No. 19-896

In The Supreme Court of the United States

TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Petitioners,

v.

ANTONIO ARTEAGA-MARTINEZ
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

Marcia Binder Ibrahim
Brock L. Bevan
LAW OFFICE OF MARCIA BINDER IBRAHIM, LLC
222 South Broad Street
Lansdale, PA 19446

Pratik A. Shah
Counsel of Record
James E. Tysse
Jehanne C. McCullough
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

Aileen M. McGrath
Michael Weisbuch
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Suite 1500
San Francisco, CA 94104

Counsel for Respondent

QUESTION PRESENTED

Whether an individual subject to prolonged detention under 8 U.S.C. § 1231(a)(6)—the same statutory provision that this Court found "ambiguous" in *Zadvydas v. Davis*, 533 U.S. 678 (2001)—is entitled after six months to either presumptive release or a neutral bond hearing while pursuing a *bona fide* withholding-of-removal claim that can take the government years to adjudicate.

TABLE OF CONTENTS

QUESTION PRESENTED i

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Legal Framework 3

B. Factual Background 8

C. Procedural History 9

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. *ZADVYDAS* INTERPRETED SECTION 1231(a)(6) TO PROTECT AGAINST UNREVIEWABLE PROLONGED DETENTION. 14

A. *Zadvydas* Authoritatively Construed Section 1231(a)(6) As Requiring Either (Supervised) Release Or A Bond-Type Determination After Prolonged Detention. 14

B. The Due Process Concerns At Issue In *Zadvydas* Apply At Least As Strongly To This Case. 16

II. SECTION 1231(a)(6) COMPELS EITHER RELEASE OR A BOND HEARING AFTER PROLONGED DETENTION FOR AN INDIVIDUAL PURSUING WITHHOLDING-ONLY RELIEF..................... 18

A. Section 1231(a)(6) Did Not Authorize Arteaga-Martinez's Continued Detention Because His Removal Was Not Reasonably Foreseeable 19

B. At A Minimum, Section 1231(a)(6) Requires A Bond Hearing After Prolonged Detention For Noncitizens Pursuing Withholding-Only Relief. 23

1. Interpreting Section 1231(a)(6) to permit prolonged detention without possibility of release on bond raises significant due process concerns. 23

2. Under the avoidance canon, Section 1231(a)(6) can be read to imply a bond hearing before a neutral decisionmaker. 28

3. The government's construction of Section 1231(a)(6) departs from traditional canons of construction and ignores controlling precedent. 34

III. NEITHER DHS REGULATIONS NOR OTHER SUPREME COURT DECISIONS WARRANT A DEPARTURE FROM *ZADVYDAS*. 38

A. DHS Regulations Cannot, And Do Not, Fix The Due Process Concerns With Section 1231(a)(6). 38

B. This Court's Recent Cases Do Not Undermine *Zadvydas*'s Holding As To The Meaning Of Section 1231(a)(6). 42

CONCLUSION 45

ADDENDUM

U.S. Const. amend. V 1a

8 U.S.C. § 1231 .... 2a

8 C.F.R. § 208.31 .... 8a

8 C.F.R. § 241.4 .... 13a

8 C.F.R. § 241.13 .... 40a

8 C.F.R. § 241.14 .... 52a

TABLE OF AUTHORITIES

CASES:

Addington v. Texas,
441 U.S. 418 (1979) 33

Blum v. Bacon,
457 U.S. 132 (1982) 23

Campos v. INS,
62 F.3d 311 (9th Cir. 1995) 37

Carlson v. Landon,
342 U.S. 524 (1952) 25, 26

Casas-Castrillon v. DHS,
535 F.3d 942 (9th Cir. 2008) 41

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

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 32

Crowell v. Benson,
285 U.S. 22 (1932) 15, 28

Demore v. Kim,
538 U.S. 510 (2003) 25, 43

Diouf v. Napolitano,
634 F.3d 1081 (9th Cir. 2011) 7, 39, 41

East Bay Sanctuary Covenant v. Biden,
993 F.3d 640 (9th Cir. 2021) 21

Foucha v. Louisiana,
504 U.S. 71 (1992) 24, 39

Guerrero-Sanchez v. Warden York Cty. Prison,
905 F.3d 208 (3d Cir. 2018)........................ *passim*

Hamama v. Adducci,
285 F. Supp. 3d 997 (E.D. Mich. 2018)............. 41

Illinois v. Gates,
462 U.S. 213 (1983) 36

In re: Gault,
387 U.S. 1 (1967) 18

INS v. St. Cyr,
533 U.S. 289 (2001) 28

Jackson v. Indiana,
406 U.S. 715 (1972) 15, 17

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) .... *passim*

Johnson v. Guzman Chavez,
141 S. Ct. 2271 (2021) 5, 22, 42

Kansas v. Hendricks,
521 U.S. 346 (1997) 15, 17, 24

Martinez v. LaRose,
968 F.3d 555 (6th Cir. 2020) 5, 19, 20

McGoldrick v. Compagnie Generale,
309 U.S. 430 (1940) 36

Minerva Surgical, Inc. v. Hologic, Inc.,
141 S. Ct. 2298 (2021) 30

Moncrieffe v. Holder,
569 U.S. 184 (2013) 4

Nken v. Holder,
556 U.S. 418 (2009) 20

Reno v. Flores,
507 U.S. 292 (1993) 26

Santosky v. Kramer,
455 U.S. 745 (1982) 32, 33

Schall v. Martin,
467 U.S. 253 (1984) 24

Stack v. Boyle,
342 U.S. 1 (1951) 29

United States v. Salerno,
481 U.S. 739 (1987) 24, 29, 33

United States v. Witkovich,
353 U.S. 194 (1957) 28

Washington v. Confederated Bands & Tribes of Yakima Indian Nation,
439 U.S. 463 (1979) 23

Wong Wing v. United States,
163 U.S. 228 (1896) 15

Woodby v. INS,
385 U.S. 276 (1966) 33

Yamataya v. Fisher,
189 U.S. 86 (1903) 28

Zadvydas v. Davis,
533 U.S. 678 (2001) .... *passim*

CONSTITUTION AND STATUTES:

U.S. CONST. amend V 14

8 U.S.C.
§ 1101 *et seq*. 3
§ 1103(g)(1) 32
§ 1225(b)(1)(A) 8
§ 1231(a)(5) 3
§ 1231(a)(6) .... *passim*
§ 1231(b)(3) 4, 9, 18
§ 1231(b)(3)(A) 4
§ 1231(h) 36, 37
§ 1252(a)(1) 4

28 U.S.C.
§ 2241(c)(3) 37

Foreign Affairs Reform and Restructuring
Act of 1998, Pub. L. No. 105-277, 112
Stat. 2681 4

OTHER AUTHORITIES:

4 WILLIAM BLACKSTONE, ANALYSIS OF THE
LAWS OF ENGLAND (6th ed., Clarendon
Press 1771) 30

4 William Blackstone, *Commentaries on the Laws of England* (1769) 30

8 C.F.R.
§ 208.31 4
§ 208.31(c) 4
§ 208.31(e) 4, 18, 20, 21
§ 208.31(g)(2) 20
§ 236.1(d)(1) 32, 44
§ 241.4(d) 6, 40
§ 241.4(d)(1) 30, 40
§ 241.4(k)(1)(i) 6
§ 241.4(k)(2)(ii) 6
§ 241.4(k)(2)(iii) 6, 40
§ 241.8(e) 3
§ 241.13(a) 6, 40
§ 241.13(d)(1) 6, 40
§ 241.13(e) 40
§ 241.13(e)(4) 6
§ 241.13(e)(5) 6
§ 241.13(e)(6) 7, 31
§ 241.13(g)(2) 6, 7, 40
§ 241.14 31
§ 241.14(a) 7
§ 241.14(i)(1) 33
§ 242.2(d) (1995) 31
§ 274a.12(a)(10) 21
§ 1236.1(d)(1) 44

19 Fed. Reg. 4,442 (July 20, 1954) 31

62 Fed. Reg. 10,361 (Mar. 6, 1997) 31

American Immigration Council & National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* (Oct. 2020)................. 22

Compact Oxford English Dictionary (2d ed. 1991) 21

Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Budget Overview, Fiscal Year 2019 Congressional Justification* (2018) 27

Hausman, David, *Fact-Sheet: Withholding-Only Cases and Detention*, ACLU Immigrants' Rights Project (Apr. 19, 2015) 4, 20, 21, 40

INTRODUCTION

The Solicitor General advances a breathtaking premise: that the government is free to imprison an individual seeking humanitarian protection from removal for more than six months—and often years longer—without any independent review for dangerousness or flight risk. This Court has never countenanced such an offense to due process. And 8 U.S.C. § 1231(a)(6), as this Court has already recognized, does not either. For individuals like Respondent Antonio Arteaga-Martinez, Section 1231(a)(6) requires (supervised) release or, at a minimum, a bond hearing before a neutral adjudicator after prolonged detention.

Arteaga-Martinez is a noncitizen who, having been removed from the United States, returned because he is likely to be tortured in his home country. The Department of Homeland Security (DHS) determined that Arteaga-Martinez had demonstrated a reasonable fear of persecution or torture, and thus referred his request for withholding of removal to an immigration judge. Because he had been ordered removed, the government sought to detain him—and did so for over six months without a hearing before any court or immigration judge.

The question in this case is whether, under Section 1231(a)(6), an individual awaiting adjudication of a *bona fide* withholding-of-removal claim is entitled to release from prolonged detention—or, at a minimum, a bond hearing to determine whether continued detention is justified and (if not) the appropriate terms of release. Based on a

straightforward application of this Court's precedent construing Section 1231(a)(6), the answer is yes.

In *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), this Court recognized that interpreting Section 1231(a)(6) to authorize unreviewable prolonged detention would give rise to "a serious constitutional problem." But because the Court found the statute to be "ambiguous," it applied the canon of constitutional avoidance to avoid that problem. *Id.* at 697. The Court held that detention is "presumptively reasonable" for six months, but after six months, if removal is not "reasonably foreseeable," Section 1231(a)(6) requires the individual's release (subject to applicable conditions of supervision). *Id.* at 699, 701. And even "if removal is reasonably foreseeable," a court should consider the risk posed by the individual's release in determining whether continued confinement is justified. *Id.* at 700.

Zadvydas controls this case. When the district court granted Arteaga-Martinez's petition for a writ of habeas corpus over three years ago, he had been detained for more than six months and his removal was not "reasonably foreseeable." No one knew when Arteaga-Martinez's removal would occur or whether it would occur at all, considering his (still pending) *bona fide* claim for withholding of removal. Section 1231(a)(6) thus required his release or, even assuming his uncertain removal were deemed reasonably foreseeable, a bond hearing before a neutral decisionmaker.

Remarkably, the government barely addresses *Zadvydas*—the on-point precedent interpreting and applying the same "ambiguous" statutory provision at

issue here—until the last few pages of its brief. But giving *Zadvydas* short shrift does not alter its significance. Indeed, the Court's reasoning in that case applies even more forcefully to the facts of this one: Congress could not have intended to force individuals to choose between years-long detention while pursuing withholding relief or forgoing such relief at the risk of life and limb.

Zadvydas addressed the same statutory text and the same constitutional concerns, and it demands the same result: the rejection of an approach that subjects individuals to unchecked prolonged detention. A contrary result—even one that purports to leave *Zadvydas* in place—will effectively overrule that decision's framework for addressing prolonged civil detention for individuals in Arteaga-Martinez's position. This Court should affirm.

