No. 20-322

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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PARTIES TO THE PROCEEDING

After petitioners filed their opening brief in this Court, the district court dismissed two of the defendants in *Aleman Gonzalez*, who were among the petitioners in this Court: David O. Livingston, in his official capacity as Sheriff of Contra Costa County, and Kristi Butterfield, in her official capacity as Facility Commander, West County Detention Facility, Contra Costa County. In addition, in *Flores Tejada*, Nathalie Asher has been substituted for petitioner Elizabeth Godfrey, in her official capacity as Seattle Field Office Director, U.S. Immigration and Customs Enforcement. The list of parties to the proceeding otherwise remains the same.

TABLE OF CONTENTS

Page

I. Section 1252(f)(1) barred the injunctive relief granted by the lower courts 1

A. The scope of Section 1252(f)(1) is properly before the Court 1

B. Section 1252(f)(1)'s prohibition applies here 2

C. Respondents' assertion that Section 1252(f)(1)'s exception allows classwide relief is incorrect 8

II. Section 1231(a)(6) does not require bond hearings 12

A. Respondents' reading of Section 1231(a)(6) is not plausible 12

B. Respondents' bond-hearing regime is not necessary to avoid serious constitutional doubts 19

TABLE OF AUTHORITIES

Cases:

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 2

Armstrong v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015) 7

Califano v. *Yamasaki*, 442 U.S. 682 (1979) 7, 10

Carlson v. *Landon*, 342 U.S. 524 (1952) 20

Catholic Social Services, Inc. v. *INS*, 232 F.3d 1139 (9th Cir. 2000) 5

Clark v. *Martinez*, 543 U.S. 371 (2005) 16

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 22

Demore v. *Kim*, 538 U.S. 510 (2003) 4, 19, 20

Facebook, Inc. v. *Duguid*, 141 S. Ct. 1163 (2021) 4

FTC v. *Cement Institute*, 333 U.S. 683 (1948) 22

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 23

Goss v. *Lopez*, 419 U.S. 565 (1975) 23

Cases—Continued: Page

Harris Trust & Savings Bank v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000) 16
Henderson v. *Shinseki*, 562 U.S. 428 (2011) 2
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 7, 8, 9, 14
Johnson v. *United States*, 333 U.S. 10 (1948) 22
Marcello v. *Bonds*, 349 U.S. 302 (1955) 22
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 23
Moskal v. *United States*, 498 U.S. 103 (1990) 4
Nielsen v. *Preap*, 139 S. Ct. 954 (2019) 5
Opati v. *Republic of Sudan*, 140 S. Ct. 1601 (2020) 13
Reno v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) 7
Rodriguez v. *Hayes*, 591 F.3d 1105 (9th Cir. 2010) 5
Shadwick v. *City of Tampa*, 407 U.S. 345 (1972) 22
Sosna v. *Iowa*, 419 U.S. 393 (1975) 12
United States v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926) 22
United States v. *Cotton*, 535 U.S. 625 (2002) 2
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 15
Wal-Mart Stores, Inc. v. *Dukes*, 564 U.S. 338 (2011) 12
Withrow v. *Larkin*, 421 U.S. 35 (1975) 22
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 18, 19

Constitution, statutes, regulations, and rules:

U.S. Const.:
Amend. IV 22
Amend. V (Due Process Clause) 19, 20, 21, 22

Statutes, regulations, and rules—Continued: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, sec. 306(a)(2), § 242(f), 110 Stat. 3009-611 to 3009-612 7

Immigration and Nationality Act,
8 U.S.C. 1101 *et seq.*:

8 U.S.C. 1103(a)(6) 17
8 U.S.C. 1103(g)(1) 17
8 U.S.C. 1182(a)(6)(A)(i) 15
8 U.S.C. 1182(a)(9)(A)(ii)(I) 15
8 U.S.C. 1226(a) 14
8 U.S.C. 1226(c) 20
8 U.S.C. 1231 1
8 U.S.C. 1231(a)(6) .... *passim*
8 U.S.C. 1231(h) 18
8 U.S.C. 1252(a)(2)(A) 4
8 U.S.C. 1252(a)(2)(A)(i) 3
8 U.S.C. 1252(e)(1)(B) 10
8 U.S.C. 1252(f)(1) .... *passim*
8 U.S.C. 1446(a) 10
8 U.S.C. 1522(a)(7)(B) 4

8 U.S.C. 1601(4) 10

8 C.F.R.:

Section 236.1(d) 14
Section 241.4(c)(2) 21
Section 241.4(h)(2) 23
Section 241.4(i)(3) 23
Section 241.4(i)(3)(i) 23
Section 241.4(i)(3)(ii) 23
Section 241.13(a) 23
Section 241.13(e)(5) 23
Section 1236.1(d) 14

