No. 19-897

In the Supreme Court of the United States

TONY H. PHAM, ET AL., PETITIONERS

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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A. Respondents' Statutory Arguments Are Incorrect

Respondents fail to show that 8 U.S.C. 1226 rather than 8 U.S.C. 1231(a) governs the detention of an alien whose order of removal has been reinstated and who is pursuing statutory withholding of removal or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Their responses to the government's arguments lack merit; their reading of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, is unsound; and their understanding of when a removal order becomes final is mistaken.

1. Respondents lack meritorious answers to the government's statutory arguments

Respondents lack a good answer to the government's main textual argument (Gov't Br. 13-17): Section 1226 authorizes detention while a "decision" on whether the alien is to be removed from the United States remains pending, 8 U.S.C. 1226(a), whereas Section 1231(a) authorizes detention after the alien has been "ordered removed," 8 U.S.C. 1231(a). The entry of a final order of removal means that the relevant "decision" is no longer pending, 8 U.S.C. 1226(a), and that the alien has been "ordered removed," 8 U.S.C. 1231(a). Entry of a final order of removal therefore marks the boundary between detention under Section 1226 and detention under Section 1231(a).

Respondents dismiss (Br. 20-22) the significance of those statutory terms, accusing the government of "fixating" on isolated words, "pluck[ing]" terms "from the broader text," and "focusing myopically on a few individual phrases." Congress, however, used terms such as "decision" and "ordered removed" prominently and persistently in the statute. In particular, Section 1226 refers twice to a "decision" on whether the alien is to be removed. 8 U.S.C. 1226(a). And Section 1231 bears the caption "Detention and removal of aliens ordered removed"; subsection (a) bears the caption "Detention, release, and removal of aliens ordered removed"; paragraphs (a)(1) and (a)(2) authorize detention during the removal period for an alien who has been "ordered removed"; and paragraph (a)(6) authorizes detention beyond the removal period for "[a]n alien ordered removed." 8 U.S.C. 1231(a)(1)-(2) and (6) (emphases omitted). Whether the Court looks at the forest or the trees,

the view remains the same: the scope of Section 1231 turns on whether the alien has been ordered removed.

Respondents also lack a good answer to the government's structural argument (Br. 17-18) that Congress placed both the provision governing reinstatement of removal orders and the provision governing statutory withholding of removal in Section 1231, not in Section 1226. See 8 U.S.C. 1231(a)(5) and (b)(3). Respondents argue (Br. 35-36) that Congress's structural choice shows that Congress meant Section 1231(a) to cover the general category of aliens with reinstated removal orders, but not the specific category of aliens with reinstated removal orders who ask for withholding of removal. But that answer fails to account for Congress's choice to place *both* the reinstatement provision *and* the withholding provision in Section 1231. That choice shows that Congress meant to address not only reinstatement in general, but also the combination of reinstatement and withholding in particular, under that section.

Finally, respondents fail to refute the government's argument (Br. 19-20) that applying Section 1231(a) would promote, while applying Section 1226 would thwart, the purposes of the reinstatement statute. Respondents accept (Br. 44) that Congress adopted the reinstatement statute in part to streamline the process for removing illegal reentrants, but argue that the choice between Section 1231(a) and Section 1226 "does not bear on that" objective. That is mistaken. An alien who is detained under Section 1226 may have an opportunity for release—specifically, a bond hearing before an immigration judge, followed by an appeal to the Board of Immigration Appeals—that is unavailable to one detained under Section 1231(a). Indeed, that is the very reason respondents here prefer the former provision.

See Gov't Br. 6-7. Affording that possibility to aliens such as respondents would undermine Congress's objective of streamlining the process of removing illegal reentrants from the United States.