STATEMENT OF THE CASE

A. Legal Framework

1. The INA, 8 U.S.C. § 1101 *et seq.*, establishes procedures for the government to remove certain noncitizens from the United States. One procedure applies to individuals who were previously removed from the United States and reentered without authorization. Their original removal order may be "reinstated from its original date," *id.* § 1231(a)(5), thereby permitting immediate removal.

An exception applies to individuals, like Arteaga-Martinez, who express a reasonable fear of being tortured, persecuted, or otherwise harmed in the country of removal. 8 C.F.R. § 241.8(e). Such an individual is entitled to mandatory withholding of

removal if his life or freedom would be threatened because of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1231(b)(3); *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013) ("[T]he Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility."). This regime implements the United States' statutory and treaty-based obligation not to return any person to a country where that person would face persecution or torture. 8 U.S.C. § 1231(b)(3)(A); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 1242, 112 Stat. 2681.

If an individual seeks such protection, an asylum officer first determines whether the individual has a "reasonable fear of persecution or torture." 8 C.F.R. § 208.31(c). If so, the individual is placed in withholding proceedings before an immigration judge. The individual may not be sent to the country of removal pending those proceedings, *id.* § 208.31(e), which may include an appeal by the government or the noncitizen to the Board of Immigration Appeals (BIA), *id.* § 208.31, and a further discretionary stay by a federal court of appeals in the event of an appeal to federal court, 8 U.S.C. § 1252(a)(1). Such proceedings can last for many months or even years because of backlogged immigration courts. *See* David Hausman, *Fact-Sheet: Withholding-Only Cases and Detention*, ACLU Immigrants' Rights Project, at 2 (Apr. 19, 2015) (average duration of 447 days for 84 cases in which the BIA remanded a withholding-only claim);[1] *see, e.g.*,

---

[1] https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf.

Martinez v. LaRose, 968 F.3d 555, 557-558 (6th Cir. 2020) (two-year detention pending withholding-only proceedings); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 213 (3d Cir. 2018) (withholding hearing scheduled 53 months after detention began).

2. Section 1231(a) governs detention, release, and removal of individuals ordered removed pending withholding-of-removal proceedings. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 (2021). That section requires detention during the initial 90-day "removal period." After the removal period, the statute provides that an individual "may" be detained only if he is (i) inadmissible, (ii) removable due to certain enumerated violations, or (iii) "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). If a covered individual is released after the removal period, Section 1231(a)(6) states that he "shall be subject to *** terms of supervision" as referenced in Section 1231(a)(3).

In *Zadvydas*, this Court interpreted Section 1231(a)(6) as not authorizing unchecked prolonged detention "beyond the removal period." 533 U.S. at 682. Because Section 1231(a)(6)'s language is "ambiguous," *id.* at 697, and a construction permitting prolonged detention would create "a serious constitutional problem," *id.* at 689, 690, the Court interpreted Section 1231(a)(6) to mandate release if, after six months, "there is no significant likelihood of removal in the reasonably foreseeable future," *id.* at 701. Even when "removal is reasonably foreseeable," release might still be necessary; in that case, a reviewing court should consider the individual's "risk

of *** committing further crimes" as one "factor potentially justifying confinement." *Id.* at 700.

3. The government purports to have implemented Section 1231(a)(6) through an administrative process. To decide whether an individual should be detained beyond the 90-day "removal period," DHS conducts an initial file review before the removal period ends. 8 C.F.R. § 241.4(k)(1)(i). If the individual is not released or removed, DHS conducts a second file review three months later (*i.e.*, after six total months of detention). *Id.* § 241.4(k)(2)(ii). If the individual is still detained a year later (a cumulative 18 months of detention), DHS conducts another review. *Id.* § 241.4(k)(2)(iii). The regulations do not provide for a hearing, any chance for the detained individual to call witnesses or challenge the government's evidence, or administrative or judicial review. *Id.* §§ 241.4(d), 241.13(g)(2).

Different regulations apply when the individual manages to convince the government that there is "good reason to believe there is no significant likelihood of removal *** in the reasonably foreseeable future." 8 C.F.R. § 241.13(a). The individual must initiate that separate process by submitting a written request for release, explaining why there is no significant likelihood of removal in the reasonably foreseeable future, to Immigration and Customs Enforcement (ICE) headquarters. *Id.* § 241.13(d)(1). Although ICE employees "may grant *** an interview" and the individual is permitted to "respond to the evidence on which [ICE] intends to rely," *id.* §§ 241.13(e)(4), (5), there is no right to a hearing and

the individual bears the burden of showing that removal is not reasonably foreseeable. If ICE decides that the individual has carried that burden (triggering *Zadvydas*'s release rule), it may continue to detain the individual if it determines that "special circumstances" justify continued detention, subject to review of that "special circumstances" finding by an immigration judge and the BIA. *Id.* §§ 241.13(e)(6), 241.14(a). But if ICE determines that removal is reasonably foreseeable, the individual cannot obtain administrative or judicial review of his continued detention. *Id.* § 241.13(g)(2).

4. In *Guerrero-Sanchez*, the Third Circuit considered how Section 1231(a)(6), as construed in *Zadvydas*, applies to an individual subject to prolonged detention while awaiting resolution of a *bona fide* withholding-of-removal claim. 905 F.3d at 213. Guerrero-Sanchez's detention had spanned 637 days, and his withholding proceedings were scheduled to begin nearly four-and-a-half years—53 months—from the date he was initially detained. *Id.* at 212-213. The Third Circuit, agreeing with the Ninth Circuit, interpreted Section 1231(a)(6) to provide an individual "facing prolonged detention" pending adjudication of a withholding claim with a bond hearing before an immigration judge. *Id.* at 224 (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011)). At that hearing, the government must show, by clear and convincing evidence, that the individual poses a flight risk or danger to the community if released. *Id.* & n.12 (noting it would be "improper to ask the alien to share equally with society the risk of error when the possible injury to the individual—deprivation of liberty—is so

significant”) (citations, internal quotation marks, and alteration omitted).

B. Factual Background

Respondent Antonio Arteaga-Martinez is a native and citizen of Mexico. Petition for Writ of Habeas Corpus at 5, No. 1:18-cv-01742 (M.D. Pa. Sept. 4, 2018), ECF No. 1 (“D. Ct. Pet.”). Over the past two decades, he has entered the United States four times. *Id.* Upon reentering the United States in 2012 after visiting an ill family member, Arteaga-Martinez was detained at the border, deemed inadmissible, and removed via expedited removal procedures. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A). While in Mexico, Arteaga-Martinez and his family experienced violence at the hands of a criminal street gang. D. Ct. Pet. 8. Fearing further gang reprisals in Mexico, Arteaga-Martinez returned to the United States. *Id.* at 7.

In May 2018, ICE issued a warrant for Arteaga-Martinez. D. Ct. Pet. 7. At that point, he had lived and worked in the United States for almost six years, was expecting the birth of his first child (a U.S. citizen), and had no criminal record (just minor traffic violations). *See* Gov’t Resp. to D. Ct. Pet. Ex. 1 at 4, No. 1:18-cv-01742 (M.D. Pa. Sept. 27, 2018), ECF No. 4-1 (“No Criminal History.”). ICE officers detained him on May 4, 2018, and the government reinstated his removal order that same day. D. Ct. Pet. 7.

While in detention, Arteaga-Martinez expressed his fear that he would be persecuted or tortured if removed to Mexico. D. Ct. Pet. 7; *see*, *e.g.*, D. Ct. Pet. Ex. H at 5 (describing how gang members beat and robbed Arteaga-Martinez, stole his car, bound his hands, taped his mouth, and left a note saying that

they would kill him if he reported them to the police). An asylum officer interviewed him and determined that he had a "reasonable fear" of future persecution and torture in Mexico. D. Ct. Pet. Ex. D at 1. Arteaga-Martinez thereafter applied for withholding of removal under 8 U.S.C. § 1231(b)(3).

In August 2018, DHS advised Arteaga-Martinez of an administrative review to assess his dangerousness and flight risk. The next month, without any personal interview (let alone a hearing), DHS denied him release from detention.

C. Procedural History

In September 2018, after four months of detention, Arteaga-Martinez petitioned for a writ of habeas corpus "ordering [the government] to release [him] immediately" or, in the alternative, providing for "a constitutionally-adequate hearing where the government must demonstrate that [his] continued detention is justified before an Immigration Judge." D. Ct. Pet. 15. The government acknowledged that Arteaga-Martinez's detention would no longer be "statutorily permissible" once "he ha[d] been detained more than six-months" if, at that point, his removal was "not imminent." Resp. to D. Ct. Pet. at 25, No. 1:18-cv-01742 (M.D. Pa. Sept. 27, 2018), ECF No. 4. And the government did not dispute, in that event, Arteaga-Martinez would be entitled to at least a bond hearing. *Id*. Instead, the government argued that Arteaga-Martinez's request was "premature" because Arteaga-Martinez had not been detained for six months (such that his detention was not yet "prolonged"). *Id.* at 24-25 (citing *Guerrero-Sanchez*, 905 F.3d at 225).

Once Arteaga-Martinez's time in detention had reached nearly six months, he moved the district court to hold the petition in abeyance pending a bond hearing before an immigration judge. Mot. To Hold In Abeyance, No. 1:18-cv-01742 (M.D. Pa. Oct. 23, 2018), ECF No. 9. The government did not oppose the motion. *Id.* at 1. On the contrary, the government conceded before the magistrate judge that, at the six-month mark, "Arteaga-Martinez [would be] entitled to a bond hearing before an Immigration Judge in accordance with *Guerrero-Sanchez*." Pet. App. 4a-5a. The magistrate judge thus recommended that the district court "grant the petition for a writ of habeas corpus and order that Arteaga-Martinez be given an individualized bond hearing before an Immigration Judge." *Id.*

Once again, the government did not object. Gov't Letter, No. 1:18-cv-01742 (M.D. Pa. Nov. 7, 2018), ECF No. 14. The district court adopted the report and recommendation, granted the habeas petition, and ordered the individualized bond hearing. Pet. App. 3a.

Arteaga-Martinez filed an unopposed motion for summary affirmance in light of *Guerrero-Sanchez*. The Third Circuit summarily affirmed. Pet. App. 1a-2a.

Arteaga-Martinez received a bond hearing before an immigration judge in November 2018. Resp. C.A. Br. 3. The immigration judge ordered his release on bond pending disposition of his withholding application. *Id.* His initial withholding hearing—which had already been postponed by the court *sua sponte* before his release date—was rescheduled to

August 2021 after his release, and eventually continued to May 2023.

SUMMARY OF ARGUMENT

A straightforward application of *Zadvydas*, which interpreted the same "ambiguous" statutory provision raising the same "serious constitutional problem" at issue here, compels Arteaga-Martinez's release or, at a minimum, a neutral bond hearing.

I. In construing Section 1231(a)(6), *Zadvydas* set forth both a specific release rule and a framework for individualized hearings when that rule does not apply. Invoking the canon of constitutional avoidance, the Court held that the statute requires release after six months of detention if "there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. And even when removal "is reasonably foreseeable" for those in prolonged detention, a reviewing court must still consider whether risk factors justify confinement "within that reasonable removal period." *Id.* at 700.

The same due process concerns necessitating application of the constitutional-avoidance canon in *Zadvydas* are present in cases, such as this one, involving prolonged detention under Section 1231(a)(6) of an individual in withholding-only proceedings. Such proceedings typically drag on for many months or even years beyond the six-month mark—subjecting detained individuals to the same kind of prolonged confinement the Court disapproved in *Zadvydas*. If anything, this case presents even more serious due process concerns because prolonged detention of individuals in withholding-only

proceedings effectively punishes them for pursuing *bona fide* withholding claims.