Rules—Continued: Page

Fed. R. Civ. P.:

Rule 20(a)(3) 11

Rule 23 10

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 3

Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281 (Dec. 21, 2000) 17

H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 8, 11, 17

Webster's Third New International Dictionary (1993) 3

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I. SECTION 1252(f)(1) BARRED THE INJUNCTIVE RELIEF GRANTED BY THE LOWER COURTS

Under 8 U.S.C. 1252(f)(1), courts lack jurisdiction "to enjoin or restrain the operation" of specified provisions of the Immigration and Nationality Act (INA), "[r]egardless of the nature of the action or claim," except for "the application of such provisions to an individual alien" in removal proceedings. The lower courts lacked jurisdiction to enter the injunctions in these cases, which fell within that prohibition and outside its exception.

A. The Scope Of Section 1252(f)(1) Is Properly Before The Court

The petition for a writ of certiorari sought review of the court of appeals' interpretation of the government's detention authority under Section 1231. See Pet. I. In

granting the petition, the Court directed the parties "to brief and argue the following question: Whether, under 8 U.S.C. § 1252(f)(1), the courts below had jurisdiction to grant classwide injunctive relief." Order (Aug. 23, 2021). Respondents contend (Br. 47-48) that the Court lacks authority to resolve the question it added. That contention fails.

Respondents argue (Br. 47-48 & n.10) that the government forfeited any claim that Section 1252(f)(1) bars injunctive relief in these cases by failing to raise it in the courts below (where it was foreclosed by circuit precedent, see Gov't Br. 16) and in the petition for a writ of certiorari. But questions of subject-matter jurisdiction "can never be forfeited or waived." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006).

Respondents contend (Br. 47) that Section 1252(f)(1) "does not concern jurisdiction" because "[i]t only limits the relief courts may provide." But the provision expressly states that no court "shall have jurisdiction" to grant the specified relief. 8 U.S.C. 1252(f)(1). And although the scope of relief is often a merits rather than a jurisdictional question, Congress "is free to attach the conditions that go with the jurisdictional label" to restrictions that courts would not otherwise deem jurisdictional. *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011). Congress did that here by using the word "jurisdiction." 8 U.S.C. 1252(f)(1).

B. Section 1252(f)(1)'s Prohibition Applies Here

Respondents contend (Br. 49-54) that Congress's prohibition on "enjoin[ing]" the "operation" of certain

provisions, 8 U.S.C. 1252(f)(1), is limited to suits that seek to restrain, rather than enforce, those provisions. That reading is unpersuasive.

1. Respondents' reading conflicts with three elements of the statutory text.

The statutory term "enjoin," 8 U.S.C. 1252(f)(1), has both a negative and an affirmative aspect: it refers to orders that restrain *and* those that enforce the operation of the covered provisions. See *Black's Law Dictionary* 529 (6th ed. 1990) (defining enjoin as "[t]o require; command; positively direct"); Gov't Br. 17-18. Respondents ignore the word's plain meaning. Instead, they appear (Br. 50) to misunderstand the government as arguing that the court of appeals' interpretation depends on "a distinction between prohibitory and compulsory injunctions." But the government's argument is that the courts below mistakenly distinguished between orders enforcing and orders restraining the specified provisions, when "enjoin" unambiguously covers both. Respondents never address that point.

The statute's reference to the "operation" of the covered provisions independently bars the relief granted here. 8 U.S.C. 1252(f)(1). That term, which refers to the "method or manner of functioning," *Webster's Third New International Dictionary* 1581 (1993), encompasses executive implementation. See Gov't Br. 18-19. Like the court of appeals, respondents suggest that "operation" actually means "*proper* operation," see Br. 50, but they offer no basis for inserting that modifier. Doing so produces a highly counterintuitive reading of the scope of the prohibition, as courts typically do not seek to restrain the "proper" operation of a statute.

Respondents also point to 8 U.S.C. 1252(a)(2)(A)(i), which states that no court shall have jurisdiction to re-

view "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)." They argue that those discrete references to "implementation" and "operation" are inconsistent with reading "operation" in Section 1252(f)(1) to include "implementation." See Br. 51. But Section 1252(a)(2)(A) does not lend itself to that kind of subtle parsing, as the provision is replete with overlapping phrases: "individual determination" and "the application of such section to individual aliens," "cause or claim," "arising from or relating to," and "implementation or operation." 8 U.S.C. 1252(a)(2)(A). "Since iteration is obviously afoot in the relevant passage, there is no justification for extruding an unnatural meaning" simply "to avoid iteration." *Moskal* v. *United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting); see, *e.g.*, *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1172 n.7 (2021) (recognizing that some statutes use a "belt and suspenders approach") (citation omitted). And the INA elsewhere uses "operation" as synonymous with "implementation." See, *e.g.*, 8 U.S.C. 1522(a)(7)(B) ("The Secretary * * * shall develop a system * * * to detect any fraud, abuse, or mismanagement in the operation of such programs."); cf. *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) ("Section 1226(e) * * * deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions.") (citation omitted).