Respondents accept (Br. 44) that the reinstatement statute serves in part to ensure that illegal reentrants ultimately are removed, but they argue that detention under Section 1226 would promote that objective just as well as detention under Section 1231(a). That, too, is wrong. Section 1231(a) authorizes detention beyond the removal period for inadmissible aliens, aliens who are removable on certain criminal or terrorist grounds, and aliens who are "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). The implementing regulations provide that, in deciding whether to release aliens detained on any of those grounds, Immigration and Customs Enforcement (ICE) must consider whether the alien poses a risk of flight or a danger to the community. See 8 C.F.R. 241.4(d)-(f). The class at issue here—aliens who have already reentered the country illegally after having been ordered removed—have shown, by their conduct, that they may be especially "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). Affording such aliens an opportunity for release by an immigration judge—rather than entrusting their detention to the judgment of ICE, which is responsible for executing the reinstated removal order—would necessarily undermine Congress's objective of ensuring the removal of such aliens from the country.

2. Respondents misread Section 1226

Section 1226, as just explained, authorizes detention "pending a decision on whether the alien is to be re-

moved from the United States." 8 U.S.C. 1226(a). Respondents argue (Br. 16-17, 28) that the decision "whether" to remove an alien remains pending until the government identifies the specific country to which it will remove the alien. But that view rests on the flawed premise that "the 'whether' and 'where' inquiries cannot be separated." Resp. Br. 28.

Speakers of the English language routinely separate "whether" to do something from "where" to do it. A family can decide "whether" to go on vacation, even if it has not yet chosen between the Jersey Shore and the Poconos. A group of friends can decide "whether" to go out to dinner, even if they have not yet chosen between two different restaurants. And a judge can decide "whether" to send a criminal defendant to prison, even if the Bureau of Prisons has not yet chosen a specific prison. So too, the government can decide "whether" an alien is to be removed, even if it has not yet identified the particular country to which it will remove him.

More importantly, Congress treated "whether" and "where" as legally distinct questions in the statutory provisions at issue here. In Section 1226, it focused on "whether," authorizing detention pending a decision on whether the alien is to be removed from the United States, but making no reference to specific destinations. 8 U.S.C. 1226(a). In Section 1231, by contrast, Congress focused on "where." It began with the premise that the alien has already been "ordered removed," 8 U.S.C. 1231(a)(1)(A), identified the "[c]ountries to which [the alien] may be removed," 8 U.S.C. 1231(b) (emphasis omitted), and then identified countries to which the alien may *not* be removed, 8 U.S.C. 1231(b)(3). See, *e.g.*, *Jama* v. *ICE*, 543 U.S. 335, 338 (2005) (Section

1231(b)(2) "sets out the procedure by which the [government] select[s] [the alien's] destination after removal [i]s ordered.") (footnote omitted).

Further, the provisions on reinstatement of removal, statutory withholding of removal, and CAT protection make sense in combination only if one treats "whether" and "where" as legally distinct questions. The reinstatement provision states that aliens with reinstated removal orders "*shall* be removed" from the United States. 8 U.S.C. 1231(a)(5) (emphasis added). The withholding and CAT provisions, by contrast, prohibit the removal of aliens (including those with reinstated removal orders) to particular countries where they face persecution and torture. See 8 U.S.C. 1231(b)(3) and 1231 note. Treating "whether" and "where" as legally distinct inquiries harmonizes the command with the prohibition; the command concerns whether the alien is to be removed, while the prohibition concerns only where the alien may be sent. Blending the two inquiries, by contrast, would render the provisions in conflict, so that the statute simultaneously would command and forbid the removal of the same alien. Under elementary rules of statutory interpretation, "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory. There can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Maracich* v. *Spears*, 570 U.S. 48, 68 (2013) (brackets, citation, and ellipsis omitted).

This Court's precedents, too, have distinguished "whether" from "where." The Court has stated that an alien who obtains withholding of removal or CAT protection "would not avoid removal, only removal to [a particular country]," *DHS* v. *Thuraissigiam*, 140 S. Ct.

1959, 1965 n.5 (2020); that an order granting CAT protection "means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country," *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1691 (2020); that "withholding only bars deporting an alien to a particular country," *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419 (1999); and that withholding "would not prevent" removal to "any other hospitable country," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). All of those statements presuppose a legal distinction between the question whether to remove an alien and the question where to send the alien. None of those statements would make sense if, as respondents insist (Br. 28), "the 'whether' and 'where' inquiries cannot be separated."