II. Under *Zadvydas*, after six months of detention, Arteaga-Martinez was presumptively entitled to release or, at a minimum, a bond hearing before a neutral decisionmaker. Removal of an individual pursuing withholding-only relief is ordinarily not "reasonably foreseeable." A hearing, decision, and administrative appeal of a withholding application can take years to complete—during which time the law forecloses removal. And an ultimate grant of withholding relief all but obviates any chance of removal (possibly forever). Given the protracted timeline and uncertain outcome, removal is anything but "reasonably foreseeable" for individuals like Arteaga-Martinez in prolonged detention. *Zadvydas* requires release in that circumstance.

Zadvydas also contemplates limits to detention under Section 1231(a)(6) even when release (unlike here) *is* reasonably foreseeable for an individual in prolonged detention. This Court tied the reasonableness of such detention to the traditional bond considerations reflected in Section 1231(a)(6)'s text—*i.e.*, preventing flight and protecting the community. And *Zadvydas* reaffirms that an administrative body within the detaining agency, without the availability of any outside review, cannot be responsible for making such determinations. A bond hearing before a neutral adjudicator (*i.e.*, the immigration judge) thus follows for such cases.

The government's contrary arguments in favor of unchecked prolonged detention—an unprecedented proposition outside the national security context—

largely ignore *Zadvydas*. Rather than adhere to this Court's decision interpreting Section 1231(a)(6), the government starts from scratch, eschews the constitutional-avoidance canon, and ignores the due process principles that Section 1231(a)(6)'s ambiguous text has been found to incorporate.

III. The government's remaining arguments fare no better. The government suggests that DHS regulations purporting to implement *Zadvydas* curtail Arteaga-Martinez's entitlement to release or an individualized hearing before a neutral decisionmaker. But those regulations cannot retroactively change the statute's meaning, which reflects the enacting Congress's intent. The regulatory scheme, moreover, continues (despite *Zadvydas*'s contrary admonition) to bestow on DHS and ICE employees "the unreviewable authority to make determinations implicating fundamental rights." 533 U.S. at 692. Those regulations do not resolve the "serious constitutional concerns" the Court identified in *Zadvydas*, *id.* at 682, and at issue here.

Nor do this Court's more recent decisions warrant a departure from *Zadvydas*. The Court has reaffirmed *Zadvydas*'s interpretation of Section 1231(a)(6) numerous times. *Guzman Chavez* did not resolve the question presented here, and *Jennings v. Rodriguez*—which interpreted other provisions by *distinguishing* Section 1231(a)(6)—lends the government no support.

ARGUMENT

I. *ZADVYDAS* INTERPRETED SECTION 1231(a)(6) TO PROTECT AGAINST UNREVIEWABLE PROLONGED DETENTION.

A. *Zadvydas* Authoritatively Construed Section 1231(a)(6) As Requiring Either (Supervised) Release Or A Bond-Type Determination After Prolonged Detention.

In *Zadvydas*, this Court ruled that Section 1231(a)(6) implicitly limits the government's authority to detain noncitizens beyond six months. Section 1231(a)(6) provides that certain noncitizens "*may* be detained" past the 90-day removal period, but that language is "ambiguous." 533 U.S. at 697. The word "may" suggests "discretion" but "does not necessarily suggest unlimited discretion." *Id.* And in providing that certain noncitizens "may be detained," Congress "failed to specify how long detention was to last." *Jennings v. Rodriguez*, 138 S. Ct. 830, 850 (2018). Had Congress intended to "authorize long-term detention" when there is no prospect of imminent removal, "it certainly could have spoken in clearer terms." *Zadvydas*, 533 U.S. at 697.

Interpreting Section 1231(a)(6)'s ambiguous terms to permit prolonged detention, moreover, "would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. The Due Process Clause prohibits the government from "depriv[ing]" any person "of life, liberty, or property, without due process of law[.]" U.S. CONST. amend V. "Freedom from imprisonment *** lies at the heart of the liberty

th[e] Clause protects," and this protection extends to all "'persons' within the United States," including noncitizens. *Zadvydas*, 533 U.S. at 690, 693-694 (citing, *e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

More specifically, the Due Process Clause permits deprivation of liberty via civil (as opposed to criminal) detention only "in certain special and 'narrow' *** 'circumstances,'" namely when "a special justification *** outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Any civil detention—whether prolonged or limited—must "bear[] [a] reasonable relation" to a valid government "purpose" and be accompanied by "adequate procedural protections." *Id.* (second alteration in original) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Those principles, as *Zadvydas* explained, suggest that permitting prolonged civil detention of individuals "ordered removed for many and various reasons, including tourist visa violations," would raise "a serious doubt" under the Due Process Clause. *Id.* at 689, 691.

In light of the weighty due process concerns raised by the government's approach to prolonged detention under Section 1231(a)(6)'s "ambiguous" language, *Zadvydas* applied the canon of constitutional avoidance to adopt a "fairly possible" construction of the statute. 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Court accordingly interpreted Section 1231(a)(6) as containing an implicit limitation: "once removal is no

longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Applying that principle, *Zadvydas* held that, at the six-month mark, detention is no longer "presumptively reasonable," and, if "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future," the individual "must be released." *Id.* at 701. In accordance with Section 1231(a)(6)'s text, *Zadvydas* made clear that release must be "supervised" and subject to traditional common-law bond considerations of danger and flight risk. *Id.* at 690-691, 700.

The Court also recognized that the same due process principles might require release after prolonged detention even when "removal *is* reasonably foreseeable." 533 U.S. at 700 (emphasis added). In such circumstances, the reviewing court should consider the individual's "risk of *** committing further crimes" as a "factor potentially justifying confinement." *Id.* *Zadvydas* therefore contemplates at least potential release for any individual after prolonged detention, subject to a court's assessment of traditional bond considerations.

B. The Due Process Concerns At Issue In *Zadvydas* Apply At Least As Strongly To This Case.

Because Section 1231(a)(6)'s meaning is not "subject to change depending on the presence or absence of constitutional concerns in each individual case," *Clark v. Martinez*, 543 U.S. 371, 382 (2005), the Court need not ask whether applying the statute to a particular category of noncitizens implicates the same due process concerns underlying *Zadvydas*. In any

event, this case presents the same concerns that *Zadvydas* recognized for prolonged detention of other noncitizens.

To comport with the Due Process Clause, the government must offer a "special justification" for continued civil detention that outweighs the individual's "constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356). But prolonged detention far beyond the "removal period" bears no "reasonable relation" to the valid government purposes that this Court recognized in *Zadvydas*: namely, preventing flight or danger to the community. *Id.* (quoting *Jackson*, 406 U.S. at 738). Indeed, the government's interest in preventing flight prior to removal is no greater here than in *Zadvydas*. Although it was unlikely that the home countries would have agreed to accept the noncitizens in that case, those individuals had been ordered removed and, having exhausted all possibilities, had no basis for obtaining statutory or other relief from removal. *See Zadvydas*, 533 U.S. at 684-686.

Open-ended, discretionary civil detention of individuals pending withholding-only proceedings raises an additional due process concern not present in *Zadvydas*. Continued detention foists upon such individuals an impossible choice: remain imprisoned (possibly for years) while the government adjudicates a right to withholding relief, or submit to immediate removal despite the risk of persecution and torture. That is not an abstract concern: individuals have abandoned meritorious withholding claims to avoid enduring prolonged detention. *See* Amicus Br. of Am.

Immigr. Council et al. at 23, *Johnson v. Guzman Chavez*, No. 19-897 (U.S. Nov. 12, 2020) (describing case of Honduran national who fled to the United States after being shot in the back by gang members, and who decided "he could no longer endure detention" after seven months and returned to Honduras).

Prolonged detention will either dissuade these individuals from pursuing withholding of removal, or "punish [them] for pursuing applicable legal remedies." *Guerrero-Sanchez*, 905 F.3d at 220. They have a right to pursue withholding-only relief, 8 U.S.C. § 1231(b)(3), and the right to remain in the United States throughout that (often lengthy) administrative process, 8 C.F.R. § 208.31(e). Yet under the government's approach, they may be subjected to prolonged detention that, "however euphemistic" its label, is no different from imprisonment. *In re: Gault*, 387 U.S. 1, 27 (1967).

II. SECTION 1231(a)(6) COMPELS EITHER RELEASE OR A BOND HEARING AFTER PROLONGED DETENTION FOR AN INDIVIDUAL PURSUING WITHHOLDING-ONLY RELIEF.

The government does not dispute that Arteaga-Martinez's detention exceeded six months. Under *Zadvydas*, Arteaga-Martinez thus was entitled to release (because removal was not—and is still not—reasonably foreseeable) or, at a minimum, a bond hearing before a neutral decisionmaker (even if his removal somehow were deemed reasonably foreseeable).

A. Section 1231(a)(6) Did Not Authorize Arteaga-Martinez's Continued Detention Because His Removal Was Not Reasonably Foreseeable.

Zadvydas held that Section 1231(a)(6) no longer authorizes detention after six months once "there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. And what counts as "reasonably foreseeable" narrows as detention drags on. *Id.* at 701; *see also* Gov't Br. 47, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Aug. 26, 2016) (conceding 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").

Because Arteaga-Martinez's detention exceeded six months, the main question under Section 1231(a)(6) is whether his removal was reasonably foreseeable. It was not. Individuals like Arteaga-Martinez pursuing *bona fide* withholding-of-removal claims have "no significant likelihood of removal in the reasonably foreseeable future" for two reasons: (1) the protracted and undefined duration of withholding-only proceedings, and (2) the potential elimination of any meaningful chance of removal. *See Martinez*, 968 F.3d at 566-567 (Gibbons, J., dissenting) (because detention for individuals in withholding-only proceedings "will continue for an uncertain and indeterminate period," their removal "is not reasonably foreseeable" and thus their continued detention is unlawful).

First, withholding proceedings typically do not conclude for years. Under federal law, individuals

pursuing *bona fide* withholding claims cannot be removed to the country specified in their orders of removal while their claims are adjudicated. *See* 8 C.F.R. §§ 208.31(e), (g)(2). That bar applies not only pending a hearing in immigration court and the immigration judge's withholding decision, but also pending BIA review plus any remand proceedings. *See id.* A federal court of appeals also has discretion to stay removal pending its review of the BIA's decision. *See Nken v. Holder*, 556 U.S. 418, 425 (2009).

The process regularly exceeds six months. A recent study found that detention following a reasonable fear determination lasted an average of 114 days when neither party appealed the immigration judge's decision; 301 days when at least one party appealed and the BIA issued a final decision; 447 days when the BIA remanded the case and the immigration judge made a final decision; and 1,065 days when a U.S. court of appeals granted a petition for review. Hausman, *supra* at 2. The cases discussed by the parties here show that the process can last far longer. For example, by the time Guerrero-Sanchez was released from civil confinement, he had spent 637 days in detention. 905 F.3d at 210. At the time of the Third Circuit appeal, his withholding proceedings were not scheduled to begin until 53 months after his initial detention. *Id.* at 212; *see also*, *e.g.*, *Martinez*, 968 F.3d at 557-558 (two-year detention pending withholding-only proceedings).

Accordingly, an ultimate determination on withholding relief, let alone actual removal, is far from "reasonably foreseeable"; the unknown and protracted duration of that decisionmaking process makes the

timetable "indefinite." *Zadvydas*, 533 U.S. at 699; *see* Compact Oxford English Dictionary 835 (2d ed. 1991) (defining "indefinite" as "[o]f undetermined extent, amount, or number; unlimited," and "indefinitely" as "[w]ithout definition or limitation to a particular thing, case, time, etc.; indeterminately, vaguely").

