No. 19-897

In the Supreme Court of the United States

TONY H. PHAM, Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, *et al.*,

Petitioners,

v.

MARIA ANGELICA GUZMAN CHAVEZ, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS

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STATEMENT

In the Immigration and Nationality Act (INA), Congress designed a calibrated and comprehensive scheme for immigration-related civil detention.

Section 1226 governs detention when the "decision" "whether the alien is to be removed from the United States" remains "pending." This language carries plain meaning: Before the INA authorizes the government to remove an individual, Section 1226 applies. Because immigration proceedings are often protracted, Congress designed Section 1226 to provide a discretionary framework consistent with the legitimate purposes of civil detention. Individuals with qualifying criminal histories are subject to mandatory detention; all others may request a hearing, at which an immigration judge determines whether an individual's particular circumstances warrant release from detention on bond.

Section 1231, by contrast, provides for mandatory detention—but only during the brief 90-day "removal period." Congress defined this as the time during which the government "*shall remove* the alien from the United States." For the "removal period" to begin—and for Section 1231 to govern detention—the INA must authorize the government to carry out a removal.

The distinction between Sections 1226 and 1231 thus follows from the text: It hinges on whether the INA authorizes the government to remove the individual. Before the government has that authority, Section 1226 governs. After, Section 1231 controls.

To ensure that removal does not result in persecution or torture, individuals may request withholding of removal to particular countries. If an individual is subject to a reinstated order of removal and therefore ineligible for other relief, he or she may accordingly pursue a "withholding-only" claim. During the pendency of

such a proceeding, the INA generally does not authorize the government to remove a noncitizen anywhere. Indeed, the entire purpose of the proceeding is to determine whether the government will have that authority. During these lengthy proceedings, Section 1226 accordingly governs civil detention.

Section 1231 detention begins only after the INA authorizes the government to remove an individual. If a noncitizen loses her withholding claim, then the "removal period" begins, triggering Section 1231 detention. Likewise, if the government identifies a third country to which the INA authorizes removal, that too begins the removal period. But such third-country removals are extraordinarily rare; recent statistics show that, following a grant of withholding, the INA authorizes a third-country removal in less than 2% of cases.

At bottom, the question is whether the INA authorizes the government to conduct a removal. For those in respondents' circumstances, it does not.

A. Legal background.

This case concerns several areas of immigration law governed by the INA: (1) withholding of removal, (2) the reinstatement process and withholding-only proceedings, (3) third-country removal, and (4) civil immigrant detention.

1. Withholding of removal.

The United States has an inviolable policy: It does not remove noncitizens to countries where persecution or torture is likely. See *Convention Against Torture: Hearing Before the Comm. on Foreign Relations*, 101st Cong. 14-15 (1990) (Statement of Deputy Ass't Att'y Gen. Mark Richard) ("The United States does not and, we trust, never would extradite or deport a person to a country where it is known that he would be subjected to torture.").

Pursuant to what is frequently called "statutory withholding," the INA bars the government from removing an individual to a country where his or her "life or freedom would be threatened" because of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

Additionally, Congress has implemented the United States' obligations under the Convention Against Torture (CAT) through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). See Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (Oct. 21, 1998) (codified at 8 U.S.C. § 1231 note). Under FARRA, the United States shall not remove "any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." *Ibid*.

Individuals who fear persecution or torture upon removal may apply for statutory withholding of removal (see 8 U.S.C. § 1231(b)(3)(A)), CAT-based withholding of removal (see 8 C.F.R. § 208.16), and CAT-based deferral of removal (see 8 C.F.R. § 208.17) (collectively, "withholding relief"). Although some individuals are disqualified from requesting statutory and CAT-based withholding (see 8 U.S.C. § 1231(b)(3)(B); 8 C.F.R. § 208.16(d)(2)), CAT deferral is expressly available to everyone, ensuring that the removal of an individual from the United States does not result in torture abroad. See 64 Fed. Reg. 8,478, 8,478-8,479 (Feb. 19, 1999) (acknowledging that CAT deferral protects even those "who assisted in Nazi persecution or engaged in genocide").

2. The reinstatement process and withholding-only proceedings.

Noncitizens who unlawfully reenter the United States are subject to reinstatement of their prior orders

of removal. 8 U.S.C. § 1231(a)(5). This "reinstatement process" (8 C.F.R. § 208.31(a)) begins when an immigration officer suspects that a noncitizen has reentered unlawfully. See 8 C.F.R. § 241.8. The officer determines whether the noncitizen: (1) "has been subject to a prior order of removal" (*id*. § 241.8(a)(1)); (2) "is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal" (*id*. § 241.8(a)(2)); and (3) "unlawfully reentered the United States" (*id*. § 241.8(a)(3)).

Following an unlawful reentry, the INA provides that "the prior order of removal is reinstated." 8 U.S.C. § 1231(a)(5). It "is not subject to being reopened or reviewed," the noncitizen "is not eligible and may not apply for any relief under this chapter," and the noncitizen "shall be removed under the prior order at any time after the reentry." *Ibid*.

"Notwithstanding the absolute terms in which [Section 1231(a)(5)'s] bar on relief is stated," a noncitizen with a reinstated order of removal may seek both statutory and CAT-based withholding of removal relief. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). Accordingly, the reinstatement process includes a self-described "[e]xception for withholding of removal." 8 C.F.R. § 241.8(e). If, during the "reinstatement process," an individual "expresses a fear of returning to the country of removal," he or she is "referred to an asylum officer for a reasonable fear determination." *Id*. § 208.31(a) & (b). See also *id*. § 241.8(e). Absent "exceptional circumstances," "this determination will be conducted within 10 days of the referral." *Id*. § 208.31(b).

If the asylum officer determines that the noncitizen "has a reasonable fear of persecution or torture," a case adjudicating "the request for withholding of removal only" will begin before an immigration judge (IJ). 8

C.F.R. § 208.31(e). See also *id*. § 208.31(g) (limited window for IJ review of reasonable fear determination). While the noncitizen's claim for withholding is pending before the IJ or the Board of Immigration Appeals (BIA), the government may not remove the individual to the country at issue. See 8 C.F.R. § 241.8(e); *id*. § 208.31(e).

Following an IJ's decision on the withholding claim, the parties may appeal to the BIA. See 8 C.F.R. § 208.31(e). A noncitizen may seek review of the BIA's decision in the appropriate court of appeals. See 8 U.S.C. § 1252(a)(1), (a)(4); *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1693 (2020).

Like asylum proceedings, withholding-only proceedings frequently last longer than a year; some take three years or more to reach a final decision. David Hausman, *Fact-Sheet: Withholding-Only Cases and Detention*, ACLU Immigrants' Rights Project 2 (Apr. 19, 2015), perma.cc/35PC-GBH6. See also, *e.g.*, *Martinez* v. *LaRose*, 968 F.3d 555, 557-558 (6th Cir. 2020) (pending withholding-only case that has lasted almost three years, with substantial proceedings yet ongoing).

If withholding relief is granted, it may be terminated only upon further legal proceedings. See 8 C.F.R. §§ 208.24, 208.17(d).

3. Third-country removal.

The INA restricts the countries to which the Department of Homeland Security (DHS) may remove an individual. See 8 U.S.C. § 1231(b)(2). This includes an individual's country of citizenship (*id*. § 1231(b)(2)(D)), last prior residence (*id*. § 1231(b)(2)(E)(iii)), or birth (*id*. § 1231(b)(2)(E)(iv)), as well as "another country whose government will accept the alien" (*id*. § 1231-(b)(2)(E)(vii)). As the Court explained in *Jama* v. *ICE*, 543 U.S. 335, 341-348 (2005), the INA requires the re-

ceiving country's consent before the government may remove a noncitizen to a nation in this last, catch-all category, but consent is not a requirement for removal to the countries listed in (E)(i) through (vi), countries with which the noncitizen has prior ties.

If a noncitizen receives withholding of removal relief based on a risk of persecution or torture in a particular country, the government is permitted to seek authority to remove the individual to some third country. See 8 C.F.R. § 208.16(f); *id*. § 1240.12(d).[1] But, because of the limitations imposed in Section 1231(b)(2)—and the reality that few countries will accept deported individuals who are not their own nationals—third-country removals are rare. American Immigration Council and National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 7 (Oct. 2020), perma.cc/3H8H-EPP8. In 2017, 1,274 individuals were granted withholding relief; only 21 of these individuals—just 1.6 percent—were removed to third countries. *Ibid*.