3. Respondents also misread Section 1231(a)

Section 1231(a) provides that an alien who has been ordered removed may be detained both during and after the removal period. See 8 U.S.C. 1231(a)(2) and (4). Respondents' brief in the court of appeals, the court of appeals' opinion, and respondents' brief in opposition in this Court all stated that the removal period (and thus detention under Section 1231) begins only when the government acquires the "practical" ability to remove the alien from the United States. Resp. C.A. Br. 23; Pet. App. 23a-24a; Br. in Opp. 8-9. Now, however, respondents abandon the theory on which they prevailed below, conceding (Br. 17) that the government's "*practical* ability to remove the individual" is "beside the point." They instead argue (Br. 16-17, 21) that the removal period begins when the government obtains the "*legal* authority" to "actually effectuate a removal" by "put[ting] an individual on an outbound plane."

Respondents' new theory fares no better than their old one. Congress directly answered the question when the removal period begins, in a provision bearing the caption "Beginning of period." 8 U.S.C. 1231(a)(1)(B) (emphasis omitted). That provision says that "[t]he removal period begins on the latest" of three possible dates: (1) "[t]he date the order of removal becomes administratively final"; (2) "if a court orders a stay of the removal of the alien, the date of the court's final order"; and (3) if the alien has already been detained for independent, non-immigration reasons, "the date the alien is released from detention." *Ibid.* Notably, the provision does not say, as respondents suggest (Br. 21), that "the removal period begins only after the government possesses legal authority" to "effectuate removal." Respondents' theory rests on a sleight of hand: replacing the three specific triggering events listed in the statute with the more general concept of "legal authority," and then invoking that general concept rather than the statutory language to argue that the removal period begins when withholding-only proceedings conclude.

Respondents rely (Br. 18) on the provision in Section 1231 stating that the government "shall remove" the alien during the removal period. 8 U.S.C. 1231(a)(1)(A). They argue (Br. 18) that, because the government has an obligation to remove the alien during the period, the period cannot begin until the government has the legal authority to fulfill that obligation. That argument is flawed for two reasons. As a threshold matter, Congress has provided express instructions about when "[t]he removal period begins." 8 U.S.C. 1231(a)(1)(B). The way to figure out when the period begins is to apply that provision, not to attempt to infer when the period ought to begin from the separate provision on which respondents rely.

Put another way, the express terms of the clause addressing the beginning of the period take precedence over any inferences respondents might seek to draw from a separate clause addressing a separate topic.

Moreover, the statutory obligation to remove the alien within the 90-day period is not absolute. Congress expressly provided that the government is to effectuate removal during the removal period "[e]xcept as otherwise provided" in Section 1231. 8 U.S.C. 1231(a)(1)(A). As a result, the obligation to remove the alien within 90 days does not apply when some other part of Section 1231—such as the provisions on withholding of removal, see 8 U.S.C. 1231(b)(3)—prevent the government from effectuating removal within 90 days. Further, Section 1231 expressly contemplates removal after the removal period expires, most notably when it authorizes detention "beyond the removal period," 8 U.S.C. 1231(a)(6). And this Court has found it "doubt[ful] that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time." *Zadvydas* v. *Davis*, 533 U.S. 678, 701 (2001). That, again, confirms that the way to determine when the removal period begins is to apply the clause about the beginning of the period as written —not to work out how long the government needs to conduct withholding-only proceedings and then reverse-engineer a start date that will allow the government to finish the proceedings by what respondents would regard as the deadline.

Respondents also argue (Br. 27) that regulations adopted by the Department of Homeland Security (DHS) require ICE to obtain travel documents for aliens during the removal period, and that ICE's failure to do so here shows that the removal period has not yet

begun. The applicable regulation, however, provides as follows: "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." 8 C.F.R. 241.4(g)(2) (emphasis added); see Resp. Br. 27 (quoting the regulation, but rendering "both before and after" as " * * * before * * * "). The regulation thus does not require the government to complete the process of securing travel documents before the end of the removal period; rather, it requires "appropriate steps" before and after that moment. 8 C.F.R. 241.4(g)(2). DHS's judgment that it is not yet "appropriate" to take additional steps, see Resp. Br. 27, does not suggest that the removal period itself has not yet begun.