Second, if an individual seeking withholding is successful, removal will almost certainly *never* occur. Just to pursue withholding relief, noncitizens must satisfy a stringent threshold eligibility test: they must demonstrate, to the satisfaction of a DHS asylum officer, that they have a "reasonable fear" of persecution or torture in the country of removal. 8 C.F.R. § 208.31(e). That standard is more demanding than the "credible fear" standard governing threshold eligibility for asylum proceedings. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 678-679 (9th Cir. 2021) ("[A]n applicant seeking withholding of removal *** must demonstrate the higher 'reasonable fear' of persecution or torture."). Only 13% of individuals who undergo a reasonable fear interview pass the test. *See* Amicus Br. of Nat'l Immigr. Litig. All. at 8-9, *Johnson v. Guzman Chavez*, No. 19-897 (U.S. Nov. 12, 2020). And many of the individuals who make it that far will prevail on their withholding-only claim. *See* Hausman, *supra* at 2 (according to one 2015 study, 27% of withholding applicants granted relief).

Individuals granted withholding relief are allowed to remain in the United States and to work legally. 8 C.F.R. § 274a.12(a)(10). That status usually lasts permanently; indeed, it will continue except in the extraordinarily rare case that country conditions improve or a different country accepts them. *See*

Guzman Chavez, 141 S. Ct. at 2286 ("[A]lternative-country removal is rare[.]"); *see also* American Immigration Council & National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 7 (Oct. 2020)[2] (just 1.6% of noncitizens granted withholding relief are removed to a third country). Thus, removal is not simply "remote" for these individuals; it is virtually certain never to occur.

Without denying that removal is not "reasonably foreseeable" for individuals in Arteaga-Martinez's position, the Solicitor General disputes that this case involves "indefinite and potentially permanent" detention as in *Zadvydas*. Br. 23. To the extent the government means to imply that *Zadvydas* applies only to cases in which removal cannot be accomplished because no country will accept the noncitizen, the Court's rule is not so limited: its presumptive release remedy necessarily extends to any individual suffering prolonged detention under Section 1231(a)(6) when removal is not "reasonably foreseeable." And, as discussed next, its further limits on prolonged detention (*e.g.*, requiring a court at least to consider dangerousness) apply even when removal *is* reasonably foreseeable.[3]

---

[2] https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf.

[3] Although *Zadvydas* requires presumptive release, and although Arteaga-Martinez's habeas petition requested that remedy, Arteaga-Martinez seeks only affirmance of the judgment granting his habeas petition—which (under binding circuit law) afforded a bond hearing resulting in his release. Now free on

B. At A Minimum, Section 1231(a)(6) Requires A Bond Hearing After Prolonged Detention For Noncitizens Pursuing Withholding-Only Relief.

If the Court declines to hold that *Zadvydas* required Arteaga-Martinez's release after six months, subject to terms of supervision, the Court should nonetheless adopt the Third Circuit's reading: Section 1231(a)(6) required a bond hearing before a neutral adjudicator.

1. Interpreting Section 1231(a)(6) to permit prolonged detention without possibility of release on bond raises significant due process concerns.

As explained, *Zadvydas* held that Section 1231(a)(6) implicitly incorporates due process principles that limit the scope of detention. When the presumptive release rule does not apply, those principles still do. *See Zadvydas*, 533 U.S. at 700. Even "if removal *is* reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor *potentially* justifying confinement." *Id.* (emphases added). *Zadvydas* recognized that whether continued confinement is justified ultimately depends on whether it would

---

bond, Arteaga-Martinez does not seek alteration of that status. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (respondent "may rely upon any matter appearing in the record in support of the judgment below"); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (respondent may defend "judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

"bear[] [a] reasonable relation" to a valid government "purpose." *Id.* at 690 (second alteration in original). Those purposes—which are identified in the text of Section 1231(a)(6) itself—are preventing risk of danger to the community and risk of flight impeding eventual removal. *Id.* Based on the same statutory text and the same due process concerns, individuals like Arteaga-Martinez held in prolonged detention are entitled to a hearing before a neutral adjudicator on that question.

The government's contrary interpretation raises serious due process concerns that far outweigh its asserted interests. This Court has never (outside the national security context) authorized prolonged detention without an individualized hearing, before a neutral adjudicator, at which the detainee has a meaningful opportunity to participate. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on dangerousness, with the government bearing the burden of proof by clear and convincing evidence); *Hendricks*, 521 U.S. at 357 (upholding civil commitment imposed following "proper procedures and evidentiary standards," including an individualized hearing); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's right to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279-281 (1984) (upholding detention pending juvenile delinquency determination where government must prove dangerousness after an adversarial hearing with notice and counsel); *cf. Zadvydas*, 533 U.S. at 692 ("The Constitution

demands greater procedural protection even for property.").

Tellingly, the government can point to no case permitting such an offense to due process. The cases on which the government relies address short-term detention for individuals that Congress has determined present a categorical risk of flight or danger to the community (or implicate another special interest). In *Demore v. Kim*, for example, the Court rejected a constitutional challenge to "detention during removal proceedings" of "deportable criminal aliens." 538 U.S. 510, 517, 518 (2003). In doing so, the Court expressly distinguished the detention at issue in *Zadvydas—i.e.*, detention "following a final order of removal"—as "materially different." *Id.* at 527. The Court further rested its holding on the more limited length of detention pending deportation proceedings, which the Court stated "lasts roughly a month and a half in the vast majority of cases *** and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530-531.[4]

Similarly, *Carlson v. Landon* addressed detention "pending determination of deportability" for noncitizens that Congress had determined were national security threats based on membership in "the Communist Party of the United States." 342 U.S. 524,

---

[4] The government later sent the Court a letter stating that the Executive Office for Immigration Review had "made several significant errors in calculating" the figures on which the Court relied. *See* Letter from Ian H. Gershengorn, Acting Solicitor General to Hon. Scott S. Harris Re: *Demore v. Kim*, S. Ct. No. 01-1491 (Aug. 26, 2016), *available at* https://online.wsj.com/public/resources/documents/Demore.pdf.

527-528 (1952). Even those individuals received bond hearings—indeed, they were granted "bail in the large majority of cases." *Id*. at 542. And *Reno v. Flores* upheld short-term detention during deportation proceedings of children with "no available parent, close relative, or legal guardian" based on the government's interest in "preserving and promoting the welfare of the child." 507 U.S. 292, 303 (1993).

The government's failure to identify a case consistent with its position is no surprise. Compared to the rights of individuals facing prolonged detention while they pursue statutory withholding-of-removal relief, the government has (at best) a weak interest in denying a bond hearing before a neutral decisionmaker. In fact, such a hearing promotes, rather than compromises, the government's interests in preventing flight and protecting the public. If the noncitizen poses a threat to those interests that cannot be addressed through a bond, detention will continue; if not, the noncitizen will be subject to individualized conditions of supervised release (which, under DHS's own regulations, include posting a bond). *See Zadvydas*, 533 U.S. at 696 ("The choice *** is not between imprisonment and the alien living at large. It is between imprisonment and supervision under release conditions that may not be violated.") (internal quotation marks and citation omitted).

The facts here are a case in point. The government has not argued that Arteaga-Martinez is a flight risk or dangerous—and certainly not to the degree that a bond would not address. Arteaga-Martinez has been law-abiding save for a few driving-license/registration infractions before his detention.

He is married, has U.S. citizen children, and has a promising claim to withholding of removal. The government has asserted no valid interest that would be served by continuing Arteaga-Martinez's prolonged detention. *See Zadvydas*, 533 U.S. at 692 ("[R]emovable status *** bears no relation to a detainee's dangerousness.").

The government's vague assertion of administrative burden (raised in its petition for certiorari, but not its merits brief) is unsupported by any actual numbers or evidence. *See* Pet. 15-16. To the contrary, the government can (and does) ensure appearances at removal proceedings through measures—such as "a combination of home visits, office visits, alert response, court tracking, and/or [monitoring] technology" as part of what ICE calls Alternatives to Detention (ATD)—that do not run roughshod over an individual's liberty interests. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Budget Overview, Fiscal Year 2019 Congressional Justification* 142 (2018).[5] "Historically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings." *Id.* There is no reason why these same steps, along with "the various forms of supervised release that are appropriate in the circumstances" (including bond), could not be used for individuals like Arteaga-Martinez. *Zadvydas*, 533 U.S. at 700.

---

[5] https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf.

2. Under the avoidance canon, Section 1231(a)(6) can be read to imply a bond hearing before a neutral decisionmaker.

As in *Zadvydas*, the Court need not decide whether prolonged detention violates the Due Process Clause, as long as there is a "fairly possible" construction of Section 1231(a)(6)'s ambiguous language "by which the question may be avoided." 533 U.S. at 689 (quoting *Crowell*, 285 U.S. at 62); *see Clark*, 543 U.S. at 381-382 (noting that "one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions") (emphasis omitted). The constitutional-avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. It is thus "a means of giving effect to congressional intent." *Id.* at 382. The avoidance canon, moreover, has long played a key role in this Court's interpretation of ambiguous statutory language in the immigration context. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (applying avoidance canon where government's reading of INA "would raise serious constitutional questions"); *United States v. Witkovich*, 353 U.S. 194, 195 (1957) (similar); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (similar).

Given the serious constitutional concerns that would arise from prolonged detention with no hearing before a neutral decisionmaker, the question is whether there is any "fairly possible" saving

construction that avoids such an interpretation of Section 1231(a)(6). The answer is yes.

Zadvydas interpreted the scope of Section 1231(a)(6)'s detention authority to coincide with bond-like considerations. If continued detention is not authorized, the Court noted, release should be "conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions." 533 U.S. at 700. And when removal is reasonably foreseeable, a court should consider the risk of "further crimes as a factor potentially justifying confinement." *Id.* A particular flight risk could also justify continued detention in that circumstance. *See id.* at 690.

Flowing from *Zadvydas*, the Third Circuit's interpretation is bolstered by two signals in Section 1231(a)(6) that provide the textual "foothold" the Solicitor General claims is lacking (Br. 7). *First*, two of the grounds that Section 1231(a)(6) enumerates for continued detention beyond the initial 90-day removal period—if the individual is "a risk to the community or unlikely to comply with the order of removal," 8 U.S.C. § 1231(a)(6)—echo precisely the historical inquiry into community safety and flight risk at bond hearings. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (law providing for bail's "purpose" was to "assur[e] the presence of [the] defendant"); *Salerno*, 481 U.S. at 746-755 (explaining that pretrial detention on the basis of future dangerousness is permissible under the Due Process clause); *see also Jennings*, 138 S. Ct. at 863 (Breyer, J., dissenting). Indeed, DHS's regulations implementing Section 1231(a)(6)'s text make flight

risk and dangerousness the dispositive factors for discretionary release eligibility. *See* 8 C.F.R. § 241.4(d)(1) ("[DHS] may release an alien if the alien demonstrates *** that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States.").

Second, Section 1231(a)(6) explicitly provides for certain "terms of supervision" if a noncitizen is released. Assessing the degree of danger or flight risk, and setting the resulting terms "of supervised release that are appropriate in the circumstances," *Zadvydas*, 533 U.S. at 700, is precisely the function of a bond hearing.