The government must undertake additional proceedings to execute a third-country removal. First, it must provide the noncitizen notice of the country to which he or she will be removed. See 8 C.F.R. § 208.17(b)(2); *Andriasian* v. *INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Kossov* v. *INS*, 132 F.3d 405, 409 (7th Cir. 1998). Then, the noncitizen has a right to request withholding relief as to that third country. See 8 U.S.C. § 1231(b)(3)(A); FARRA § 2242(a).

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[1] The INA also allows the government to pursue third-country removal prior to a withholding-only proceeding, in lieu of contesting the claim before the IJ.

4. Civil immigration detention.

Two civil detention provisions in the INA are relevant here.

First, Section 1226 governs the detention of noncitizens "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The INA provides that, during these lengthy proceedings, civil detention is mandatory for those with certain criminal convictions. *Id*. § 1226(c). For all others, it is discretionary. *Id*. § 1226(a)(2). After an initial custody determination by DHS,[2] Congress determined that a noncitizen is entitled to a bond hearing before an IJ. 8 C.F.R. § 236.1(d)(1). To obtain release, the BIA holds that the noncitizen must prove that he is neither a danger to the community nor a flight risk. *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

Separately, Section 1231 provides for the mandatory detention of noncitizens during the 90-day "removal period." 8 U.S.C. § 1231(a)(2). The "removal period" is defined as the "period of 90 days" in which "the Attorney General *shall* remove the alien from the United States." *Id*. § 1231(a)(1)(A) (emphasis added). The "removal period" thus begins when the INA authorizes the government to effectuate a physical removal. *Id*. § 1231(a)(1)(B). Consistent with its purpose, U.S. Immigration and Customs Enforcement (ICE) must undertake steps to effectuate removal of noncitizens dur-

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[2] Although Section 1226 refers to the Attorney General, Congress has transferred the enforcement of the INA to the Secretary of Homeland Security. 6 U.S.C. §§ 202, 557; see *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019).

ing the removal period, including by securing travel documents for the noncitizen. 8 C.F.R. § 241.4(g).

B. Factual and procedural background.

1. Respondents are noncitizens who were removed from the United States and then either persecuted, tortured, or threatened with such conduct in the countries to which they had been removed. In several cases, they received death threats. Pet. App. 6a-7a. For example, following his removal to El Salvador, respondent Rodriguez Zometa was immediately threatened with death by the 18th Street Gang. COA JA41. Fearing for their safety, each of the respondents returned to the United States without authorization. Pet. App. 7a.

During the reinstatement process, each respondent asserted a fear of persecution or torture if removed, and "the asylum officer, after an initial screening interview, found that the [respondents] had a 'reasonable fear' of persecution or torture." Pet. App. 7a. Each respondent was therefore placed in withholding-only proceedings. *Ibid.* The government detained all of the respondents during those proceedings without affording them a bond hearing. *Ibid*.

2. Two sets of respondents filed habeas actions in the Eastern District of Virginia, seeking declarations that they were detained under Section 1226, as well as injunctive relief ordering individualized bond hearings. Pet. App. 8a. In one of the two actions, the district court certified a statewide class of similarly situated detainees. *Ibid*.[3]

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[3] The government did not object to class treatment on appeal. See Pet. App. 8a.

The district court entered summary judgment for respondents in both cases, holding that "the text, structure, and intent of the INA compel the conclusion that [respondents were] detained under" Section 1226(a). Pet. App. 66a. The court reasoned that Section 1226—which applies "pending a decision on whether the alien is to be removed" (8 U.S.C. § 1226(a))—must control, "because until withholding-only proceedings are complete, a decision has not been made on whether [respondents] will in fact be removed from the United States." Pet. App. 66a.

The district court rejected the government's contention that the possibility of third-country removal took respondents outside the ambit of Section 1226. Pet. App. 69a-70a. The court explained that "third-country removal would require additional proceedings," including at least "notice and the opportunity for a hearing." *Id*. at 69a.

Section 1231, the court held, "govern[s] only the final logistical period, in which the government has actual authority to remove the alien and need only schedule and execute the deportation." Pet. App. 67a. That much is clear from both the triggering conditions—which center around "legal impediment[s] to actual removal"—and the 90-day duration of the removal period itself: "[I]t would be contrary to congressional intent to shoehorn a class of aliens whose proceedings will typically far exceed 90 days into the 'removal period' for which Congress has specifically intended a 90-day limit." *Id*. at 66a-67a. For these and other reasons, the court concluded, Section 1226 is the better fit.

3. The Fourth Circuit affirmed. Based on a thorough examination of the text and structure of the two provisions, it concluded that—unlike the government's reading—the district court's interpretation "fully effectuates the plain text of the provisions and also ensures

that [Section] 1226 and [Section] 1231 fit together to form a workable statutory framework." Pet. App. 18a.

The court of appeals found that the "plain text of [Section] 1226, which authorizes detention 'pending a decision on whether the alien is to be removed from the United States'" ultimately invokes the question of "whether the government has the authority to execute a removal." Pet. App. 18a-19a. This reading is "confirmed by the text and structure of [Section] 1231," which is triggered "not when 'an alien is ordered removed,' as the government would have it, but only when the 'removal period' begins"—that is, when "the government has the actual legal authority to remove a noncitizen from the country." *Id*. at 19a.

The government's reading, the court observed, "could leave agency officials caught between competing mandates" (Pet. App. 21a), and "unable to meet the 90-day removal deadline" (*id*. at 22a). Section 1231 "is concerned primarily not with detention at all, but with defining the 90-day removal period within which the government *must* remove a noncitizen." *Id*. at 20a. But if a noncitizen in withholding-only proceedings prevails, then she "may *not* be removed to the country designated on the removal order." *Ibid*. And the removal period is limited to 90 days, "strongly suggest[ing] that it is intended to apply only when all legal barriers to removal are cleared away." Pet. App. 21a. Yet it is "obvious" that withholding-only proceedings take "substantially longer than 90 days" and, while ongoing, legal barriers to removal remain. *Ibid*.

Thus, the court concluded that the text and structure of Sections 1226 and 1231 "align." Pet. App. 20a. "Before the government has the actual authority to remove a noncitizen from the country, [Section] 1226 applies; once the government has that authority, [Section] 1231 governs." *Id.* at 18a. And "[b]ecause the gov-

ernment lacks the authority to actually execute orders of removal while withholding-only proceedings are ongoing, [respondents] are detained under [Section] 1226." *Ibid*. (alterations incorporated; quotation marks omitted).

The court found the government's arguments to the contrary unpersuasive. First, as to the government's argument that while withholding-only proceedings are ongoing, the only question "pending" is *where* and not "*whether* the alien is to be removed" (Pet. App. 23a), the court held that the "whether" and "where" questions cannot be "separated so cleanly" because "legally and practically, the two are intertwined." *Id*. at 23a-24a.

Second, the court rejected the government's argument that a reinstated removal order triggers the 90-day removal period even for individuals in withholding-only proceedings. In "[t]he small percentage of cases in which * * * a noncitizen with a 'reasonable fear' of persecution or torture is permitted to apply for withholding of removal," "the decision-making process in their cases remains 'ongoing—*i.e.,* it has *not* been consummated—as the agency is still determining whether [they] will be granted withholding of removal or will be removed.'" Pet. App. 26a-27a.

Finally, the court rejected the government's request for deference. Pet. App. 30a. It noted that, "[a]lthough the courts are divided * * * on the ultimate merits of this dispute, there is one point on which they are unanimous: The regulations cited by the government do not actually specify which section—[Section] 1226 or [Section] 1231—authorizes detention of noncitizens subject to reinstated removal orders who have been placed in withholding-only proceedings." *Ibid*.

Dissenting, Judge Richardson agreed with the government that Section 1231 governs the detention of all noncitizens with pending withholding-only proceedings. Pet. App. 33a.

SUMMARY OF ARGUMENT

A.1. Under our construction, the detention provisions of Sections 1226 and 1231 fit together seamlessly. Before the INA authorizes the government to remove an individual—that is, when the "decision on whether the alien is to be removed from the United States" remains "pending"—Section 1226 applies. By congressional design, that statute authorizes IJs to make individualized determinations about the necessity of long-term civil detention, except in the case of certain noncitizens with criminal histories, who are subject to mandatory detention.

After the INA authorizes a noncitizen's removal, the "removal period" begins, and the government is obligated to effectuate the removal of that individual from the United States. The mandatory detention of Section 1231 facilitates that removal.

