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.

(*Caption continued on inside cover*)

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

BRIEF IN OPPOSITION

Ahilan T. Arulanantham
Michael Kaufman*
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5232
mkaufman@aclusocal.org

Matt Adams
Aaron Korthuis
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave, Suite 400
Seattle, WA 98104
(206) 957-8611

Counsel for Respondent

*Counsel of Record

(*Additional Counsel on Inside Cover)*

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Petitioners,

—v.—

EDWIN OMAR FLORES TEJADA, *et al.*,

Respondents.

Marc Van Der Hout
Johnny Sinodis**
VAN DER HOUT LLP
180 Sutter Street, Suite 500
San Francisco, CA 94104
(415) 981-3000

Alison Pennington
IMMIGRANT LEGAL DEFENSE
1322 Webster St., Suite 300
Oakland, CA 94612
(510) 467-0655

Vasudha Talla
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

Judah Lakin
Amalia Wille
LAKIN & WILLE LLP
1939 Harrison Street, Suite 420
Oakland, CA, 94612
(510) 379-9216

Jesse Newmark**
CENTRO LEGAL DE LA RAZA
3400 E. 12th Street
Oakland, CA 94601
(510) 679-1608

**Application for Admission
Forthcoming

QUESTION PRESENTED

If 8 U.S.C. 1231(a)(6) governs Respondents' detention (*see Pham v. Guzman Chavez*, No. 19-897), whether the statute should be construed to require a bond hearing before a neutral decisionmaker after six months of incarceration for individuals pursuing *bona fide* claims to relief from removal that can take the government years to adjudicate.

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INTRODUCTION

These interlocutory appeals do not warrant review. They present an issue on which there is only the most shallow of circuit splits. Another case now pending before this Court may render the appeals moot. Neither case has reached final judgment; further factual development on the unresolved constitutional claims would assist the Court in addressing the statutory question presented. And the rulings below are consistent with this Court's precedent, including *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

The class representatives and nearly all class members in the two lawsuits at issue—*Aleman* and *Flores*—are noncitizens who, after being removed from the United States, returned because they face persecution or torture in their home countries. A Department of Homeland Security ("DHS") official has determined that each has *bona fide* claims to protection under the asylum laws because they would be persecuted or tortured if returned, and referred them for "withholding-only" proceedings.[1] They are entitled to remain in the United States while their claims are adjudicated. Class members were all incarcerated for more than six months pending final adjudication of their withholding-only proceedings without a hearing before a neutral decisionmaker to assess whether they posed a flight risk or danger requiring their continued confinement.

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[1] "Withholding-only" proceedings are held before Immigration Judges to assess a noncitizen's claims for withholding of removal or relief under the Convention Against Torture.

The court of appeals held that such individuals are detained pursuant to 8 U.S.C. 1231(a)(6), and that the statute requires bond hearings after six months to determine whether ongoing confinement remains justified. It concluded, as did this Court in *Zadvydas,* that Section 1231(a)(6) is ambiguous, and that reading it to require a hearing to detain individuals beyond six months was necessary to avoid the serious constitutional problems arising from prolonged incarceration without a hearing.

The Court should deny review for four reasons. First, the circuits have just begun considering how to interpret Section 1231(a)(6) in light of *Rodriguez*, and there is no significant split. The only courts of appeals in which the question was actually litigated by the parties—the Third and the Ninth—conducted a detailed analysis of the statutory text and this Court's precedents in *Zadvydas* and *Rodriguez*, and agreed Section 1231(a)(6) should be construed to require a hearing. Only the Sixth Circuit has disagreed, and it did so in passing, without analysis, in a case in which the noncitizen did not even raise the issue and then explicitly conceded it.

Second, granting certiorari would be premature because both appeals may be rendered moot. This Court has granted certiorari to determine which statute governs detention during the withholding-only proceedings at issue here. *See Pham v. Guzman Chavez*, No. 19-897. If the Court concludes that Section 1226(a) applies, the *Flores* appeal would be moot and the *Aleman* appeal would require a remand to appoint new class representatives and assess numerosity. The Court should deny certiorari, rather than hold for *Guzman Chavez*, because the government can raise *Guzman Chavez* on remand if it

is relevant, and further proceedings below are necessary in any event.

Third, review is also premature because these cases come to the Court as interlocutory appeals on undeveloped records. Both cases have not reached final judgment and include unresolved due process claims, the resolution of which would aid this Court's consideration of the statutory question presented. Those unadjudicated constitutional claims require the development of facts this Court has considered in similar cases—including the gravity of Respondents' liberty interest (i.e., the length of detention), and the quality of the existing procedures. Developing the record on Respondents' constitutional claims would inform the Court's consideration of the interrelated statutory question presented, because the court below construed the statute to require a hearing to avoid constitutional concerns.

Finally, the decisions are correct. *Zadvydas v. Davis* already held that Section 1231(a)(6) is "ambiguous," and interpreted it to contain an "implicit 'reasonable time' limitation" of six months, after which detention is permitted only if removal is "reasonably foreseeable" and there are sufficient public safety concerns to "justify[] confinement within that reasonable removal period." 533 U.S. at 682, 700-01. The decisions below simply read the statute to require a procedure—a custody hearing before an Immigration Judge ("IJ")—to determine whether there are sufficient public safety concerns to continue confinement beyond six months.

Petitioners' regulations implementing *Zadvydas* provide for a paper-only custody review by DHS officials at six months, and they permit release on bond. *See* 8 C.F.R. 241.4(k), 241.5(b). The dispute in

these cases is therefore narrow. The parties agree that detention under Section 1231(a)(6) is discretionary, not mandatory, and that the government must determine whether continued confinement is warranted after six months. They disagree only about *how* that determination is to be made: at a hearing before a neutral IJ, or via paper review by DHS officials, i.e., the jailing authorities.

The court of appeals correctly interpreted a statute this Court has already identified as "ambiguous" to require IJ bond hearings, concluding that a contrary interpretation would raise serious constitutional concerns. Reading Section 1231(a)(6) to require only a paper review conducted by the jailing authority has resulted in the needless incarceration of individuals who pose no flight risk or danger—in some cases, for years. Outside the national security context, this Court has *never* upheld the constitutionality of detention beyond six months absent the bedrock due process protection of a hearing before a neutral decisionmaker. Because Section 1231(a)(6) is ambiguous as to the procedures required to assess danger and flight risk, the court of appeals correctly construed it to require custody hearings to implement that detention authority.

