No. 20-322

In the Supreme Court of the United States

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

v.

ESTEBAN ALEMAN GONZALEZ, ET AL.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether, under 8 U.S.C. 1252(f)(1), the courts below had jurisdiction to grant classwide injunctive relief.

2. Whether a noncitizen detained under 8 U.S.C. 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the noncitizen is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Petitioners were the defendants-appellants in the court of appeals. Merrick B. Garland, in his official capacity as Attorney General; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; and David L. Neal, in his official capacity as Director of the Department of Justice Executive Office for Immigration Review (EOIR), are petitioners in both *Garland* v. *Aleman Gonzalez* and *Garland* v. *Flores Tejada*. David W. Jennings, in his official capacity as San Francisco Field Office Director, U.S. Immigration and Customs Enforcement (ICE); Tracy Short, in his official capacity as Chief Immigration Judge, EOIR; David O. Livingston, in his official capacity as Sheriff of Contra Costa County; and Kristi Butterfield, in her official capacity as Facility Commander, West County Detention Facility, Contra Costa County, are petitioners in *Aleman Gonzalez*. Tae D. Johnson, in his official capacity as Acting Director of ICE; Elizabeth Godfrey, in her official capacity as Seattle Field Office Director, ICE; and Stephen Langford, Warden, Northwest Detention Center, are petitioners in *Flores Tejada*.*

Respondents were the plaintiffs-appellees in the court of appeals. Esteban Aleman Gonzalez and Eduardo Gutierrez Sanchez, for themselves and on behalf of a class of similarly situated individuals, are respondents in *Aleman Gonzalez*. Edwin Omar Flores Tejada, for himself and on behalf of a class of similarly situated individuals, is respondent in *Flores Tejada*. Arturo

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* Attorney General Garland, Secretary Mayorkas, Director Neal, Chief Judge Short, Director Godfrey, Acting Director Johnson, and Warden Langford are automatically substituted for their predecessors. See Sup. Ct. R. 35.3.

Martinez Baños and German Ventura Hernandez were plaintiffs in the district court in *Flores Tejada*.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Aleman Gonzalez* v. *Barr*, No. 18-16465 (Pet. App. 1a-66a) is reported at 955 F.3d 762. The order of the district court (Pet. App. 67a-93a) is reported at 325 F.R.D. 616.

The opinion of the court of appeals in *Flores Tejada* v. *Godfrey*, No. 18-35460 (Pet. App. 94a-105a) is reported at 954 F.3d 1245. The orders of the district court (Pet. App. 106a-110a, 126a-128a) are not published in the Federal Supplement but are available at 2018 WL 1617706 and 2017 WL 9938446. A report and recommendation of the magistrate judge (Pet. App. 111a-125a) is not published in the Federal Supplement but is available at 2018 WL 3244988. An additional report and recommendation of the magistrate judge (Pet. App. 129a-157a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Aleman Gonzalez* v. *Barr*, No. 18-16465, and *Flores Tejada* v. *Godfrey*, No. 18-35460, were entered on April 7, 2020. The petition for a writ of certiorari was filed on September 4, 2020. The petition was granted on August 23, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-41a.

STATEMENT

A. Legal Background

1. Congress has established a detailed framework for judicial review of final orders of removal and other executive determinations pertaining to immigration. 8 U.S.C. 1252. That framework channels most challenges brought by noncitizens into petitions for review in the courts of appeals.[1] 8 U.S.C. 1252(a)(5) and (b)(9). It also imposes several limitations on judicial review of executive decision-making and the operation of the immigration system more broadly. *E.g.*, 8 U.S.C. 1252(a)(2) (specifying "Matters not subject to judicial review") (emphasis omitted).

These cases involve Section 1252(f), which is entitled "Limit on injunctive relief," 8 U.S.C. 1252(f) (emphasis omitted), and which provides:

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

> 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 covered provisions ("part IV of this subchapter, as amended") govern the "Inspection, Apprehension, Examination, Exclusion, and Removal" of noncitizens. 8 U.S.C. Ch. 12, Subch. II, Pt. IV (caption) (capitalization omitted). They include Section 1231. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 962 (2019).

2. These cases also concern the authority of U.S. Immigration and Customs Enforcement (ICE) to detain noncitizens who have been ordered removed from the United States. That detention is currently subject, as relevant here, to three sets of legal rules: (1) requirements imposed by Congress in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*; (2) requirements imposed by the Department of Homeland Security (DHS) in regulations; and (3) additional requirements imposed by the Ninth and Third Circuits in decisions interpreting the INA. We describe each set of requirements in turn.

a. Congress has regulated the removal and detention of noncitizens in the INA. The section at issue here, 8 U.S.C. 1231, governs the detention of noncitizens who have been "ordered removed." 8 U.S.C. 1231(a)(1)(A).

Section 1231 establishes a 90-day "removal period" within which the government generally must secure removal. 8 U.S.C. 1231(a)(1)(A). The government "shall" detain noncitizens during that period, and "[u]nder no circumstances during the removal period shall the [government] release" those whose removal is based on certain criminal or national-security grounds. 8 U.S.C. 1231(a)(2).

In some cases, the government is unable to secure removal within the removal period. In those cases, the government "may" continue to detain four categories of noncitizens: (1) "inadmissible" noncitizens, (2) noncitizens who are "removable" for national-security or foreign-policy reasons or for violating entry conditions, status requirements, or certain criminal laws, (3) noncitizens who pose a "risk to the community," and (4) noncitizens who are "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). Noncitizens who fall outside those categories (or who fall within them but are not detained) are subject to supervision upon release. 8 U.S.C. 1231(a)(3) and (6).

Section 1231(a)(6) does not expressly specify how long detention may continue after the removal period. In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted the statute to include an "implicit limitation": detention beyond the removal period may last only for "a period reasonably necessary to bring about" removal. *Id.* at 689. The Court identified six months of detention (including the 90-day removal period) as presumptively reasonable. *Ibid.* Thereafter, if a noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut the showing or release the noncitizen. *Id.* at 701.

b. DHS has supplemented Section 1231 with regulations. One set of regulations governs the discretionary decision to detain noncitizens beyond the removal period. 8 C.F.R. 241.4. An ICE field office ordinarily conducts a custody review before the conclusion of the removal period, and a review panel at ICE headquarters conducts a further review at six months of detention. 8 C.F.R. 241.4(k)(1) and (2). Thereafter, the review panel conducts a further review each year, or sooner if there has been "a material change in circumstances since the last annual review." 8 C.F.R. 241.4(k)(2)(iii). During those reviews, ICE considers both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as "flight risk" and danger of "future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). The noncitizen may submit evidence, use an attorney or other representative, and, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

A second set of DHS regulations implements this Court's decision in *Zadvydas*. 8 C.F.R. 241.13. If a noncitizen who has been detained for six months provides good reason to believe that "there is no significant likelihood of removal in the reasonably foreseeable future," adjudicators at ICE headquarters review the noncitizen's case. 8 C.F.R. 241.13(d)(1). The noncitizen has the right to submit evidence, to respond to the government's evidence, to be represented by an attorney, and, ultimately, to receive "a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d) and (e).