Section 1252(f)(1)'s proviso that it applies "[r]egardless of the nature of the action or claim" confirms that it bars injunctions purporting to enforce the covered provisions. 8 U.S.C. 1252(f)(1). In respondents' view (Br. 52), that clause "simply means that where a claim

would enjoin the statute's operation, it cannot support injunctive relief." But the statute already says that, so respondents' interpretation renders the proviso surplusage. Under the government's interpretation, the proviso eliminates any doubt that the bar applies to claims, like those here, "alleg[ing] that the Executive's action does not comply with the statutory grant of authority." *Nielsen* v. *Preap*, 139 S. Ct. 954, 975 (2019) (Thomas, J., concurring in part and concurring in the judgment).

2. Respondents' interpretation conflicts with various background rules of interpretation.

This Court typically interprets statutes to grant *favored* treatment to constitutional claims, but respondents' position compels the opposite by barring certain forms of relief for constitutional challenges to the statute itself while permitting relief for statutory challenges to the Executive's implementation. See Gov't Br. 19 & n.2, 21. Respondents contend (Br. 52) that their interpretation does not single out constitutional claims, because "[c]lasswide injunctions are prohibited if they seek to enjoin the statute's operation, regardless of whether the claim for that injunction arises under the Constitution or a statute," such as "the Religious Freedom Restoration Act." But respondents offer no example of the dismissal of a statutory claim for lack of jurisdiction, confirming that their interpretation disfavors constitutional claims in practice. See *Rodriguez* v. *Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (permitting statutory claims to proceed and indicating constitutional claims would be barred); *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (reversing conclusion that Section 1252(f)(1) foreclosed statutory claims). And respondents them-

selves suggest that "the purpose of the provision was to prohibit injunctions * * * on the basis of constitutional challenges that the Supreme Court had not yet resolved, rather than to prevent injunctions against unlawful implementation of those procedures by regulations that conflict with the statute." Br. 54 (citation omitted).

Respondents' interpretation undermines Section 1252(f)(1)'s function as a jurisdictional bar. To determine whether a plaintiff seeks to enforce the *proper* operation of the covered provisions, a court must first adjudicate the merits. See Gov't Br. 21-22. Respondents counter (Br. 53) that, under the government's reading, "courts may address the merits with respect to declaratory relief, and may grant injunctions on behalf of individual plaintiffs." But even assuming that were correct, it would not change the fact that respondents' interpretation would inappropriately compel courts to adjudicate the merits as a prerequisite to determining jurisdiction to grant the kind of relief requested here.

Respondents' position would also permit plaintiffs to avoid the jurisdictional bar by the simple expedient of recharacterizing constitutional claims as statutory claims under the guise of constitutional avoidance. See Gov't Br. 22-23. Respondents note (Br. 53) that "the constitutional avoidance canon is a tool for interpreting statutes, not enjoining them." But that only confirms the point: respondents' interpretation invites abuse of the canon, and evasion of the jurisdictional bar, by plaintiffs who assert facially implausible statutory claims because constitutional claims are barred.

Respondents and their amici invoke the observation that, "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have

jurisdiction." *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979); see Resp. Br. 49; Law Professors Amici Br. 4. But that is irrelevant because Section 1252(f)(1) unambiguously displaces the lower courts' equitable power by denying "jurisdiction or authority" to any "court (other than the Supreme Court)" to grant certain forms of relief. 8 U.S.C. 1252(f)(1). The federal courts' equitable power "is subject to express and implied statutory limitations," and the statutory text must be given "its fairest reading." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 327, 329 (2015). Contrary to amici's contention, Section 1252(f)(1), properly construed, does not endanger the judiciary's authority "to enjoin unlawful conduct," Law Professors Amici Br. 5. It extends only to the operation of a narrow set of statutory provisions; it applies to the lower courts, but not to this Court; and it limits classwide injunctive relief, but not relief for individual noncitizens in removal proceedings.

Finally, respondents suggest (Br. 54) that this Court endorsed their interpretation in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018). But the Court merely noted that "[t]he *Court of Appeals* held that [Section 1252(f)(1)] did not affect its jurisdiction over [the noncitizens'] statutory claims." *Id.* at 851 (emphasis altered). This Court did not itself adopt that interpretation.