STATEMENT OF THE CASE

I. Legal Framework

All *Flores* class members, and the vast majority of *Aleman* class members (including the class representatives), are individuals with reinstated orders of removal whom DHS asylum officers have found to have *bona fide* claims to protection from removal because they will be persecuted or tortured if

returned to their home countries.[2] They were all therefore transferred from summary removal to full-scale proceedings before an IJ to adjudicate their claims. *See* 8 C.F.R. 208.31(e), 241.8(e). They are entitled to remain in the United States pending adjudication of those claims. Before the relief afforded below, all had been detained for more than six months—and in some instances, for years—without any hearing to assess whether there was any need for their detention.

A. Withholding-Only Proceedings

When the government believes that an individual who has previously been removed has reentered the United States without authorization, the removal order may be "reinstated from its original date." 8 U.S.C. 1231(a)(5).

While the reinstatement process generally allows for summary expulsion without any opportunity to appear before an IJ, DHS's regulations create an "exception" for those who express a fear of being harmed in the country of removal. 8 C.F.R. 241.8(e). The regulations implement the United States' non-refoulment obligations under the Convention Against Torture ("CAT"). *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478-01 (Feb. 19, 1999). Under the regulations, a DHS asylum officer first determines whether the individual "has a reasonable fear of persecution or torture." 8 C.F.R. 208.31(e). Those whom the DHS officer has found to have a "reasonable fear" are placed in withholding-

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[2] Petitioners' statement that the certified classes "are not limited to aliens who are subject to reinstated removal orders and who have been placed in withholding-only proceedings," Pet. 27, ignores that the *Flores* class by definition is limited to precisely such individuals. App. 112a.

only proceedings before an IJ, where they can apply for withholding of removal and protection under the CAT. *See* 8 C.F.R. 208.31(e); 8 C.F.R. 208.16(b).

Withholding of removal is required where an individual's "life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). CAT protection is afforded to those who establish that "it is more likely than not that [they] would be tortured if removed to the proposed country of removal." 8 C.F.R. 208.16(c)(2). Both withholding and CAT relief are mandatory: "the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility." *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

Withholding-only proceedings before an IJ operate much like ordinary removal proceedings. Individuals in withholding-only proceedings receive the full panoply of procedures available to individuals in removal proceedings under 8 U.S.C. 1229a, including the right to present and confront evidence. *See generally* 8 C.F.R. 1208.31(e). However, in withholding-only proceedings, the IJ may adjudicate only claims for withholding and CAT relief.

The IJ's decision in withholding-only proceedings is appealable to the BIA by the noncitizen or the government. *See* 8 C.F.R. 1208.31(e). If the BIA rules against the noncitizen, the noncitizen may petition for review of the decision by the court of appeals. *See* 8 U.S.C. 1252(a)(1). Those found to have *bona fide* claims by DHS are entitled to remain in the U.S. during administrative proceedings and, if granted a stay of removal by the circuit court, pending judicial review. This legal process often takes years.

The Third and Ninth Circuits have held that individuals with reinstated removal orders in withholding-only proceedings are detained pursuant to Section 1231(a). *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-32 (9th Cir. 2017); *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 213-19 (3d Cir. 2018). In contrast, the Second and Fourth Circuits have ruled that such individuals are detained under Section 1226(a). *See Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir. 2016); *Guzman Chavez v. Hott*, 940 F.3d 867, 878 (4th Cir. 2019). This Court granted certiorari in *Guzman Chavez* to resolve that split.

B. Prolonged Detention Under Section 1231(a)

Subject to certain exceptions, Section 1231(a)(1) requires the removal of individuals with final administrative removal orders during a 90-day "removal period." 8 U.S.C. 1231(a)(1)(B).

During this 90-day "removal period," Section 1231(a)(2) requires that DHS "shall detain the alien," and may not release those found inadmissible or deportable on certain grounds. *See* 8 U.S.C. 1231(a)(2). However, the statute provides that individuals "*may* be detained beyond the [90-day] removal period" where the individual is deportable or inadmissible on certain grounds, or "has been determined . . . to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (emphasis added). Thus, after 90 days, the statute does not require detention, but rather provides that it "may" continue when, *inter alia*, the individual presents a risk of danger or flight.

In *Zadvydas*, this Court found Section 1231(a)(6) "ambiguous" as to the length of detention it

authorized. 533 U.S. at 697. Applying the constitutional avoidance canon, the Court construed Section 1231(a)(6) to contain an "implicit 'reasonable time' limitation" of six months. *Id*. at 682. After six months, the Court concluded, the statute permits continued detention only if: (1) there is a "significant likelihood of removal in the reasonably foreseeable future"; and (2) there is sufficient "risk of the alien's committing further crimes" to warrant confinement during that period. *Id*. at 700-01.

This Court has twice reaffirmed *Zadvydas*'s construction of Section 1231(a)(6). *See Rodriguez*, 138 S. Ct. at 844; *Clark v. Martinez*, 543 U.S. 371, 379 (2005). In *Rodriguez,* the Court held that two other immigration detention statutes—Sections 1225(b) and 1226(c)—could not be read to require bond hearings after six months of detention, observing that "a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." *Rodriguez*, 138 S. Ct. at 844. Unlike Sections 1225(b) and 1226(c), the Court explained, Section 1231(a)(6) is "ambiguous" because it provides that the government "may" release people under the statute, does not specify a fixed period of confinement, and includes no "specific provision authorizing release" only in limited circumstances. *Id*. at 844, 846. *See also Clark*, 543 U.S. at 378.

C. Regulations Under Section 1231

After *Zadvydas*, the government modified its regulations under Section 1231 to implement the decision. *See Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Fed. Reg. 56967-01 (November 14, 2001).

Under the regulations now in place, DHS must conduct file custody reviews at set intervals for individuals detained under Section 1231: before the 90-day removal period expires; again at six months; and again one year after that. *See* 8 C.F.R. 241.4(k); 241.13.