A third set of regulations concerns the supervision of noncitizens who are released after the removal period. 8 C.F.R. 241.5. They must report periodically to DHS

and fulfill other requirements. 8 C.F.R. 241.5(a). ICE may require bond in an amount sufficient to ensure compliance with any removal order and supervised-release conditions. 8 C.F.R. 241.5(b).

c. In *Diouf* v. *Napolitano*, 634 F.3d 1081 (9th Cir. 2011), and *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018), the Ninth and Third Circuits concluded that ICE must follow a further set of procedures, over and above the requirements just discussed, when detaining noncitizens under Section 1231(a)(6). Both courts believed that "prolonged detention" under Section 1231(a)(6) would raise "serious constitutional concerns." *Diouf*, 634 F.3d at 1086 (citation omitted); *Guerrero-Sanchez*, 905 F.3d at 213, 221. Both courts invoked the canon of constitutional avoidance to construe Section 1231(a)(6) to avoid those concerns. *Diouf*, 634 F.3d at 1086; *Guerrero-Sanchez*, 905 F.3d at 223-226. The courts read Section 1231(a)(6) to impose the following rules:

- The noncitizen is entitled to a bond hearing after six months of detention. *Diouf*, 634 F.3d at 1092; *Guerrero-Sanchez*, 905 F.3d at 226.
- A bond hearing need not be held after six months if release or removal is imminent. *Diouf*, 634 F.3d at 1092 n.13; *Guerrero-Sanchez*, 905 F.3d at 226 n.15.
- The bond hearing must be held before an immigration judge in the Department of Justice (DOJ). *Diouf*, 634 F.3d at 1091-1092; *Guerrero-Sanchez*, 905 F.3d at 224.
- The government bears the burden of proving that the noncitizen poses a flight risk or danger to the

community. *Diouf*, 634 F.3d at 1092; *Guerrero-Sanchez*, 905 F.3d at 224.

The Ninth Circuit further held that the Due Process Clause requires the government to prove its case by clear and convincing evidence. Pet. App. 4a-5a, 36a-37a. The Third Circuit interpreted Section 1231(a)(6) itself as imposing the same requirement. *Guerrero-Sanchez*, 905 F.3d at 224 n.12.

B. Procedural History

1. Aleman Gonzalez

a. Respondents in *Aleman Gonzalez*—Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez—are natives and citizens of Mexico. Pet. App. 7a, 70a-71a. They reentered the United States illegally after being removed from the United States under orders of removal. *Ibid.* In such circumstances, the INA provides that "the prior order of removal is reinstated from its original date." 8 U.S.C. 1231(a)(5). Respondents were apprehended, their orders of removal were reinstated, and they applied for withholding of removal—a country-specific form of protection that leaves the underlying removal order intact but prevents removal to a country where the noncitizen would face persecution or torture. Pet. App. 70a-71a; *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). Respondents' applications were referred to immigration judges, and both were detained under Section 1231(a). Pet. App. 70a-71a. They sought bond hearings, but immigration judges denied their motions for lack of jurisdiction. *Ibid.*

The *Aleman Gonzalez* respondents then brought this habeas suit in the United States District Court for the Northern District of California, claiming that individuals detained under Section 1231(a)(6) are entitled to

bond hearings after six months under *Diouf* and seeking classwide declaratory and injunctive relief. Pet. App. 67a. The court rejected the government's argument that Section 1252(f)(1) barred the suit, citing circuit precedent holding that Section 1252(f)(1) "'prohibits only injunction of the operation of the detention statutes, not injunction of a violation of the statutes,'" and that the jurisdictional bar does not apply to declaratory relief. *Id.* at 84a (quoting *Rodriguez* v. *Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)).

The district court certified, for purposes of the statutory claims, a class consisting of "all individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, [ICE], and who have reached or will reach six months in detention, and have been or will be denied a prolonged detention bond hearing before an Immigration Judge" (except for the members of classes already certified in two other cases). Pet. App. 72a, 84a. It later clarified that the class includes only those with "live claims" before an adjudicatory body. *Id.* at 8a-9a.

On the merits, the government argued that the Ninth Circuit's holding in *Diouf* had been superseded by *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018). Pet. App. 86a. In that case, this Court reversed a Ninth Circuit decision that had relied on the canon of constitutional avoidance to read an atextual bond-hearing requirement into another provision of the INA, 8 U.S.C. 1226(a). The district court acknowledged that *Rodriguez* "is in tension with *Diouf*," but concluded that the two cases are "not clearly irreconcilable" and that *Diouf* accordingly remained binding. Pet. App. 91a. The court issued a "preliminary injunction" that "enjoined" the government "from detaining [respondents] and the

class members pursuant to section 1231(a)(6) more than 180 days without * * * providing each a bond hearing before an [immigration judge] as required by *Diouf*." *Id.* at 92a.

b. The court of appeals affirmed. Pet. App. 1a-66a. Although the court "recognize[d] some tension" between *Diouf* and *Rodriguez*, *id.* at 4a, and acknowledged that the government's arguments are "not without some appeal," *id.* at 30a, it concluded that *Diouf* was not "clearly irreconcilable" with *Rodriguez*, *id.* at 25a. The court perceived a "material difference" between the statutes at issue, observing that Section 1226(a) authorizes detention for a limited period pending a decision on removal, whereas Section 1231(a)(6) authorizes potentially indefinite detention. *Id.* at 41a-42a. The court noted that *Zadvydas* had already interpreted Section 1231(a)(6) as generally not authorizing detention once removal is no longer reasonably foreseeable. *Id.* at 42a. And the court found that *Zadvydas* lent support to the additional limitations adopted in *Diouf*. *Id.* at 42a-43a.

Judge Fernandez dissented. Pet. App. 56a-66a. He emphasized this Court's admonition in *Rodriguez* that constitutional avoidance comes into play only when a "statute is found to be susceptible of more than one construction." *Id.* at 59a (quoting *Rodriguez*, 138 S. Ct. at 842). He observed that *Diouf* identified neither "a textual ambiguity in the statute regarding a bond hearing requirement" nor "any plausible basis in the statutory text for such a hearing." *Ibid.* He concluded that *Diouf* was irreconcilable with *Rodriguez*. *Ibid.*

2. Flores Tejada

a. Respondent in *Flores Tejada*—Edwin Flores Tejada—is a native and citizen of El Salvador. Pet.

App. 130a n.2. Like the *Aleman Gonzalez* respondents, he had a prior removal order reinstated after he reentered the United States illegally. *Id.* at 136a. His application for withholding of removal was referred to an immigration judge and he was detained. *Ibid.* In 2017, an amended complaint named him as a plaintiff in a previously filed habeas suit in the Western District of Washington, contending that plaintiffs were entitled to a custody hearing before an immigration judge and seeking classwide declaratory and injunctive relief. *Id.* at 129a-130a, 137a-138a. The district court dismissed two other named plaintiffs, because one had been released from custody and the other had been removed. *Id.* at 127a, 138a, 145a-146a. The court certified a class consisting of all individuals who (1) have had a removal order reinstated, have applied for withholding of removal, and have been placed in proceedings before an immigration judge in the Western District of Washington to adjudicate their applications and (2) have been detained for 180 days without a bond hearing or since their last bond hearing. *Id.* at 98a-99a.

The district court granted the class partial summary judgment on its statutory claims. Pet. App. 106a-110a; see *id.* at 111a-125a. As in *Aleman Gonzalez*, the court rejected the government's contention that *Rodriguez* superseded *Diouf*. *Id.* at 107a-109a. The court entered judgment stating that "[i]njunctive relief is granted in [respondent's] and the class members' favor," 16-cv-1454 D. Ct. Doc. 84, at 2 (Apr. 4, 2018), and requiring the government to provide periodic bond hearings every six months, Pet. App. 123a.

b. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 94a-105a. The court first explained that its analysis in *Aleman Gonzalez*, decided

the same day, "appl[ies] equally here." *Id.* at 100a. The court reiterated its conclusion that *Diouf*'s "construction of § 1231(a)(6) to require an individualized bond hearing for an alien subject to prolonged detention is not clearly irreconcilable with [*Rodriguez*]," *ibid.*, and accordingly affirmed the "injunction's requirement that the Government must provide class members with an individualized bond hearing after six months of detention," *id.* at 101a.

The court of appeals concluded that the district court had erred, however, by also requiring "additional statutory bond hearings every six months" thereafter. Pet. App. 101a. The court of appeals noted that *Diouf* did not require "additional bond hearings every six months," and it found "no support" in "the statutory text" for such a construction. *Id.* at 101a, 103a-104a. The court therefore vacated that portion of the injunction and remanded the case for consideration of the class's constitutional claims. *Id.* at 104a.

