No.

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

YOLANY PADILLA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1225(b)(1)(B)(ii)—which authorizes the government to detain aliens who are placed in expedited removal proceedings, but who then establish a credible fear of persecution based on a protected ground—violates the Due Process Clause of the Fifth Amendment because it contains no provision authorizing bond hearings.

2. Whether 8 U.S.C. 1252(f)(1) prohibits lower courts from granting classwide injunctions against the operation of 8 U.S.C. 1221-1232.

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are U.S. Department of Homeland Security (DHS); U.S. Immigration and Customs Enforcement (ICE); U.S. Customs and Border Protection (CBP); U.S. Citizenship and Immigration Services (USCIS); Department of Justice Executive Office for Immigration Review; William P. Barr, Attorney General; Chad F. Wolf, Acting Secretary of Homeland Security; Matthew T. Albence, Senior Official Performing the Duties of the Director of ICE; Marc J. Moore, ICE Seattle Field Office Director; Mark A. Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner of CBP; Kenneth T. Cuccinelli, Senior Official Performing the Duties of Director of USCIS; Charles Ingram, Warden of the Federal Detention Center, SeaTac; David Shinn, Warden of the Federal Correctional Institute, Victorville; Lowell Clark, Warden of the Northwest Detention Center; and James Janecka, Warden of the Adelanto Detention Facility.

Respondents (appellees below) are Yolany Padilla, Ibis Guzman, Blanca Orantes, and Baltazar Vasquez, for themselves and on behalf of a class of similarly situated individuals.

The U.S. Department of Health and Human Services (HHS); Office of Refugee Resettlement (ORR); Alex M. Azar, Secretary of HHS; Scott Lloyd, Director of ORR; Matthew T. Albence, Acting Deputy Director of ICE; John P. Sanders, Acting Commissioner of CBP; and Elizabeth Godfrey, ICE Seattle Field Office Acting Director were defendants in the district court.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.)

Padilla v. *U.S. Immigration and Customs Enforcement*, No. 18-cv-928 (July 2, 2019)

United States Court of Appeals (9th Cir.):

Padilla v. *U.S. Immigration and Customs Enforcement*, No. 19-35565 (Mar. 27, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 953 F.3d 1134. An order of the court of appeals (App., *infra*, 48a-51a) is unreported. An order of the district court (App., *infra*, 52a-75a) is reported at 387 F. Supp. 3d 1219. An additional order of the district court (App., *infra*, 76a-98a) is reported at 379 F. Supp. 3d 1170. An additional order of the district court (App., *infra*, 99a-113a) is not published in the Federal Supplement but is available at 2019 WL 1056466.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2020. On March 19, 2020, this Court extended

the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 114a-118a.

STATEMENT

A. Legal Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, sets forth a streamlined procedure, known as expedited removal, that the Department of Homeland Security (DHS) may invoke to remove certain aliens who indisputably have no authorization to be admitted to the United States. 8 U.S.C. 1225(b)(1). As relevant here, the government may invoke expedited removal if an alien unlawfully entered the United States without being admitted or paroled, has been continuously present in the United States for less than two years, lacks valid entry documents or attempts to gain admission through fraud or misrepresentation, and has been designated for application of expedited-removal procedures by the Secretary of Homeland Security. 8 U.S.C. 1225(b)(1)(A); see 8 U.S.C. 1182(a)(6)(C) and (7).[1] In 2004, the Secretary designated for application of expedited-removal procedures certain inadmissible aliens who are encountered within 100 air miles of the U.S. border and within 14 days of having unlawfully entered the United States. See *Designating Aliens for*

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[1] The statute refers to the Attorney General, but a separate statute transfers the designation authority to the Secretary. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).[2]

As a general rule, if an immigration officer finds that an alien is eligible for and should be placed in expedited removal, the officer may order the alien removed without further hearing or review. 8 U.S.C. 1225(b)(1)(A)(i). But that general rule is subject to an exception: if an alien placed in expedited removal "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country," the immigration officer must refer the alien to an asylum officer for a screening interview. 8 C.F.R. 235.3(b)(4); see 8 U.S.C. 1225(b)(1)(A)(ii).