These paper-only administrative reviews, conducted by the jailing authority itself, provide:

- no in-person, adversarial hearing;
- no neutral decision-maker;
- no opportunity to call witnesses;
- no ability to challenge the government's evidence of flight risk and danger;
- and no administrative appeal.

Moreover, the individual bears the burden of proving a negative "to the satisfaction of" DHS: namely, that their release would not pose a danger to the community or significant flight risk. 8 C.F.R. 241.4(d)(1).

Noncitizens whose removal is not reasonably foreseeable but have been designated as "specially dangerous" (because they have been convicted of certain violent crimes and are likely to commit a violent crime if released due to mental illness) are treated differently under the regulations. They do receive custody reviews by IJs at in-person, adversarial hearings. 8 C.F.R. 241.14(f), (h), (i). At the hearing, the government "shall have the burden of proving, by clear and convincing evidence," that continued detention is warranted. *Id*. at 241.14(h)(1). For so long as the IJ orders continued detention, the noncitizen has the right to further periodic IJ hearings every six months. *Id*. at 241.14(k)(3).

II. Statement of Facts

The class representatives in these actions—Esteban Aleman Gonzalez, Jose Eduardo Gutierrez, Edwin Flores Tejada, Arturo Martinez Baños, and German Ventura Hernandez—are noncitizens who returned to the United States after facing persecution or torture in their home countries following their removal.

They were apprehended after re-entering the country without authorization, initially subjecting them to summary reinstatement of removal pursuant to 8 U.S.C. 1231(a)(5). But when DHS officials found that each had established a "reasonable fear" that they would be persecuted or tortured if deported, the officials referred them for full-scale withholding-only proceedings. *See* 8 C.F.R. 208.31(e).

Withholding-only proceedings require multiple hearings and often take years to finish because of backlogged immigration courts. *See generally Guzman Chavez*, 940 F.3d at 877 (observing that "[w]ithholding-only proceedings are lengthy"). All five class representatives were incarcerated for more than six months before their withholding-only hearings in immigration court were completed. Appeals available as of right can substantially lengthen the time it takes to resolve a case. BIA appeals often take more than six months to complete. Because Respondents demonstrated a "reasonable fear," they are legally entitled to remain in the country while these administrative processes are ongoing.

Absent the injunctions entered below, the class representatives would have faced additional incarceration of months or years without meaningful review—even if they *prevailed* on their claims to relief in immigration court. For example, the IJ

granted Mr. Gutierrez withholding of removal, yet the government continued to detain him during *its* appeal of that decision—an appeal it eventually withdrew. *See* Exhibits A and C of Request for Judicial Notice, *Aleman v. Barr*, No. 18-16465 (9th Cir. Nov. 06, 2019) Dkt. 42 (hereinafter "RJN Dkt. 42").

Prior to the injunctions, the government's custody review system failed to protect against unnecessary and arbitrary prolonged confinement. For example, after the government had already incarcerated Mr. Aleman for six months, a DHS official approved his continued detention based solely on the fact that he had a pending case. *See* App. 71a. The official made no finding that he posed a danger to the community or flight risk. The decision simply states: "Due to your claim of fear of returning to Mexico, ICE is unable to move forward with your removal from the United States at this time. Pending a ruling on your claim, you are to remain in ICE custody." ER 43, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 05, 2019) Dkt. 15. On that basis alone, the official ordered Mr. Aleman's detention for at least another year. *See* 8 C.F.R. 241.4(k)(2)(iii). Later, at a bond hearing conducted pursuant to the preliminary injunction, an IJ determined that Mr. Aleman posed no danger or flight risk warranting detention, and ordered him released on bond. Exhibit B of RJN Dkt. 42.

Class members often present meritorious claims to withholding or CAT protection. Indeed, Mr. Gutierrez has already been granted withholding. Other Respondents have equally compelling claims. For example, after he was deported from the United States, Mr. Martinez was kidnapped, beaten, sodomized, and psychologically tortured by Mexican

police officers who held him until his former employers in the United States paid a ransom. *See* Amended Complaint ¶60, *Flores v. Barr*, No. 2:16-cv-01454-JLR-BAT (W.D. Wash. Jan. 31, 2017) Dkt. 38. It is that experience that forms the basis for his pending claim for relief.

Many class members can be safely released pending adjudication of their *bona fide* claims to relief. After the injunctions issued in these cases, IJs held hearings and determined that many class members present no danger or flight risk warranting detention. Exhibits A and B of RJN Dkt. 42; Exhibits A and B to Amended Complaint, *Flores v. Barr*, No. 2:16-cv-01454-JLR-BAT (W.D. Wash. Jan. 31, 2017) Dkt. 38-1, 38-2. As a result, these Respondents were able to return to their families and communities—and avoid additional unnecessary prolonged confinement—while the government adjudicates their claims.

For class members ordered released under the injunction, the government retains authority to impose appropriate "terms of supervision," in addition to bond. 8 U.S.C. 1231(a)(6). The government's supervision programs have proven extremely effective in preventing recidivism and flight. "[T]he court appearance rate had consistently surpassed 99 percent" under the primary supervision program. *See* AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 9-10 (2019) https://fas.org/sgp/crs/homesec/R45804.pdf.

III. Procedural History

A. *Flores v. Barr*

In September 2016, Mr. Martinez filed a putative class action in the Western District of Washington challenging the legality of his confinement pending withholding-only proceedings. App. 137a. In an amended complaint, Mr. Flores and Mr. Ventura joined as class representatives. App. 138a. The lawsuit raised two sets of claims. First, the Respondents argued they were detained under the authority of Section 1226(a), and entitled to a bond hearing under that statute and its implementing regulations. Second, they argued that, if Section 1231(a)(6) applies, they are entitled to a bond hearing once their detention becomes prolonged under both that statute and the Due Process Clause. App. 137a.

The district court dismissed the first claim, finding it controlled by *Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-32 (9th Cir. 2017) (holding Section 1231(a)(6) governs detention during withholding-only proceedings). The court subsequently certified a class of all individuals in the Western District of Washington who were placed in withholding-only proceedings, and who have been detained six months or longer without a bond hearing. App. 99a.[3]

The district court granted summary judgment for Respondents on their remaining statutory claim, concluding that Section 1231(a)(6) required an IJ bond hearing to detain Respondents beyond six months. The court determined that *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011), which so required, was not irreconcilable with

[3] The court dismissed the claims of Mr. Martinez and Mr. Ventura as moot. App. 12.