3. Respondents' interpretation also conflicts with the purpose of Section 1252(f)(1). Congress enacted that provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, sec. 306(a)(2), § 242(f), 110 Stat. 3009-611 to 3009-612, which was designed in large measure to protect executive discretion from judicial intrusion. See *Reno* v. *American-Arab Anti-Discrimination Commit-*

tee, 525 U.S. 471, 486 (1999); Gov't Br. 23-24. Respondents contend (Br. 52) that "the agency has no discretion to violate the statute," but that misses the point. By reserving the power to grant programmatic injunctive relief to this Court, Section 1252(f)(1) operates on the premise—vividly illustrated by this case—that the lower courts will sometimes misinterpret the statute, inappropriately cabining executive discretion. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996) (House Report) ("[S]ingle district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S."). Congress made the permissible choice to allow the Executive to continue enforcing the immigration laws until this Court has spoken.

C. Respondents' Assertion That Section 1252(f)(1)'s Exception Allows Classwide Relief Is Incorrect

Respondents contend (Br. 55-59) that Section 1252(f)(1)'s exception for relief granted to "individual alien[s]" in removal "proceedings," 8 U.S.C. 1252(f)(1), applies to classes of noncitizens in proceedings. That interpretation lacks merit.

1. Respondents' interpretation ignores this Court's repeated pronouncements that classwide injunctions fall outside the exception in Section 1252(f)(1). See Gov't Br. 26. Most notably, *Rodriguez* held that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [the covered provisions]." 138 S. Ct. at 851 (citation omitted). Respondents consider that statement dictum because the Court remanded for "the court of appeals to consider 'in the first instance' 'whether it may issue classwide injunctive relief based on respondents' constitu-

tional claims.'" Br. 56 (quoting *Rodriguez*, 138 S. Ct. at 851). But as the government has explained (Br. 27), the Court remanded to permit the court of appeals to determine in the first instance whether its prior rationale—that Section 1252(f)(1)'s general prohibition does not extend to statutory claims seeking to enforce the statute—was applicable to constitutional claims. *Rodriguez*, 138 S. Ct. at 851. The Court did not remand for the Ninth Circuit to reconsider *this Court*'s holding that Section 1252(f)(1), where it applies, bars classwide injunctive relief. Respondents offer no response.

2. Even assuming the scope of the exception remains an open question, respondents' argument conflicts with the statute's text, which permits relief with respect to "the application of [the covered] provisions to an individual alien against whom [removal] proceedings * * * have been initiated." 8 U.S.C. 1252(f)(1).

The unambiguous meaning of "individual alien"—which refers to a *single* alien—excludes classwide relief. See Gov't Br. 28. Respondents contend (Br. 55) that "Congress sought to restrict" only "*pre-enforcement* challenges to certain immigration statutes by persons *not* in removal proceedings, and by organizations." But the phrase "alien against whom [removal] proceedings * * * have been initiated," 8 U.S.C. 1252(f)(1), already accomplishes that goal. Adding the adjective "individual" before the noun "alien" thus makes clear that the provision bars classwide relief. Respondents effectively concede that they read "individual" out of the statute. See Br. 58 ("Sometimes the better overall reading of the statute contains some redundancy.") (citation omitted).

Statutory context confirms the plain meaning. See Gov't Br. 28-29. The exception refers to "*an* individual alien" in the singular, in contrast with the proviso's ref-

erence to the "identity of the party or parties bringing the action," 8 U.S.C. 1252(f)(1) (emphasis added)—suggesting that the general bar on review applies to class suits but the exception does not. Respondents ignore that point.

Respondents cite (Br. 57-58) *Yamasaki*, *supra*, for the proposition that "references to 'any individual' * * * do *not* eliminate courts' authority under Rule 23 to address claims by a class of individuals." But *Yamasaki* is irrelevant for a host of reasons, including that the statute there used the term "individual" as a noun rather than an adjective. 442 U.S. at 699-700; see Gov't Br. 30-31. Respondents suggest (Br. 58) this distinction is meaningless because other provisions purportedly use "the modifier 'individual' in a way that plainly adds no independent content." Respondents' examples do not help their argument. See 8 U.S.C. 1601(4) (congressional pronouncement rather than enforceable statute); 8 U.S.C. 1446(a) (contrasting "individual case" with "cases or classes of cases"). Regardless, superfluity in other contexts cannot justify rendering "individual" superfluous here, when an alternative interpretation gives full effect to the statutory term.