The object of the screening interview is to determine whether the alien has a "credible fear" of persecution based on a protected ground or of torture. See 8 U.S.C. 1225(b)(1)(B)(v); 8 C.F.R. 208.30(e). If the asylum officer (subject to review by a supervisor and, if the alien requests, an immigration judge) finds that the alien lacks a credible fear, DHS may remove the alien without further hearing or review. 8 U.S.C. 1225(b)(1)(B)(iii); 8 C.F.R. 208.30(e)(8). But if the alien establishes that he has a credible fear, then under the applicable regulations, he receives full consideration of his application

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[2] In 2019, the Secretary issued a notice designating additional aliens for application of expedited-removal procedures. See *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409, 35,413-35,414 (July 23, 2019). A district court issued a preliminary injunction barring the application of that designation. See *Make The Road N.Y.* v. *McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019). The court of appeals reversed that injunction, but as of the filing of this petition, it has not yet issued its mandate. See *Make The Road N.Y.* v. *Wolf*, 962 F.3d 612 (D.C. Cir. 2020). The designation in effect at all times relevant to the proceedings below was thus the designation issued in 2004.

for relief or protection in proceedings before an immigration judge. See 8 C.F.R. 208.30(f). This brief uses the shorthand term "transferred alien" to refer to an alien who is placed in expedited removal proceedings, found to have a credible fear, and then transferred to proceedings before an immigration judge for resolution of the application for asylum or other protection.

2. This case concerns the detention of transferred aliens. The INA provides that, if "the officer determines at the time of the interview that an alien has a credible fear of persecution," then "the alien *shall be detained* for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii) (emphasis added). In other words, the INA requires the detention of transferred aliens until the resolution of their asylum applications without the opportunity for release on bond. The only exception to that rule is that DHS may "parole" an alien into the United States "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5(b).

Years ago, in *In re X-K-*, 23 I. & N. Dec. 731 (2005), the Board of Immigration Appeals ruled that certain transferred aliens—those apprehended after crossing the border illegally, as opposed to those encountered at a port of entry—may seek bond hearings before immigration judges. *Id.* at 736. The Board believed that the statute was "silent" on the subject of bond in those circumstances and that such aliens could therefore invoke the general regulations allowing bond hearings for aliens in removal proceedings. *Id.* at 734; see 8 C.F.R. 1003.19(h)(2), 1236.1(d)(1).

This Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), although involving somewhat different issues, rested on reasoning that is irreconcilable with

the Board's decision in *X-K-*. As relevant here, the Court concluded that Section 1225(b)(1)(B)(ii)—which, again, states that "the alien shall be detained for further consideration of the application for asylum," 8 U.S.C. 1225(b)(1)(B)(ii)—"mandate[s] detention of aliens throughout the completion of applicable proceedings," *Rodriguez*, 138 S. Ct. at 845. The Court further explained that "'[d]etained' does not mean 'released on bond.'" *Id.* at 851. Finally, the Court noted that the INA expressly authorizes release on parole for "'urgent humanitarian reasons or significant public benefit,'" and "[t]hat express exception to detention," the Court concluded, "implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released." *Id.* at 844 (quoting 8 U.S.C. 1182(d)(5)(A)).

After *Rodriguez*, in *In re M-S-*, 27 I. & N. Dec. 509 (2019), the Attorney General revisited and overruled the Board of Immigration Appeals' previous decision in *X-K-*. *Id.* at 518-519. In accordance with *Rodriguez*, the Attorney General instead concluded that Section 1225(b)(1)(B)(ii) "requires detention until removal proceedings conclude"—except for the possibility of parole —and "cannot be read to contain an implicit exception for bond." *Id.* at 516-517. The Attorney General's construction of the INA is "controlling." 8 U.S.C. 1103(a)(1).

B. Factual Background and Proceedings Below

1. Named respondents Yolany Padilla, Ibis Guzman, Blanca Orantes, and Baltazar Vasquez are transferred aliens: they entered the country unlawfully, were placed in expedited removal proceedings, were found to have a credible fear of persecution or torture, and were transferred to proceedings before an immigration judge

for consideration of their applications for relief or protection. App., *infra*, 101a-102a. At the time, the Board of Immigration Appeals' decision in *X-K-* was still in place, and respondents accordingly all received bond hearings. *Ibid.* Respondents then brought this action in district court in June 2018, claiming, among other things, that those bond hearings were procedurally inadequate. *Id.* at 4a.

The district court certified a nationwide class of "[a]ll detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording of the hearing within seven days of requesting a bond hearing." App., *infra*, 100a; see *id.* at 99a-113a. On respondents' motion for a preliminary injunction, the court held that they were likely to succeed on their claim that the existing procedures for those bond hearings violated the Due Process Clause of the Fifth Amendment. *Id.* at 81a-93a. Invoking the procedural-due-process balancing test set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court fashioned a new set of procedures for those hearings. App., *infra*, 99a-113a. Specifically, the court issued a preliminary injunction ordering the government to:

1. Conduct bond hearings within seven days of a bond hearing request by a class member, and release any class member whose detention time exceeds that limit;
2. Place the burden of proof on Defendant Department of Homeland Security in those bond hearings to demonstrate why the class member should

not be released on bond, parole, or other conditions;

3. Record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and

4. Produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

Id. at 97a-98a.

