Id.* at 409. Here, by contrast, the decisions of the two district courts and the resulting injunctions differ in part, and the Ninth and Third Circuits split with the Sixth Circuit on the question of whether § 1231 even requires bond hearings in the first place. *See* Pet. at 22, 25. *Amicus* IRLI respectfully submits that this Court's resolution of the split in circuit authority is needed.

B. A bond-hearing requirement undercuts federal policies.

By setting immigration policy on a systemic basis, the Ninth Circuit's decisions intrude on the plenary power of the political branches to set immigration policy. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (recognizing "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (interior quotation marks omitted); *Plasencia*, 459 U.S. at 32 (controlling immigration an act of sovereignty). Even if *Zadvydas* correctly decided the issue with respect to detained former LPRs with

no likely prospect that a country would accept them, it would not justify further judicial intrusion into immigration policy.

First, the nation must speak with one voice on the issue of immigration. *Arizona*, 567 U.S. at 394-95. Foreign countries may value relations with the United States, but they also value remittances from their citizens unlawfully present in the United States. *See*, *e.g.*, Jordan E. Dollar & Allison D. Kent, *In Times of Famine, Sweet Potatoes Have No Skin: A Historical Overview and Discussion of Post-Earthquake U.S. Immigration Policy Towards the Haitian People*, 6 INTERCULTURAL HUM. RTS. L. REV. 87, 113 (2010). By compelling the release of illegal aliens into the United States, the judiciary undermines the Government's ability to negotiate the return of foreign nationals. An illegal alien at large can send money home; a detained illegal alien cannot.

Second, compelling the release of illegal aliens serves as a magnet for further illegal immigration. In essence, it equates to a billboard reading "come to the United States, spend six months in detention, and get released." Contrary to that message, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). The decisions of the Ninth Circuit erode a deterrent effect from our immigration laws. That erosion leads to an influx of illegal aliens, which then leads to systemic overload that makes the Government unable to process all the claims from arriving aliens.

This Court should reel in the lower federal courts by granting review here and narrowing the scope of court involvement in setting immigration policy.

C. The six-month trigger for a bond hearing is improper during a health pandemic.

Even if this Court decides against revisiting the whole of *Zadvydas*, this Court should relax the six-month presumption for the reasonableness of a period of detention. What seemed reasonable to this Court in 2001 does not necessarily equate to that same period's being presumptively reasonable during the COVID-19 pandemic.

The term "reasonable" necessarily includes review of the specific context. *Cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952) (Due Process Clause considers reasonableness in context). During the COVID-19 pandemic, the Government reasonably may need more time than usual to arrange removal to foreign nations. The pandemic almost certainly slows governmental response times on both sides of removal transaction between our Government and the foreign nations that will receive or repatriate the affected aliens.

Amicus IRLI respectfully submits that—if the Court insists on the fiction of reading a reasonable period into the INA—a reasonable period today is considerably longer than six months.

III. THESE CASES PRESENT AN IDEAL VEHICHLE FOR RESOLVING THE ISSUE OF BOND HEARINGS UNDER § 1231.

In addition to presenting a split in circuit authority on a recurring and important question, these cases

also present an ideal vehicle for this Court to resolve the scope of the bond-hearing requirement—if any—in 8 U.S.C. § 1231.

A. A decision in *Guzman Chavez* will not moot these cases.

As the Government explains, a decision in *Albence v. Guzman Chavez*, No. 19-897 (U.S.), will not moot these actions, even if—as seems unlikely—this Court holds that aliens subject to reinstated removal orders in withholding-only proceedings fall under 8 U.S.C. § 1226. *See* Pet. at 25-27. The certified classes here include *all* aliens detained under § 1231(a)(6), without regard to withholding-only issue. Thus, the class relief will remain in place for aliens *not* in withholding-only proceedings, even if *Guzman Chavez* redirects withholding-only proceedings to § 1226. This Court's *Jennings* decision addressed bond hearings for § 1226, and this Court needs to review that issue for § 1231.

B. The issues presented are purely legal.

This case presents two subsidiary questions. First, can one plausibly read § 1231 to *require* a bond hearing? Second, if so, does a no-bond-hearing reading of the plain text raise any constitutional questions that implicate the avoidance canon?

Although the answer to the second question may differ for former LPRs under a removal order *vis-à-vis* recent illegal entrants, the questions and their answers remain purely legal. Thus, no fact-bound issues would impede this Court's resolution of the question presented in these cases.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

October 13, 2020 Respectfully submitted,

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