The government's contrary interpretation makes a hash of both statutes. It claims that a decision that a noncitizen "is to be removed" has already been made, even when the INA does not authorize the government to remove the individual. Similarly, the government claims that the "removal period" begins—triggering an obligation to remove within 90 days—long before it is determined whether the INA will ever authorize the government to remove the individual. These are not plausible constructions of the statutes.

2. During the pendency of a withholding-only proceeding, the INA does not authorize the government to remove an individual. These are lengthy proceedings, the very kind that Congress designed Section 1226 to

govern. The government's own conduct confirms that the "removal period" has not yet begun.

3. The possibility of third-country removal does not alter the calculus. To be sure, we agree with the government to a point: In circumstances where the INA authorizes the government to remove an individual to a third country, the removal period will begin, and Section 1231 will govern detention in service of physical removal. But for the government to possess this authority, it must first identify a country to which the INA allows removal of the noncitizen.

In the vast majority of withholding cases, there is no such country. Recent statistics indicate that, in more than 98% of cases where withholding relief is granted, the government does not remove the individual to some third country. In all of those cases, the withholding-only proceeding does decide "*whether*" a noncitizen is "to be removed"—not, as the government would have it, merely to "where" the individual is to be removed.

4. The text and placement of the reinstatement provision, 8 U.S.C. § 1231(a)(5), are consistent with our construction. When the INA is read as a whole, Section 1231(a)(5) does not establish that the "removal period" begins for noncitizens well before the INA authorizes removal anywhere.

5. *Zadvydas* proves our point. There, the INA *did* authorize the government to remove the noncitizens to specific countries; the barriers to their removal were practical and diplomatic. The decision to remove the individuals had indeed been made. That is why Section 1231 detention applied, and that authority is what is fundamentally lacking here.

B. Not only is our construction truer to the statutory text, but it is necessary to avoid routine constitu-

tional violations. Withholding-only proceedings often take years to resolve. The Fifth Amendment's fundamental protection of personal liberty does not authorize such prolonged civil detention absent an opportunity for a hearing before a neutral adjudicator, who may balance the individual's liberty interests with the facts supporting any legitimate detention rationale. In designing the INA, Congress channeled prolonged detention into Section 1226 precisely to ensure the protection of individual liberty interests.

C. For similar reasons, respondents' interpretation accords with the purposes of the INA's civil detention regime; the government's does not. Civil detention is permissible in order to protect the community, to preclude a serious risk of absconding, or to aid imminent physical removal. Section 1226's discretionary detention provision considers these legitimate detention rationales as well as individual liberty interests. It directs IJs to make individualized detention determinations for the duration of protracted legal proceedings.

The government's construction, by contrast, does not advance any legitimate purpose of the INA. It would impose mandatory detention on thousands of people each year, for the entire duration of a lengthy withholding-only proceeding, regardless of whether an individual's circumstances warrant that substantial intrusion on liberty. The very bond hearings that respondents request address the interests that the government now seeks to invoke.

The government was more candid in the petition for certiorari, admitting there its true objective—to use immigration detention as a "tool[]" to "diminish illegal immigration." Pet. 15. But it is categorically *im*permissible to use civil immigration detention as a means to punish and deter.

D. The government's argument for *Chevron* deference lacks all merit. It made no such argument in the petition for certiorari. If it had, we would have responded that this case presents a predicate question: Whether the Court should overturn *Chevron*. The Court should not apply *Chevron* without first resolving that threshold issue. In any event, the government's deference argument is baseless because no regulation addresses which detention provision applies in these circumstances.

ARGUMENT

A. Section 1226 governs detention during withholding-only proceedings.

Under our proposed construction, Sections 1226 and 1231 work hand-in-glove. Section 1226 provides for long-term detention "pending" the often-lengthy legal proceedings that determine "whether" the individual is "to be removed." That is, it applies before the INA authorizes the government to remove a person from this country. During these protracted proceedings, the immigration judge has discretion as to whether to order the individual detained. Once the INA authorizes removal, the "removal period" begins. During this time, the government "*shall remove* the alien from the United States within a period of 90 days," and Section 1231 mandates detention. 8 U.S.C. § 1231(a) (emphasis added).

In withholding-only proceedings, the very question at issue is whether the INA will authorize the government to remove the individual from the United States. Thus, the question "whether" the individual is "to be removed" remains "pending." 8 U.S.C. § 1226(a). Similarly, the "removal period" cannot begin long before the INA ever authorizes removal. It makes no sense to say that someone is within the "removal period"—the peri-

od when the government "shall remove" him—when the INA does not actually allow the government to remove him.

1. Section 1226 governs detention before the INA authorizes removal; Section 1231 governs detention after.

a. By its text, Section 1226(a) provides that a noncitizen may be "detained pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a).

To accurately describe a noncitizen as one who is "to be removed," the INA must authorize the government to physically remove the individual—that is, the government must have authority to move that person physically to a foreign country. See Webster's New Twentieth Century Dictionary 1530 (2d ed. 1966) (defining "removed" as "changed in place" or "carried to a distance"). If proceedings remain ongoing to determine whether the INA will in fact permit removal, the individual is accurately described as one "detained pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a).

Put most simply, if legal impediments remain to effectuating a removal—if the INA does not yet authorize the government to put an individual on an outbound plane—the decision "whether the alien is to be removed" has not yet been made. Ordinary English does not countenance describing this individual as one who "is to be removed." Rather, that "decision" remains "pending."

The government resists our position by inventing a new one: It conflates our construction (which depends on whether the INA authorizes the government to remove) with whether the government has the "*practical* ability to carry out an order." Pet'r Br. 22 (emphasis added). It insists that Section 1226(a) does not encom-

pass circumstances in which there is a "practical" obstacle to removal (*ibid.*), whereas Section 1231 does (such as the refusal of a foreign nation to receive an individual (*id.* at 23-25)).

The government's contention confuses two distinct things—whether the INA supplies *legal* authority to remove, and whether there exist practical obstacles that prevent the exercise of that legal authority. Assume, for a moment, the INA authorizes the removal of an individual to his or her country of birth, but that country is temporarily not accepting returnees as a result of COVID-19. In that case, the government would possess *legal authority* under the INA to remove, even though it lacks the *practical* ability to remove the individual at that instant.[4] We agree with the government that an individual in those circumstances would appropriately be described as one "who is to be removed." Such an individual would be subject to Section 1231, not Section 1226, because the INA authorizes the government to remove her. Legal authority to remove is the relevant inquiry for whether Section 1226 applies—and the government's reference to practical obstacles to removal emanating from circumstances outside the INA's scope are beside the point.

b. The text of Section 1231 further compels this result. Once the INA supplies the government with legal authority to remove an individual from the United

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[4] Or suppose that, because the United States lacks diplomatic relations with a country, that country will not accept returnees. These examples parallel the circumstances in *Zadvydas*, described in greater detail below. See pages 35-37, *infra*. To be sure, legal authority under the INA sometimes (but not always) depends upon the consent of the destination country. See pages 5-6, *supra*.

States, Section 1231 detention begins. This conclusion follows inescapably from the statute's definition of the essential term "removal period."

The detention provision of Section 1231 applies "[d]uring the removal period." 8 U.S.C. § 1231(a)(2). Of critical importance here, Congress expressly defined the "removal period" as the "period of 90 days" in which the DHS Secretary "*shall* remove the alien from the United States." 8 U.S.C. § 1231(a)(1)(A) (emphasis added).

The word "shall" "'indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.'" *National Ass'n of Home Builders* v. *Defenders Of Wildlife*, 551 U.S. 644, 661 (2007). And the directive imposed by "shall" is especially pronounced when, as here, "a statute distinguishes between 'may' and 'shall;'" in these circumstances, "it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016). Indeed, Section 1231 elsewhere repeatedly uses the permissive term "may," underscoring the obligatory nature of the word "shall" in the statutory context. See, *e.g.*, 8 U.S.C. § 1231(a)(1)(C) ("the alien *may* remain in detention"); *id*. § 1231(a)(6) (a noncitizen "*may* be detained beyond the removal period"); *id*. § 1231(b)(2)(C) ("The Attorney General *may* disregard a designation.").

Because the removal period is the time during which the government has an obligation to remove an individual, it follows that the removal period cannot begin before the INA authorizes the government to execute the removal order. Section 1231(a)(1)(A) admits of no other reading.

This conclusion is reinforced by the three events that trigger the "removal period." 8 U.S.C.