After the injunction was issued, but before the effective date set by the district court, the Attorney General issued his decision in *M-S-*, overruling *X-K-* and concluding that transferred aliens have no statutory entitlement to bond hearings in the first place. App., *infra*, 55a-56a. Respondents then amended their complaint to add a claim that the statute, as interpreted by the Attorney General in *M-S-*, violated the Due Process Clause. *Ibid.*

The district court modified its injunction in light of the Attorney General's decision. App., *infra*, 52a-75a. In what the court labeled "Part A" of the new injunction, the court reaffirmed the original injunction's imposition of procedural requirements for class members' bond hearings. *Id.* at 53a (emphasis omitted). In "Part B," the court held that "the statutory prohibition at [Section 1225(b)(1)(B)(ii)] against releasing [transferred aliens] on bond * * * violates the U.S. Constitution," and ordered that class members be accorded bond hearings with the procedural guarantees just discussed. *Ibid.* (emphasis omitted). The court rejected the government's contention that it was prohibited from granting a classwide injunction by 8 U.S.C. 1252(f)(1), which states that "no court (other than the Supreme Court)

shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1232] other than with respect to the application of such provisions to an individual alien." 8 U.S.C. 1252(f)(1); see App., *infra*, 59a-62a.

2. The court of appeals denied the government's motion for a stay pending appeal with respect to Part B of the injunction, but granted the motion for a stay pending appeal with respect to Part A. App., *infra*, 48a-51a. As a result, the government was required to continue to provide bond hearings to transferred aliens, but was not required to follow the procedural requirements that the district court had imposed on those hearings. *Ibid.*

3. a. A divided court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-47a.

The court of appeals first affirmed Part B of the injunction—the part holding unconstitutional the statutory prohibition on bond hearings for transferred aliens. App., *infra*, 9a-20a. As relevant here, the court concluded that respondents were "likely to succeed on their claim that they are constitutionally entitled to individualized bond hearings." *Id.* at 12a. In reaching that conclusion, the court reasoned that, "'[g]iven the substantial liberty interests at stake,'" "bail proceedings for noncitizens are necessary." *Ibid.* (citation omitted). The court rejected the government's contention that respondents lack rights under the Due Process Clause because they have not yet been admitted to the United States, reasoning that "once a person is standing on U.S. soil—regardless of the legality of his or her entry—he or she is entitled to due process." *Id.* at 19a. The court also rejected the government's reliance on *Demore* v. *Kim*, 538 U.S. 510 (2003), a case in which this Court held that the mandatory detention of certain

criminal aliens without bond hearings complied with the Due Process Clause. App., *infra*, 13a-15a. The court stated that the duration of detention in this case—in the court's view, "anywhere from six months to over-a-year"—is "far longer than the periods at issue in *Demore*." *Id.* at 14a-15a.

The court of appeals then vacated Part A of the injunction—the part requiring that class members receive bond hearings within seven days of requesting them, that DHS bear the burden of proof in such hearings, that the government record such hearings, and that the government produce written decisions at the end of such hearings. App., *infra*, 22a-23a. The court explained that "[t]he current record is * * * insufficient to support the district court's findings with respect to likelihood of success, the harms facing [respondents], and the balance of the equities implicated by Part A of the preliminary injunction." *Id.* at 22a. But the court left the district court free to reimpose those procedural requirements on a more developed record. *Id.* at 23a.

After addressing the merits, the court of appeals rejected the government's contention that Section 1252(f)(1) deprived the district court of jurisdiction to issue the classwide injunction. App., *infra*, 24a-28a. The court of appeals stated that Section 1252(f)(1) is "silen[t] as to class actions," and it contrasted that provision with a "neighboring subsection" that "expressly prohibits class actions." App., *infra*, 25a (citing 8 U.S.C. 1252(e)(1)(B)). The court read Section 1252(f)(1)'s limitation of injunctions to the application of a statutory provision to an "individual alien" as precluding only challenges brought by "organizational plaintiffs," not challenges brought on behalf of a class of aliens. *Id.* at 26a.

b. Judge Bade dissented. App., *infra*, 32a-47a.

On jurisdiction, Judge Bade concluded that Section 1252(f)(1) bars a lower court from issuing a classwide injunction against the operation of 8 U.S.C. 1225(b)(1)(B)(ii). App., *infra*, 32a-42a. She observed that this Court has stated that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [certain statutory provisions." *Id.* at 33a (quoting *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481-482 (1999)). She also explained that, even setting aside this Court's cases, the word "individual" in the statutory term "an individual alien" would be serve no function if classes of aliens could obtain injunctions against the operation of the specified statutory provisions. *Id.* at 35a.