Judge Fernandez concurred in part and dissented in part. Pet. App. 105a. He agreed with the majority to the extent it vacated the judgment and remanded for further proceedings. *Ibid.* But for the reasons stated in his dissent in *Aleman Gonzalez*, he dissented to the extent that it affirmed the district court's judgment. *Ibid.*

SUMMARY OF ARGUMENT

I. The injunctions entered below were barred by 8 U.S.C. 1252(f)(1), which provides that lower courts may not "enjoin or restrain the operation of" specified provisions of the INA (including the one governing post-removal-period detention), "[r]egardless of the nature of the action or claim." That prohibition's only ex-

ception is "with respect to the application of such provisions to an individual alien against whom [removal] proceedings * * * have been initiated." *Ibid.*

A. The Ninth Circuit has held that Section 1252(f)(1) does not apply to injunctions that purport to *enforce* the covered provisions of the INA, but that interpretation is mistaken. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 975 (2019) (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment).

The provision's plain text refutes the Ninth Circuit's reading. The term "enjoin" refers both to injunctions that prohibit the operation of the covered provisions and those that purport to *compel* their operation. Even if the term were limited to prohibitory injunctions, the result would be the same, because the injunctions below prohibit the "operation"—in other words, executive implementation—of a covered provision. 8 U.S.C. 1252(f)(1). The Ninth Circuit's view that the statute merely bars injunctions against the provisions' "proper operation," *Rodriguez* v. *Hayes*, 591 F.3d 1105, 1121 (2010), effectively limits Section 1252(f)(1)'s bar to constitutional challenges to the covered provisions themselves, which is inconsistent with the statute's instruction that it applies "[r]egardless of the nature of the action or claim," 8 U.S.C. 1252(f)(1).

The government's interpretation is consistent with background principles of law. Congress typically accords preferential, not disfavored, status to constitutional claims. And the Ninth Circuit's approach collapses a jurisdictional inquiry with the suit's merits, because whether a suit seeks to enforce a "proper" understanding of the covered provisions, *Rodriguez*, 591 F.3d at 1121, cannot be determined until its merits are resolved.

The history and purposes of Section 1252(f)(1) further support interpreting it to prohibit injunctions enforcing the covered provisions. It was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, sec. 306(a)(2), § 242(f), 110 Stat. 3009-611 to 3009-612. Both Section 1252(f)(1) and IIRIRA more broadly were designed to protect executive discretion and channel judicial review to individual challenges. The Ninth Circuit's interpretation seriously undermines that scheme.

B. Section 1252(f)(1)'s exception for relief granted to an "individual alien" in removal proceedings, 8 U.S.C. 1252(f)(1), does not apply to the classwide injunctions granted below. The Ninth Circuit has found the exception applicable to classes comprising noncitizens in proceedings, see *Padilla* v. *ICE*, 953 F.3d 1134 (2020), vacated on other grounds and remanded, 141 S. Ct. 1041 (2021), but that reading is untenable.

This Court has repeatedly recognized that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [the covered provisions]." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 851 (2018) (citation omitted); see *Reno* v. *American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471, 481-482 (1999); *Nken* v. *Holder*, 556 U.S. 418, 431 (2009). And the statutory text unambiguously precludes classwide relief. Its exception applies only to an "individual alien" in removal proceedings. 8 U.S.C. 1252(f)(1). The term "individual" restricts relief to a particular noncitizen before the court. The Ninth Circuit's contrary reading of the exception is unpersuasive and conflicts with the history and purposes of IIRIRA,

as well as the legislative history. In particular, it undermines Congress's goal of channeling challenges into suits brought by individual noncitizens and enables lower courts to engage in programmatic oversight of the immigration system.

II. The Ninth and Third Circuits have held that 8 U.S.C. 1231(a)(6) requires the government to provide a bond hearing before an immigration judge after six months of detention and to release the noncitizen if it cannot prove that he poses a flight risk or danger to the community. That reading is erroneous.

The text of Section 1231(a)(6) provides no foothold for the requirements that the Ninth and Third Circuits imposed. It simply provides that DHS may detain a noncitizen beyond the removal period if the noncitizen is inadmissible, removable for specified reasons, a danger to the community, or unlikely to comply with the removal order. It nowhere refers to six-month cutoffs, bond hearings, or immigration judges. And imposing those requirements violates Congress's instruction not to construe Section 1231 "to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States." 8 U.S.C. 1231(h).

The Ninth and Third Circuits' bond-hearing regime also conflicts with this Court's precedents. The Court has stated that a noncitizen detained under Section 1231 "is not entitled to a bond hearing." *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021). Further, it has rejected efforts to read bond-hearing requirements into statutes that make no mention of such requirements. See *Rodriguez*, 138 S. Ct. at 847-848.

The Ninth and Third Circuits invoked the canon of constitutional avoidance and this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), but neither

justifies their bond-hearing regime. Constitutional avoidance applies only when a statute is susceptible of more than one plausible reading and when one of those readings raises serious constitutional concerns. In *Zadvydas*, the Court found ambiguity as to the permissible length of detention under Section 1231(a)(6), and then invoked constitutional avoidance to resolve the ambiguity in a way that avoided serious constitutional concerns. By contrast, Section 1231(a)(6) contains no ambiguity on the point in dispute here; it plainly does not require bond hearings. Nor does applying the statute as written and as implemented by existing regulations raise any serious constitutional concerns.

ARGUMENT

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

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 provision consists of two halves: (1) a general rule that courts lack jurisdiction "to enjoin or restrain the operation" of the specified provisions "[r]egardless of the nature of the action or claim," and (2) an exception for "the application of such provisions to an individual alien." *Ibid.* The injunctions

in these cases fell within the rule because they enjoined the operation of 8 U.S.C. 1231(a)(6), and they fell outside the exception because they were entered with respect to a class rather than "an individual alien." 8 U.S.C. 1252(f)(1).

A. The Injunctions In These Cases Enjoin The Operation Of Section 1231(a)(6)

Section 1252(f)(1) deprives courts of jurisdiction to enjoin the operation of specified provisions of the INA. The Ninth Circuit has held, however, that the jurisdictional bar does not apply to injunctions that prohibit "conduct [that] is not authorized by the statutes." *Rodriguez* v. *Hayes*, 591 F.3d 1105, 1120 (2009); see *Ali* v. *Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), vacated on other grounds, 421 F.3d 795 (9th Cir. 2005). As two Members of this Court have explained, that reading is flawed. See *Nielsen* v. *Preap*, 139 S. Ct. 954, 975 (2019) (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment). The provision bars a classwide injunction even on a claim that "the Executive's action does not comply with the statutory grant of authority." *Ibid.* That interpretation follows from the statutory text, from background principles, and from the history and purpose of Section 1252(f)(1) and IIRIRA more broadly.

1. Section 1252(f)(1) provides that a lower court lacks jurisdiction to "enjoin" the "operation of" the covered provisions "[r]egardless of the nature of the action or claim." 8 U.S.C. 1252(f)(1). Each of the quoted terms and phrases indicates that the jurisdictional bar covers injunctions based on a conclusion that the action enjoined violates the statutory grant of authority.

In holding that "Section 1252(f) prohibits only injunction of 'the operation of' the detention statutes, not

injunction of a violation of the statutes," *Rodriguez*, 591 F.3d at 1120, the Ninth Circuit has not acknowledged, much less grappled with, the plain meaning of the word "enjoin." 8 U.S.C. 1252(f)(1). It has apparently assumed, as a colloquial matter, that "enjoin" means merely to prohibit. That assumption contradicts the term's definition and this Court's cases.

The plain meaning of "enjoin" encompasses not only injunctions that block the operation of the covered provisions on constitutional or other grounds, but also injunctions that direct the Executive to comply with the court's reading of the provisions. "Enjoin" means "[t]o require; command; positively direct." *Black's Law Dictionary* 529 (6th ed. 1990) (emphasis omitted). Similarly, an "[i]njunction" is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Id.* at 784 (emphasis omitted). Thus, enjoining the operation of the covered provisions includes commanding their purported operation just as much as it includes prohibiting it.