§ 1231(a)(1)(B). The removal period does not begin until the order of removal is "administratively final." *Id*. § 1231(a)(1)(B)(i). It does not begin if a court of appeals has stayed removal. *Id*. § 1231(a)(1)(B)(ii). And it does not begin if a noncitizen is detained in non-immigration custody. *Id*. § 1231(a)(1)(B)(iii). Thus, the "removal period" does not begin until these impediments to the government's implementation of a removal order are eliminated; the "removal period" is inherently tied to the government's authority to remove an individual from this country.

The balance of Section 1231 confirms that the "removal period" is tethered to the final steps necessary to execute the removal order—steps that can be taken only if the government has authority to remove. Section 1231(a)(1)(C) suspends the removal 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." Regulations likewise obligate ICE to obtain travel documents for the noncitizen during the "removal period." 8 C.F.R. § 241.4(g)(2).

In sum, the "removal period"—and therefore Section 1231 detention—cannot begin until the INA authorizes the government to remove an individual. That is why it is called the "*removal* period."

Section 1231's plain text thus derails the government's position. As the government would have it, the "removal period" begins—triggering the government's *obligation* to remove—long before the government pos-

sesses authority to remove. That interpretation is fundamentally at odds with the statutory language.[5]

c. The government reads Section 1231 differently by fixating on the phrase "ordered removed." Pet'r Br. 13-15, 23-24. But this attempt to pluck the phrase from the broader text fails to account for the critical obligation that arises during the "removal period"—that is, the requirement to actually remove the noncitizen. 8 U.S.C. § 1231(a)(1)(A). As we just said, the government does not explain how the "removal period" can begin at a time when the government lacks authority to remove, and whether it will gain that authority is the subject of ongoing legal proceedings.

Additionally, the balance of Section 1231 defeats the government's essential argument—that Section 1231 applies whenever a noncitizen is "ordered removed." The text is explicit that a removal order alone is insufficient to trigger the start of the "removal period." 8 U.S.C. § 1231(a)(1)(B). Rather, that order must have "become[] administratively final." *Id*. § 1231(a)(1)(B)(i). Similarly, if a court of appeals stays the removal order, the "removal period" of Section 1231 does not begin (*id*. § 1231(a)(1)(B)(ii)), even though that

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[5] Section 1231(a)(6) provides for limited continuing detention in the event that the government "fails to remove the alien during" the 90-day removal period. *Zadvydas* v. *Davis*, 533 U.S. 678, 682 (2001). See Pet'r Br. 25-26. But for Section 1231(a)(6) to attach, the "removal period" must have first begun, because the statute authorizes limited detention "*beyond* the removal period." 8 U.S.C. § 1231(a)(6) (emphasis added). Our central point is that the "removal period" cannot begin *before* the INA authorizes removal. Section 1231(a)(6), by contrast, addresses situations where obstacles to remove arise apart from INA authority. See pages 17-18, *supra*.

noncitizen remains one "ordered removed." Likewise, noncitizens incarcerated in state or federal criminal custody may be "ordered removed," yet the "removal period" still does not begin. *Id*. § 1231(a)(1)(B)(iii).

This text thus refutes the government's central contention that "Section 1231(a) governs the detention of an alien who has been 'ordered removed.'" Pet'r Br. 14. Rather, the text compels the conclusion that the removal period begins only after the government possesses legal authority under the INA to actually effectuate a removal. As we will show (see pages 22-23, *infra*), that authority is lacking here.[6]

d. The pragmatic choices Congress made in the INA confirm our construction, not the government's.

By design, Section 1226 supplies detention authority during the pendency of lengthy immigration proceedings that determine whether the INA authorizes an individual's physical removal. During these protracted proceedings, Congress allowed DHS or an IJ to release a noncitizen on bond or under conditions of supervision. 8 U.S.C. § 1226(a). See also 8 C.F.R.

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[6] 8 U.S.C. § 1231(a)(7) provides that a noncitizen "ordered removed" is not eligible for employment authorization unless the government finds that an individual "cannot be removed due to the refusal" of foreign countries to accept that individual or that "removal of the alien is otherwise impracticable or contrary to the public interest." This language does not bear on when the "removal period" begins, which is the relevant inquiry for Section 1231 detention. And it certainly is not in tension with our central point that legal authority under the INA to remove is what renders an individual subject to Section 1231. The refusal of a foreign country to accept an individual or other practical obstacles outside the INA do not determine whether, from the perspective of the INA, an individual is one who is "to be removed."

§ 236.1(d)(1) (authorizing IJs to make custody determinations). That determination is individualized, assessing whether the noncitizen is a flight risk or a danger to the community. *Id*. § 236.1(c)(8). Congress thus crafted a statute that balances the liberty interests of non-citizens with the legitimate purposes of civil detention.

Conversely, Section 1231(a) requires mandatory, short-term detention to effectuate physical removal. The length of the "removal period"—90 days—is designed "to afford the government a reasonable amount of time within which to make the travel, consular, and various other administrative arrangements that are necessary to secure removal." *Diouf* v. *Mukasey*, 542 F.3d 1222, 1231 (9th Cir. 2008). This detention is consistent with its role in the physical execution of a removal order.

By focusing myopically on a few individual phrases, the government's arguments to the contrary thus contravene the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Defenders of Wildlife*, 551 U.S. at 666 (quotation omitted). See also *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which * * * language is used and the broader context of the statute as a whole") (quotation omitted).

2. While a withholding claim is pending, the INA does not authorize removal.

Because the government lacks authority under the INA to execute a removal order during the pendency of withholding-only claims, Section 1226 governs detention during this period.

a. The government does not contest the fundamental principle: As the court of appeals concluded, the government cannot "execute removal orders 'while withholding-only proceedings are ongoing.'" Pet'r Br. 21.

Indeed, a withholding claim proceeds only if an asylum officer or an IJ determines that the noncitizen has a "reasonable fear" of prosecution or torture in that country. 8 C.F.R. § 208.31(e) & (g). It would defeat the purpose of withholding relief if the individual, after being found to have a reasonable fear, were removed to the country in question *before* adjudication of the withholding claim. See FARRA § 2242(a), 8 U.S.C. § 1231 note.

The government therefore does not argue—because it cannot plausibly do so—that the INA authorizes removal of a noncitizen prior to the completion of a withholding-only proceeding.[7] As a result, the very issue to be addressed in a withholding-only proceeding is *whether* the individual will be removed from this country. Until that determination is made, the "decision on whether the alien is to be removed" remains "pending." 8 U.S.C. § 1226(a).

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[7] As we explain below (see pages 27-31, *infra*), if the INA authorizes removal to some third country—an outcome that is extraordinarily rare—then the government would have authority to remove independent of the withholding-only proceeding. But the government's attempt to distinguish "whether" a noncitizen is "to be removed" from "where" he is "to be removed" is, for reasons we will describe, quite incorrect. In short, if the answer to the "where" question is "nowhere" (as it usually is when withholding is granted), that addresses "whether" the noncitizen is "to be removed."

And viewing the question from the perspective of Section 1231(a), it is not plausible for the government to maintain that the "removal period" has begun—the statutory prerequisite to Section 1231 detention—when the government in fact lacks authority under the INA to remove the noncitizen anywhere. Since the removal period imposes a mandatory obligation on the government to remove the individual (8 U.S.C. § 1231(a)(1)(A)), this period cannot begin long before the government possesses authority to remove.

b. This conclusion, moreover, follows from the INA's express determination of when a removal order is "final." The removal period begins no earlier than the "date the order of removal becomes administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The INA in turn defines when an "order of deportation" is "final" (8 U.S.C. § 1101(a)(47)), which is the definition that controls the meaning of an "order of removal" (see *Nasrallah*, 140 S. Ct. at 1690).

Under the INA, an order of removal is final either when the BIA affirms the order or at "the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B). The government claims that, at the time of reinstatement, the *prior* removal order is "*already* final." Pet'r Br. 27-28 (emphasis added). But this analysis, focusing on the prior order, is necessarily wrong: As every court of appeals has held, federal courts may exercise judicial review over the *reinstatement* order, and *that* is a new order of removal subject to judicial review.[8] Under the govern-

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[8] *Arevalo* v. *Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda* v. *Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias* v. *Ash-*

ment's construction, courts would be stripped of jurisdiction to adjudicate reinstatement orders (because such appeals would be time barred)—a contention that eleven circuits all reject.

And, in circumstances where withholding claims are raised, the finality of the *reinstatement* order—and thus the trigger for the removal period—turns on the completion of the withholding-only proceedings. Once again, the lower courts agree unanimously that "the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete." *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015). That is, "the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete." *Ibid*. See also *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 506 (5th Cir. 2016); *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *Jimenez-Morales* v. *United States Att'y Gen.*, 821 F.3d 1307, 1309 (11th Cir. 2016).