The bond-related language embedded in Section 1231(a)(6) reflects the common-law backdrop against which Congress enacted the statute. *See Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307 (2021) (explaining that Congress "legislate[s] against a background of common-law adjudicatory principles, and it expect[s] those principles to apply except when a statutory purpose to the contrary is evident") (internal quotation marks omitted). The right to seek release via a bond hearing has been settled, in both the civil and criminal context, since before the founding. 4 WILLIAM BLACKSTONE, ANALYSIS OF THE LAWS OF ENGLAND 147-148 (6th ed., Clarendon Press 1771). In England, "every prisoner (except for a convict serving his sentence) was entitled to seek release on bail." *Jennings*, 138 S. Ct. at 863 (Breyer, J., dissenting) (citing 4 William Blackstone, *Commentaries on the Laws of England* 296-297 (1769)). And "American

history makes clear that the settlers brought this practice with them to America." *Id.*

Critically, the bond review contemplated by Section 1231(a)(6) must be performed by a neutral party, not the jailer. *Zadvydas* recognized "that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." 533 U.S. at 692 (internal quotation marks omitted). It is at least "fairly possible" to construe Section 1231(a)(6) as incorporating that historically grounded constitutional norm.

To be sure, *Zadvydas* anticipated that a habeas court would perform the neutral function in that habeas case, 533 U.S. at 687, 699-700, but the statute does not limit review to a habeas court. The Third and Ninth Circuits sensibly interpreted Section 1231(a)(6) to imply such hearings before immigration judges—*i.e.*, the same authorities who traditionally perform those functions. The Executive Branch has long implemented statutes authorizing discretionary detention by providing for custody review in the immigration courts. *See* 19 Fed. Reg. 4,442 (July 20, 1954); 8 C.F.R. § 242.2(d) (1995); 62 Fed. Reg. 10,361 (Mar. 6, 1997). Consistent with that practice, the government's regulations implementing Section 1231(a)(6) require immigration judges to perform bond hearings when the agency has determined that its "special circumstances" exception to *Zadvydas*'s release rule applies. *See* 8 C.F.R. §§ 241.13(e)(6), 241.14. And for noncitizens detained pending removal proceedings but eligible for release under Section 1226(a), the government's regulations provide for bond

hearings before immigration judges at the outset of detention. *See* 8 C.F.R. § 236.1(d)(1); *Jennings*, 138 S. Ct. at 847.

Despite the uniform practice, the government now argues that Congress could not have intended immigration judges to perform custody reviews under Section 1231(a)(6) because Congress later transferred the Attorney General's statutory authority to the Secretary of Homeland Security. Br. 11-12. The government did not raise that argument below, presumably because it is inapt. In transferring some statutory authority to DHS, Congress provided that the Department of Justice retained the "authorities and functions" that were "exercised by the Executive Office for Immigration Review [EOIR] or by the Attorney General with respect to [EOIR]" prior to the effective date of the Homeland Security Act. 8 U.S.C. § 1103(g)(1). Custody redeterminations under Section 1231(a)(6) fit comfortably within the Attorney General's (and immigration judges') retained functions. And if there were any question whether Congress intended to eliminate that key due process protection of a neutral adjudicator, constitutional avoidance would compel the conclusion that Congress did not. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) ("government enforcement agent" cannot be "neutral" adjudicator).

Finally, nothing precludes the Third Circuit's adoption of a clear-and-convincing evidentiary standard for the bond hearing. The degree of proof required in a particular proceeding is traditionally a question "left to the judiciary to resolve." *Santosky v. Kramer*, 455 U.S. 745, 755-756 (1982); *see also*

Zadvydas, 533 U.S. at 701 (providing for a burden-shifting approach on the question whether removal is reasonably foreseeable); *Woodby v. INS*, 385 U.S. 276, 284-286 (1966) (requiring the government to prove deportability by "clear, unequivocal, and convincing evidence" where Congress had "not addressed itself to the question of what degree of proof is required in deportation proceedings" under the INA). And because prolonged civil detention implicates a core due process interest—the protection of liberty—the clear-and-convincing evidence standard is appropriate. *Santosky*, 455 U.S. at 756 (explaining that the clear and convincing standard is "necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual with a significant deprivation of liberty") (internal quotation marks omitted); *see also Salerno*, 481 U.S. at 750 (upholding pretrial detention where the government bore the burden of proof, by clear and convincing evidence, on dangerousness); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (requiring the government to justify civil confinement based on mental illness under a heightened standard of proof).

Indeed, the government itself has adopted the same clear-and-convincing standard for noncitizens who are provided custody hearings before immigration judges at six months—*i.e.*, those the government has deemed specially dangerous. *See* 8 C.F.R. § 241.14(i)(1) (government "shall have the burden of proving, by clear and convincing evidence, that the

alien should remain in custody because the alien's release would pose a special danger to the public").[6]

3. The government's construction of Section 1231(a)(6) departs from traditional canons of construction and ignores controlling precedent.

a. The government's competing construction proceeds as if this Court had not already analyzed the exact same statutory provision. *See* Br. 9-13 (lacking any reference to *Zadvydas*). The government purports to construe Section 1231(a)(6), but without regard for *Zadvydas*'s authoritative construction of the same "ambiguous" provision that this Court read to incorporate due process constraints on civil detention authority. 533 U.S. at 700. In further dismissal of *Zadvydas*, the government (oddly) discusses the constitutional-avoidance canon only *after* purporting to have completed its statutory construction—even though the avoidance canon is one of the traditional tools of statutory construction.

This *tabula rasa* approach culminates in a redline purporting to show how the Third and Ninth Circuits have altered Section 1231(a)(6)'s text. Br. 12. In reality, *Zadvydas* already interpreted Section 1231(a)(6) to incorporate similar baseline due process protections, as follows:

---

[6] In any event, the government does not argue that the result of Arteaga-Martinez's bond hearing would have been different under a different evidentiary standard. Because the applicable standard makes no difference to the disposition of this case, this Court could decline to resolve it here.

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period up to six months, after which release is required if removal is not significantly likely to occur in the reasonably foreseeable future, and, if released, shall be subject to the terms of supervision in paragraph (3). If removal is reasonably foreseeable after six months of detention, a court should consider the risk of the alien committing further crimes as a factor potentially justifying confinement. Release is not required for "specially dangerous" aliens.

Having started with *Zadvydas*'s construction—rather than ignoring it and starting from scratch as the government does—the Third and Ninth Circuits' approach is no more than a faithful application of Section 1231(a)(6) to individuals like Arteaga-Martinez.

The government contends that the Third and Ninth Circuits' interpretation, by focusing on danger and flight risk, writes out the first two categories specified in Section 1231(a)(6) (inadmissible noncitizens and noncitizens removable for specified violations) for continued detention beyond the initial removal period. Br. 11. Not so. All four categories

continue to do work: specifically, the first two categories still justify continued detention *without regard to danger or flight risk* for the period between the initial removal period (90 days) and the presumptive release threshold (180 days).

Just as *Zadvydas* did not read any of those categories out of the statute by requiring *release* after six months, the Third and Ninth Circuits have not read them out of the statute by requiring a *bond hearing* after six months. In other words, the question whether a noncitizen may be detained beyond the *90-day* removal period (governed by the statute's four categories) is distinct from the question whether a noncitizen must be released or given a bond hearing after *six months* of detention (governed by the statute's implicit limits on prolonged detention).

b. The government also argues that Section 1231(h) requires reversal. But that argument is waived: The government did not raise Section 1231(h) in response to Arteaga-Martinez's habeas petition, in an objection to the magistrate judge's report and recommendation, on appeal, in a petition for rehearing, or even in its petition for certiorari. And neither the Third Circuit nor the Ninth Circuit considered it. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983) (Court will not "consider[] questions urged by a petitioner or appellant not pressed or passed upon in the courts below" except "in exceptional cases") (quoting *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940)).

In any event, Section 1231(h) cannot bear the weight the government places on it. 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 [government] or any other person." 8 U.S.C. § 1231(h). As *Zadvydas* held, that provision "does not deprive an alien of the right *** to challenge detention that is without statutory authority." 533 U.S. at 688. For such a challenge, the habeas statute provides the vehicle to seek release from detention "in violation of the *** laws *** of the United States." 28 U.S.C. § 2241(c)(3); *see Zadvydas*, 533 U.S. at 688. But the Court necessarily construed Section 1231(a)(6) to limit prolonged detention. The same logic applies to Arteaga-Martinez's same argument for limiting his prolonged detention.

The government's contention, moreover, proves too much. Section 1231(h) was not intended to preclude all enforceable limits on government action under Section 1231, but rather to foreclose mandamus actions compelling the government to carry out certain statutory duties (*e.g.*, its duty to remove noncitizens during the removal period). *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995) (explaining that Congress enacted the predecessor to Section 1231(h) to "target *** Ninth Circuit law allowing mandamus relief" in the form of accelerated deportation hearings). The government cites no authority for the proposition that Section 1231(h) bars all attempts to enforce statutory limits—a constitutionally suspect proposition.

c. The government further argues that *Zadvydas* is inapplicable because it provided for (supervised) release instead of a bond hearing. Br. 22-23. Putting aside that *Zadvydas* dictates the same release remedy

here (*see* Part II.A, *supra*), the Court's decision there was not so limited. Like *Zadvydas*, this case is ultimately about the statute's implicit incorporation of due process principles that safeguard against unjustified prolonged detention. *Zadvydas* made explicit that when the presumptive release rule does not apply—*i.e.*, when removal after six months of detention *is* reasonably foreseeable—a neutral adjudicator must decide whether continued detention is permissible. 533 U.S. at 700. Interpreting Section 1231(a)(6) to provide for independent review is thus properly considered an *application*, not an *expansion*, of *Zadvydas*'s core principles.

III. NEITHER DHS REGULATIONS NOR OTHER SUPREME COURT DECISIONS WARRANT A DEPARTURE FROM *ZADVYDAS*.

A. DHS Regulations Cannot, And Do Not, Fix The Due Process Concerns With Section 1231(a)(6).

Contrary to the government's contention, DHS regulations implementing Section 1231(a)(6) cannot resolve the due process problems associated with denying individuals in withholding-only proceedings release or a bond hearing after prolonged detention.

Zadvydas already interpreted Section 1231(a)(6) to incorporate due process protections, and this Court has rejected the argument that Section 1231(a)(6)'s meaning can change when the "constitutional concerns that influenced [the Court's] statutory construction in *Zadvydas* are not present." *Clark*, 543 U.S. at 380. The canon of constitutional avoidance is "a means of giving effect to congressional intent," *id.*

at 382, and subsequent regulatory changes cannot alter the enacting legislature's intent. Allowing the scope of a statute's protections to be defined by the current regulatory regime would "render every statute a chameleon, its meaning subject to change." *Id.*

In any event, DHS regulations governing detention under Section 1231(a)(6) fail to cure at least two of the problems *Zadvydas* diagnosed. First, as noted, the Court recognized "that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692 (internal quotation marks omitted). But the DHS regulations do not offer neutral administrative or judicial review except in narrow circumstances not applicable to Arteaga-Martinez (because he has not been designated specially dangerous). *See Guerrero-Sanchez*, 905 F.3d at 227 (finding due process concerns because custody reviews are performed by "DHS employees who are not ostensibly neutral decision makers such as immigration judges"); *Diouf*, 634 F.3d at 1091 (same).

Second, this Court held that placing the "burden on [the] detainee" creates a due process problem, and noted that similar detention procedures have been struck down under the Due Process Clause. *Zadvydas*, 533 U.S. at 691 (citing *Foucha*, 504 U.S. at 81-83 (striking down detention where detainee "has the burden of proving that he is not dangerous")). But the DHS regulations continue to place the burden of proof on the individual. *See Diouf*, 634 F.3d at 1091 (identifying due process concerns because the

regulations "place the burden on the alien rather than the government").

The generally applicable DHS regulations require ICE employees to conduct custody reviews at 90 and 180 days of detention; the individual bears the burden of proof in such proceedings; and there is no hearing, no opportunity to present witnesses, and no appeal right. 8 C.F.R. § 241.4(d). If not released, the individual's only hope is that a future custody review—a year later—will turn out better. *Id.* § 241.4(k)(2)(iii). And because a showing that the individual presents no flight risk and is not dangerous makes him merely *eligible* for release, *id.* § 241.4(d)(1), these procedures do not implement *Zadvydas*'s mandates. At all times, ICE (*i.e.*, the jailer) enjoys complete discretion over detention determinations.