On the merits, Judge Bade concluded that the district court's injunction "is overbroad and extends far beyond the demands of due process." App., *infra*, 42a. She read this Court's cases to mean that, "as a constitutional matter, the government need only provide bond hearings to detained aliens once the detention period becomes 'prolonged' or fails to serve its immigration purpose," a period, she opined, "generally understood to be six months." *Id.* at 45a. Yet, Judge Bade pointed out, "the longest period a named plaintiff [in the class] waited to obtain a bond hearing after securing a positive credible fear determination was about three weeks"—"a period far shorter than the presumptively reasonable six months." *Id.* at 46a n.7.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that aliens transferred from expedited removal proceedings have a constitutional entitlement to a bond hearing. And even assuming that a detained transferred alien would be

constitutionally entitled to a bond hearing in certain circumstances, the court further erred in holding that 8 U.S.C. 1252(f)(1) allows a lower court to issue a classwide injunction to remedy that purported violation. The court's decision on the merits incorrectly holds an Act of Congress unconstitutional, and its decision on the propriety of a classwide remedy contradicts this Court's precedents and conflicts with the decisions of two other courts of appeals. The decision below also intrudes upon the political branches' responsibility for immigration policy, compromises the United States' ability to protect its territorial sovereignty from illegal immigration, and adds to the burdens that are already overwhelming the country's immigration system. This Court's review of both issues therefore is warranted.

A. The Court Of Appeals Erred In Holding That Section 1225(b)(1)(B)(ii) Violates The Due Process Clause

Section 1225(b)(1)(B)(ii) provides, with respect to aliens initially processed for expedited removal, that "[i]f the officer determines at the time of the interview that an alien has a credible fear of persecution[,] * * * the alien shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii). The Attorney General, relying in part on the Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), has determined, that transferred aliens have no statutory right to bond hearings under that provision. See pp. 4-5, *supra*. Neither the district court nor the court of appeals questioned the Attorney General's reading as a matter of statutory interpretation. The court of appeals instead affirmed the district court's preliminary injunction in relevant part on the ground that the statute violates the Due Process Clause of the Fifth Amendment. App., *infra*, 9a.

That ruling is incorrect for three reasons. First, respondents have failed to establish that they may invoke the Due Process Clause to seek release into the United States. Second, respondents also have failed to establish that the Due Process Clause, even if it may be invoked in these circumstances, requires the government to accord them bond hearings. Finally, at a minimum, respondents have failed to establish that the statute violates the Due Process Clause as to the whole class.

1. Over a century ago, this Court held that, as to "foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). The Court has since reiterated that principle time and again. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Respondents fall within the scope of that rule. Under the definition of the class, respondents are all aliens. App., *infra*, 100a. All of them have "entered the United States without inspection." *Ibid.* And all of them were "initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b)," *ibid.*, because they were encountered within 100 air miles of the border and within 14 days of having unlawfully entered the United States, see pp. 2-3, *supra*. In short, respondents have "never

been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law." *Nishimura Ekiu*, 142 U.S. at 660. As to them, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Ibid.*

The court of appeals concluded that the cases just discussed pertain only to "noncitizens apprehended at a port-of-entry" and that, "once a person is standing on U.S. soil—regardless of the legality of his or her entry —he or she is entitled to due process." App., *infra*, 18a-19a. But this Court recently rejected that very argument in *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020), a case in which an alien claimed rights under the Due Process Clause on the ground that he "was not taken into custody the instant he attempted to enter the country" but instead "succeeded in making it 25 yards into U.S. territory before he was caught." *Id.* at 1982. The Court explained that the "century-old rule regarding the due process rights of an alien seeking initial entry * * * would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil." *Ibid.* The Court further explained that extending due process rights to "an alien who tries to enter the country illegally" would "undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location." *Id.* at 1982-1983 (citation omitted).

In this case, the named respondents were, like the alien in *Thuraissigiam*, apprehended at or near the border, roughly contemporaneously with their illegal entry. See, *e.g.*, Third Am. Compl. ¶ 58 ("On or about May 18, 2018, Ms. Padilla and [her son] entered the United States. As they were making their way to a

nearby port of entry, they were arrested by a Border Patrol agent for entering without inspection."); see also *id.* ¶¶ 69, 78, 91. The other class members likewise were encountered within 100 air miles of the border and within 14 days of having unlawfully entered the United States. See pp. 2-3, *supra*. The fact that respondents have set foot on U.S. soil does not entitle them to invoke the Due Process Clause in an effort to attain release into the United States.

2. Even assuming that respondents could invoke the Due Process Clause, they could not establish that detention without bond hearings violates the Constitution. This Court has long affirmed the constitutionality of immigration detention, explaining that "[p]roceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); see *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952).