This Court has often explained that the term "enjoin" includes affirmative and negative commands. In interpreting the adjoining paragraph, which restricts judicial authority to "enjoin the removal of any alien," 8 U.S.C. 1252(f)(2), the Court described an injunction as "a means by which a court tells someone what to do or not to do," *Nken* v. *Holder*, 556 U.S. 418, 428 (2009). It further observed that, "[i]n a general sense, every order of a court which commands or forbids is an injunction." *Ibid.* (citation omitted; brackets in original). Similarly, in the context of the Tax Injunction Act, which provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of

any tax under State law," 28 U.S.C. 1341, the Court has suggested that the term "enjoin" may include injunctions requiring rather than forbidding the specified acts. See *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1, 12-13 (2015) (equating "'[r]estrain'" with "'enjoin'" and holding that, in that context, it "captures only those orders that stop (*or perhaps compel*) acts of 'assessment, levy or collection'") (emphasis added); *Hibbs* v. *Winn*, 542 U.S. 88, 118 (2004) (Kennedy, J., dissenting) ("It is noteworthy that the term 'enjoin' has not just its meaning in the restrictive sense but also has meaning in an affirmative sense. * * * That definition may well be implicated here, since an order invalidating a tax credit would seem to command States to collect taxes they otherwise would not collect."). Moreover, with respect to the related term "injunction," the Court has held that an order "direct[ing] [an agency] to perform certain acts" was "plainly cast in injunctive terms" and thus fell within the scope of a statute authorizing direct appeal to this Court from an "'injunction'" issued by a three-judge court. *Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 307-308 (1975) (quoting 28 U.S.C. 1253).

Even setting aside the word "enjoin," the relief below would still be barred. Section 1252(f)(1) prohibits orders that enjoin or restrain "the operation of" the covered provisions. 8 U.S.C. 1252(f)(1). The term "operation," in this context, is synonymous with execution, enforcement, or implementation. See, *e.g.*, *Webster's Third New International Dictionary* 1581 (1993) ("method or manner of functioning"). Section 1252(f)(1) therefore prohibits injunctions that restrain the Executive's implementation of the immigration laws, even

when the basis for the lawsuit is that the Executive has purportedly misinterpreted the relevant provisions.

The Ninth Circuit attempted to evade that point by construing Section 1252(f)(1) to preclude only orders that prohibit the "*proper* operation" of the covered provisions. *Rodriguez*, 591 F.3d at 1121 (emphasis added). But the statute simply does not say that, and courts "may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

Moreover, the Ninth Circuit's gloss on "operation" effectively draws a distinction between suits that challenge the covered provisions themselves (*e.g.*, on constitutional grounds) and those that challenge the Executive's allegedly erroneous implementation of them. That distinction is incompatible with Section 1252(f)'s instruction that the jurisdictional bar applies "[*r*]*egardless* of the nature of the action or claim." 8 U.S.C. 1252(f)(1) (emphasis added). That language makes clear that the bar applies to claims that "allege that the Executive's action does not comply with the statutory grant of authority." *Preap*, 139 S. Ct. at 975 (Thomas, J., concurring in part and concurring in the judgment). The Ninth Circuit's contrary approach effectively deletes the "regardless" clause.[2]

Section 1252 itself shows that Congress knows how to distinguish between constitutional and statutory

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[2] The Ninth Circuit has suggested, without holding, that Section 1252(f)(1) might potentially bar not only injunctions based on constitutional claims, but also injunctions that "enjoin the operation of [the covered] provisions to relieve harm caused by misinterpretation of other statutory provisions." *Rodriguez*, 591 F.3d at 1121. Even so, the Ninth Circuit still sees constitutional challenges as the provision's primary target. *Id.* at 1120.

claims. One clause forbids construing certain provisions of the INA "as precluding review of constitutional claims." 8 U.S.C. 1252(a)(2)(D). Another limits "[j]udicial review of determinations under section 1225(b) of this title and its implementation," while allowing claims that raise the issue of "whether such section, or any regulation issued to implement such section, is constitutional." 8 U.S.C. 1252(e)(3)(A)(i). In Section 1252(f)(1), by contrast, Congress drew no distinction between constitutional claims and claims that the Executive is violating a statute. Just the opposite: It deprived courts of jurisdiction "[r]egardless of the nature of the action or claim." 8 U.S.C. 1252(f)(1).

An earlier three-judge-court statute further illustrates this point. It provided that an "injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute." 28 U.S.C. 2281 (1970). Unlike Section 1252(f), that provision singled out constitutional challenges to a statute. This Court explained that "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." *Phillips* v. *United States*, 312 U.S. 246, 252 (1941). The Ninth Circuit has adopted virtually the same interpretation of Section 1252(f), but in the absence of any similar language singling out constitutional challenges to statutes. This Court should give effect to the different language in Section 1252(f).

2. a. Background legal principles support interpreting Section 1252(f)(1) to apply to claims that seek to enforce the covered provisions. When Congress distinguishes constitutional from statutory claims, it typically treats constitutional claims *more* favorably than statutory ones. Thus, the Court generally requires a "heightened showing" before concluding that a statute precludes jurisdiction over constitutional claims, but not over statutory claims. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 9 (2012) (citation omitted); see *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977). And Section 1252 itself expressly exempts constitutional claims from certain provisions limiting courts' jurisdiction. See 8 U.S.C. 1252(a)(2)(D) and (e)(3)(A). But the Ninth Circuit's rule inverts the usual approach by construing Section 1252(f)(1) as barring constitutional challenges to the covered provisions but permitting statutory challenges to the Executive's implementation of those provisions. See *Rodriguez*, 591 F.3d at 1121. There is no indication that Congress sought to *disfavor* constitutional claims when it enacted Section 1252(f). A court should "hardly attribute to Congress a purpose to be less scrupulous about [a protection] necessitated by the Constitution than one granted by it as a matter of expediency." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).

b. The Ninth Circuit's interpretation also seriously undermines Section 1252(f)'s function as a jurisdictional bar. Although jurisdiction and the merits sometimes overlap, the Court ordinarily presumes that Congress does not mean for courts to "decide * * * the merits" in order to "answer the legally and analytically antecedent jurisdictional question." *Sisson* v. *Ruby*, 497

U.S. 358, 365 (1990). "Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it," and they thus benefit from "straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). The Ninth Circuit's approach, however, greatly complicates the jurisdictional inquiry by collapsing it with the merits. Whether a plaintiff's suit seeks to enforce a "proper" understanding of a covered provision determines both the applicability of Section 1252(f)'s bar and whether the plaintiff wins on the merits. *Rodriguez*, 591 F.3d at 1121. It is impossible to make that determination until the conclusion of suit—which is why the Ninth Circuit's reasoning is "circular and unpersuasive." *Preap*, 139 S. Ct. at 975 (Thomas, J., concurring in part and concurring in the judgment).

These cases are a prime example of that problem. If, at the conclusion of this litigation, the government prevails on its plain-text interpretation of Section 1231(a)(6), then respondents' lawsuits will be revealed as an effort to *restrain* the proper understanding of that provision, rather than enforce it. At that point it will be clear that the lower courts lacked jurisdiction to grant the requested injunctive relief even under the Ninth Circuit's approach—though the government will have been compelled to litigate the issue (and questions associated with class certification) for years despite Section 1252(f)'s express jurisdictional bar.

c. The Ninth Circuit's carveout for statutory claims also enables plaintiffs to circumvent the jurisdictional bar by recharacterizing constitutional claims as statutory ones under the doctrine of constitutional avoidance. Again, these cases aptly illustrate the problem.

Rather than assert the constitutional claims that ostensibly motivated their suits, respondents have advanced a facially implausible interpretation of Section 1231(a) under the guise of constitutional avoidance. See pp. 40-41, *infra*; *Hamama* v. *Adducci*, 912 F.3d 869, 879-880 (6th Cir. 2018) (characterizing "the claim that 'the district court was not enjoining or restraining the statutes'" as "implausible on its face," and noting that "[i]f these limitations on what the government can and cannot do under the removal and detention provisions are not 'restraints,' it is not at all clear what would qualify as a restraint"), cert. denied, 141 S. Ct. 188 (2020). Had they limited their complaints to the underlying constitutional claims, classwide injunctions would have been barred even under the Ninth Circuit's approach. The perverse incentive to plead constitutional claims as pseudo-statutory claims can be eliminated simply by applying Section 1252(f)'s bar "[r]egardless of the nature of the action or claim." 8 U.S.C. 1252(f)(1).