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croft, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner* v. *Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez* v. *INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Briseno-Sanchez* v. *Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot* v. *Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez* v. *Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003) ("Although § 1252 speaks specifically of judicial review of 'orders of removal,' every circuit to address the question has found [Section] 1252 to cover review of reinstatement orders as well."); *Sarmiento Cisneros* v. *United States Att'y Gen.*, 381 F.3d 1277, 1278 (11th Cir. 2004).

This is precisely why the implementing regulations speak not of a reinstatement decision that becomes immediately final, but rather a "reinstatement *process*"; if a noncitizen expresses fear "in the course of" that process, withholding-only proceedings are initiated. 8 C.F.R. § 208.31(a) (emphasis added). That "process" does not conclude until the withholding-only proceedings are completed. *Luna-Garcia*, 777 F.3d at 1185.

c. The typical duration of withholding-only proceedings further confirms that they fit within the ambit of Section 1226, not Section 1231. As the lower courts here recognized, "it is obvious that withholding-only proceedings take substantially longer than 90 days." Pet. App. 21a (quoting Pet. App. 67a). The "government does not dispute this common-sense assessment." *Ibid*. Nor could it, as withholding-only proceedings "are lengthy, beginning * * * with a screening interview by an asylum officer, followed by referral to an immigration judge for an administrative hearing, a subsequent decision by that judge, and the opportunity for appeal to the Board of Immigration Appeals." *Ibid*. It is no surprise, then, that withholding-only proceedings routinely exceed a year in length, and they frequently extend to multiple years. See Hausman, *Fact-Sheet*, *supra*, at 2.

Indeed, the temporal duration of these proceedings renders the government's alternative construction unsound. As we have said, Congress directs that ICE "shall remove the alien from the United States" during the "period of 90 days," which is the "removal period." 8 U.S.C. § 1231(a)(1)(A). The Court should not construe the statute in a manner that makes it structurally impossible for ICE to satisfy its statutory obligation. It makes little sense to interpret the INA such that "an entire class of cases will put government officials—

routinely and completely foreseeably—in dereliction of their statutory duties." Pet. App. 22a.[9]

d. The government's own conduct confirms that, during the pendency of withholding-only proceedings, the "removal period" has not yet begun.

The governing regulation obligates ICE to take concrete actions during the "removal period" to execute the order. For example, ICE must "undertake appropriate steps to secure travel documents for the alien * * * before * * * the expiration of the removal period." 8 C.F.R. § 241.4(g)(2). Here, however, ICE did not undertake that obligation while respondents' withholding-only proceedings were underway. As to respondent Romero, for example, the government simply averred that "ICE is routinely able to obtain travel documents from the government of El Salvador" and thus "there is every reason to believe that it could obtain a valid travel document should Petitioner's appeal be denied." COA JA150. See also COA JA162-163 (petitioner Serrano-Colocho); COA JA167-168 (petitioner Castro-Castro). Of course, it was sensible that ICE never undertook these steps, as it had no authority to remove these individuals anywhere.

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[9] The government (at 30) misconstrues the phrase "[e]xcept as otherwise provided in this section." 8 U.S.C. § 1231(a)(1)(A). The government may have longer than 90 days to effectuate a removal when, for example, "the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure." *Id*. § 1231(a)(1)(C). The clause does not, as the government would have it, neuter the very point of the "removal period," which is to actually remove the individual.

3. The government's focus on third-country removal is misplaced.

As we have described, the government's proposed construction is untenable: It requires the Court to accept that the decision "whether" a noncitizen is "to be removed" is made before the INA ever authorizes removal anywhere, and it likewise requires the Court to conclude that the "removal period" begins before the INA actually permits the government to remove an individual. Neither conclusion is correct.

Resisting the first point, the government maintains "*whether* the alien is to be removed from the United States" is distinct from "*where* the alien may be sent." Pet'r Br. 16. Thus, because a grant of withholding "leaves the underlying removal order intact and leaves the government free to remove the alien to another country," the government (*ibid.*) would conclude that a withholding decision does not determine "*whether* the alien is to be removed." 8 U.S.C. § 1226(a) (emphasis added).

The flaw with this argument is that the "whether" and "where" inquiries cannot be separated. See Pet. App. 23a. A determination as to "whether" a noncitizen will be removed requires, as one predicate, identification of a country to which the INA authorizes removal. If there is no country to which the INA authorizes removal—or if the government has not yet undertaken the proceedings to identify such a country—the determination as to "whether" a noncitizen will be removed has not yet been made.[10]

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[10] Put slightly differently, if the answer to the question "where" the INA authorizes a noncitizen's removal is "nowhere," that re-

As we explained (see pages 5-7, *supra*), the INA limits the range of countries to which an individual may be removed. 8 U.S.C. § 1231(b)(2). A typical place of removal is the country where the noncitizen is a subject, national, or citizen. *Id*. § 1231(b)(2)(D). While other alternatives exist, they are not generally applicable; for example, a noncitizen may also be removed to the country where she was born, a consideration relevant only if that differs from her country of citizenship. *Id*. § 1231(b)(2)(E)(vi). Indeed, for most, the country of citizenship is the same nation as all other statutory options. Critically, the government cannot legally remove a noncitizen to a country in which he lacks one of the statutorily defined connections, *unless* that nation agrees specifically to "accept the alien into that country." *Id*. § 1231(b)(2)(E)(vii).[11]

In addition to these structural limitations on removal authority, the INA includes the statutory-withholding bar on removal to places where an individual is likely to be persecuted (8 U.S.C. § 1231(b)(3)), and the CAT-based bar on removal to a place where

solves the question of "whether" the individual is "to be removed"—she will *not* be removed.

[11] The government is simply wrong in asserting that "practical and geopolitical considerations" form the sole "inability to remove" noncitizens to a third country. Pet'r Br. 31. The INA does not authorize the government to remove a noncitizen to any country in the world. Rather, to remove an individual to a third country, a country within the scope of Section 1231(b)(2)(E) must exist. The "terminal clause" of (2)(E), which provides for removal to countries in which a noncitizen does not possess one of the enumerated connections, contains "an acceptance requirement." *Jama*, 543 U.S. at 341-342. Thus, for (2)(E)(vii) to supply authority under the INA to remove a noncitizen, the foreign nation must first agree to accept the individual. *Ibid*.

torture is likely (FARRA § 2242, 8 U.S.C. § 1231 note). Before the government may remove an individual to a third country, it must first provide the noncitizen notice and allow an opportunity to request withholding as to *that* country.[12] See 8 C.F.R. § 208.17(b)(2); *Andriasian*, 180 F.3d at 1041; *Kossov*, 132 F.3d at 409. The full panoply of withholding relief applies to any third country designation. See 8 U.S.C. § 1231(b)(3)(A); FARRA § 2242, 8 U.S.C. § 1231 note.

Absent identification of a country to which the INA authorizes removal—both in the sense that the country is eligible under Section 1231(b)(2) and not blocked by the withholding mechanisms in Section 1231(b)(3) and FARRA § 2242—no decision on "whether the alien *is to be removed*" has yet been made. 8 U.S.C. § 1226(a) (emphasis added). Rather, for that decision to have been made, there must be a determination that the INA authorizes removal to some specific country.

Most often, if an IJ grants withholding of removal as to the noncitizen's country of citizenship, the INA does not authorize removal to some third country. That is why, "[i]n practice," individuals granted "withholding of removal" "are almost never removed from the U.S." *Kumarasamy* v. *Attorney Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006). In 2017, 1,274 noncitizens were granted withholding relief; only 21 of these individuals—just 1.6 percent—were removed to third countries. American Immigration Council and National Immigrant Justice Center, *The Difference Between Asy-*

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[12] Take for example, a Yazidi woman who wins a claim that she is likely to be persecuted or tortured on the basis of her religion if she is removed to Syria. She may well present the same claim—and win—for withholding as to Iraq.

lum and Withholding of Removal 7 (Oct. 2020), perma.cc/3H8H-EPP8. Against this backdrop, it blinks reality for the government to maintain that withholding proceedings determine only "*where* and *when* removal may occur," and not "*whether* the alien is to be removed from the United States." Pet'r Br. 11 (emphasis added).