Most notably, in *Demore* v. *Kim*, 538 U.S. 510 (2003), the Court upheld an Act of Congress that required the government to detain certain criminal aliens without bail pending completion of their removal proceedings. *Id.* at 517-531. The alien in *Demore* had far more significant ties to the United States than the aliens in this case; whereas the aliens in this case were apprehended and placed in expedited-removal proceedings shortly after illegally entering the United States, the alien in *Demore* had entered the United States lawfully, had become a lawful permanent resident, and had resided in the United States for over ten years before committing

a crime that made him deportable. *Id.* at 513. If detention without bail was permissible in *Demore*, it certainly is here.

The court of appeals distinguished *Demore* on the ground that it involved a shorter period of detention. The Court in *Demore* stated that "the detention at stake * * * lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal," 538 U.S. at 530, whereas the court here estimated that respondents "may expect to be detained for anywhere from six months to over-a-year," App., *infra*, 14a. But the court of appeals' emphasis on the duration of the detention was misplaced.

Under this Court's precedents, detention is ancillary to the conduct of removal proceedings and to the actual removal of an alien who is ordered removed. Accordingly, detention pending the completion of particular immigration proceedings ordinarily may continue as long as those proceedings remain ongoing. Such detention is not subject to any fixed numerical cap, such as six or twelve or eighteen months. This Court has explained that immigration detention generally remains constitutional at least as long as it "bears a reasonable relation to the purpose for which the individual was committed." *Demore*, 538 U.S. at 527 (citation omitted). Detention pending the completion of removal proceedings "necessarily serves the purpose of preventing * * * aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Detention does not cease to serve that purpose simply because a particular period of time has lapsed.

This Court has indicated that immigration detention may raise constitutional concerns if it is "indefinite" or "potentially permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Detention pending the completion of removal proceedings does not raise such concerns. The duration of removal proceedings varies and will be unknown in any particular case until it is completed, but such detention is neither indefinite nor potentially permanent. The detention ends when removal proceedings end, as they always do. See *Demore*, 538 U.S. at 528-531.

Indeed, a focus on the duration of detention alone is particularly inapt because that duration may result from the alien's own choices. The procedures established by Congress and the Attorney General for the conduct of removal proceedings afford aliens numerous procedural protections, including a right of appeal to the Board and judicial review, as well as opportunities to apply for various forms of relief. Some aliens apply for "different forms of * * * discretionary relief"; some "ask for multiple continuances"; some file appeals. *Sopo* v. *United States Attorney General*, 825 F.3d 1199, 1216 (11th Cir. 2016), vacated as moot, 890 F.3d 952 (11th Cir. 2018). The fact that aliens who take advantage of the procedure and substantive avenues for relief afforded to them may be detained while the system adjudicates their claims is not a sign of a *lack* of due process; it is a sign that extensive process has been provided and found by the aliens to be beneficial. But once invoked, completing any process takes time. Indeed, this Court acknowledged in *Demore* that the adjudicatory framework and associated provisions for detention may require a detained alien to make difficult choices about whether to seek further review, but it observed

that "the legal system is replete with situations requiring the making of difficult judgments as to which course to follow." 538 U.S. at 530 n.14 (citation and ellipsis omitted).

Here, respondents have been detained pending the completion of proceedings to adjudicate their asylum applications. Their detention "necessarily serves" the legitimate immigration purposes of "preventing * * * aliens from fleeing prior to or during their removal proceedings" and of "increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528. Detention also may serve to protect society from the possibility of harm by aliens who are deemed a threat to the community if released. *Id.* at 531-533 (Kennedy, J., concurring). And respondents' detention is limited, not indefinite or potentially permanent, because it will end when their proceedings end. See *id.* at 529. Respondents' detention accordingly comports with the Constitution. *Id.* at 531.

3. Even if respondents could invoke the Due Process Clause in seeking release into the United States, and even if the detention of a particular alien might at some point or in some circumstances become unconstitutional, the court of appeals and district court still would lack a sound basis for a classwide determination of unconstitutionality. Just as a facial challenge to a statute can succeed only if the statute violates the Constitution in all of its applications, see *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1128 (2019), so too a classwide challenge can succeed only if the statute violates the Constitution as applied to all members of the class. A court's power to enjoin enforcement of a statute or declare it unconstitutional extends only as far as the constitutional violation; "injunctive relief should be no more burdensome to the

defendant than necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). It follows that a court has no authority to enjoin the enforcement of a statute or declare it unconstitutional as to an entire class if the statute is valid as to some members of the class.

In this case, the district court certified a class composed of "*all* detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording of the hearing within seven days of requesting a bond hearing." App., *infra*, 100a (emphasis added). A classwide injunction against the enforcement of Section 1225(b)(1)(B)(ii) thus could be justified, if at all, only if Section 1225(b)(1)(B)(ii) violates the Constitution as applied to *all* such aliens, irrespective of the length of their detention or other circumstances. As explained above, however, the detention requirement in that provision is presumptively *valid* in all its applications. If detention were nevertheless alleged to be inconsistent with due process in a particular instance, such a claim could properly be raised only in an individual, as-applied challenge.