3. The history and purposes of the INA's judicial-review provisions support interpreting Section 1252(f)(1) to prohibit injunctions that purport to enforce the covered provisions.

Congress adopted Section 1252(f)(1) as part of an overhaul of judicial review of immigration proceedings in IIRIRA, sec. 306(a)(2), § 242(f), 110 Stat. 3009-611 to 3009-612. As this Court has observed, IIRIRA "substantially limited the availability of judicial review." *Nken*, 556 U.S. at 424. And "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 486

(1999) (emphasis omitted); see *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (same).

In addition to shielding certain executive determinations from court oversight, IIRIRA minimized the disruptiveness of judicial review by "streamlin[ing] all challenges to a removal order into a single proceeding" brought by an individual noncitizen in the form of a "petition for review." *Nken*, 556 U.S. at 424; see 8 U.S.C. 1252(b)(9) ("Judicial review of all questions of law and fact, * * * arising from any action taken or proceeding brought to remove an alien from the United States * * * shall be available only in judicial review of a final order[.]"). And although not *every* immigration-related claim may be appropriately raised in a petition for review, see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion), Section 1252(f)(1) ensures that relief is awarded only on an "individual" basis even outside that context, 8 U.S.C. 1252(f)(1); see pp. 25-33, *infra* (discussing Section 1252(f)'s prohibition on classwide relief). To further streamline immigration proceedings, Congress also adopted other provisions designed to prevent "the deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487.

Interpreting Section 1252(f)(1) to permit injunctive relief *enforcing* purported interpretations of the covered provisions would undermine the structure and purposes of the scheme. Under the Ninth Circuit's interpretation, if other jurisdictional prerequisites are satisfied, individual noncitizens (whether in removal proceedings or not), classes of noncitizens, advocacy organizations, and others may sue to have the covered provisions enforced through broad injunctions. The inevita-

ble consequence is judicial micromanagement of executive enforcement of the immigration laws nationwide. As in these cases, a single district court may enjoin the government to comply with a misinterpretation of the immigration laws, and the government must obtain a stay or be forced to comply pending potentially lengthy appellate proceedings. Furthermore, the Ninth Circuit's interpretation runs directly counter to IIRIRA's "theme" of "protecting the Executive's discretion from the courts," *AADC*, 525 U.S. at 486, by barring challenges to the statute itself but not challenges to executive implementation.

B. The Injunctions In These Cases Fall Outside The Exception In Section 1252(f)(1) Because They Seek Classwide, Not Individual, Relief

The jurisdictional bar in Section 1252(f)(1) is subject to an exception: A court *may* enjoin or restrain the operation of the specified provisions "with respect to the application of such provisions to an individual alien against whom [removal] proceedings * * * have been initiated." 8 U.S.C. 1252(f)(1). In *Padilla* v. *ICE*, 953 F.3d 1134 (2020), vacated on other grounds and remanded, 141 S. Ct. 1041 (2021), the Ninth Circuit held that, even though the exception refers to the application of the specified provisions to "'an individual alien,'" the exception also covers any class "composed of individual noncitizens, each of whom is in removal proceedings." *Id.* at 1151 (citation omitted). This Court, however, has already concluded that classwide relief categorically falls outside the exception. In any event, that interpretation is compelled by the text, context, history, and purpose of Section 1252(f).

1. This Court has already concluded—not once, but thrice—that classwide injunctions fall outside the exception to Section 1252(f). In *Rodriguez*, a class of noncitizens subject to immigration detention argued that they were entitled to bond hearings under the applicable statutes and the Constitution. 138 S. Ct. at 839. This Court rejected the class's statutory claims, but remanded for reconsideration of its 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)." *Ibid.* The Court explained that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [the covered provisions]." *Ibid.* (citation omitted).

On this point, *Rodriguez* simply repeated an interpretation of Section 1252(f)(1) that this Court had already embraced in two earlier cases. In *AADC*, the Court explained that Section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation" of the covered provisions, "but specifies that this ban does not extend to individual cases." 525 U.S. at 481-482. And in *Nken*, the Court described Section 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal provisions." 556 U.S. at 431.

The Ninth Circuit in *Padilla* nevertheless viewed the provision's applicability to classwide relief as "unresolved." 953 F.3d at 1149. The Ninth Circuit reasoned that, because this Court had remanded *Rodriguez* for the court of appeals to decide whether it continued to have jurisdiction, this Court must have regarded the statute's application to classwide injunctions as unsettled. *Ibid.* That reading was mistaken. In *Rodriguez*,

the court of appeals had held that Section 1252(f)(1) "did not affect its jurisdiction over [the challengers'] *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.'" 138 S. Ct. at 851 (quoting *Rodriguez*, 591 F.3d at 1120) (ellipsis omitted). After rejecting those statutory claims on the merits, this Court observed that the Ninth Circuit's reasoning with respect to Section 1252(f)(1) "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." *Ibid.*

The sole purpose of the remand was thus to permit the court of appeals to consider whether *its own* prior logic—that Section 1252(f)(1) does not bar injunctions enforcing, rather than restraining, the covered provisions—would apply to constitutional claims. Contrary to the *Padilla* court's suggestion, that remand did not invite the court of appeals to reconsider *this Court's* repeated conclusion that Section 1252(f)(1), where it applies, "prohibits federal courts from granting classwide injunctive relief against the operation of [the statutory provisions]." *Rodriguez*, 138 S. Ct. at 851 (quoting *AADC*, 525 U.S. at 481).

The *Padilla* court also sought to overcome this Court's repeated statements about Section 1252(f)(1) by asserting that this Court has never considered the availability of injunctive relief "where every member of a class is 'an individual alien against whom proceedings under such part have been initiated.'" 953 F.3d at 1149 (quoting 8 U.S.C. 1252(f)(1)). That, too, was incorrect. In *Rodriguez* itself, the dissent emphasized that

"[e]very member of the classes" was "an 'individual alien against whom proceedings under such part have been initiated.'" 138 S. Ct. at 875 (Breyer, J., dissenting) (quoting 8 U.S.C. 1252(f)(1)).

2. Even setting *Rodriguez* aside, the text of Section 1252(f)(1) prohibits classwide injunctive relief.

a. On its face, the exception in Section 1252(f)(1) applies only to an injunction against the application of the covered provisions "to an individual alien." 8 U.S.C. 1252(f)(1). The word "individual," used as an adjective, means "pertaining or belonging to, or characteristic of, one single person." *Black's Law Dictionary* 773; see 7 *The Oxford English Dictionary* 879 (2d ed. 1989) ("Of, pertaining or peculiar to, a single person or thing, or some one member of a class[.]"). Thus, "an individual alien" means "a single alien." A class of aliens is not "an individual alien," even if it consists of individual aliens. Indeed, "[t]he *class* action" is "'an exception to the usual rule that litigation is conducted by and on behalf of the *individual* named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (emphases added; citation omitted). The term "individual" therefore unambiguously excludes classwide relief.

Grammar and context confirm that reading. The exception refers to "*an* individual alien," 8 U.S.C. 1252(f)(1) (emphasis added), rather than using a more expansive phrase, such as "individual aliens," which might at least arguably encompass classwide relief. Cf. *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1482 (2021) (relying on Congress's use of "the singular 'a'" in the statute). Moreover, the general prohibition on injunctive relief uses both the singular and the plural, barring relief "[r]egardless of * * * the identity of the *party or parties*." 8 U.S.C. 1252(f)(1) (emphasis added). But the

exception uses only the singular, permitting relief for "an individual alien." *Ibid.* That contrast suggests that the general restriction applies both to class suits and individual suits, but the exception applies only to the latter. See *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted).

b. In *Padilla*, the Ninth Circuit reasoned that the term "'individual alien'" serves to distinguish noncitizens from "organizational plaintiffs," not to distinguish an individual noncitizen from a class of noncitizens. 953 F.3d at 1150. But the phrase "alien against whom proceedings under such part have been initiated" *already* denotes a natural person—because organizations are neither "alien[s]" nor subject to removal proceedings. 8 U.S.C. 1252(f)(1). The Ninth Circuit's interpretation thus renders the term "individual" superfluous. See *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1761 (2018) ("A statute ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant.") (citation and ellipses omitted).