Indeed, if third-country removal did ensure robust removal of noncitizens granted withholding—that is, if it took the "whether" question off the table, leaving only the "where"—it would be surprising for the government to routinely expend considerable resources litigating a few thousand withholding-only cases each year. Following a noncitizen's identification of a reasonable fear of persecution or torture in one country, the government could simply choose to remove an individual to an available third country in lieu of litigating the withholding claim. The government virtually never does so, because most often no third country is available.

But let us be clear: If the government can identify a third country to which the INA authorizes removal, then the removal period would begin. In that circumstance, the government would have legal authority to effectuate a removal, and Section 1231(a) would provide for detention incident to removal. Our argument thus accounts for third-country removal; that process just has to be *lawfully available in a particular case* for it to be relevant to detention. The mere existence of third-country removal provisions does not weigh on the

construction of the dividing point between Sections 1226 and 1231.[13]

There is nothing "patently unworkable" about this construction. Pet'r Br. 34. It has governed immigration detention in Virginia for the nearly three years since the district court's injunction in this case, and throughout the Second Circuit for more than four years. Rather, the detention provision is responsive to the noncitizen's proceedings: As in any other kind of case, once the INA authorizes the government to physically remove an individual from the United States, the "removal period" begins, triggering Section 1231 detention.

4. Respondents' construction is consistent with the reinstatement statute's text and placement.

To resist our construction, the government points to the text (Pet'r Br. 15-17) and placement (*id*. at 17-

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[13] The government's response on this score is a curious one. It chastises the court of appeals for supposedly "ignor[ing] the law based on its own characterization of such dispositions as merely 'theoretical.'" Pet'r Br. 31. And it paints our position as asking the Court to "ignore[]" the "legal principle" that withholding protection "shield[s] aliens from removal to particular countries." *Id*. at 33. That withholding relief is country-specific is obvious and unarguable. But the government misses the point. Until some third country is identified—a country to which the INA authorizes the government to remove an individual—"whether" the noncitizen "is to be removed" has yet to be resolved. 8 U.S.C. § 1226(a). The government fails to explain how the mere *possibility* that, in some sliver of cases, a third country might serve this role should result in the fiction that noncitizens in these circumstances are *always* "to be removed." The conclusion that the government would have the Court draw is, as a factual matter, demonstrably false.

19) of the reinstatement statute, 8 U.S.C. § 1231(a)(5). These contentions fail to account for the statutory relationship between withholding-only proceedings and the reinstatement of removal process.

a. The government claims (at 14, 16) that the decision whether an individual is "to be removed" from the United States is not "pending" on account of Section 1231(a)(5). That provision provides that, following reinstatement, a removal order "is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5). The noncitizen subject to the removal order "is not eligible and may not apply for any relief under this chapter," and that individual "shall be removed under the prior order at any time." *Ibid*.

Read in isolation, the absolute language of Section 1231(a)(5) could suggest that noncitizens with reinstated orders of removal are ineligible for withholding relief—indeed, it is "relief" available under the INA. Likewise, it could suggest that removal may be effectuated notwithstanding a pending claim for withholding.

But such a construction would plainly conflict with the specific protections that establish withholding relief. The INA is clear that "the Attorney General *may not* remove an alien" to a place where persecution is likely. 8 U.S.C. § 1231(b)(3)(A). While statutory withholding contains certain exceptions (*id*. § 1231(b)(3)(B)), there is no exception for reinstated removal orders. And the statute incorporating CAT relief is even more absolute; it protects "any person" (FARRA § 2242(a), 8 U.S.C. § 1231 note), which creates a categorical obligation that the United States does not remove *anyone* to a place where torture is likely.

The Court has already harmonized these statutory provisions. In *Fernandez-Vargas*, it recognized the "absolute terms" in which Section 1231(a)(5) provides a

"bar on relief." 548 U.S. at 35 n.4. But, "[n]otwithstanding" that statutory text, a noncitizen with a reinstated order of removal "may seek withholding of removal" both under the statutory-based and CAT-based withholding mechanisms. *Ibid*. See also *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" for CAT-based relief.).[14]

Because of these independent statutes, Section 1231(a)(5) does not render "made and * * * final" the decision "on whether the alien is to be removed *from* the United States." Pet'r Br. 16. That is why the regulations provide for withholding-only claims in the context of reinstatement proceedings. See, *e.g.*, 8 C.F.R. §§ 241.8(e), 208.31. When a noncitizen presents a claim for withholding of removal, the decision "whether the alien is to be removed from the United States" is made only after those proceedings conclude. Until then, it is "pending."

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[14] The government agrees (at 4) that "[e]ven an alien subject to a reinstated removal order may seek statutory withholding and CAT protection." Indeed, the specific statutes providing withholding relief in absolute terms govern the more general provision regarding reinstatement proceedings. See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Statutory withholding identifies its exceptions, and reinstatement proceedings are not among them. 8 U.S.C. § 1231(b)(3)(B). CAT-based withholding was adopted specifically to admit no exception. See pages 2-3, *supra*. If there were a conflict (there is not), FARRA's adoption in 1998 (see Pub. L. No. 105-277, 112 Stat. 2681-822) post-dates Section 1231(a)(5) (see Pub. L. No. 104-208, § 305(a)(3), 110 Stat 3009 (Sept. 30, 1996)), and thus controls.

b. The relationship between these statutes also answers the government's structural argument—that an inference can be drawn by Section 1231(a)(5)'s placement in Section 1231. Pet'r Br. 17-19.

That inference falters for a simple reason: In the usual case, no withholding-only proceeding accompanies a reinstated order of removal. Withholding proceedings are the "[e]xception" (8 C.F.R. § 241.8(e)), not the norm. Most often, when there is a reinstated order of removal, it *is* the case that the noncitizen is immediately placed in the removal period, beginning Section 1231 detention. See Pet. App. 26a (describing that, in "the ordinary case," individuals with reinstated orders of removal immediately enter the removal period).

In 2015, for example, 137,449 people were subject to a reinstated order of removal. See Bryan Baker and Christopher Williams, *Immigration Enforcement Actions: 2015*, DHS 8 (July 2017), perma.cc/U2HJ-WLKY. But in 2014, immigration judges completed only 2,551 withholding-only proceedings. See Hausman, *Fact-Sheet*, *supra*, at 1. See also FY 2016 Statistics Yearbook, DOJ, at B2 (Mar. 2017), perma.cc/W4HC-YY5E. In more than 98% of cases, there is no withholding-only proceeding, and the reinstatement process immediately yields the result that an individual is "to be removed" (8 U.S.C. § 1226(a)), and the "removal period" begins (*id*. § 1231(a)(1)).

The placement of Section 1231(a)(5) in Section 1231 thus makes good sense. But that does not support an inference as to which provision governs when there is a withholding-only claim. And, in any event, this placement certainly cannot overcome the plain statuto-

ry text in Sections 1226 and 1231, which together identify authority to remove under the INA as the core distinguishing feature of the two detention regimes.[15]

5. Zadvydas *does not aid the government*.

The government is wrong to rely (at 25-26) on *Zadvydas*. If anything, that case underscores the rule that we urge: The division between the statutory provisions is authority to remove under the INA.

In *Zadvydas,* the noncitizens were subject to Section 1231(a) detention precisely because the INA *did* authorize their removal. Consistent with U.S. law, Kestutis Zadvydas was ordered removed to Germany, his country of birth. 533 U.S. at 684; see 8 U.S.C. § 1231(b)(2)(E)(v) (identifying noncitizen's birthplace as appropriate destination for removal). He had no withholding claim or any other basis under the INA to resist removal to Germany.

Instead, Zadvydas was not removed because Germany "would not accept" him. 533 U.S. at 684. But, unlike the provisions on unrelated third countries (see pages 5-6, *supra*), the consent of a noncitizen's birth country is *not* a legal prerequisite to removing him there. *Jama*, 543 U.S. at 341-348 (no "acceptance requirement" for removal to countries described in 8 U.S.C. § 1231(b)(2)(E)(i)-(vi)); see also *id.* at 347 ("It would be a stretch to conclude that merely because Congress expressly directed the Attorney General to

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[15] The placement of statutory withholding in Section 1231 does not support an inference, either. In non-reinstatement cases, withholding claims are usually adjudicated as part of the removal proceeding. See *Nasrallah*, 140 S. Ct. at 1692. But that does not mean that Section 1231 governs during these proceedings.

obtain consent when removing an alien to a country with which the alien lacks the ties of citizenship, nativity, previous residence, and so on, Congress must also have *implicitly* required him to obtain advance acceptance from countries with which the alien *does* have such ties."). Thus, as far as the INA was concerned, the government could have simply flown Zadvydas to a U.S. military base in Germany and pushed him out the door. The government *was* authorized by the INA to remove Zadvydas; the impediment to his removal was solely diplomatic, not legal.