Rodriguez, and therefore controlled. The court issued a permanent injunction requiring the government to provide periodic IJ hearings every six months. *Id.* The district court did not reach Respondents' constitutional claims.

A panel of the Ninth Circuit, consisting of Judges Milan Smith, Eric D. Miller, and Ferdinand Fernandez, affirmed in part and reversed in part. Applying the panel's decision in *Aleman*, *see infra*, it found *Flores* class members were entitled to an initial bond hearing after six months of detention under Section 1231(a)(6). App. 100a-101a. However, it held the district court erred by concluding that the statute required periodic bond hearings every six months thereafter. App. 101a-104a. The court remanded to enable the district court to consider Respondents' constitutional claim to periodic review. "[T]he Government did not object to such a remand." App. 104a.

The government declined to seek rehearing en banc, and filed the instant petition for writ of certiorari. Proceedings on remand to address Respondents' constitutional claims are stayed pending this Court's resolution of the petition for writ of certiorari.

B. *Aleman v. Barr*

In March 2018, Mr. Aleman and Mr. Gutierrez filed a putative class action in the Northern District of California challenging prolonged confinement without a bond hearing in violation of Section 1231(a)(6) and the Due Process Clause.

On June 18, 2018, the district court certified the class and ordered a class-wide preliminary injunction. App. 67a. The court held that *Diouf*

established that Respondents were entitled to bond hearings after six months of imprisonment under Section 1231(a)(6), and that *Rodriguez* did not require a different result, because it involved statutes the Supreme Court itself had identified as materially distinct from Section 1231(a)(6). App. 87a-91a. The court did not reach Respondents' claim that the Due Process Clause requires such hearings, and had no occasion to address Respondents' constitutional claims for additional safeguards—including periodic review—because Respondents had not sought preliminary relief on those claims.

The certified class includes individuals who have been detained in the Ninth Circuit for more than six months pursuant to Section 1231(a)(6), have "live claims" before the immigration court, BIA, or the circuit courts, and have not been provided a bond hearing. App. 72a; Order, *Aleman v. Sessions*, No. 3:18-CV-1869-JSC (N.D. Cal. July 20, 2018) Dkt. 42. While the vast majority of class members, including the two class representatives, are detained pending withholding-only proceedings, the class also includes some individuals with administratively final orders pursuing other defenses to removal. *See* Plaintiffs-Appellees' Answering Brief at 9-10, *Aleman v. Barr*, No. 18-16465 (9th Cir. June 10, 2019) Dkt. 21-1 (describing other legal claims that class members may pursue). DHS officers have determined that all class members seeking withholding have *bona fide* claims warranting a full IJ adjudication. And all class members pursuing non-withholding defenses have obtained either an administrative or judicial stay of removal by making "a strong showing that [they are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Accordingly, all class members are legally entitled to remain in the United States

while their claims are adjudicated through the immigration process.

On appeal, the same Ninth Circuit panel that considered the *Flores* appeal affirmed the *Aleman* preliminary injunction, holding that *Diouf*'s reading of Section 1231(a)(6) to require bond hearings for detention beyond six months survived this Court's decision in *Rodriguez*. App. 24a-53a. The court of appeals noted that this Court had itself identified critical differences between the statutes construed in *Rodriguez* and Section 1231(a)(6). It also relied on this Court's prior construction of Section 1231(a)(6) in *Zadvydas* as ambiguous and not authorizing detention beyond six months absent a finding of danger or flight risk and a likelihood of removal. The court of appeals did not address Respondents' constitutional claims, which remain to be adjudicated. As in *Flores*, the government declined to seek rehearing en banc.

The district court stayed discovery pending the government's appeal of the preliminary injunction.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari for four reasons. *First*, there is only the shallowest of circuit splits on the question presented, and further percolation would assist the Court. *Second*, this Court's decision in *Guzman Chavez* may moot these appeals before the Court can decide them. *Third*, these cases come to the Court from interlocutory appeals based on undeveloped records. Allowing them to proceed to final judgment below would provide the Court with a full record on facts relevant to both the statutory and constitutional claims, including the length of class members' detentions and the risks of

erroneous deprivations of liberty under existing procedures. The Court should therefore deny certiorari and wait to consider review after final judgment based on a fully developed factual record.

Fourth, the decisions below are correct. There is no question that Section 1231(a)(6) can be read to afford IJ bond hearings at six months, as Petitioners' own regulations provide for heightened procedural protections after six months for all individuals under the statute, 8 C.F.R. 241.4(k), release on bond pursuant to those procedures, 8 C.F.R. 241.5(b), and IJ hearings for individuals deemed "specially dangerous" and subject to prolonged confinement. 8 C.F.R. 241.14(k).

Moreover, because the statute is ambiguous on the question, it should be read to require a bond hearing at six months, in light of the structure of the statute, the Court's reasoning in *Zadvydas,* and the severe constitutional concerns presented by prolonged detention without a hearing before a neutral decisionmaker. Both Sections 1231(a)(6) and 1226(a) contain the same operative language: that the government "may" detain certain individuals. Because Section 1226(a) has long been read to afford an IJ bond hearing, Section 1231(a)(6) can also be so read. And the court of appeals' decision to require such hearings avoids the serious constitutional problems posed by permitting prolonged detention—often for years—without a hearing before a neutral decisionmaker to determine that incarceration is required.

I. There Is No Mature Split, and the Issue Warrants Further Percolation.

The government's primary argument for certiorari is that there is a split in the circuits

regarding the proper interpretation of this Court's 2018 ruling in *Rodriguez*, as it applies to Section 1231(a)(6). But in the two years since *Rodriguez*, only three circuits have issued any rulings construing Section 1231(a)(6). These decisions have not resulted in a mature split. The two circuits in which the claim was actually litigated agreed, after detailed analysis. The one circuit that disagreed did so in a case in which the noncitizen not only did not raise the claim that Section 1231(a)(6) requires a bond hearing, but actually *conceded* it does not. The court addressed it *sua sponte*, in a single conclusory paragraph, without briefing from the parties or any engagement with the reasoning of the other circuits. Such a shallow split does not warrant this Court's intervention. The Court would benefit from allowing other circuits to address the issue, and from awaiting a record that would better inform this Court's consideration if it proves necessary.