Further undercutting the Ninth Circuit's reading, Section 1252(f)(1) broadly prohibits injunctive relief "[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action," but then establishes a narrow exception for "an individual alien." 8 U.S.C. 1252(f)(1). That structure makes clear that the statute restricts both the kind of relief available and the kind of parties that may seek that relief; it does not merely eliminate relief for organizational plaintiffs. It would have made no sense to specify that the prohibition applies "[r]egardless of * * * the

identity of the party or parties bringing the action," *ibid.*, if it were meant only to preclude relief for certain types of parties.

The Ninth Circuit grounded its reading of "individual" in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), in which this Court held that the Social Security judicial-review provision—which permits "[a]ny individual" to file "a civil action" to obtain review of a decision to which he was a party, 42 U.S.C. 405(g) (1976)—did not foreclose class certification. 442 U.S. at 701. The Court explained that the Social Security provision "prescribes that judicial review shall be by the usual type of 'civil action' brought routinely in district court." *Id.* at 699-700. That phrase evokes the Federal Rules of Civil Procedure, which "'govern the procedure in the United States district courts in *all* suits of a civil nature'" and further "provide for class actions." *Id.* at 700 (citation omitted). The *Yamasaki* Court therefore concluded that Section 405(g) permits a Social Security plaintiff to take advantage of the normal procedural mechanisms associated with civil litigation, including class actions. *Id.* at 700-701.

Yamasaki is inapt. The statutory text in *Yamasaki* used the term "individual" as a noun, but Section 1252(f)(1) uses it as an adjective. "As a noun, 'individual' ordinarily means 'a human being'" as opposed to an organization, *Mohamad* v. *Palestinian Authority*, 566 U.S. 449, 454 (2012) (brackets and citation omitted), but as an adjective, "individual" means "pertaining * * * to[] a single person * * * or some *one member of a class*," 7 *The Oxford English Dictionary* 879 (emphasis added). Elsewhere in Section 1252, Congress used a formulation analogous to the one in *Yamasaki*—the word "any" followed by a singular noun, 42 U.S.C.

405(g) (1976)—to describe parties eligible for relief, but it did not do so in Section 1252(f)(1), see, *e.g.*, 8 U.S.C. 1252(e)(4)(B) (providing that "[a]ny alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review"); see also *Padilla*, 953 F.3d at 1154 (Bade, J., dissenting). The provision in *Yamasaki* also included the phrase "civil action," 42 U.S.C. 405(g) (1976), implicating the Federal Rules of Civil Procedure and their authorization of class actions, while the prohibition in Section 1252(f)(1) applies "[r]egardless" of whatever *other* provisions imply about particular actions, claims, or parties, 8 U.S.C. 1252(f)(1).

The provisions in the two cases differ structurally, too. In contrast to the open-ended authorization of judicial review in *Yamasaki*, the "individual alien" proviso in Section 1252(f)(1) functions as a narrow exception to a broad jurisdictional bar. 8 U.S.C. 1252(f)(1). When "Congress has enacted a general rule," a court "should not eviscerate that legislative judgment through an expansive reading" of an "exception." *Knight* v. *Commissioner*, 552 U.S. 181, 191 (2008) (citation omitted).

Apart from relying on *Yamasaki*, *Padilla* also contrasted Section 1252(f)(1) with Section 1252(e)(1)(B), which bars courts from "certify[ing] a class under Rule 23" in certain cases. 953 F.3d at 1149-1150 (quoting 8 U.S.C. 1252(e)(1)(B)) (brackets in original). But Section 1252(f)(1) does not prohibit class actions outright, so the textual difference between the two provisions is both unsurprising and appropriate. Instead, Section 1252(f)(1) bars a particular *form of relief*: relief that enjoins or restrains the operation of the covered provisions beyond their application to an individual nonciti-

zen before the court. Class actions may still be appropriate in suits that do not request a prohibited form of relief. See *Preap*, 139 S. Ct. at 962 (discussing classwide declaratory relief).[3]

3. The Ninth Circuit's conclusion that Section 1252(f)(1) permits classwide injunctive relief creates enormous practical problems and seriously undermines Congress's purpose in many of the same ways as its holding that the provision permits injunctions enforcing covered INA provisions. See pp. 23-25, *supra*. Classwide injunctions (as in these cases) undermine Congress's goal of channeling challenges into suits brought by individual noncitizens. They dramatically magnify the disruption inflicted by incorrect lower-court decisions. And even without classwide injunctions, individual suits remain available to prevent violations of individual rights, given that Section 1252(f)(1) permits lower courts to grant relief to "an individual alien." 8 U.S.C. 1252(f)(1); cf. *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 236-237 (2013) (explaining, while upholding a class-action waiver, that individual suits are "adequate to ensure 'effective vindication' of a federal right"). The court of appeals' expansive reading of the exception effectively obliterates the jurisdictional bar: although the Ninth Circuit nominally interprets the bar to apply to claims that the covered

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[3] Even assuming classwide declaratory relief is permissible under Section 1252(f)(1), the classes in these cases were certified under Rule 23(b)(2), see Pet. App. 83a, 127a, 156a, which applies only if "final injunctive relief or *corresponding* declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2) (emphasis added). In *Rodriguez*, this Court noted but did not resolve the question whether standalone declaratory relief is capable of "sustain[ing a] class on its own" under Rule 23(b)(2). 138 S. Ct. at 851.

provisions are unconstitutional, plaintiffs may bring programmatic lawsuits on both statutory *and* constitutional grounds pursuant to the exception.

The legislative history confirms that Congress understood that classwide injunctive relief would be prohibited. Discussing a provision materially identical to what was later enacted as Section 1252(f)(1), the House Judiciary Committee explained that it would allow removal procedures to be challenged but that those removal "procedures [would] remain in force while such lawsuits are pending" (*i.e.*, until this Court ruled). H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 33, 161 (1996). Such procedures are not in force during the pendency of litigation when district courts are permitted to grant classwide or nationwide injunctions against the INA's operation. The Committee also observed that "courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights," *id.* at 161, again showing that the exception was expected to apply only to individual noncitizens, not classes of them.

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

The Ninth and Third Circuits have interpreted 8 U.S.C. 1231(a)(6) to impose various procedural requirements not specified in the statutory text, including bond hearings. See *Diouf* v. *Napolitano*, 634 F.3d 1081, 1084-1092 (9th Cir. 2011); *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 219-227 (3d Cir. 2018). Those interpretations are wrong.

A. The Ninth and Third Circuits' Bond-Hearing Regime Has No Basis In The Statutory Text

Section 1231 governs the detention of noncitizens who have been "ordered removed" from the United States. 8 U.S.C. 1231(a)(1)(A). Section 1231 provides that the government "shall" detain them during the 90-day removal period, 8 U.S.C. 1231(a)(2), and that it "may" detain them after that period, 8 U.S.C. 1231(a)(6). The clause that governs detention after the removal period provides:

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

Ibid. The Ninth and Third Circuits held that the provision requires a bond hearing before an immigration judge after six months of detention (unless release or removal is imminent), and that DHS bears the burden of proving at the hearing that the noncitizen poses a flight risk or danger to the community. See *Diouf*, 634 F.3d at 1091-1092; *Guerrero-Sanchez*, 905 F.3d at 224-226 & n.13. Those holdings do not just misinterpret Section 1231(a)(6), they rewrite it.