B. The Court Of Appeals Erred In Holding That Section 1252(f)(1) Permits Classwide Injunctions

Even assuming that detention under Section 1225(b)(1)(B)(ii) without a bond hearing might violate the Constitution in a particular instance, any injunction against the enforcement of that statute would have to be limited to the individual aliens who brought the suit and established a violation in the statute's application to

them. Section 1252(f)(1) deprives the district court of jurisdiction to issue an injunction for the benefit of an entire class. The court of appeals held that Section 1252(f)(1) permits classwide injunctions, but that decision contradicts both the controlling precedent of this Court and the plain terms of the statute.

1. Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. 1252(f)(1). The reference to "part IV of this subchapter" is to 8 U.S.C. 1221-1232, a series of provisions addressing the "Inspection, Apprehension, Examination, Exclusion, and Removal" of aliens. 8 U.S.C. Ch. 12, Subch. II, Pt. IV (caption) (capitalization altered). The statutory provision at issue in this case, Section 1225(b)(1)(B)(ii), is included in Part IV and thus is covered by Section 1252(f)(1)'s jurisdictional bar.

In three previous cases, this Court has described Section 1252(f)(1) as prohibiting classwide injunctions against the operation of 8 U.S.C. 1221-1232. In *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999), the Court explained that "[Section 1252(f)(1)] prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2], but specifies that this ban does not extend to individual cases." *Id.* at 481-482. In *Nken*

v. *Holder*, 556 U.S. 418 (2009), the Court described Section 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal provisions." *Id.* at 431. And in *Rodriguez*, the Court explained that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." 138 S. Ct. at 851 (brackets and citation omitted).

The applicability of Section 1252(f)(1) to class actions brought by aliens was not directly at issue in *AADC* and *Nken*, so the Court's statements in those cases were arguably dicta. The statement in *Rodriguez*, however, was a holding. In *Rodriguez*, a class of aliens subject to immigration detention argued that they were entitled to bond hearings under the applicable statutes and the Constitution. 138 S. Ct. at 839. The Court rejected the class's statutory claims, but remanded the case to the Ninth Circuit for consideration of the class's constitutional claims. *Id.* at 851. The Court instructed the Ninth Circuit that, on remand, it "should first decide whether it continues to have jurisdiction despite 8 U.S.C. 1252(f)(1)," which, the Court noted, "'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232.'" *Ibid.* (brackets and citation omitted). The Court's reading of Section 1252(f)(1) thus formed part of the remand instructions and was necessary to the remand judgment, making it a holding and not a dictum. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

The court of appeals reasoned that, because this Court remanded *Rodriguez* to the Ninth Circuit rather

than simply holding that there was no jurisdiction to issue the requested classwide injunction, the Court must have viewed the availability of classwide injunctive relief as "unresolved." App., *infra*, 25a. That misreads *Rodriguez*. The Court's opinion states:

> Section 1252(f)(1) thus 'prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232.' [*AADC*], 525 U.S. at 481. * * * The Court of Appeals held that this provision did not affect its jurisdiction over respondents' *statutory* claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct not authorized by the statutes.' 591 F.3d at 1120. This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims.

Rodriguez, 138 S. Ct. at 851 (brackets and ellipsis omitted). As that passage shows, the Court stated the governing legal rule in plain terms: Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." *Ibid.* (brackets and citation omitted). The Court then remanded the case so that the Ninth Circuit could reconsider the continuing viability of a separate rationale on which the Ninth Circuit had previously relied—namely, that the aliens sought to enjoin the officers' conduct rather than the operation of the statutes. Put simply, the purpose of the remand was to enable the Ninth Circuit to reconsider the Ninth Circuit's own previous ruling—not to enable it to reconsider and reverse *this Court's* ruling that Section 1252(f)(1) "prohibits federal courts

from granting classwide injunctive relief against the operation of §§ 1221-1232." *Ibid.* (brackets and citation omitted).

2. Even setting aside precedent and treating the question presented as an issue of first impression, the court of appeals' reading of Section 1252(f)(1) is still wrong. Section 1252(f)(1) begins by stating a broad restriction on courts' jurisdiction to award injunctions: "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1232]." 8 U.S.C. 1252(f)(1). Section 1252(f)(1) then carves out a narrow exception to that restriction: a court may award an injunction "with respect to the application of such provisions to an individual alien against whom proceedings under [8 U.S.C. 1221-1232] have been initiated." *Ibid.*

The critical words for purposes of this case are "an individual alien." The word "individual," used as an adjective, means "[o]f, relating to, or involving a single person or thing, as opposed to a group." *Black's Law Dictionary* 924 (11th ed. 2019) (emphasis omitted). A class of aliens is not "an individual alien"; by definition, a class is a group, not a single person. That is why this Court has described "[t]he *class* action" as "'an exception to the usual rule that litigation is conducted by and on behalf of the *individual* named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (emphasis added; citation omitted). A class action is the antithesis of an action by an individual party.