The later regulations specifically designed to implement *Zadvydas*'s release rule likewise fail to provide for neutral adjudication or judicial review (except as to an inapplicable regulatory exception). Even when a noncitizen "has provided good reason to believe there is no significant likelihood of removal *** in the reasonably foreseeable future," 8 C.F.R. § 241.13(a), it merely triggers a process through which ICE decides that question for itself, *id.* §§ 241.13(d)(1), (e). The detainee has no right to a hearing before ICE makes a final determination. And if ICE decides that removal is reasonably foreseeable, that is the end of the matter. *Id.* § 241.13(g)(2).

Applying these regulations, the government detains over 85% of noncitizens ordered removed but awaiting withholding adjudications. Hausman, *supra* at 2. And DHS's procedures have rubber-stamped

prolonged detention of many noncitizens without individualized determinations. *See Casas-Castrillon v. DHS*, 535 F.3d 942, 950-952 (9th Cir. 2008) (describing an individual who was detained for seven years, having received a single DHS file review deeming him a flight risk, with no notice of the review, no interview or opportunity to contest the government's findings, and no possibility of appeal); *Diouf*, 634 F.3d at 1092 (addressing an individual who was detained for two years based on DHS custody reviews); *Hamama v. Adducci*, 285 F. Supp. 3d 997, 1018 n.12 (E.D. Mich. 2018) (explaining, in a case involving a large class of detainees, that there was "strong evidence that the reviews in our case were not undertaken in a good faith effort" because "[v]irtually every detainee who had a *** review was denied release").

The government ultimately concedes that "[t]he Due Process Clause does, of course, require neutral administrative adjudicators." Br. 19. But the government fails to grasp that ICE, as the jailer, cannot be "neutral" as a matter of law or logic. *See* p. 32, *supra*. Contrary to the government's contention (Br. 20), that is true regardless of case-specific proof that the ICE adjudicator harbors individual bias. The issue is not actual bias; when individuals like Arteaga-Martinez seek "neutral" review, they are simply seeking review by someone other than their jailer.

The government makes a similar mistake by arguing that unreviewable ICE adjudications raise no constitutional concerns because there is "no constitutional right to an appeal." Br. 20. This analogy might make sense if courts, rather than ICE

employees, performed the custody reviews at issue. But the problem here is not merely a lack of appellate review, but rather conferral on "an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Zadvydas*, 533 U.S. at 692.

B. This Court's Recent Cases Do Not Undermine *Zadvydas*'s Holding As To The Meaning Of Section 1231(a)(6).

This Court's post-*Zadvydas* decisions do not warrant a departure from that precedent. The Court has repeatedly reaffirmed *Zadvydas*'s interpretation of Section 1231(a)(6). *See Guzman Chavez*, 141 S. Ct. at 2281-2282; *Jennings*, 138 S. Ct. at 844; *Clark*, 543 U.S. at 379. And the government has not asked the Court to overrule *Zadvydas* here.[7]

The government relies on passing dicta from *Guzman Chavez* to argue that Section 1231(a)(6) affords no right to a bond hearing. Br. 13. But *Guzman Chavez* addressed the antecedent question whether individuals like Arteaga-Martinez are to be detained under either section 1226 or section 1231, *see* 141 S. Ct. at 2284—not the contours of Section 1231(a)(6) detention for those individuals. Given that the latter question was not presented, briefed, or argued in *Guzman Chavez*, the government is wrong to suggest that the Court preemptively decided it—

[7] *Amicus* supporting the government is not so bashful: it asks the Court to "reconsider or narrow *Zadvydas*." Amicus Br. of Immigr. Reform Law Inst. at 7, *Garland v. Gonzalez,* No. 20-322 (U.S. Oct. 21, 2021) (formatting omitted). That request, albeit unwarranted, is at least candid—and underscores that the government can prevail only if the Court overrules *Zadvydas*.

despite holding the petition in this case pending resolution of *Guzman Chavez* and then granting certiorari (with full briefing and argument) on that very question.

The government also relies on *Jennings*. Tellingly, after making that decision the centerpiece of its petition for certiorari (at 6-12), the government relegates *Jennings* to an afterthought in its merits brief. Br. 14. For good reason: *Zadvydas*, unlike *Jennings*, actually construed Section 1231(a)(6)—the very same "ambiguous" provision at issue here. *Jennings*, by contrast, repeatedly and emphatically distinguished *Zadvydas*, concluding that, unlike Section 1231(a)(6), the provisions at issue in that case (Sections 1225(b), 1226(a), and 1226(c)) were *not* ambiguous.

Indeed, *Jennings* made clear that "a series of textual signals distinguishes" the provisions at issue there from Section 1231(a)(6). 138 S. Ct. at 844. For example, *Jennings* recognized that whereas Section 1231(a)(6) uses the ambiguous word "may" and does not "specify how long detention" can last, Section 1225(b) uses the unambiguous word "shall," and mandates detention "for a specified period of time." *Id.* at 844, 850. Section 1225(b) also contains an "express exception to detention," implying "that there are no *other* circumstances" in which release is permissible. *Id.* at 844. Similarly, unlike "the statutory provision in *Zadvydas*," discretionary detention under Section 1226(a) and mandatory detention under Section 1226(c) both have a "definite termination point," when removal proceedings conclude. *Id.* at 846 (quoting *Demore*, 538 U.S. at 529). And Section 1226(c)

contains a narrow, express exception to mandatory detention and thus prohibits releasing detainees "under any other conditions." *Id.* at 847. Finally, the implementing regulations for those provisions, unlike for Section 1231(a)(6), already provide for neutral bond hearings. *Id.* (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)).

*****

Under this Court's precedent, Section 1231(a)(6) provides protection from prolonged detention for individuals like Arteaga-Martinez, whether in the form of release or an individualized hearing before a neutral decisionmaker. If the Court holds otherwise, however, it should remand this case for consideration of the underlying constitutional question that the Third Circuit avoided through its construction of Section 1231(a)(6): whether Arteaga-Martinez's prolonged detention without the opportunity for a bond hearing before a neutral decisionmaker violates the Due Process Clause.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

Marcia Binder Ibrahim
Brock L. Bevan
LAW OFFICE OF MARCIA BINDER IBRAHIM, LLC

Pratik A. Shah
Counsel of Record
James E. Tysse
Aileen M. McGrath
Michael Weisbuch
Jehanne C. McCullough
AKIN GUMP STRAUSS HAUER & FELD LLP

Counsel for Respondent

November 22, 2021

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

U.S. Const. amend. V 1a

8 U.S.C. § 1231 .... 2a

8 C.F.R. § 208.31 .... 8a

8 C.F.R. § 241.4 .... 13a

8 C.F.R. § 241.13 .... 40a

8 C.F.R. § 241.14 .... 52a

CONSTITUTION OF THE UNITED STATES OF AMERICA

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Title 8. Aliens and Nationality

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * *

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily,

under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

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

* * *

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race,

religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a

particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

* * *

(h) Statutory construction

Nothing 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.

* * *

Code of Federal Regulations

Title 8. Aliens and Nationality

Chapter 1. Department of Homeland Security

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal

Subpart B. Credible Fear of Persecution

§ 208.31. Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. USCIS has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to

removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum

officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) Review by immigration judge. The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does

not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

Code of Federal Regulations

Title 8. Aliens and Nationality

Chapter 1. Department of Homeland Security

Subchapter B. Immigration Regulations

Part 241. Apprehension and Detention of Aliens Ordered Removed

Subpart A. Post-Hearing Detention and Removal

§ 241.4. Continued detention of inadmissible, criminal, and other aliens beyond the removal period

(a) Scope. The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the

provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104–208, 110 Stat. 3009–546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) Applicability to particular aliens—

(1) Motions to reopen. An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the

provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) Parole for certain Cuban nationals. The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) Individuals granted withholding or deferral of removal. Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) Service determination under 8 CFR 241.13. The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR

241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) Delegation of authority. The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) District Directors and Directors of Detention and Removal Field Offices. The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90–day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities

associated with these reviews in his or her respective jurisdictional area.

(2) Headquarters Post–Order Detention Unit (HQPDU). For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) The HQPDU review plan. The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) Additional delegation of authority. All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) Custody determinations. A copy of any decision by the district director, Director of the Detention and

Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) Showing by the alien. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) Service of decision and other documents. All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served

on the alien, in accordance with 8 CFR 103.8, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) Alien's representative. The alien's representative is required to complete Form G–28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) Criteria for release. Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) Factors for consideration. The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in

work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) Travel documents and docket control for aliens continued in detention—

(1) Removal period.

(i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) The date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this

section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) In general. The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) Availability of travel document. In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) Removal. The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) Alien's compliance and cooperation.

(i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by

law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90–day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) District director's or Director of the Detention and Removal Field Office's custody review procedures. The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) Records review. The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director1 by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic

interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) Notice to alien. The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) Factors for consideration. The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be

able to reach the conclusions set forth in paragraph (e) of this section.

(4) District director's or Director of the Detention and Removal Field Office's decision. The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) District office or Detention and Removal Field office staff. The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) Determinations by the Executive Associate Commissioner. Determinations by the Executive Associate Commissioner to release or retain custody of

aliens shall be developed in accordance with the following procedures.

(1) Review panels. The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) Records review. Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) Personal interview.

(i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall

personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) Alien's participation. Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) Panel recommendation. Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) Determination. The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) No significant likelihood or removal. During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no

significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) Conditions of release—

(1) In general. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) Sponsorship. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) Employment authorization. The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) Withdrawal of release approval. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) Timing of reviews. The timing of reviews shall be in accordance with the following guidelines:

(1) District director or Director of the Detention and Removal Field Office.

(i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period, or is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention

and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) HQPDU reviews—

(i) District director or Director of the Detention and Removal Field Office referral for further review. When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination

transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) District director or Director of the Detention and Removal Field Office retains jurisdiction. When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90–day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90–day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) Continued detention cases. A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not

more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) Review scheduling. Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) Discretionary reviews. The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) Postponement of review. In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as

anticipated at the time review was suspended or postponed.

(4) Transition provisions.

(i) The provisions of this section apply to cases that have already received the 90–day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, February 3, 1999; Supplemental Detention Procedures, April 30, 1999; Interim Changes and Instructions for Conduct of Post-order Custody Reviews, August 6, 1999; Review of Long-term Detainees, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http://www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district

director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) Revocation of release—

(1) Violation of conditions of release. Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) Determination by the Service. The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner.

Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) Timing of review when release is revoked. If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination

whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

Code of Federal Regulations

Title 8. Aliens and Nationality

Chapter 1. Department of Homeland Security

Subchapter B. Immigration Regulations

Part 241. Apprehension and Detention of Aliens Ordered Removed

Subpart A. Post-Hearing Detention and Removal

§ 241.13. Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future

(a) Scope. This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.

(b) Applicability to particular aliens—

(1) Relationship to § 241.4. Section 241.4 shall continue to govern the detention of aliens under a final order of removal, including aliens who have requested a review of the likelihood of their

removal under this section, unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future.

(2) Continued detention pending determinations.

(i) The Service's Headquarters Post-order Detention Unit (HQPDU) shall continue in custody any alien described in paragraph (a) of this section during the time the Service is pursuing the procedures of this section to determine whether there is no significant likelihood the alien can be removed in the reasonably foreseeable future. The HQPDU shall continue in custody any alien described in paragraph (a) of this section for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated.