1. The most obvious problem with the Ninth and Third Circuits' interpretation is that it effectively adds words that the statute does not contain. Section 1231(a)(6) says nothing about six-month cutoffs, bond hearings, exceptions for noncitizens whose release or removal is imminent, immigration judges, or burdens of proof. The Ninth and Third Circuits simply "created

out of thin air a requirement for bond hearings that does not exist in the statute" and "adopted new standards that the government must meet" at those hearings. *Hamama*, 912 F.3d at 879-880 (criticizing a district court that had adopted a similar reading); see *Martinez* v. *LaRose*, 968 F.3d 555, 566 (6th Cir. 2020). A court, however, may not "add words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

"Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019). For example, Congress knows how to change the rules based on the length of detention; in Section 1231(a) itself, it prescribed one set of rules for detention during the removal period, see 8 U.S.C. 1231(a)(2), and a separate set of rules after that period, see 8 U.S.C. 1231(a)(6). And it knows how to require hearings before immigration judges. See, *e.g.*, 8 U.S.C. 1225(b)(1)(B)(iii)(III), 1229a(a)(1), 1232(a)(5)(D)(i).

The Ninth and Third Circuits' bond-hearing regime also effectively omits words from the statute. Section 1231(a)(6) allows DHS to detain a noncitizen after the removal period when the noncitizen is (1) "inadmissible"; (2) "removable" for national-security or foreign-policy reasons or for violating status requirements, entry conditions, or certain criminal laws; (3) "a risk to the community"; or (4) "unlikely to comply with the order of removal" (*i.e.*, a flight risk). 8 U.S.C. 1231(a)(6). But on the Ninth and Third Circuits' reading, the government may detain a noncitizen for more than six months only on the third and fourth grounds—that is, only when the noncitizen poses a danger to the community or a flight

risk. See *Diouf*, 634 F.3d at 1092; *Guerrero-Sanchez*, 905 F.3d at 224 & n.12. The other two grounds—inadmissibility and removability for the specified reasons—essentially evaporate at the six-month mark. "Once again, statutory construction does not work that way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden* v. *United States*, 141 S. Ct. 1817, 1829 (2021) (plurality opinion).

The Ninth and Third Circuits also rewrote the text allocating authority within the Executive Branch. When Congress enacted Section 1231(a)(6), it authorized detention of a noncitizen "who has been determined by *the Attorney General* to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (emphasis added). Later, Congress transferred various functions under the INA—including implementation of Section 1231—to the Secretary of Homeland Security. See 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), 1551 note; *Johnson* v. *Guzman Chavez*, 141 S. Ct. 2271, 2280 n.1 (2021). In doing so, it provided that, "[w]ith respect to any function transferred" to the Secretary, "reference in any other Federal law" to another officer "shall be deemed to refer to the Secretary." 6 U.S.C. 557. Under that deeming clause, Section 1231(a)(6) authorizes detention of a noncitizen "who has been determined by [*the Secretary*] to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).

The Ninth and Third Circuits held, however, that a noncitizen may be detained for more than six months only if an immigration judge in DOJ—not the Secretary of Homeland Security—finds that the noncitizen poses a flight risk or danger to the community. See *Diouf*, 634

F.3d at 1091-1092; *Guerrero-Sanchez*, 905 F.3d at 227. Congress transferred the power to make the necessary findings to DHS, but the Ninth and Third Circuits transferred it back to DOJ.

All in all, the Ninth and Third Circuits interpreted Section 1231(a)(6) as if it read as follows:

> An alien ordered removed ~~who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or~~ who has been determined by ~~the [Secretary of Homeland Security]~~ an immigration judge, at a bond hearing, by clear and convincing evidence, to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond ~~the removal period~~ six months and, if released, shall be subject to the terms of supervision in paragraph (3). But a bond hearing need not be held if release or removal is imminent.

However desirable (or not) those revisions, a court's task "is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

2. The Ninth and Third Circuits' bond-hearing regime also violates the rule of construction in 8 U.S.C. 1231(h), which states: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Ibid.* The Ninth and Third Circuits did the very thing Section 1231(h) forbids: They "construed" "this section" to "create" several "procedural right[s] or benefit[s]," *ibid.*—namely, the right to a bond hearing after six months of detention, the right to have an immigration judge preside at the hearing, and

the placement on the government of the burden of proving dangerousness or flight risk.

B. The Ninth And Third Circuits' Bond-Hearing Regime Conflicts With This Court's Precedents

The Ninth and Third Circuits' bond-hearing regime also contradicts this Court's precedents—most obviously, the Court's recent decision in *Guzman Chavez*. In *Guzman Chavez*, the Court decided which section of the INA—8 U.S.C. 1226 or 8 U.S.C. 1231—governs detention of noncitizens who have had their removal orders reinstated and have applied for withholding or deferral of removal. 141 S. Ct. at 2280. The Court explained that, "[i]f the answer is § 1226," "then the alien may receive a bond hearing before an immigration judge," but "[i]f the answer is § 1231," "*then the alien is not entitled to a bond hearing*." *Ibid.* (emphasis added). And it concluded that "§ 1231 * * * governs the detention," "*meaning those aliens are not entitled to a bond hearing while they pursue withholding of removal*." *Ibid.* (emphasis added). The italicized words show that the Court understood Section 1231 not to require bond hearings.

The Ninth and Third Circuits' decisions also conflict with *Rodriguez*, in which this Court rejected an effort to engraft a bond-hearing requirement onto 8 U.S.C. 1226(a). Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed" and provides that the government "may release the alien on * * * bond." 8 U.S.C. 1226(a)(2)(A). Federal regulations provide for bond hearings at the outset of detention under Section 1226(a). See 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). But the Ninth Circuit directed the government "to provide procedural protections that go well beyond the initial bond hearing established by existing

regulations—namely, periodic bond hearings every six months in which the [government] must prove by clear and convincing evidence that the alien's continued detention is necessary." *Rodriguez*, 138 S. Ct. at 847. This Court reversed, explaining that "[n]othing in § 1226(a)'s text * * * even remotely supports * * * those requirements." *Ibid.*

Here, the Ninth and Third Circuits have repeated the interpretive error condemned in *Rodriguez*: they have required bond hearings even though "[n]othing" in the relevant text "even remotely supports" that requirement. 138 S. Ct. at 847. In fact, this case is easier than *Rodriguez*. The statute in *Rodriguez* provided that the government "may release the alien on * * * bond," 8 U.S.C. 1226(a)(2)(A), but Section 1231(a)(6) says nothing at all about bond. And, unlike the provision in *Rodriguez*, Section 1231 may not be "construed to create any * * * procedural right." 8 U.S.C. 1231(h). If the provision in *Rodriguez* could not be read to require bond hearings, the provision here certainly cannot be.

The Ninth Circuit sought to distinguish *Rodriguez* on the ground that it involved a judicial directive to hold periodic bond hearings every six months, rather than (as here) a "single bond hearing" after the first six months. Pet. App. 38a. But that distinction makes no legal difference. The Ninth Circuit's error in *Rodriguez* was not that it required too many bond hearings, but that it imposed a requirement that had no basis in the text. Similarly, the Ninth and Third Circuits have erred in requiring bond hearings even though Section 1231(a)(6) says nothing at all about them (single, periodic, or otherwise).

Finally, the Ninth and Third Circuits' bond-hearing regime contradicts this Court's precedents on administrative procedure. The Court has explained that, when Congress entrusts an agency with "responsibility for substantive judgments," it presumptively also entrusts the agency—not reviewing courts—with "the formulation of procedures." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.* DHS has thus granted noncitizens procedural protections that are not specified in the statutory text. See 8 C.F.R. 241.4. DHS and DOJ could choose to adopt further procedures beyond those required by the statute, including bond hearings before immigration judges. But courts may not.

C. Constitutional Avoidance Does Not Justify Imposing The Ninth And Third Circuits' Bond-Hearing Regime

The Ninth and Third Circuits justified their bond-hearing regime by invoking the canon of constitutional avoidance. See *Diouf*, 634 F.3d at 1086; *Guerrero-Sanchez*, 905 F.3d at 223. Under that canon, a court may read a statute, if "fairly possible," to avoid a "serious doubt" about the statute's constitutionality. *Rodriguez*, 138 S. Ct. at 842 (citation omitted). But the canon has no application here.