In the same vein, respondents point (Br. 56) to a nearby provision stating that no court may "certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." 8 U.S.C. 1252(e)(1)(B). But Section 1252(f)(1) does not bar class proceedings altogether—just certain forms of relief. The difference in language is therefore appropriate. See Gov't Br. 31-32. Again, respondents offer no answer.

3. Like their interpretation of Section 1252(f)(1)'s prohibition, respondents' construction of the exception conflicts with congressional purpose by permitting systemic judicial oversight of federal immigration policy and dramatically magnifying the harm inflicted by incorrect lower-court rulings. Respondents' interpretation also undermines Congress's general goal, reflected in the INA, of channeling immigration challenges to suits filed by individual noncitizens. See Gov't Br. 24, 32. Respondents suggest (Br. 55) that Congress's purposes are adequately vindicated by precluding suits by organizations and noncitizens who are not in removal proceedings, but respondents cannot dispute that, from the perspective of limiting programmatic litigation, suits seeking classwide injunctions pose many of the same (or even greater) risks.

Respondents argue (Br. 57) that the government's interpretation is impracticable because it requires courts to enter multiple individual injunctions when confronted with multiple suits raising the same issue. But Section 1252(f)(1) is designed, in part, to prevent lower courts from overseeing federal immigration policy on a systemic basis, while still permitting "courts [to] issue injunctive relief pertaining to the case of an individual alien, * * * thus protect[ing] against any immediate violation of rights." House Report 161. Using multiple, individual injunctions is fully consistent with that purpose. And even then, the provision would simply bar consolidated relief, not joinder per se.

In any event, class actions are critically distinct from joinder. Joinder generally operates on the default premise of litigation by and against individual parties. See, *e.g.*, Fed. R. Civ. P. 20(a)(3) ("The court may grant judgment to one or more plaintiffs according to their

rights, and against one or more defendants according to their liabilities."). In contrast, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). A class "acquire[s] a legal status separate from the interest asserted by" the named representative, *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), and a class suit may survive events that moot the representative's interest, *id.* at 401. As a result, even if relief awarded to multiple parties in a joined case could be considered relief for each "individual alien," 8 U.S.C. 1252(f)(1), relief awarded to a class with an independent legal status could not.

II. SECTION 1231(a)(6) DOES NOT REQUIRE BOND HEARINGS

Respondents contend (Br. 18-46) that 8 U.S.C. 1231(a)(6), read in light of the canon of constitutional avoidance, entitles a noncitizen to a bond hearing after six months of detention. Respondents do not dispute that the canon applies only if the statutory text is susceptible of multiple plausible readings and one reading would raise serious constitutional doubts. But respondents have not shown that Section 1231(a)(6) can plausibly be read to require bond hearings, much less that adopting that reading is necessary to avoid serious constitutional doubts.

A. Respondents' Reading Of Section 1231(a)(6) Is Not Plausible

1. Respondents contend (Br. 15) that Section 1231(a)(6) is "ambiguous as to the procedures required for detention that exceeds six months." But Section

1231(a)(6) cannot plausibly be read to require the procedures they seek.

a. Respondents begin (Br. 19) by inserting a bond-hearing requirement into Section 1231(a)(6), even though the text says nothing about bond hearings. Respondents emphasize (*ibid.*) that Section 1231(a)(6) provides that the Department of Homeland Security (DHS) "may" detain noncitizens beyond the removal period, but that does not advance their case. The word "may" indicates only that the statute *allows* DHS to release noncitizens, on bond or otherwise. The word "may" connotes discretion, see *Opati* v. *Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020), but imposes no obligation to hold bond hearings.

Respondents further contend (Br. 19) that, by empowering DHS to detain noncitizens who pose a danger to the community or risk of flight, Section 1231(a)(6) echoes "the traditional criteria applied in custody hearings." But Section 1231(a)(6) goes beyond authorizing DHS to detain noncitizens who pose "a risk to the community" or a flight risk; it also authorizes DHS to detain noncitizens who are "inadmissible" or "removable" on specified grounds. 8 U.S.C. 1231(a)(6). Respondents overlook the latter two bases in equating Section 1231(a)(6) with a standard for bond hearings. In any event, the references to community safety and flight risk simply specify grounds for detention. They do not require the use of any given procedure, such as a bond hearing, to determine whether those grounds exist.

Respondents likewise infer a bond-hearing regime (Br. 24) from Section 1231(a)(6)'s requirement that DHS supervise noncitizens whom it chooses to release after the removal period (*i.e.*, after three months of detention). That inference, too, is flawed. A requirement

to continue supervising noncitizens who are released after three months does not imply a requirement to conduct bond hearings for noncitizens who remain detained after six months.