So too with the other noncitizen in *Zadvydas*, Kim Ho Ma. 533 U.S. at 685-686. Ma was ordered removed to Cambodia, his country of birth (*ibid.*)—again, a legally appropriate destination for removal. See 8 U.S.C. § 1231(b)(2)(E)(v). Although Ma had applied for withholding relief, that request had been denied at the time that he was in Section 1231 detention. *Kim Ho Ma* v. *Reno*, 208 F.3d 815, 819 (9th Cir. 2000). The INA authorized his removal to Cambodia, even though Cambodia did not accept returnees from the United States. *Zadvydas*, 533 U.S. at 686.

In sum, the INA *did* permit the government to remove both Zadvydas and Ma. The obstacle to their removal had no grounding in the INA, which, *Jama* teaches, does not require consent from a noncitizen's birth country before removal there. The decision "whether" Zadvydas and Ma were "to be removed" *had* been made, precisely because the INA provided the government removal authority. That is what is lacking here.

B. Congress did not craft the INA to routinely yield constitutional violations.

Not only is our construction the most natural reading of the INA's text and structure, but it also avoids

the routine constitutional violations that the government's approach would cause. When choosing "between competing plausible interpretations of a statutory text," there is a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").

1. The Fifth Amendment's Due Process Clause, applicable to all individuals within the United States, provides an essential "[f]reedom from * * * government custody, detention, or other forms of physical restraint." *Zadvydas*, 533 U.S. at 690. See also *id*. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."). It countenances *civil* detention only "in certain special and 'narrow' nonpunitive 'circumstances.'" *Id*. at 690. There must be some "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Ibid*.

In the immigration context, civil detention is justified only if there exists a flight risk or a danger to the community (see 8 U.S.C. § 1226(c)), or if the detention is incidental to the individual's imminent physical removal from the United States (see *id*. § 1231(a)(2)). See *Zadvydas*, 533 U.S. at 690-691; *Demore* v. *Kim*, 538 U.S. 510 (2003) (rejecting facial due process challenge to 8 U.S.C. § 1226(c)).

The Court has broadly understood that immigration detention raises grave constitutional concerns once it eclipses six months and the removal of the noncitizen is not forthcoming. See *Zadvydas*, 533 U.S. at 701 (holding that six months is a "presumptively reasona-

ble period of detention"); *Clark*, 543 U.S. at 386-387 (confirming the six-month presumption for length of detention following the finality of removal orders).[16]

2. But, as the government would construe the INA, individuals would routinely be subject to prolonged periods of civil detention, even when there is no legitimate justification for it. This would trammel the Due Process Clause's core protection of liberty.

Most withholding-only claims result in lengthy legal proceedings, with many lasting years. One study considered 84 cases in which the BIA remanded a withholding-only claim to the IJ; proceedings in those cases averaged 447 days. Hausman, *Fact-Sheet*, *supra*, at 2. When a court of appeals ordered a remand, detention averaged 1,065 days. *Ibid*. Indeed, incarceration reaching three years is predictable and inevitable. See *Martinez*, 968 F.3d at 557-558; *id*., No. 19-3908 (6th Cir.), Dkt. 53.

In fact, the government appears to acknowledge that its construction would routinely lead to prolonged detention. In the court of appeals, the government ar-

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[16] The courts of appeals have squarely endorsed this position. See, *e.g.*, *German Santos* v. *Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 208-213 (3d Cir. 2020) (conducting as-applied due process analysis, and finding prolonged detention pending removal proceedings unconstitutional where an individual was "detained for more than two-and-a-half years" with "no end in sight"); *Padilla* v. *ICE*, 953 F.3d 1134, 1142-1147 (9th Cir. 2020), petition for certiorari pending, No. 20-234. See also *id*. at 1158-1159 (Bade, J., dissenting) (agreeing with majority that, "as a constitutional matter, the government [must] provide bond hearings to detained aliens once the detention becomes 'prolonged' or fails to serve its immigration purpose, a period generally understood to be six months").

gued that respondents should "file a habeas petition and seek release" in order to "show that [their] detention has become prolonged and that there is 'no significant likelihood of removal in the reasonably foreseeable future.'" COA Gov't Br. 7 (quoting *Zadvydas*, 533 U.S. at 701). See also COA Gov't Reply 26 (similar). That is, per the government, respondents should argue that their prolonged detention is unconstitutional.

This is a most extraordinary argument. The government apparently recognizes that, under its proffered construction, the INA would routinely lead to prolonged civil confinement unmoored from the permissible purposes of civil detention. As recourse, the government contends, individuals should file habeas corpus petitions, asserting that their confinement exceeds the limits imposed by the Due Process Clause. Put differently, application of Section 1231 would lead to regular constitutional violations, remediated only if a noncitizen pursues an individualized habeas action.[17]

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[17] The post-order custody review (POCR) process (Pet'r Br. 34-36) does not mollify these severe constitutional concerns. Due process mandates adjudication by "a neutral decisionmaker." *Foucha* v. *Louisiana*, 504 U.S. 71, 81 (1992). That is, "due process requires a 'neutral and detached judge in the first instance.'" *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993). The POCR process involves no neutral judge; rather, the power is held by the *jailer*, the "Director of the Detention and Removal Field Office having jurisdiction over the alien." 8 C.F.R. § 241.4(c)(1). The "serious constitutional problem[s]" arising out of a statute permitting prolonged "deprivation of human liberty" without basic "procedural protection[s]" is "obvious." *Zadvydas*, 533 U.S. at 692. *Zadvydas* therefore precludes the contention that the existence of the POCR regulation obviates the constitutional violation. *Ibid*.

There is a far more reasonable way to construe the INA's detention provisions. Consistent with the mandate that the government "shall remove" a noncitizen from the United States during the 90 day "removal period," Section 1231 detention begins only when the INA authorizes the government to remove. Prior to that point, when legal proceedings are underway to determine whether the noncitizen "is to be removed," Section 1226 governs, providing the process required by the Fifth Amendment. Congress simply did not write a statute that would render constitutional violations routine.

3. The Court rejected a different constitutional avoidance argument in *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018), because the proposed construction there was "implausible" and "without any arguable statutory foundation." So too in *Preap*, 139 S. Ct. at 972, where the Court concluded that the statutory text "cuts clearly against respondents' position."

This case is nothing like *Jennings* or *Preap*. Here, for all the reasons we have explained, we present the decidedly better textual argument. At the very least, our statutory construction is a plausible one, and thus an appropriate candidate for application of the constitutional avoidance canon.

Suppose for a moment that a government agency had power to seize private property, so long as an agency employee signed-off on the seizure pursuant to putatively neutral criteria. And suppose that the agency's word was final, with no judicial review. The Court would not hesitate to conclude that the resulting deprivations of property were without adequate due process of law. The same is true when long-term personal liberty is on the line.

Our reading is so plausible that the government itself has adopted it on multiple prior occasions. In *Lopez* v. *Napolitano*, 2014 WL 1091336, at *3 (E.D. Cal. Mar. 18, 2014), for example, the government asserted that an individual in withholding-only proceedings was "being detained pursuant to 8 U.S.C. § 1226(a)" specifically because his reinstated order of removal would not be administratively final until his withholding proceedings had concluded.[18] See also *Castillo* v. *ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1241 (W.D. Wash. 2012) (government agreed that "because [detainee's] application for withholding of removal [was] pending, he [was] currently not subject to a final reinstated order of removal" and was detained under Section 1226).

In sum, our reading of the statute is not only the better one, it also is most consistent with the constitutional protections for personal liberty.

C. The government's reading defies the legitimate purposes of civil detention.

Applying Section 1226(a) to withholding-only cases comports with the underlying purposes of civil immigration detention; applying Section 1231, on the other hand, does not.

1. The government's interpretation would distort the legitimate purposes of civil detention by allowing the government to wield immigration incarceration as an instrument of punishment. But punishment is not a permissible aim of immigration detention. See

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[18] In *Lopez*, the government said squarely that "an alien awaiting 'withholding only' proceedings is detained under Section 236(a) because of the non-final nature of the removal order." *Lopez* v. *Napolitano*, No. 12-cv-1750, Dkt. 17, at 6 (E.D. Cal.).