4. Respondents' view of finality is mistaken

Respondents offer one last textual argument (Br. 24-26): the removal period begins only when the removal order becomes "final," and, they assert, a reinstated removal order in turn becomes final only when withholding-only proceedings conclude. That, too, is wrong.

First, respondents' theory of finality misconceives the nature of a reinstated removal order. "[A] removal order undoubtedly is administratively final when it first is executed; if it is reinstated from its original date, it stands to reason that it retains the same administrative finality." *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 831 (9th Cir. 2017), cert. denied, 139 S. Ct. 411 (2018). Respondents answer that, regardless of the finality of the prior order, the "reinstatement order" is a "new order" that must become final all over again. Resp. Br. 24 (emphasis omitted). The reinstatement statute, however, states that "the *prior order* of removal is *reinstated*."

8 U.S.C. 1231(a)(5) (emphasis added). By definition, reinstating the prior order means restoring that prior order with its finality intact, not creating a new order of removal. The reinstatement provision then further states that "the alien shall be removed *under the prior order*." *Ibid.* (emphasis added). That, too, shows that the alien's removal occurs under the prior order of removal, not under some new order.

Second, respondents' theory of finality conflicts with the clause providing that, upon reinstatement, the prior order of removal "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). To say that an order may not be reopened or reviewed is to say that it is final. Respondents insist (Br. 33-34) that withholding-only proceedings are an exception to that bar to reopening or reviewing reinstated removal orders, but that view is mistaken. "Withholding-only proceedings do not * * * purport to override section 1231(a)(5)'s prohibition on reopening or reviewing a prior removal order. * * * At most, a grant of withholding will only inhibit the order's execution with respect to a particular country." *Padilla-Ramirez*, 882 F.3d at 832.

Third, respondents' theory of finality contradicts this Court's decision last Term in *Nasrallah*. In that decision, the Court repeatedly stated that an order granting CAT protection "does not disturb the final order of removal," *Nasrallah*, 140 S. Ct. at 1691; that a "ruling on a CAT claim does not affect the validity of the final order of removal," *ibid.*; that certain statutory provisions "simply establish that a CAT order may be reviewed together with a final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal," *ibid.*; and that "a CAT order is distinct from a final order of removal and does not affect

the validity of the final order of removal," *id.* at 1692. Those statements foreclose respondents' theory that a request for CAT protection resets the finality of the reinstated removal order. The government highlighted that contradiction in its opening brief (Br. 28-29), yet respondents' brief never addresses it.

Against all of that, respondents cite (Br. 24-25 & n.8) a line of court of appeals decisions concerning judicial review of withholding-only proceedings. Congress has authorized judicial review of "a final order of removal," but only if the petition for review is "filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(a)(1) and (b)(1). Lower courts have recognized that, under the definition of finality set out in the statute, see 8 U.S.C. 1101(a)(47)(B), "[t]here are compelling arguments in favor of finding that [the] reinstated removal order is final" as soon as it is issued. *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955, 958 (9th Cir. 2012). The courts have observed, however, that as a result of the 30-day deadline for filing a petition for review, treating the reinstated removal order as final for purposes of judicial review could "make it impossible" for aliens to seek judicial review of orders issued in withholding-only proceedings. *Ibid.* Invoking the presumption in favor of judicial review, those courts have determined that a reinstated removal order should be deemed final for purposes of judicial review of an order issued in withholding-only proceedings only after the completion of those proceedings. *Ibid.*

Judge Richardson's dissent in this case maintained that the decisions on which respondents rely "are improperly based on a pragmatic desire to permit judicial review," rather than on the statutory text. Pet. App. 40a. This Court, however, need not resolve that issue in

order to decide this case. The Court has explained that "[f]inality is variously defined; like many legal terms, its precise meaning depends on context." *Clay* v. *United States*, 537 U.S. 522, 527 (2003). Even if the presumption in favor of judicial review justifies adopting an atextual meaning of finality for purposes of judicial review, it would not justify the further step of carrying that departure from the text's plain meaning over to the provisions at issue here, which have nothing to do with judicial review. See *Padilla-Ramirez*, 882 F.3d at 831.