This Court's decision in *Rodriguez*, *supra*—which respondents largely ignore—reinforces those points. There, the Court considered the meaning of 8 U.S.C. 1226(a), which provides that DHS "may" detain a noncitizen pending a removal decision and also "may release" the noncitizen on "bond." The Ninth Circuit had held that Section 1226(a) required bond hearings every six months, but this Court rejected that reading, observing that "[n]othing in § 1226(a)'s text * * * even remotely supports" that requirement. *Rodriguez*, 138 S. Ct. at 847. Given that the combination of "may" with the reference to "bond" in Section 1226(a) does not support a bond-hearing requirement, neither does the combination of "may" with references to community safety, flight risk, and supervision in Section 1231(a)(6). Indeed, if respondents are correct that "[t]here is * * * no material difference between the two statutes," Br. 24, then *Rodriguez* resolves this case.

Respondents would draw a different lesson from Section 1226(a). They observe (Br. 22-24) that federal regulations accord bond hearings to individuals detained under Section 1226(a). See 8 C.F.R. 236.1(d), 1236.1(d). They read those regulations (Br. 23) to mean that the government has "interpreted Section 1226(a)" to require bond hearings, and they infer that Section 1231(a)(6) may likewise be read to require such hearings. But respondents misunderstand the regulations. The regulations do not interpret the statute itself to require bond hearings. Rather, they represent an exercise of DHS's discretion "to grant additional procedural

rights" over and above those required by Congress. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). Choosing to grant bond hearings under Section 1226(a) creates no obligation to grant them under Section 1231(a)(6).

b. After adding a bond-hearing requirement that the statutory text does not contain, respondents rewrite the substantive standard that the statute does contain. Section 1231(a)(6) allows DHS to detain a noncitizen if the noncitizen is (1) inadmissible, (2) removable for specified reasons, (3) a danger to the community, or (4) a flight risk. Yet respondents argue (Br. 22) that only the third and fourth grounds can support detention for more than six months.*

Respondents assert (Br. 22) that the first and second grounds of detention "instruct who may be *initially* detained beyond the removal period," but not who may be detained "at the point detention becomes prolonged." That just rewrites the text in a different way. Section 1231(a)(6) authorizes DHS to detain a noncitizen who fits into any of the four categories "beyond the removal period," 8 U.S.C. 1231(a)(6)—not just between the end of the removal period and some unspecified point when detention becomes prolonged. Moreover, "[t]he opera-

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* Respondents are presumably driven to that reading because many of them are inadmissible. The named plaintiffs and many class members in *Aleman Gonzalez*, as well as the named plaintiff and all class members in *Flores Tejada*, were removed from the United States, illegally reentered the country, and then had their original removal orders reinstated. See Gov't Br. 7-11. An "alien present in the United States without being admitted" usually "is inadmissible." 8 U.S.C. 1182(a)(6)(A)(i). And an "alien * * * who * * * has been ordered removed" is also usually "inadmissible" for at least "10 years." 8 U.S.C. 1182(a)(9)(A)(ii)(I).

tive language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all * * * categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). There is no textual basis for concluding that two of the four grounds expire at the six-month mark.

c. Respondents' revisions of the statutory text do not end there. Even though Congress has granted the power to implement Section 1231(a)(6) to the Secretary of Homeland Security, see Gov't Br. 36, respondents would transfer the power to conduct bond hearings (and thus to judge flight risk and community safety) to immigration judges in the Department of Justice (DOJ).

Respondents argue (Br. 26) that the government forfeited that objection by failing to raise it below. But the government argued that Section 1231(a)(6) "does not require that a bond hearing be held after an individual is subject to immigration detention for more than six months, *or that it be held before an immigration judge*." Gov't C.A. Br. 1, *Flores Tejada* v. *Godfrey*, No. 18-35460 (Mar. 25, 2019) (emphasis added). In any event, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 246 n.2 (2000) (citation omitted).

On the merits, respondents invoke (Br. 26) a grandfathering provision, 8 U.S.C. 1103(g)(1), under which immigration judges could continue to perform functions they performed before the creation of DHS. But Section 1231(a)(6) was previously implemented by the Immigration and Naturalization Service (INS), not immi-

gration judges. See *Detention of Aliens Ordered Removed*, 65 Fed. Reg. 80,281, 80,293 (Dec. 21, 2000). Because immigration judges did not hold bond hearings under Section 1231(a)(6) when DHS was created, the argument that they *retained* that function under Section 1103(g)(1) is unfounded.