As described above, the Ninth Circuit engaged in a lengthy and detailed analysis of this Court's decision in *Rodriguez*, the significant textual differences between Section 1231(a)(6) and the statutes at issue in *Rodriguez*, and this Court's interpretation of Section 1231(a)(6) in *Zadvydas*. App. 24a-53a. The Third Circuit, which reached the same result, similarly engaged in a detailed examination of the statutory text, *Zadvydas*, and circuit court precedent. *Guerrero-Sanchez*, 905 F.3d at 219-27 (construing Section 1231(a)(6) to require a six-month bond hearing).

In contrast, the only decision on the other side of the purported split, *Martinez v. LaRose*, 968 F.3d 555 (6th Cir. 2020), barely addresses the issue. And for good reason: the claim made here was not even presented. The noncitizen there did not argue that he

had a right to a hearing under Section 1231(a)(6). He made only two arguments: (1) that he was entitled to a hearing under Section 1226(a) (the issue on which this Court has granted certiorari in *Pham v. Guzman Chavez*, No. 19-897); and (2) that the fact of his detention itself violated due process, requiring outright release, not a hearing. He also expressly conceded that Section 1231 cannot be read to require a bond hearing. *See* Appellant's Opening Brief at 3, *Martinez v. LaRose*, No. 19-3908 (6th Cir. Nov. 6, 2019) Dkt. 26 (stating that Section 1231(a) "does not require bond hearings").

The Sixth Circuit held he was detained under Section 1231(a), not Section 1226, and rejected his constitutional challenge. *Id.* at 560-566. Then, even though the issue had not been presented, the Sixth Circuit *sua sponte* opined that Section 1231(a) could not be construed to require a bond hearing to justify detention beyond six months. *Id.* at 566. In a single paragraph, the court stated merely that it was "reluctant to graft a bond-hearing requirement onto a statute" after *Rodriguez*, and that the petitioner "conceded that a bond requirement would be out of place in a post-[*Rodriguez*] world." *Id.* In rejecting a hearing requirement, the court never addressed *Zadvydas*'s construction of Section 1231, the textual differences this Court identified between the statutes at issue in *Rodriquez* and Section 1231, or DHS's own existing regulations providing for IJ hearings under Section 1231. Nor did it engage with the thorough analyses from the Third and Ninth Circuits.

A cursory paragraph in a case where no party raised the claim, and the noncitizen conceded it, does not create a mature split warranting this Court's review. No court of appeals that has actually engaged in analyzing the text and precedents in a case raising

the question has disagreed with the courts below. It has been only two years since *Rodriguez*, and the Court would benefit from other circuits addressing how *Rodriguez* and *Zadvydas* apply to Section 1231(a)(6). This is particularly true where, as detailed below, the question presented implicates significant due process issues, and the record has not developed the facts necessary to assess those issues, including the lengths of detention typically at issue and the sufficiency of the existing custody review procedures. *See Guerrero-Sanchez*, 905 F.3d at 221-27; *Diouf*, 634 F.3d at 1087-93 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

II. These Cases Are Poor Vehicles for This Court's Review.

A. *Guzman Chavez* May Moot These Appeals.

In *Pham v. Guzman Chavez*, No. 19-897, this Court has granted certiorari to decide whether Section 1226 or Section 1231 governs detention pending withholding-only proceedings. If the Court concludes that Section 1226 governs, it would moot both of these appeals.

The *Flores* class is limited to people in withholding-only proceedings. App. 99a. Therefore, if this Court concludes in *Guzman Chavez* that Section 1226 governs detention during withholding-only proceedings, there would be no *Flores* class members detained under Section 1231. The case would need to be remanded to address Respondents' claims that they are entitled to IJ bond hearings under Section 1226 and due process.

Aleman presents a slightly different mootness issue because the certified class is not limited to people in withholding-only proceedings. *See* App. 72a.

But it, too, would require remand to the district court because the vast majority of *Aleman* class members, including both class representatives, are in withholding-only proceedings. If the Court concludes Section 1226 governs those proceedings, Mr. Aleman and Mr. Gutierrez would not qualify as class members, let alone have claims typical of the class, because Section 1231(a)(6) would not govern their detention.

Even if "some class members" in *Aleman* "will continue to have live claims," Pet. 28, the case would require a remand to assess numerosity and determine whether the *Aleman* class could proceed with new class representatives. Where class representatives' claims are moot and an intervening change in law "fragment[s]" the class, "the case *must* be remanded to the District Court for reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." *Kremens v. Bartley*, 431 U.S. 119, 134-35 (1977) (emphasis added).

B. Both Cases are Interlocutory Appeals with Undeveloped Records, and Have Ongoing Proceedings in District Court That Will Develop Facts Relevant to the Question Presented.

Review would also be premature because neither case has reached final judgment, and further factual development would better inform this Court's review, if such review were ever warranted. *Aleman* affirmed only a preliminary injunction on Respondents' statutory claim to a hearing, and the lower courts did not address Respondents' constitutional claims. *Flores* has been remanded to the district court to address whether to award additional relief on

constitutional grounds. Adjudication of these claims will require further development of the record concerning the factors this Court has identified as relevant to the due process inquiry. And that record would in turn ensure that this Court can decide Respondents' interrelated statutory and constitutional questions on a full record.

Awaiting final judgment and resolution of Respondents' constitutional claims will provide a fuller record on which to decide the issues presented. The factual record would shed light on important factors relevant to the due process inquiry, including data on the length of class members' immigration proceedings and detentions, and the likelihood of erroneous deprivations under the existing paper-only procedures. *See Demore v. Kim*, 538 U.S. 510, 529-30 (2003) (citing statistics on the average length of immigration proceedings in considering due process challenge to Section 1226(c)); *Zadvydas*, 533 U.S. at 724 (Kennedy, J., dissenting) (relying on statistics regarding government custody reviews in considering whether the procedures raise constitutional concerns). *See also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (identifying factors relevant to procedural due process, including significance of liberty interests, risk of error, and costs of providing additional procedures).