B. Respondents' Constitutional Arguments Are Incorrect

Although respondents do not dispute the government's authority to detain them during withholding-only proceedings, they argue (Br. 37-45) that applying Section 1231(a) rather than Section 1226 would raise constitutional doubts and that this Court should read the statute to avoid those doubts. As the Court observed in another case about immigration detention, "[t]he 'constitutional doubts' argument has been the last refuge of many an interpretive lost cause." *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993). "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (citation omitted). In this case, for the reasons just given, the application of ordinary textual analysis makes plain that Section 1231, not Section 1226, governs respondents' detention. In any event, "[s]tatutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional." *Flores*, 507 U.S. at 314 n.9 (citation omitted). Applying Section 1231(a) here raises no serious constitutional doubts.

1. This Court has repeatedly held that detention is "a constitutionally valid aspect of the deportation process." *Demore* v. *Kim*, 538 U.S. 510, 523 (2003); see, *e.g.*, *Flores*, 507 U.S. at 306; *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896). In particular, detention of aliens in connection with removal or removal proceedings need only "meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." *Flores*, 507 U.S. at 306; see, *e.g.*, *Demore*, 538 U.S. at 527 (detention must bear "a reasonable relation to the purpose for which the individual was committed") (citation omitted). That deferential standard reflects the Court's understanding that "the power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

There can be no serious doubt that detention under Section 1231(a) satisfies that test. The Court's cases establish, and respondents concede, that preventing flight and protecting the community are both legitimate purposes of immigration detention. See *Demore*, 538 U.S. at 527; *id.* at 531-532 (Kennedy, J., concurring); Resp. Br. 38. Section 1231(a) rationally advances those purposes. It authorizes detention beyond the removal period only if the alien is inadmissible, removable on certain criminal or terrorist grounds, or found by ICE to be "unlikely to comply with the order of removal" or to pose "a risk to the community." 8 U.S.C. 1231(a)(6). And as already noted, the aliens at issue here—those who have illegally reentered the country after having been ordered removed—have shown by their conduct

that they may be especially "unlikely to comply with the order of removal." *Ibid.*

This Court's decision in *Zadvydas* confirms that Section 1231(a) comports with the Constitution. In that case, the Court acknowledged that immigration detention comports with the Constitution if it "bears a reasonable relation to the purpose for which the individual was committed." *Zadvydas*, 533 U.S. at 690 (brackets and citation omitted). The Court then stated that Section 1231(a) might raise serious doubts under that standard if it were read to authorize "indefinite and potentially permanent" detention—*i.e.*, detention with "no obvious termination point" when there was no impediment to removal under the INA but no foreign country would accept the alien. *Id.* at 696-697. To avoid that problem, the Court adopted a limiting construction, under which "continued detention" is "no longer authorized by statute" once "removal is not reasonably foreseeable." *Id.* at 699-700. The Court adopted a "presumption" that detention satisfies that standard for the first "six months." *Id.* at 701. It held that, "[a]fter this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Ibid.* By adopting that limiting construction, *Zadvydas* has already cured any potential constitutional problem in Section 1231(a). As long as the government abides by the safeguards set out in the opinion for detention that lasts more than six months, there can be no serious doubt that the detention continues to bear a reasonable relation to the legitimate purpose of effectuating removal.

2. Respondents argue (Br. 37-42) that detaining them under Section 1231(a) would nonetheless raise serious doubts under the Due Process Clause because it would expose them to mandatory, prolonged, and punitive detention without bond hearings. That argument misconstrues both the statute and the Constitution.

a. In misconstruing the statute, respondents first err in asserting (Br. 14) that Section 1231(a) "would impose mandatory detention * * * for the entire duration of a lengthy withholding-only proceeding." Section 1231(a) makes detention mandatory only for the 90-day removal period; after that period, the government "may"—not must—detain the alien. 8 U.S.C. 1231(a)(6). Even within the removal period, moreover, the statute makes detention mandatory only for criminal and terrorist aliens, not for aliens in general.* Section 1226—which respondents insist should govern their detention—likewise makes detention mandatory for criminal and terrorist aliens, see 8 U.S.C. 1226(c), and the Court has