Respondents note (Br. 26) the government's acknowledgment that DHS and DOJ could choose to grant bond hearings before immigration judges to noncitizens detained under Section 1231(a)(6), suggesting that it contradicts the argument that Congress has vested the power to implement Section 1231(a)(6) in the Secretary of Homeland Security. It does not. When Congress created DHS, it authorized the Secretary to delegate immigration functions to "any employee of the United States," "with the consent of the head of the Department * * * under whose jurisdiction the employee is serving." 8 U.S.C. 1103(a)(6). Thus, *the Secretary* may, with the Attorney General's consent, delegate authority to implement Section 1231(a)(6) to DOJ officials. But that does not mean that *a court* may (as the Ninth Circuit did here) delegate that authority over the Secretary's objection and without the Attorney General's consent.

Finally, respondents quote (Br. 27) a committee report supposedly showing that Congress expected immigration judges to hold bond hearings under Section 1231(a)(6). See House Report 161. But the quoted recommendation pertained to a clause, removed before enactment, that would have authorized release during the removal period based on "a specific finding" about "insufficient detention space" and "a bond containing such conditions as the Attorney General may prescribe." *Id.* at 25. The passage is inapposite to the actual statute.

2. Even if Section 1231(a)(6), standing alone, were "ambiguous as to the procedures required" (Resp. Br. 15), the rule of construction in 8 U.S.C. 1231(h) would resolve that ambiguity. Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Ibid.* That forecloses respondents' interpretation, under which Section 1231(a)(6) *would* confer legally enforceable procedural rights or benefits, including the right to a bond hearing and the right to have an immigration judge preside.

Respondents nevertheless relegate Section 1231(h) to a footnote. They observe (Br. 37 n.9) that it does not preclude a noncitizen from seeking a writ of habeas corpus when DHS purportedly lacks statutory authority to detain. But Section 1231(a)(6) plainly grants DHS authority to detain respondents. This case instead concerns whether courts may "constru[e] § 1231(a)(6) to include additional procedural protections during the statutorily authorized detention period." Pet. App. 48a (citation and emphasis omitted). Congress answered that question in the negative in Section 1231(h).

3. Respondents attempt to overcome their textual problems by invoking (Br. 20-21) this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). They argue (Br. 15) that, because "*Zadvydas* held that the text of Section 1231(a)(6) is ambiguous as to the length of detention it authorizes," the Court should conclude that "Section 1231(a)(6) is similarly ambiguous as to the procedures required for detention that exceeds six months."

That argument is incorrect. In *Zadvydas*, this Court deemed Section 1231(a)(6) ambiguous only after using the ordinary tools of statutory interpretation, and it selected an interpretation that fell within the zone of ambiguity. The Court explained that, because the provision "has as its basic purpose effectuating an alien's removal," it could be read to mean that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Zadvydas*, 533 U.S. at 697, 699. Respondents have shown no comparable connection between their interpretation and the text or logic of Section 1231(a)(6).

B. Respondents' Bond-Hearing Regime Is Not Necessary To Avoid Serious Constitutional Doubts

Because Section 1231(a)(6) is clear, this Court could resolve the case without discussing the Constitution. Regardless, respondents' bond-hearing regime is not necessary to avoid serious constitutional doubts.

1. Respondents argue (Br. 29-34) that the Due Process Clause permits the government to detain a noncitizen for more than six months under Section 1231(a)(6) only if a neutral adjudicator holds a hearing and makes an individualized finding that the noncitizen poses a flight risk or danger to the community. Respondents rest (Br. 29-30) that claim on the "legal tradition" of allowing detainees to seek bail and on this Court's "modern civil detention jurisprudence." But respondents' authorities—which all involve citizens—are beside the point. This Court has emphasized that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 521 (citation omitted). As relevant here, the Court has held that immigration detention does not automatically

violate the Constitution simply because it is not based on individualized determinations or because the detainee receives no bond hearing.

For example, in *Carlson* v. *Landon*, 342 U.S. 524 (1952), this Court rejected a challenge in those circumstances. As the Court later described the case, "[a]lthough the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the [government] had adopted a policy of refusing to grant bail" to them. *Demore*, 538 U.S. at 524. They were accordingly detained "without any finding of flight risk" or "'individualized finding' of likely future dangerousness." *Id.* at 524-525 (brackets and citation omitted). This Court nonetheless held that the detention complied with the Due Process Clause. *Carlson*, 342 U.S. at 544. Respondents attempt (Br. 35) to distinguish *Carlson* as involving "a national security threat," but this Court has cited *Carlson* as a relevant precedent even in cases that did not involve national security. See *Demore*, 538 U.S. at 523-525.