The grammar of Section 1252(f)(1) reinforces the plain meaning of the adjective "individual." In stating the general rule against injunctions, Congress used

both the singular and the plural: "Regardless of * * * the identity of the *party or parties*." 8 U.S.C. 1252(f)(1) (emphasis added). But in stating the exception to that rule, Congress used only the singular: "*an* individual alien." *Ibid.* (emphasis added). That contrast indicates that Congress meant the general jurisdictional restriction to apply regardless of the number of parties involved, but the exception to apply only where a court enjoins the application of the specified provisions to a single alien.

The same conclusion follows from the principle that a court should, if possible, read a statute so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1761 (2018) (citation omitted). The only possible function of the adjective "individual" in the phrase "an individual alien" is to exclude class-wide injunctions. To read Section 1252(f)(1) to allow injunctions for classes would leave the adjective "individual" with no work to do, and would in effect read the word out of the statute.

The court of appeals' contrary analysis lacks merit. The court read the words "individual alien" to "prohibit injunctive relief with respect to organizational plaintiffs." App., *infra*, 26a. But Section 1252(f)(1) applies "[r]egardless * * * of the identity of the party or parties bringing the action." 8 U.S.C. 1252(f)(1). That language unambiguously establishes that the jurisdictional bar applies to all types of plaintiffs, not just organizational plaintiffs. In addition, the word "alien" in the phrase "an individual alien" already denotes a natural person and already excludes organizational plaintiffs. If the word "individual" served only to exclude organizational plaintiffs, it would add nothing to the statute.

The court of appeals also contrasted the language of Section 1252(f)(1) (which bars injunctions except with respect to "an individual alien") with the nearby Section 1252(e)(1)(B) (which bars courts from "certify[ing] a class under Rule 23" in certain cases). App., *infra*, 25a (quoting 8 U.S.C. 1252(e)(1)(B)). All that contrast shows, however, is that whereas Section 1252(e)(1)(B) bars the certification of classes altogether, Section 1252(f)(1) bars classwide *injunctive* relief and does not categorically bar other forms of relief if independently proper and justified. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 962 (2019) (discussing classwide declaratory relief). The contrast in no way suggests that Section 1252(f)(1) allows the relief ordered here—a classwide *injunction* against the operation of 8 U.S.C. 1225(b)(1)(B)(ii).

Finally, the court of appeals relied on *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), in which this Court read a different statute authorizing suit by "any individual" to permit "class relief." App., *infra*, 25a-26a (quoting *Yamasaki*, 442 U.S. at 700-701). The court failed to explain why it attached more significance to *Yamasaki*, which concerned a different statute, than to *AADC*, *Nken*, and *Rodriguez*, which concerned the very statute at issue here. In any event, the text of the statute in *Yamasaki* differs in material ways from the text of the statute here. The statute in *Yamasaki*, by authorizing suits by individuals, excluded organizational plaintiffs but did not clearly prohibit individuals from joining together in classes. The statutory provision here, by contrast, begins with the words "Regardless * * * of the identity of the party or parties bringing the action," and permits an injunction only with respect to application of a statutory provision to an "individual alien." 8 U.S.C. 1252(f)(1). That text shows that the whole point of the

statute was not simply to exclude particular types of plaintiffs but to restrict classwide relief.

C. Both Questions Presented Warrant This Court's Review

1. The court of appeals' decision on the merits warrants review because the court held an Act of Congress unconstitutional. This Court has recognized that judging the constitutionality of a federal statute is "the gravest and most delicate duty" of the federal judiciary. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The Court has therefore applied "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional," even in the absence of a circuit conflict. *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay); see, *e.g.*, *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2345-2346 (2020); *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2086 (2020); *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020); *Allen* v. *Cooper*, 140 S. Ct. 994, 1000 (2020); *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019); *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017); *Zivotofsky* v. *Kerry*, 576 U.S. 1, 9 (2015); *Department of Transportation* v. *Association of American R.R.s*, 575 U.S. 43, 46 (2015); *United States* v. *Alvarez*, 567 U.S. 709, 714 (2012) (plurality opinion); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 14 (2010); *United States* v. *Comstock*, 560 U.S. 126, 132-133 (2010).