* The relevant provision contains two sentences: "During the removal period, the [Secretary of Homeland Security] shall detain the alien. Under no circumstance during the removal period shall the [Secretary] release [certain terrorist and criminal aliens]." 8 U.S.C. 1231(a)(2). Although the word "shall" often imposes a mandate, reading it that way in the first sentence would make the second sentence superfluous. DHS has thus long read the second sentence to require the detention of terrorist and criminal aliens, and the first sentence to authorize but not require the detention of other aliens. See *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001); cf. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760-761 (2005). Consistent with that understanding, this Court has stated that Section 1231(a) "mandates detention of certain criminal aliens" during the removal period. *Zadvydas*, 533 U.S. at 698.

already upheld the constitutionality of that provision, see *Demore*, 538 U.S. at 531.

Second, respondents overstate the length of time for which the government detains aliens in withholding-only proceedings. Their empirical claims about the length of such detention rest (Resp. Br. 5, 26, 35, 39) on a two-page study that is outside the record. See David Hausman, Immigrants' Rights Project, ACLU, *Fact Sheet: Withholding-Only Cases and Detention, An Analysis Based on Data Obtained Through the Freedom of Information Act ("FOIA")* (Apr. 19, 2015). But that study does not support respondents' assertions. It states that withholding-only cases in which no party pursues an appeal "resulted in an average detention length of 114 days," or "nearly four months." *Id.* at 2 (emphasis omitted); see *id.* at 2 nn.5-6. That is less than the six months that even respondents concede (Br. 38) is constitutionally permissible. And while detention may last longer in some cases, especially those involving appeals, that shows that the duration of detention often results from the alien's own choices. See pp. 19-20, *infra*.

Third, respondents err in attributing (Br. 43) a "punitive" purpose to Section 1231(a). As noted, the section serves the legitimate purposes of preventing flight and protecting the community. See pp. 14-16, *supra*. Respondents seize on the government's statement in the petition for a writ of certiorari that the section helps "diminish illegal immigration," Resp. Br. 43 (quoting Pet. 15), but that statement means only that the section helps effectuate the removal of illegal reentrants, not that it seeks to punish them. Respondents also argue (Br. 43) that Section 1226 would allow the government to achieve any non-punitive goal in a less restrictive way by affording bond hearings. "But when the Government

deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528.

Fourth, respondents observe (Br. 43) that Section 1231(a) does not necessarily guarantee bond hearings. See Gov't Br. 7 n.2 (discussing circuit conflict on whether an alien detained under Section 1231(a) is entitled to a bond hearing after six months); Pet. at 13-28, *Barr* v. *Aleman Gonzalez*, No. 20-322 (filed Sept. 4, 2020) (seeking a writ of certiorari to resolve that conflict). Respondents, however, overlook the robust procedural protections that aliens detained under Section 1231(a) unquestionably do receive. For example, ICE field offices conduct initial reviews at the outset of post-removal-period detention; a review panel at ICE headquarters conducts further reviews periodically thereafter; and aliens may submit evidence and have the assistance of counsel during those reviews. *Id.* at 34-35. Separately, if detention lasts more than six months, an alien has the opportunity to establish to adjudicators at ICE headquarters that he is entitled to release because there is no significant likelihood of removing him in the reasonably foreseeable future. *Ibid.* Respondents may believe that other procedures, such as a formal bond hearing before an immigration judge, "would be even better," but this Court is "'not a legislature charged with formulating public policy.'" *Flores*, 507 U.S. at 315 (brackets and citation omitted).

In any event, aliens who are detained under Section 1231(a) likely would not properly be entitled to release on bond in the first place. Section 1231(a)(6), again, empowers the government to detain aliens beyond the removal period if (among other things) they are "unlikely to comply with the order of removal." 8 U.S.C.

1231(a)(6). Respondents concede (Br. 43) that aliens who fall in that category should properly be denied bond anyway. And the aliens at issue here—*i.e.*, aliens who have illegally reentered the country after having been ordered removed—have shown by their conduct that they generally are "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).

b. Respondent's contention also misconstrues the Constitution, because this Court's test for the constitutionality of immigration detention turns on whether the detention has a rational relation to a legitimate purpose. Where detention satisfies that test, the Court has upheld it even if it is mandatory, see *Demore*, 538 U.S. at 531, even without the availability of bond or bond hearings, see *id.* at 523-525; *Carlson*, 342 U.S. at 543-544. And although the Court has held that Congress may not use immigration detention to punish aliens, it has made clear that detention "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens" does not amount to punishment. *Wong Wing*, 163 U.S. at 235.