Similarly, in *Demore*, this Court considered Section 1226(c), which provides for mandatory detention of certain criminal noncitizens pending removal proceedings. Although that provision called for detention without any individualized findings, the Court rejected a facial challenge under the Due Process Clause. *Demore*, 538 U.S. at 521-531. Respondents seek (Br. 34) to distinguish *Demore* because it involved mandatory rather than discretionary detention, but that point cuts *against* respondents' position. Mandatory detention represented a more serious deprivation of liberty than the discretionary detention at issue here, since the detainees could not even ask the Executive for release.

2. Respondents contend (Br. 28) that detention here raises special constitutional concerns because it is "[p]rolonged." In their view (Br. 32-33), prolonged detention—by which they mean detention lasting more than six months—comports with the Due Process Clause only if accompanied by "greater procedural protections." But even assuming that is so, DHS's regulations provide the necessary protections, at least as a general matter. As our opening brief explains (at 5), the regulations provide for a review panel at Immigration and Customs Enforcement (ICE) headquarters to review the noncitizen's case at six months of detention, and to consider the noncitizen's individual circumstances when deciding whether detention remains justified. The noncitizen may submit evidence, use an attorney or other representative, and, if appropriate, seek a government-provided translator.

Respondents raise three principal objections to that procedure. None is sound.

First, respondents argue (Br. 39-40) that "the jailer" "cannot be responsible for custody reviews." But the six-month custody review required by DHS's regulations is not conducted by the noncitizen's "jailer"—*i.e.*, by the agent who took him into custody or by the warden in charge of his detention facility. Rather, the review is conducted by a separate set of officials in ICE's Headquarters Post-Order Detention Unit. See 8 C.F.R. 241.4(c)(2). Respondents suggest (Br. 40) that adjudicators in the same agency that took them into custody (ICE) are insufficiently neutral. But this Court has repeatedly held that, when the adjudicator is not personally biased, an adjudication does not violate the Due Process Clause simply because the adjudicator or his agency combines enforcement and adjudicative func-

tions. For instance, the Federal Trade Commission may hear an antitrust charge although it previously investigated that charge. See *FTC* v. *Cement Institute*, 333 U.S. 683, 700-701 (1948). A state medical board may both investigate and adjudicate charges against a doctor. See *Withrow* v. *Larkin*, 421 U.S. 35, 46-55 (1975). And Congress may vest the power to conduct deportation hearings in adjudicators who are "subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions." *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955). Respondents rely (Br. 40) on *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972), *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), and *Johnson* v. *United States*, 333 U.S. 10 (1948), but those decisions involved the Fourth Amendment's requirement that warrants be issued by neutral and detached magistrates, not the Fifth Amendment's distinct requirement that adjudicators be neutral.

Second, respondents allege (Br. 43) that ICE routinely fails to conduct the custody reviews required by its regulations. But "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In any event, if ICE fails to comply with its regulations, the solution is to enforce the regulations, not to invent additional procedures without foundation in the Constitution, the statute, or the regulations.

Third, respondents argue (Br. 42) that DHS's regulations do not give the detainee an adequate opportunity to present his case. But the regulations guarantee the

noncitizen the opportunity to present a written statement supporting release, 8 C.F.R. 241.4(h)(2); to present his position orally at a personal interview, 8 C.F.R. 241.4(i)(3)(i); to "submit * * * any information" that would support release, 8 C.F.R. 241.4(i)(3)(ii); and to use the assistance of an attorney or other representative, *ibid.*

Respondents argue (Br. 42) that the personal interview guaranteed by the regulations does not amount to a formal "hearing." But this Court has held that informal hearings can satisfy due process if they provide a meaningful opportunity to be heard, as the personal interview here does. See, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 580, 584 (1975) (approving "an informal give-and-take" rather than an "elaborate hearing"); *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972) ("What is needed is an informal hearing."); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) ("Informal procedures will suffice.").

Respondents also assert (Br. 41) that ICE has the discretion to deny an interview. As our opening brief explains (at 45), that is incorrect. The regulations provide that, unless ICE has already decided to grant release, "a Review Panel *shall* personally interview the detainee." 8 C.F.R. 241.4(i)(3)(i) (emphasis added). Respondents cite (Br. 8 n.2) a provision stating that "[t]he scheduling of such interviews shall be at the discretion" of ICE, 8 C.F.R. 241.4(i)(3), but that provision simply allows ICE to set the interview's date and time, not to deny one altogether. Respondents also cite (Br. 8 n.2) a provision stating that ICE "*may* grant the alien an interview." 8 C.F.R. 241.13(e)(5) (emphasis added). But that provision does not concern the six-month custody review; rather, it concerns the separate review procedures implementing this Court's holding in *Zad-*

vydas that Section 1231(a)(6) authorizes continued detention only while removal remains reasonably foreseeable. See 8 C.F.R. 241.13(a).

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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