(ii) The HQPDU has no obligation to release an alien under this section until the HQPDU has had the opportunity during a six-month period, dating from the beginning of the removal period (whenever that period begins and unless that period is extended as provided in section 241(a)(1) of the Act), to make its determination

as to whether there is a significant likelihood of removal in the reasonably foreseeable future.

(3) Limitations. This section does not apply to:

(i) Arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by § 212.12 of this chapter;

(ii) Aliens subject to a final order of removal who are still within the removal period, including aliens whose removal period has been extended for failure to comply with the requirements of section 241(a)(1)(C) of the Act; or

(iii) Aliens who are ordered removed by the Alien Terrorist Removal Court pursuant to title 5 of the Act.

(c) Delegation of authority. The HQPDU shall conduct a review under this section, in response to a request from a detained alien, in order to determine whether there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. If so, the HQPDU shall determine whether the alien should be released from custody under appropriate conditions of supervision or should be referred for a determination under § 241.14 as to whether the alien's continued detention may be justified by special circumstances.

(d) Showing by the alien—

(1) Written request. An eligible alien may submit a written request for release to the HQPDU asserting the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. The alien may submit whatever documentation to the HQPDU he or she wishes in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future.

(2) Compliance and cooperation with removal efforts. The alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents.

(3) Timing of request. An eligible alien subject to a final order of removal may submit, at any time after the removal order becomes final, a written request under this section asserting that his or her removal is not significantly likely in the reasonably foreseeable future. However, the Service may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the removal period.

(e) Review by HQPDU—

(1) Initial response. Within 10 business days after the HQPDU receives the request (or, if later, the expiration of the removal period), the HQPDU shall respond in writing to the alien, with a copy to

counsel of record, by regular mail, acknowledging receipt of the request for a review under this section and explaining the procedures that will be used to evaluate the request. The notice shall advise the alien that the Service may continue to detain the alien until it has made a determination under this section whether there is a significant likelihood the alien can be removed in the reasonably foreseeable future.

(2) Lack of compliance, failure to cooperate. The HQPDU shall first determine if the alien has failed to make reasonable efforts to comply with the removal order, has failed to cooperate fully in effecting removal, or has obstructed or hampered the removal process. If so, the HQPDU shall so advise the alien in writing, with a copy to counsel of record by regular mail. The HQPDU shall advise the alien of the efforts he or she needs to make in order to assist in securing travel documents for return to his or her country of origin or a third country, as well as the consequences of failure to make such efforts or to cooperate, including the provisions of section 243(a) of the Act. The Service shall not be obligated to conduct a further consideration of the alien's request for release until the alien has responded to the HQPDU and has established his or her compliance with the statutory requirements.

(3) Referral to the State Department. If the HQPDU believes that the alien's request provides grounds for further review, the Service may, in the exercise of its discretion, forward a copy of the

alien's release request to the Department of State for information and assistance. The Department of State may provide detailed country conditions information or any other information that may be relevant to whether a travel document is obtainable from the country at issue. The Department of State may also provide an assessment of the accuracy of the alien's assertion that he or she cannot be returned to the country at issue or to a third country. When the Service bases its decision, in whole or in part, on information provided by the Department of State, that information shall be made part of the record.

(4) Response by alien. The Service shall permit the alien an opportunity to respond to the evidence on which the Service intends to rely, including the Department of State's submission, if any, and other evidence of record presented by the Service prior to any HQPDU decision. The alien may provide any additional relevant information to the Service, including reasons why his or her removal would not be significantly likely in the reasonably foreseeable future even though the Service has generally been able to accomplish the removal of other aliens to the particular country.

(5) Interview. The HQPDU may grant the alien an interview, whether telephonically or in person, if the HQPDU determines that an interview would provide assistance in reaching a decision. If an interview is scheduled, the HQPDU will provide an interpreter upon its determination that such assistance is appropriate.

(6) Special circumstances. If the Service determines that there are special circumstances justifying the alien's continued detention notwithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14, and provide written notice to the alien. In appropriate cases, the Service may initiate review proceedings under § 241.14 before completing the HQPDU review under this section.

(f) Factors for consideration. The HQPDU shall consider all the facts of the case including, but not limited to, the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.

(g) Decision. The HQPDU shall issue a written decision based on the administrative record, including any documentation provided by the alien, regarding the likelihood of removal and whether there is a

significant likelihood that the alien will be removed in the reasonably foreseeable future under the circumstances. The HQPDU shall provide the decision to the alien, with a copy to counsel of record, by regular mail.

(1) Finding of no significant likelihood of removal. If the HQPDU determines at the conclusion of the review that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, despite the Service's and the alien's efforts to effect removal, then the HQPDU shall so advise the alien. Unless there are special circumstances justifying continued detention, the Service shall promptly make arrangements for the release of the alien subject to appropriate conditions, as provided in paragraph (h) of this section. The Service may require that the alien submit to a medical or psychiatric examination prior to establishing appropriate conditions for release or determining whether to refer the alien for further proceedings under § 214.14 because of special circumstances justifying continued detention. The Service is not required to release an alien if the alien refuses to submit to a medical or psychiatric examination as ordered.

(2) Denial. If the HQPDU determines at the conclusion of the review that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the HQPDU shall deny the alien's request under this section. The denial shall advise the alien that his or her detention will continue to be governed under the

established standards in § 214.4. There is no administrative appeal from the HQPDU decision denying a request from an alien under this section.

(h) Conditions of release—

(1) In general. An alien's release pursuant to an HQPDU determination that the alien's removal is not significantly likely in the reasonably foreseeable future shall be upon appropriate conditions specified in this paragraph and in the order of supervision, in order to protect the public safety and to promote the ability of the Service to effect the alien's removal as ordered, or removal to a third country, should circumstances change in the future. The order of supervision shall include all of the conditions provided in section 241(a)(3) of the Act, and § 241.5, and shall also include the conditions that the alien obey all laws, including any applicable prohibitions on the possession or use of firearms (see, e.g., 18 U.S.C. 922(g)); and that the alien continue to seek to obtain travel documents and provide the Service with all correspondence to Embassies/Consulates requesting the issuance of travel documents and any reply from the Embassy/Consulate. The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal, including, but not limited to, attendance at any rehabilitative/sponsorship program or submission for medical or psychiatric examination, as ordered.

(2) Advice of consequences for violating conditions of release. The order of supervision shall advise an alien released under this section that he or she must abide by the conditions of release specified by the Service. The order of supervision shall also advise the alien of the consequences of violation of the conditions of release, including the authority to return the alien to custody and the sanctions provided in section 243(b) of the Act.

(3) Employment authorization. The Service may, in the exercise of its discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) Withdrawal of release approval. The Service may, in the exercise of its discretion, withdraw approval for release of any alien under this section prior to release in order to effect removal in the reasonably foreseeable future or where the alien refuses to comply with the conditions of release.

(i) Revocation of release—

(1) Violation of conditions of release. Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six

months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.

(2) Revocation for removal. The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.

(3) Revocation procedures. Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

(j) Subsequent requests for review. If the Service has denied an alien's request for release under this section, the alien may submit a request for review of his or her detention under this section, six months after the Service's last denial of release under this section. After applying the procedures in this section, the HQPDU shall consider any additional evidence provided by the alien or available to the Service as well as the evidence in the prior proceedings but the HQPDC shall render a de novo decision on the likelihood of removing the alien in the reasonably foreseeable future under the circumstances.

Code of Federal Regulations

Title 8. Aliens and Nationality

Chapter 1. Department of Homeland Security

Subchapter B. Immigration Regulations

Part 241. Apprehension and Detention of Aliens Ordered Removed

Subpart A. Post-Hearing Detention and Removal

§ 241.14. Continued detention of removable aliens on account of special circumstances

(a) Scope. The Service may invoke the procedures of this section in order to continue detention of particular removable aliens on account of special circumstances even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(1) Applicability. This section applies to removable aliens as to whom the Service has made a determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under § 241.13.

(2) Jurisdiction. The immigration judges and the Board have jurisdiction with respect to

determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section, but do not have jurisdiction with respect to aliens described in paragraphs (b), (c), or (d) of this section.

(b) Aliens with a highly contagious disease that is a threat to public safety. If, after a medical examination of the alien, the Service determines that a removable alien presents a threat to public safety initiate efforts with the Public Health Service or proper State and local government officials to secure appropriate arrangements for the alien's continued medical care or treatment.

(1) Recommendation. The Service shall not invoke authority to continue detention of an alien under this paragraph except upon the express recommendation of the Public Health Service. The Service will provide every reasonably available form of treatment while the alien remains in the custody of the Service.

(2) Conditions of release. If the Service, in consultation with the Public Health Service and the alien, identifies an appropriate medical facility that will treat the alien, then the alien may be released on condition that he or she continue with appropriate medical treatment until he or she no longer poses a threat to public safety because of a highly contagious disease.

(c) Aliens detained on account of serious adverse foreign policy consequences of release—

(1) Certification. The Service shall continue to detain a removable alien where the Attorney General or Deputy Attorney General has certified in writing that:

(i) Without regard to the grounds upon which the alien has been found inadmissible or removable, the alien is a person described in section 212(a)(3)(C) or section 237(a)(4)(C) of the Act;

(ii) The alien's release is likely to have serious adverse foreign policy consequences for the United States; and

(iii) No conditions of release can reasonably be expected to avoid those serious adverse foreign policy consequences,

(2) Foreign policy consequences. A certification by the Attorney General or Deputy Attorney General that an alien should not be released from custody on account of serious adverse foreign policy consequences shall be made only after consultation with the Department of State and upon the recommendation of the Secretary of State.

(3) Ongoing review. The certification is subject to ongoing review on a semi-annual basis but is not subject to further administrative review.

(d) Aliens detained on account of security or terrorism concerns—

(1) Standard for continued detention. Subject to the review procedures under this paragraph (d), the Service shall continue to detain a removable alien based on a determination in writing that:

(i) The alien is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) of (B) of the Act or the alien has engaged or will likely engage in any other activity that endangers the national security;

(ii) The alien's release presents a significant threat to the national security or a significant risk of terrorism; and

(iii) No conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be.

(2) Procedure. Prior to the Commissioner's recommendation to the Attorney General under paragraph (d)(5) of this section, the alien shall be notified of the Service's intention to continue the alien in detention and of the alien's right to submit a written statement and additional information for consideration by the Commissioner. The Service shall continue to detain the alien pending the decision of the Attorney General under this paragraph. To the greatest extent consistent with

protection of the national security and classified information:

(i) The Service shall provide a description of the factual basis for the alien's continued detention; and

(ii) The alien shall have a reasonable opportunity to examine evidence against him or her, and to present information on his or her own behalf.

(3) Aliens ordered removed on grounds other than national security or terrorism. If the alien's final order of removal was based on grounds of inadmissibility other than any of those stated in section 212(a)(3)(A)(i), (A)(iii), or (B) of the Act, or on grounds of deportability other than any of those stated in section 237(a)(4)(A) or (B) of the Act:

(i) An immigration officer shall, if possible, conduct an interview in person and take a sworn question-and-answer statement from the alien, and the Service shall provide an interpreter for such interview, if such assistance is determined to be appropriate; and

(ii) The alien may be accompanied at the interview by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government.