The importance of developing a complete factual record in the district court is underscored by *Demore*, in which this Court relied on incorrect statistics about the length of detention submitted by the government for the first time on appeal. *See* 538 U.S. at 529. The government later confessed error and asked the Court to amend *Demore* to omit reference to those time periods. *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott

S. Harris, Clerk, Supreme Court 1-3 (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). Hearing these appeals now, in this interlocutory posture, risks injecting similar errors concerning untested and unverified facts into the Court's analysis. This Court should review these cases, if at all, only after final judgment on a complete record on that and other issues.

Denying certiorari, rather than holding for *Guzman Chavez*, is the better course, given the need for a fuller record and the interlocutory nature of these appeals. If and when *Guzman Chavez* is decided, the government could move to modify and/or vacate the injunctions if appropriate. And if *Guzman Chavez* does not alter the landscape, this Court can consider a petition for certiorari from final judgment.

III. The Decisions Below Are Correct.

The decisions below correctly interpreted Section 1231(a)(6) to require a bond hearing to justify more than six months of detention. The statute is ambiguous on the procedure required. Outside the national security context, neither this Court nor earlier common-law precedents have ever permitted prolonged civil detention without a hearing before a neutral decisionmaker at which the detainee has a meaningful opportunity to challenge the government's basis for detention. *See Rodriguez*, 138 S. Ct. at 863 (Breyer, J., dissenting) ("Blackstone tells us that every prisoner (except for a convict serving his sentence) was entitled to seek release on bail.").

This Court already determined that Section 1231(a)(6) is ambiguous as to the detention it authorizes and should be construed to avoid constitutional concerns. *Zadvydas*, 533 U.S. at 689. Unlike two of the provisions at issue in *Rodriguez*—

Sections 1225(b) and 1226(c)—Section 1231(a)(6) provides that the Attorney General "may" detain after the 90-day removal period, not that he "shall" detain, and does not set forth an exclusive set of conditions under which release may be granted. In fact, the statute expressly envisions the possibility of release where individuals do not pose "a risk to the community or [are] unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). *Zadvydas* read the statute to prohibit detention beyond six months absent findings that removal is reasonably foreseeable and that the individual poses a risk to public safety. 533 U.S. at 700. The court of appeals merely construed the statute to require that the latter finding be made at a hearing before an IJ. Because the statutory text is ambiguous regarding how the determination of flight risk and danger is to be made, and the government's interpretation would raise serious due process concerns, the court properly construed the statute to require such hearings.

A. The Rulings Below Avoid the Serious Constitutional Concerns Presented by Prolonged Detention Without a Hearing.

The court of appeals' construction of Section 1231(a)(6) was necessary to avoid the serious due process concerns arising from Respondents' prolonged incarceration under the statute.

The Due Process Clause prohibits prolonged incarceration without adequate procedural safeguards. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. Immigration detention, like all civil detention, is justified only where "it bears a

reasonable relation to [its] purpose." *Id*. (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)).

Thus, any incarceration incident to removal must both "bear[ ] [a] reasonable relation" to valid government purposes, and be accompanied by adequate procedural protections to ensure that there is a demonstrated need for detention. *Id*. The purpose of immigration detention is to protect against danger and flight risk while removal proceedings are pending. *Id*. at 690-91. Detention is thus arbitrary and violates due process where an individual does not pose a sufficient danger or flight risk.

The Due Process Clause protects at a minimum "those settled usages and modes of proceeding existing in the common and statute law of England." *Den* ex dem. *Murray v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 277 (1855). Blackstone recognized the right to bail "in any Case whatsoever." 4 WILLIAM BLACKSTONE, ANALYSIS OF THE LAWS OF ENGLAND 148 (6th ed., Clarendon Press 1771). The Framers brought that tradition to the Constitution and early federal statutes. *Rodriguez*, 138 S. Ct. at 863-64 (Breyer, J., dissenting).

Consistent with that tradition, this Court has repeatedly recognized that civil detention requires an individualized hearing before a neutral decision-maker to ensure the person's confinement serves the government's goals. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on dangerousness, where the government bears the burden of proof by clear and convincing evidence); *Kansas v. Hendricks*, 521 U.S. 346, 374 (1997) (upholding civil commitment when there are "proper procedures and evidentiary standards,"

including an individualized hearing on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279-81 (1984) (upholding detention pending a juvenile delinquency determination where the government proves dangerousness in a fair adversarial hearing with notice and counsel). Because due process prohibits civil detention that is excessive in relation to the governmental interest, it also requires procedures to ensure that detention remains reasonable rather than excessive. *Salerno*, 481 U.S. at 747.

And when faced with *prolonged* confinement, this Court has required heightened procedures to ensure that the length of detention remains reasonable in relation to its purpose. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."); *Jackson*, 406 U.S. at 736 (holding that detention beyond the "initial commitment" for an individual found incompetent to stand for trial requires additional safeguards, including individualized consideration of dangerousness); *Foucha*, 504 U.S. at 76 n.4 (holding "insanity acquittees may be initially held" on less rigorous procedures, but must be afforded individualized hearings concerning flight risk or danger when detention is prolonged).

This Court has recognized that detention under Section 1231(a) beyond six months presents serious constitutional concerns. In *Zadvydas*, the Court observed that "Congress previously doubted the

constitutionality of detention for more than six months." 533 U.S. at 701. And later, even in upholding "brief" mandatory detention under Section 1226(c) in *Demore*—the only case in which this Court has ever upheld civil detention without an individualized hearing outside the national security context—it emphasized the brevity of the detention, based on its understanding that even outlier cases would typically conclude in "about five months." 538 U.S. at 529-30. "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . ." *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975).

Indeed, in *Rodriguez*, the government conceded that "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely." *See* Pet'r Br. at 47, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Aug. 26, 2016).

Respondents' entitlement to process here is even stronger than in *Zadvydas,* which involved noncitizens who had exhausted their defenses to removal and been finally ordered removed. By contrast, all class members have been found to have *bona fide* claims to relief that would prevent their removal, and as a result are entitled to remain in the U.S. for the time it takes to adjudicate those claims—often a matter of years. 8 C.F.R. 208.31(e).[4] Yet even

[4] As explained *supra*, all *Aleman* class members with non-withholding claims have been granted administrative or judicial stays of removal in connection with their claims to relief. *See Nken*, 556 U.S. at 434 (stay may only be issued if applicant makes "a strong showing that he is likely to succeed on the merits").

if no neutral decisionmaker has found that they present a flight risk or danger warranting detention, they face the prospect of being needlessly detained for that entire period.