The duration of detention does not itself render continued detention unconstitutional, for it is ordinarily the result of the alien's own choices—*e.g.*, the decision to avail himself of opportunities to contest removability (although that is foreclosed for aliens under reinstated removal orders), to seek continuances, or to take administrative appeals. That is true in the present context as well, in which aliens with reinstated removal orders have availed themselves of the opportunity to seek statutory withholding or CAT protection. Congress and the Attorney General have provided extensive process to such aliens, including an initial decision from an immi-

gration judge and an appeal to the Board of Immigration Appeals. See 8 C.F.R. 1208.31(e). The duration of detention for aliens who choose to invoke those procedures does not signal a lack of due process; rather, it demonstrates that extensive process has been provided and found by the alien to be beneficial. Indeed, this Court acknowledged in *Demore* that the immigration system sometimes requires aliens to make difficult choices about whether the benefits of invoking further process outweigh the costs of prolonging their detention, but explained that "'the legal system is replete with situations requiring the making of difficult judgments as to which course to follow'" and that "there is no constitutional prohibition against requiring parties to make such choices." 538 U.S. at 530 n.14 (citation and ellipsis omitted). And, of course, the regulations governing detention under Section 1231(a)(6) establish procedures permitting release if an alien establishes that he is not a flight risk or danger to the community. See 8 C.F.R. 241.4(d)-(f).

C. At A Minimum, The Government's Reading Of Section 1231(a) Deserves Deference

At a minimum, respondents have failed to refute the government's argument (Br. 36-39) that its reading of Sections 1226 and 1231(a) deserves deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The case for *Chevron* deference here rests on two regulations: 8 C.F.R. 241.8(f), which makes clear that the detention of aliens with reinstated removal orders is governed by the regulations corresponding to Section 1231(a), and 8 C.F.R. 241.4(b)(3), which makes clear that the detention of aliens who have been granted withholding or deferral of

removal is likewise governed by the regulations corresponding to Section 1231(a).

First, respondents argue (Br. 47) that Section 241.8(f) means only that "reinstatement proceedings are subject, generally, to Part 241 of Title 8 of the Code of Federal Regulations." Section 241.8(f), however, does more than address "reinstatement proceedings" "generally." *Ibid.* It specifically provides that "[e]xecution of the reinstated order of removal *and detention of the alien* shall be administered in accordance with [Part 241]." 8 C.F.R. 241.8(f) (emphasis added). And Part 241, in turn, corresponds to Section 241 of the INA, which is numbered Section 1231 in the U.S. Code. Section 241.8(f) thus makes plain that the detention of an alien with a reinstated removal order is governed by Section 1231, not by Section 1226.

Second, respondents argue (Br. 47) that a nearby provision of the regulations, Section 241.8(e), makes an exception to Section 241.8(f) for aliens in withholding-only proceedings. Section 241.8(e), however, reads as follows: "If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to [8 C.F.R. 208.31]." 8 C.F.R. 241.8(e). Nothing in that provision qualifies Section 241.8(f)'s separate command that the "detention of [an] alien" with a reinstated removal order must be "administered in accordance with" the regulations corresponding to Section 1231(a). 8 C.F.R. 241.8(f).

Finally, respondents argue (Br. 48) that the remaining regulation, Section 241.4(b)(3), applies by its terms

only to aliens "who are otherwise subject to detention." 8 C.F.R. 241.4(b)(3). But respondents do not deny that aliens who are pursuing or have received statutory withholding or CAT protection *are* subject to detention. The only point in dispute is which provision governs that detention: Section 1226 or Section 1231? The regulation answers that question. It states that the detention of aliens granted statutory withholding or CAT protection is governed by "part 241"—*i.e.*, the part corresponding to Section 1231. *Ibid.*

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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