That course remains appropriate even though the court of appeals considered the case at the preliminary-injunction stage and remanded the case to the district court after vacating a part of its injunction. This Court

has often granted writs of certiorari where lower federal courts have, on constitutional grounds, issued preliminary injunctions against the enforcement of Acts of Congress. See, *e.g.*, *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205, 212 (2013); *Gonzales* v. *Raich*, 545 U.S. 1, 9 (2005); *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 660-661 (2004); *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002); *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 539-540 (2001). What is more, although the court of appeals stated that respondents were "*likely* to succeed on their claim that they are constitutionally entitled to individualized bond hearings," App., *infra*, 12a (emphasis added), it affirmed an injunction providing that the class "*is* constitutionally entitled to a bond hearing," *id.* at 74a (emphasis added). Further, although the court of appeals remanded the case to the district court for further findings with respect to the particular procedural requirements that the bond hearings must follow, the court of appeals and respondents have not suggested that additional proceedings in the district court would affect the requirement to hold the bond hearings in the first place. Accordingly, in the face of an injunction that bars the enforcement of an Act of Congress nationwide and classwide on constitutional grounds, this Court's review is called for now.

2. The court of appeals' remedial holding regarding Section 1252(f)(1) similarly warrants this Court's review. That holding conflicts with precedent of this Court. See Sup. Ct. R. 10(c). The Court held in *Rodriguez* that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232." 138 S. Ct. at 851 (brackets and

citation omitted); see *Nken*, 556 U.S. at 431; *AADC*, 525 U.S. at 481. In conflict with *Rodriguez*, the court of appeals held here that "§ 1252(f)(1) does *not* on its face bar class actions or classwide relief." App., *infra*, 25a (emphasis added).

The court of appeals' holding regarding Section 1252(f)(1) also warrants review because it conflicts with the decisions of two other courts of appeals. See Sup. Ct. R. 10(a). The Tenth Circuit has held that "§ 1252(f) forecloses jurisdiction to grant class-wide injunctive relief to restrain operation of §§ 1221-[1232]." *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (1999). The Sixth Circuit has similarly held that courts "do not have jurisdiction under § 1252(f)(1) to issue class-based injunctive relief against the removal and detention statutes," *Hamama* v. *Adducci*, 912 F.3d 869, 878 (2018), cert. denied, No. 19-924 (July 2, 2020), and that "Congress stripped all courts, save for the Supreme Court, of jurisdiction to enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232 on a classwide basis," *Hamama* v. *Adducci*, 946 F.3d 875, 877 (2020). The dissent in this case observed, and the majority did not deny, that the decision here has "create[d] a circuit split." App., *infra*, 46a (Bade, J., dissenting).

3. The significant practical consequences of the decision below underscore the need for this Court's review. The Court has explained that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." *Plasencia*, 459 U.S. at 34. It has further explained that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952).

The court of appeals' merits and remedial holdings both undermine that principle. The merits decision enables courts to invoke the Due Process Clause to set aside the political branches' policy judgments about immigration detention. And the remedial decision allows lower federal courts to issue sweeping classwide injunctions against the operation of federal removal and detention statutes, even though Congress has insisted that any such injunction be limited to "an individual alien." 8 U.S.C. 1252(f)(1).

In addition, this Court has recognized the United States' overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 163 (1993). The court of appeals' merits holding compromises that interest by enabling aliens to obtain release into the United States even though Congress has instructed that they "shall be detained." 8 U.S.C. 1225(b)(1)(B)(ii). The court's holding regarding Section 1252(f)(1) similarly compromises that interest by enabling courts to issue classwide injunctions against the operation of detention provisions.

Finally, this Court has taken note of the "burdens" that are "currently 'overwhelming our immigration system.'" *Thuraissigiam*, 140 S. Ct. at 1966 (citation omitted). The court of appeals' merits holding adds to those burdens, because it compels the Executive to continue to provide bond hearings to transferred aliens even though Congress and the Executive both agree that no such hearings should be provided. The court's remedial

holding similarly exacerbates those burdens, by enabling courts to impose new requirements through broad classwide injunctions.

4. This Court should grant certiorari now, rather than granting, vacating, and remanding in light of its intervening decision in *Thuraissigiam*. See p. 13, *supra* (discussing inconsistency between a portion of the court of appeals' analysis and *Thuraissigiam*). The district court here has enjoined the government from effectuating, classwide and nationwide, the statutory prohibition in Section 1225(b)(1)(B)(ii) against releasing transferred aliens on bond. See pp. 7-8, *supra*. The court of appeals has declined to stay that portion of the injunction. See p. 8, *supra*. As a result, that portion of the injunction remains in effect today. Postponing review by remanding the case in light of *Thuraissigiam* would allow that injunction to remain in effect even longer, and would thus prolong the "irreparable injury" that the United States suffers "[a]ny time" it is "enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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