Petitioners claim their existing custody review procedures satisfy any constitutional concerns, Pet. 20-22, but the procedures are plainly deficient. They provide no hearing, only a paper review. The decisionmaker is the jailing authority, rather than a neutral decisionmaker. The detainee cannot present witnesses, or even see (let alone challenge) the government's evidence. And there is no appeal. *See* 8 C.F.R. 241.4(d).

In addition to recognizing that detention beyond six months presents constitutional problems, *Zadvydas* identified serious due process concerns where "[t]he sole procedural protections available to the alien are found in administrative proceedings, [and] where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review." 533 U.S. at 692 ("the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights'") (quoting *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 450 (1985)). As *Zadvydas* observed, "[t]he Constitution demands greater procedural protection even for property." *Id.*

Unsurprisingly, the existing procedures routinely result in unjustified prolonged incarceration. For example, after six months of confinement, a DHS official ordered Mr. Aleman's continued detention for another year merely because he had a pending claim for withholding. ER 43, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 05, 2019)

Dkt. 15. The official did not even evaluate whether Mr. Aleman presented a danger or flight risk. *Id*. An IJ later ordered Mr. Aleman released on bond after a hearing conducted pursuant to the preliminary injunction, finding that he presented no danger or flight risk warranting detention. In another case, an individual detained for seven years had received a single DHS file review deeming him a flight risk, with no notice, no interview or opportunity to contest the government's findings, and no appeal. *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951-52 (9th Cir. 2008); *see also Diouf*, 634 F.3d at 1092 (describing individual detained nearly two years based on DHS paper custody reviews, only to be released by an IJ after a bond hearing where he was found to pose no flight risk or danger).

To imprison a human being found to have a *bona fide* claim to relief—and a right to remain in the U.S. while that claim is adjudicated—for *years* without any meaningful opportunity to contest the necessity for detention violates the most fundamental principles of due process.

B. Section 1231(a)(6) is Ambiguous as to the Procedure Required, and the Courts Below Properly Construed It to Require Bond Hearings.

Section 1231(a)(6) is ambiguous regarding the procedures required for prolonged detention. The statute specifies that noncitizens "may" be detained beyond the 90-day removal period, not that they "shall" be detained. And it authorizes such detention where, *inter alia*, a noncitizen "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." *Id.* In contrast, other provisions mandate

detention of noncitizens. *Compare* 8 U.S.C. 1231(a)(2) (providing the Attorney General "shall detain" and [u]nder no circumstance during the removal period . . . release" individuals inadmissible or deportable on certain grounds).

In *Zadvydas*, this Court construed Section 1231(a)(6) to "contain an implicit 'reasonable time' limitation" of six months to avoid the "serious constitutional problem" posed by the prolonged detention of noncitizens whose removal was not reasonably foreseeable. 533 U.S. at 682. The Court concluded it was "fairly possible" to read an implicit limitation into Section 1231(a)(6) because it provides that the Attorney General "*may*" detain. Detention under the statute is permissible only if removal is "reasonably foreseeable," and there is "risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period." *Id.* at 700-01. Thus, *Zadvydas* interpreted Section 1231(a)(6) to require an assessment of the need for continued confinement in all cases exceeding six months. *Id.*

Rodriguez reaffirmed *Zadvydas*'s application of the constitutional avoidance canon to Section 1231(a)(6). The Court held 8 U.S.C. 1225(b) and 1226(c) could not be construed to require bond hearings in cases of prolonged detention because "a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6)." 138 S. Ct. at 844. It reaffirmed that Section 1231(a)(6) is "ambiguous" because it does not specify a fixed period of confinement, provides that the government "may" release people under the statute, and includes no "specific provision authorizing release" in limited circumstances. *Id.* at 844, 846.

The court of appeals faithfully applied *Zadvydas*'s holding that Section 1231(a)(6) contains an "implicit 'reasonable time' limitation" of six months. 533 U.S. at 682. Petitioners claim that the limitation *Zadvydas* read into the statute is confined to cases in which removal is not reasonably foreseeable, Pet. 19, but *Zadvydas* held that the statute imposes *two* constraints on detention beyond six months. Detention is authorized only if (1) removal is "reasonably foreseeable"; *and* (2) there is sufficient "risk of the alien's committing further crimes" that would "potentially justify[] confinement." *Id*. at 700-01.

The court below merely held that the determination of flight risk and danger that Section 1231(a)(6) requires must be made by an IJ at a hearing. *See Guerrero-Sanchez*, 905 F.3d at 221 ("While *Zadvydas* limited the *substantive* scope of § 1231(a)(6)," it left open "construing § 1231(a)(6) to include additional *procedural* protections during the statutorily authorized detention period," to avoid constitutional concerns). For over a century, the federal courts have likewise construed immigration statutes to include additional procedures to avoid due process problems. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (construing immigration statute to require hearing to avoid constitutional problem); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (same).

Petitioners argue that Section 1231(a)(6) cannot be read to require IJ bond hearings. Pet. 17. But Petitioners' own regulations implementing Section 1231(a)(6) require custody reviews at six months (a rule promulgated to implement *Zadvydas*); release on bond pursuant to those custody reviews; and a hearing before an IJ for individuals deemed "specially

dangerous." 8 C.F.R. 241.4, 241.5(b), 241.5, 241.13, 241.14(a)(2), (f-k).

Respondents' construction of Section 1231(a)(6) also finds support in Section 1226(a), the pre-final order detention statute. Similar to Section 1231(a)(6), Section 1226(a) provides the Attorney General "may" detain an individual "pending a decision on whether the alien is to be removed from the United States." Petitioners admitted below that "the operative language of § 1231(a)(6) directly mirrors that of § 1226(a)." Respondents-Appellants' Opening Brief at 18, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 01, 2019) Dkt. 14-1. And while Section 1226(a) does not by its terms specify who makes "bond" determinations, the government has long read the statute to require IJ hearings. *See* 8 C.F.R. 1236.1(d)(1) (establishing IJ bond hearings to review initial custody determination by DHS), 1003.19(a) (same).