(4) Factors for consideration. In making a recommendation to the Attorney General that an alien should not be released from custody on account of security or terrorism concerns, the Commissioner shall take into account all relevant information, including but not limited to:

(i) The recommendations of appropriate enforcement officials of the Service, including the director of the Headquarters Post-order Detention Unit (HQPDU), and of the Federal Bureau of Investigation or other federal law enforcement or national security agencies;

(ii) The statements and information submitted by the alien, if any;

(iii) The extent to which the alien's previous conduct (including but not limited to the commission of national security or terrorism-related offenses, engaging in terrorist activity or other activity that poses a danger to the national security and any prior convictions in a federal, state or foreign court) indicates a likelihood that the alien's release would present a significant threat to the national security or a significant risk of terrorism; and

(iv) Other special circumstances of the alien's case indicating that release from detention would present a significant threat to the national security or a significant risk of terrorism.

(5) Recommendation to the Attorney General. The Commissioner shall submit a written recommendation and make the record available to the Attorney General. If the continued detention is based on a significant risk of terrorism, the recommendation shall state in as much detail as practicable the factual basis for this determination.

(6) Attorney General certification. Based on the record developed by the Service, and upon this recommendation of the Commissioner and the Director of the Federal Bureau of Investigation, the Attorney General may certify that an alien should continue to be detained on account of security or terrorism grounds as provided in this paragraph (d). Before making such a certification, the Attorney General shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national security and classified information and to comply with the requirements of due process.

(7) Ongoing review. The detention decision under this paragraph (d) is subject to ongoing review on a semi-annual basis as provided in this paragraph (d), but is not subject to further administrative review. After the initial certification by the Attorney General, further certifications under paragraph (d)(6) of this section may be made by the Deputy Attorney General.

(e) [Reserved]

(f) Detention of aliens determined to be specially dangerous—

(1) Standard for continued detention. Subject to the review procedures provided in this section, the Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because:

(i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;

(ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and

(iii) No conditions of release can reasonably be expected to ensure the safety of the public.

(2) Determination by the Commissioner. The Service shall promptly initiate review proceedings under paragraph (g) of this section if the Commissioner has determined in writing that the alien's release would pose a special danger to the public, according to the standards of paragraph (f)(1) of this section.

(3) Medical or mental health examination. Before making such a determination, the Commissioner shall arrange for a report by a physician employed or designated by the Public Health Service based

on a full medical and psychiatric examination of the alien. The report shall include recommendations pertaining to whether, due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.

(4) Detention pending review. After the Commissioner or Deputy Commissioner has made a determination under this paragraph, the Service shall continue to detain the alien, unless an immigration judge or the Board issues an administratively final decision dismissing the review proceedings under this section.

(g) Referral to Immigration Judge. Jurisdiction for an immigration judge to review a determination by the Service pursuant to paragraph (f) of this section that an alien is specially dangerous shall commence with the filing by the Service of a Notice of Referral to the Immigration Judge (Form I–863) with the Immigration Court having jurisdiction over the place of the alien's custody. The Service shall promptly provide to the alien by personal service a copy of the Notice of Referral to the Immigration Judge and all accompanying documents.

(1) Factual basis. The Service shall attach a written statement that contains a summary of the basis for the Commissioner's determination to continue to detain the alien, including a description of the evidence relied upon to reach the determination regarding the alien's special

dangerousness. The Service shall attach copies of all relevant documents used to reach its decision to continue to detain the alien.

(2) Notice of reasonable cause hearing. The Service shall attach a written notice advising the alien that the Service is initiating proceedings for the continued detention of the alien and informing the alien of the procedures governing the reasonable cause hearing, as set forth at paragraph (h) of this section.

(3) Notice of alien's rights. The Service shall also provide written notice advising the alien of his or her rights during the reasonable cause hearing and the merits hearing before the Immigration Court, as follows:

(i) The alien shall be provided with a list of free legal services providers, and may be represented by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government;

(ii) The Immigration Court shall provide an interpreter for the alien, if necessary, for the reasonable cause hearing and the merits hearing.

(iii) The alien shall have a reasonable opportunity to examine evidence against the alien, to present evidence in the alien's own

behalf, and to cross-examine witnesses presented by the Service; and

(iv) The alien shall have the right, at the merits hearing, to cross-examine the author of any medical or mental health reports used as a basis for the determination under paragraph (f) of this section that the alien is specially dangerous.

(4) Record. All proceedings before the immigration judge under this section shall be recorded. The Immigration Court shall create a record of proceeding that shall include all testimony and documents related to the proceedings.

(h) Reasonable cause hearing. The immigration judge shall hold a preliminary hearing to determine whether the evidence supporting the Service's determination is sufficient to establish reasonable cause to go forward with a merits hearing under paragraph (i) of this section. A finding of reasonable cause under this section will be sufficient to warrant the alien's continued detention pending the completion of the review proceedings under this section.

(1) Scheduling of hearing. The reasonable cause hearing shall be commenced not later than 10 business days after the filing of the Form I–863. The Immigration Court shall provide prompt notice to the alien and to the Service of the time and place of the hearing. The hearing may be continued at the request of the alien or his or her representative.

(2) Evidence. The Service must show that there is reasonable cause to conduct a merits hearing under a merits hearing under paragraph (i) of this section. The Service may offer any evidence that is material and relevant to the proceeding. Testimony of witnesses, if any, shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(3) Decision. The immigration judge shall render a decision, which should be in summary form, within 5 business days after the close of the record, unless that time is extended by agreement of both parties, by a determination from the Chief Immigration Judge that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien. If the immigration judge determines that the Service has met its burden of establishing reasonable cause, the immigration judge shall advise the alien and the Service, and shall schedule a merits hearing under paragraph (i) of this section to review the Service's determination that the alien is specially dangerous. If the immigration judge determines that the Service has not met its burden, the immigration judge shall order that the review proceedings under this section be dismissed. The order and any documents offered shall be included in the record of proceedings, and may be relied upon in a subsequent merits hearing.

(4) Appeal. If the immigration judge dismisses the review proceedings, the Service may appeal to the Board of Immigration Appeals in accordance with

§ 3.38 of this chapter, except that the Service must file the Notice of Appeal (Form EOIR–26) with the Board within 2 business days after the immigration judge's order. The Notice of Appeal should state clearly and conspicuously that it is an appeal of a reasonable cause decision under this section.

(i) If the Service reserves appeal of a dismissal of the reasonable cause hearing, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board will decide the Service's appeal, by single Board Member review, based on the record of proceedings before the immigration judge. The Board shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens, and shall determine the issue within 20 business days of the filing of the notice of appeal, unless that time is extended by agreement of both parties, by a determination from the Chairman of the Board that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien.

(iii) If the Board determines that the Service has met its burden of showing reasonable cause under this paragraph (h), the Board shall remand the case to the immigration judge for the scheduling of a merits hearing under paragraph (i) of this section. If the Board determines that the Service has not met its burden, the Board shall dismiss the review proceedings under this section.

(i) Merits hearing. If there is reasonable cause to conduct a merits hearing under this section, the immigration judge shall promptly schedule the hearing and shall expedite the proceedings as far as practicable. The immigration judge shall allow adequate time for the parties to prepare for the merits hearing, but, if requested by the alien, the hearing shall commence within 30 days. The hearing may be continued at the request of the alien or his or her representative, or at the request of the Service upon a showing of exceptional circumstances by the Service.

(1) Evidence. The Service shall have the burden of proving, by clear and convincing evidence, that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The immigration judge may receive into evidence any oral or written statement that is material and relevant to this determination. Testimony of witnesses shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(2) Factors for consideration. In making any determination in a merits hearing under this section, the immigration judge shall consider the following non-exclusive list of factors:

(i) The alien's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence;

(ii) The alien's previous history of recidivism, if any, upon release from either Service or criminal custody;

(iii) The substantiality of the Service's evidence regarding the alien's current mental condition or personality disorder;

(iv) The likelihood that the alien will engage in acts of violence in the future; and

(v) The nature and seriousness of the danger to the public posed by the alien's release.

(3) Decision. After the closing of the record, the immigration judge shall render a decision as soon as practicable. The decision may be oral or written. The decision shall state whether or not the Service has met its burden of establishing that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The decision shall also include the reasons for the decision under each of the standards of

paragraph (f)(1) of this section, although a formal enumeration of findings is not required. Notice of the decision shall be served in accordance with § 240.13(a) or (b).

(i) If the immigration judge determines that the Service has met its burden, the immigration judge shall enter an order providing for the continued detention of the alien.

(ii) If the immigration judge determines that the Service has failed to meet its burden, the immigration judge shall order that the review proceedings under this section be dismissed.

(4) Appeal. Either party may appeal an adverse decision to the Board of Immigration Appeals in accordance with § 3.38 of this chapter, except that, if the immigration judge orders dismissal of the proceedings, the Service shall have only 5 business days to file a Notice of Appeal with the Board. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a merits decision under this section.

(i) If the Service reserves appeal of a dismissal, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board shall conduct its review of the appeal as provided in 8 CFR part 3, but shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens. The decision of the Board shall be final as provided in § 3.1(d)(3) of this chapter.

(j) Release of alien upon dismissal of proceedings. If there is an administratively final decision by the immigration judge or the Board dismissing the review proceedings under this section upon conclusion of the reasonable cause hearing or the merits hearing, the Service shall promptly release the alien on conditions of supervision, as determined by the Service, pursuant to § 241.13. The conditions of supervision shall not be subject to review by the immigration judge or the Board.

(k) Subsequent review for aliens whose release would pose a special danger to the public—

(1) Periodic review. In any case where the immigration judge or the Board has entered an order providing for the alien to remain in custody after a merits hearing pursuant to paragraph (i) of this section, the Service shall continue to provide an ongoing, periodic review of the alien's continued detention, according to § 241.4 and paragraphs (f)(1)(ii) and (f)(1)(iii) of this section.

(2) Alien's request for review. The alien may also request a review of his or her custody status because of changed circumstances, as provided in

this paragraph (k). The request shall be in writing and directed to the HQPDU.

(3) Time for review. An alien may only request a review of his or her custody status under this paragraph (k) no earlier than six months after the last decision of the immigration judge under this section or, if the decision was appealed, the decision of the Board.

(4) Showing of changed circumstances. The alien shall bear the initial burden to establish a material change in circumstances such that the release of the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section.

(5) Review by the Service. If the Service determines, upon consideration of the evidence submitted by the alien and other relevant evidence, that the alien is not likely to commit future acts of violence or that the Service will be able to impose adequate conditions of release so that the alien will not pose a special danger to the public, the Service shall release the alien from custody pursuant to the procedures in § 241.13. If the Service determines that continued detention is needed in order to protect the public, the Service shall provide a written notice to the alien stating the basis for the Service's determination, and provide a copy of the evidence relied upon by the Service. The notice shall also advise the alien of the right to move to set aside the prior review proceedings under this section.

(6) Motion to set aside determination in prior review proceedings. If the Service denies the alien's request for release from custody, the alien may file a motion with the Immigration Court that had jurisdiction over the merits hearing to set aside the determination in the prior review proceedings under this section. The immigration judge shall consider any evidence submitted by the alien or relied upon by the Service and shall provide an opportunity for the Service to respond to the motion.

(i) If the immigration judge determines that the alien has provided good reason to believe that, because of a material change in circumstances, releasing the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section, the immigration judge shall set aside the determination in the prior review proceedings under this section and schedule a new merits hearing as provided in paragraph (i) of this section.

(ii) Unless the immigration judge determines that the alien has satisfied the requirements under paragraph (k)(6)(i) of this section, the immigration judge shall deny the motion. Neither the immigration judge nor the Board may sua sponte set aside a determination in prior review proceedings. Notwithstanding 8 CFR 3.23 or 3.2 (motions to reopen), the provisions set forth in this paragraph (k) shall

be the only vehicle for seeking review based on material changed circumstances.

(iii) The alien may appeal an adverse decision to the Board in accordance with § 3.38 of this chapter. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a denial of a motion to set aside a prior determination in review proceedings under this section.