Zadvydas, 533 U.S. at 694 (citing *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896)). In fact, the Court has repeatedly emphasized that punishment—with its twin pillars of retribution and deterrence—is not a permissible aim of *any* civil detention system. See *Kansas* v. *Crane,* 534 U.S. 407, 412 (2002) (cautioning that civil detention must not become a "mechanism for retribution or general deterrence").

Running headlong into these clear precedents, the government argues that Section 1231 should apply to withholding-only cases specifically because it "has an overriding interest in" using the immigration detention system as a "tool[]" to "diminish illegal immigration." Pet. 15. There is no permissible government interest here: This is punishment, plain and simple. Put another way, the government aims to deter unlawful immigration by making an example of the noncitizens who exercise their lawful right to seek withholding-only relief.

Even if the government had not explicitly acknowledged this punitive intent, it would be clear by implication. As the Court has recognized, the purpose of immigration detention is to achieve the statutory goals of "ensuring the appearance of aliens at future immigration proceedings and [p]reventing danger to the community." *Zadvydas*, 533 U.S. at 690 (internal quotation marks and citations omitted). Bond hearings are designed to achieve exactly those ends, with the least disruption to the potential detainee's own protected interests. They allow IJs—neutral decisionmakers—to weigh the government's interest in preventing flight and protecting the public against the individual's constitutionally protected interest in freedom from physical restraint.

The government's policy contentions (at 19-21) thus lack force. The government asserts (at 20) that re-

instatement is designed to operate with "relatively streamlined procedures" to expedite removal. But the question posed here—whether individuals are subject to mandatory or discretionary detention during withholding-only proceedings—does not bear on that. The duration of withholding proceedings is a function of their structure and the speed at which the agency elects to adjudicate them. That question is separate from the detention issue posed here.

The government further asserts (at 20) that mandatory detention operates to ensure that noncitizens "do not abscond to avoid removal." But the government cites not a shred of evidence for this generalized concern. Nor could it: The bond proceeding itself specifically requires an IJ to consider whether the particular noncitizen is a flight risk. 8 C.F.R. § 236.1(c)(8). If the noncitizen is unable to satisfy an IJ that he or she will not abscond, then there will be no release from custody under Section 1226. See *Guerrero-Sanchez* v. *Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018).

That is to say, the procedures that exist under Section 1226 are designed to address the interests the government now advances. But they also consider an individual's liberty interests. The only government interest that remains—punishment, the interest that the government asserted in the petition for certiorari—is a manifestly improper one. Cf. *Demore*, 538 U.S. at 532-533 (Kennedy, J., concurring) (immigration detention that "is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons" may be an unconstitutional "arbitrary deprivation[] of liberty").

2. What is more, the government's construction of the INA is at odds with the essential purposes of withholding relief.

The INA and FARRA together reflect a bedrock principle of our Nation's immigration laws, ensuring that removals do not result in torture or persecution. See page 3, *supra*. When Congress implemented CAT relief through domestic law, it specifically extended relief to "*any* person." FARRA § 2242(a) (emphasis added). Withholding of removal is thus the broad counterbalance to other policy goals that seek to restrict immigration.[19] In short, it is a fundamental reflection of our American values.

Construing the INA as the government proposes here, however, seeks to punish individuals for their exercise of this essential right. The question here is limited to only those individuals who have already passed a reasonable fear interview conducted by an immigration officer or an IJ. See 8 C.F.R. § 208.31. Indeed, the statutory remedies are designed for precisely these individuals. Congress did not write the detention provisions of the INA so as to nakedly deter exercise of such core protections against persecution and torture.

D. No regulation warrants deference.

The government's request for deference (at 36-39) lacks any conceivable merit, a conclusion on which the lower courts are unanimous.[20]

1. To start with, deference is warranted, if at all,[21] only when "all the 'traditional tools' of construction"

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[19] See, *e.g.*, Executive Order No. 13,780, *Protecting the Nation From Foreign Terrorist Entry Into the United States* § 3(b)(vi); (Mar. 6, 2017) (exempting CAT claims).

[20] See Pet. App. 30a; *Guerrero-Sanchez*, 905 F.3d at 215; *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 831 (9th Cir. 2017); *Guerra* v. *Shanahan*, 831 F.3d 59, 63 (2d Cir. 2016).

are "exhaust[d]"—that is, "only when that legal toolkit is empty and the interpretive question still has no single right answer." *Kisor*, 139 S. Ct. at 2415. One such tool of construction is the doctrine of constitutional avoidance. See pages 36-41, *supra*. Even assuming *Chevron* is good law, the government's deference argument must come subsequent in the analysis to our contention regarding constitutional avoidance. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-575 (1988) (holding *Chevron* unavailable where "the Board's construction of the statute * * * poses serious questions of the validity of [the statute] under the First Amendment").

2. In any event, because no regulation addresses the question whether Section 1226 or Section 1231 applies to individuals in withholding-only proceedings, nothing here warrants deference.

The government first points (at 37) to 8 C.F.R. § 241.8(f), which provides: "Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part." All this

[21] The petition for certiorari did not make a deference argument. If it had, respondents would have raised a threshold issue in the brief in opposition: Whether the Court should repudiate *Chevron* deference entirely. Before considering *Chevron* deference here, the Court should direct briefing on the question whether to overturn that doctrine. See, *e.g.*, *Baldwin* v. *United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment) ("[T]here are serious questions * * * about whether [*Chevron*] comports with the APA and the Constitution."); *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

means is that reinstatement proceedings are subject, generally, to Part 241 of Title 8 of the Code of Federal Regulations.

The only regulation in Part 241 regarding detention even conceivably applicable here is 8 C.F.R. § 241.3(a), which states that, "*[o]nce the removal period * * * begins*, an alien in the United States will be taken into custody pursuant to the warrant of removal." (emphasis added). Of course, whether the removal period *has* begun is the essential question of statutory construction. Nothing in either Sections 241.8(f) or 241.3(a) indicates that the removal period begins during the pendency of withholding-only proceedings, long before the government has actual authority to remove the individual. See *Padilla-Ramirez*, 882 F.3d at 831 ("This regulation * * * does not answer the question of when the removal period begins."); *Guerra*, 831 F.3d at 63; *Guerrero-Sanchez*, 905 F.3d at 215.

In response, the government (at 38) argues that Section 241.8(f) "categorically" provides that the "regulations implementing Section 1231" apply to individuals in withholding-only proceedings. "That regulation," the government asserts, "contains no exception for the subset of aliens who have been placed in withholding-only proceedings." Pet'r Br. 38. This argument fails twice.

First, it disregards the directly adjacent provision. Section 241.8(e) expressly provides an "[e]xception for withholding of removal," by which a noncitizen who "expresses a fear of returning to the country designated in that order" is *not* subject to automatic execution of the reinstated order, but is instead "immediately referred to an asylum officer" for proceedings governed by 8 C.F.R. § 208.31. The regulation thus does provide an "exception" for individuals in withholding-only pro-

ceedings. The government does not even attempt to square its argument with this plain text.

Second, the government's argument skips past what the regulations actually say. Section 241.3(a) simply parrots the language of the statute. Detention therefore turns on the beginning of the "removal period." The regulation says nothing about whether the "removal period" has begun for individuals in withholding-only proceedings.

The other regulation on which the government relies (at 37-38) does even less for its position. 8 C.F.R. § 241.4(b)(3) provides that noncitizens "granted withholding of removal * * * *who are otherwise subject to detention* are subject to the provisions of this part 241." (emphasis added).

This regulation does not aid the government for the same reason as the prior one—it fails to address whether, for individuals in withholding-only proceedings, the "removal period" has begun, triggering the detention period in Part 241. What is more, the regulation is conditional, applying only to those noncitizens "who are otherwise subject to detention." That is, there must be *some* alternative basis (e.g., the criminal detention bar in 8 U.S.C. § 1226(c)) that would render the individual "subject to detention" for this provision to apply. The government is simply wrong to contend that an individual granted withholding relief is somehow subject to Section 1231 detention.

* * *

At bottom, Section 1226 governs long-term detention, when proceedings are underway to determine whether the INA will authorize an individual's removal from the United States. By providing IJs with discretion, Section 1226 calibrates the need for community protection and prevention of flight with the liberty in-

terests secured by the Due Process Clause. Section 1231, by contrast, governs short-term detention during the "removal period," when the government is obligated to effectuate removal.

The INA does not, as the government would have it, mandate prolonged civil detention in jail-like settings merely because noncitizens have exercised their statutory right to request withholding of removal. Rather, the INA's plain text, structure, and purposes all confirm that Section 1226 governs detention during withholding-only proceedings.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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