Petitioners claim that the statutes' texts meaningfully differ because Section 1226(a) provides that the government "may release the alien . . . on bond," whereas Section 1231(a)(6) does not expressly mention "bond" as a condition of release. Pet. 17. But another regulation the government ignores already construes Section 1231(a)(6) to authorize release *on bond* following a custody review under the statute. *See* 8 C.F.R. 241.5(b) (providing that release order under Section 1231(a)(6) "may require the posting of a bond").

By authorizing detention of those "who have been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal," Section 1231(a)(6)'s "language echoes the traditional bond standard." *Hurtado-*

Romero v. Sessions, No. 18-CV-01685-EMC, 2018 WL 2234500, at *3 (N.D. Cal. May 16, 2018). *Compare Salerno*, 481 U.S. at 742; 18 U.S.C. 3142(e) (authorizing pre-trial detention where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community"). The bond hearing requirement therefore comports with the substantive standard utilized by Section 1231(a)(6).

Petitioners assert that *Rodriguez* rejected an "unstated bond-hearing requirement under Section 1226(a)," and therefore requires rejecting that requirement for Section 1231(a)(6). Pet 17. Not so. The Court held that Section 1226(a) cannot be read to require "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that [an individual's] continued detention is necessary" because "[n]othing in § 1226(a)'s text . . . supports the imposition of either of those requirements." 138 S. Ct. at 847. By "[t]hose requirements" the Court referred to "periodic bond hearings" and a "clear and convincing burden of proof." *Id.* The Ninth Circuit carefully adhered to *Rodriguez* by reversing the *Flores* injunction's imposition of similar requirements under Section 1231(a)(6). App. 102a-104a.

Nothing in the Court's decision suggested that Section 1226(a) did not require bond hearings at all—the issue here. To the contrary, *Rodriguez* expressly observed that noncitizens "detained under § 1226(a) receive bond hearings at the outset of detention." 138 S. Ct. at 847 (citing 8 C.F.R. 236.1(d)(1), 1236.1(d)(1)). *Rodriguez* therefore provides no reason to question

the bond hearing requirement under either Section 1226(a) or 1231(a)(6).[5]

IV. The Practical Consequences of the Decisions Below Do Not Warrant This Court's Review.

Petitioners raise the specter that the decisions below would impede enforcement of the immigration laws, Pet. 23-24, but provide no evidence to substantiate these concerns. The decisions below reaffirm a rule that has been in place in the Ninth Circuit since 2011. Yet despite nearly a decade of experience, Petitioners introduced no evidence below—and cite none here—that the rule has hampered immigration enforcement.

The rule affords a modest remedy: a hearing at which people can request release on suitable conditions of supervision. Release follows only if an IJ is satisfied that the class member presents neither a danger nor flight risk warranting detention. Government reports document that the conditions of supervision available to DHS are extraordinarily effective. *See supra*. And although Petitioners suggest that class members categorically present flight risks, Pet. 23, they presented no evidence to that effect, and in enacting Section 1231(a)(6) Congress made no such finding. Rather, Congress determined that noncitizens held under Section 1231(a)(6) could be

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[5] Petitioners repeatedly criticize the decision below for construing Section 1231(a)(6) to require that the government bear the burden of proof by clear and convincing evidence. But as Petitioners acknowledge, it required a heightened standard of proof because pre-existing circuit precedent had established this requirement "as a *constitutional* matter," not as a statutory one. Pet. 25 n.3. And Petitioners expressly recognize that certiorari is not warranted on this issue. *Id*.

safely released, and *Zadvydas* construed that authority to authorize detention beyond six months *only* where there is an *individualized* showing of danger or risk of flight. *Zadvydas*, 533 U.S. at 700. When Congress makes a categorical judgment that certain noncitizens shall be detained, it says so. *See* 8 U.S.C. 1226(c) (providing that the government "shall" detain individuals with certain criminal offenses); 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (non-citizens who do not establish a "credible" fear of persecution "shall be detained . . . until removed"). It has made no such judgment about individuals with *bona fide* claims to relief. Indeed, the fact that DHS does release on bond some noncitizens in withholding-only proceedings refutes the suggestion that the group poses a categorical risk of flight or danger.

Petitioners' burden claims are also overstated because the rulings below affect relatively few cases. Based on government data, there have been under 300 bond hearings conducted under the *Aleman* and *Flores* injunctions in 2020. Petitioners provide no evidence that immigration courts in the Ninth Circuit, which are staffed by dozens of IJs and collectively handle thousands of bond hearings each year, have been unable to handle this very modest increase in bond hearings. *See* Transactional Records Access Clearinghouse, *Immigration Court Bond Hearings and Related Case Decisions*, https://trac.syr.edu/phptools/immigration/bond/ (last visited Dec. 10, 2020).

Finally, Petitioners' argument that the rulings below undermine the separation of powers, Pet. 23-24, is unavailing. The rulings authorize bond hearings by IJs—employees of the Department of Justice subject to reversal by the Attorney General. *See* 8 C.F.R. 1003.10(a). Petitioners' regulations

already expressly delegate authority to IJs in arguably the most serious cases—involving people deemed "specially dangerous." *See* 8 C.F.R. 241.14(f). Under the rulings below, the executive branch retains authority to determine who may be released under Section 1231(a)(6). It need only make that decision consistent with the statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

Ahilan T. Arulanantham
Michael Kaufman
Counsel of Record
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5232
mkaufman@aclusocal.org

Matt Adams
Aaron Korthuis
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave,
Suite 400
Seattle, WA 98104
(206) 957-8611

Marc Van Der Hout
Johnny Sinodis**
VAN DER HOUT LLP
180 Sutter Street,
Suite 500
San Francisco, CA 94104
(415) 981-3000

Judah Lakin
Amalia Wille
LAKIN & WILLE LLP
1939 Harrison Street,
Suite 420
Oakland, CA, 94612
(510) 379-9216

Alison Pennington
IMMIGRANT LEGAL DEFENSE
1322 Webster St., Suite 300
Oakland, CA 94612
(510) 467-0655

Vasudha Talla
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

Jesse Newmark**
CENTRO LEGAL DE LA RAZA
3400 E. 12th Street
Oakland, CA 94601
(510) 679-1608

**Application for Admission Forthcoming