1. 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." *Rodriguez*, 138 S. Ct. at 842 (citation omitted). It helps a court "choose between competing

plausible interpretations of a statutory text." *Id.* at 843 (brackets and citation omitted).

The Ninth and Third Circuits' reading of Section 1231(a)(6) is not plausible. As discussed above, that reading requires inserting words that Congress did not enact, deleting other words that Congress did enact, and rewriting still other parts of the statutory text. "That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Rodriguez*, 138 S. Ct. at 843.

The Ninth and Third Circuits found their reading of Section 1231(a)(6) plausible because the statute provides that a noncitizen "may" (rather than "shall") be detained beyond the removal period. See Pet. App. 12a, 22a, 41a, 49a; *Guerrero-Sanchez*, 905 F.3d at 223. The Ninth Circuit explained that, although a clause providing that DHS "shall" detain someone forecloses release on bond, a clause providing that it "may" detain someone "may be construed to authorize release on bond." Pet. App. 26a. But the question here is not whether the statute *authorizes* DHS to release someone on bond; it is whether the statute *requires* the government to hold a bond hearing after six months of detention. Section 1231(a)(6) cannot plausibly be interpreted to contain such a requirement.

2. In addition, the canon enables courts to interpret statutes "to avoid *serious* constitutional doubts," "not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993). There is no serious doubt that Section 1231(a)(6), as implemented by existing regulations, complies with the Due Process Clause of the Fifth Amendment.

To begin, Section 1231(a)(6) satisfies the substantive component of the Due Process Clause. The Court has explained 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). Detention under Section 1231(a)(6) helps ensure the removal of noncitizens who have already been "ordered removed" from the country. 8 U.S.C. 1231(a)(6).

Nor does Section 1231(a)(6), as implemented by the existing regulations, violate the procedural component of the Due Process Clause "[w]hen detention crosses the six-month threshold." *Diouf*, 634 F.3d at 1091; see *Guerrero-Sanchez*, 905 F.3d at 225. This Court has upheld detention in connection with removal without any individualized hearings or individualized findings at all. For example, in *Carlson*, the Court held that the Due Process Clause permitted the government to detain certain deportable persons without bail or any findings of flight risk or dangerousness. 342 U.S. at 537-542; see *Demore*, 538 U.S. at 525 (explaining that "[t]here was no 'individualized finding'" in *Carlson*) (brackets omitted). And in *Demore*, the Court rejected a facial challenge to a statute providing for the mandatory detention of criminal noncitizens, including lawful permanent residents, during the pendency of their removal proceedings, despite the lack of findings of flight risk or dangerousness. 538 U.S. at 523-531.

The Ninth and Third Circuits reasoned that "*prolonged* detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns'" under the Due Process Clause. *Diouf*, 634 F.3d at 1086 (emphasis added; citation omitted); see

Guerrero-Sanchez, 905 F.3d at 221. Assuming for the sake of argument that that is so, existing regulations, at least as a general matter, provide adequate process for noncitizens detained under Section 1231(a)(6). The regulations generally require a custody review by the field office at the end of the removal period (*i.e.*, usually after three months of post-removal-order detention), a further review by a review panel at ICE headquarters after six months, and additional reviews by the review panel annually thereafter (sooner if circumstances materially change). 8 C.F.R. 241.4(k)(1) and (2). During those reviews, officials must consider both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as " flight risk" and danger of "future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). The noncitizen has the right to submit evidence, to use an attorney or other representative, and, if appropriate, to seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

A separate set of regulations implements this Court's holding that Section 1231(a)(6) permits detention only for "a period reasonably necessary to bring about th[e] alien's removal from the United States." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); see 8 C.F.R. 241.13. If a noncitizen who has been detained for six months shows that "there is no significant likelihood of removal in the reasonably foreseeable future," adjudicators at ICE headquarters must review the noncitizen's case. 8 C.F.R. 241.13(d)(1). The noncitizen has the right to submit evidence, to respond to the government's evidence, and to use an attorney or other representative. 8 C.F.R. 241.13(e).

The Ninth and Third Circuits objected that the DHS officials who apply the current procedures might not be

"neutral." *Diouf*, 634 F.3d at 1091-1092; *Guerrero-Sanchez*, 905 F.3d at 227. The Due Process Clause does, of course, require neutral administrative adjudicators, but any claim of bias "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). To rebut that presumption, the party demanding recusal must provide a "specific reason for disqualification"—for example, a showing that the adjudicator has a pecuniary interest in the case. *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The mere fact that an agency combines investigative and adjudicative functions does not establish bias; in fact, agencies combine such functions all the time. See *Withrow*, 421 U.S. at 47. Here, respondents have provided no specific reason to impute bias categorically to the adjudicators at ICE headquarters who conduct custody reviews. They thus have not overcome the presumption of neutrality.

The Ninth and Third Circuits also observed that the existing regulations do not place the burden on the government to show that detained noncitizens pose a flight risk or danger to the community. See *Diouf*, 634 F.3d at 1091-1092; *Guerrero-Sanchez*, 905 F.3d at 227. But this Court has upheld detention without any individualized findings of flight risk or dangerousness. See p. 42, *supra*. In addition, in contexts where the regulations do authorize bond hearings, it is the noncitizen who has traditionally borne the burden of justifying release. See 8 C.F.R. 236.1(c)(8) (detention under Section 1226(a) pending decisions on removal).

The Third Circuit further noted that an immigration judge's ruling on bond may be appealed to the Board of Immigration Appeals, while there is no appeal from a

custody review. *Guerrero-Sanchez*, 905 F.3d at 227 (citing 8 C.F.R. 241.4(d)); see 8 C.F.R. 1003.1(b)(7). That is true, but it does not raise a constitutional problem. Even in criminal cases, "it is well settled that there is no constitutional right to an appeal." *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Much less does the Constitution guarantee a right to an appeal in administrative proceedings such as this one. In addition, the Board's review of immigration judges' bond decisions is a creature of the regulations, not of the statute. See 8 C.F.R. 1003.1(b)(7). Perhaps the Third Circuit meant to read *both* the right to a bond hearing *and* the right to appeal into Section 1231(a)(6), but if so, that only makes its reading of the text even less plausible.

Finally, the Ninth Circuit suggested that existing regulations are inadequate because they allow detention based on written records alone. *Diouf*, 634 F.3d at 1091. That is incorrect. In some contexts, due process requires someone to have the opportunity "to state his position orally," *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); in others, the opportunity to submit a "written statement" suffices, *Hewitt* v. *Helms*, 459 U.S. 460, 476 (1983). But even assuming this case falls in the former category, existing regulations satisfy due process, for they *do* provide the noncitizen an opportunity to state his position orally. During the initial three-month custody review, the field office has the discretion to hold "a personal or telephonic interview" with the noncitizen. 8 C.F.R. 241.4(h)(1). And during the six-month review and subsequent reviews, ICE headquarters may decide to *release* the noncitizen based on the papers alone, 8 C.F.R. 241.4(i)(2), but continued detention requires a personal interview, 8 C.F.R. 241.4(i)(3)(i). The Ninth Circuit appeared to believe that ICE had the discretion

to deny a personal interview even after six months of detention, but it conflated the regulations governing the three-month review with those governing later reviews. See *Diouf*, 634 F.3d at 1091 & n.12.

In short, existing regulations provide—at least as a general matter—all the process that the Constitution requires. To the extent exceptional cases arise, courts could consider as-applied constitutional challenges to continued detention under Section 1231(a)(6). The Ninth and Third Circuits may have believed that it "would be even better" to require formal bond hearings across the board, but a court applying the Due Process Clause is not "'a legislature charged with formulating public policy.'" *Flores*, 507 U.S. at 315 (citation omitted).

D. *Zadvydas* Does Not Justify Imposing The Ninth And Third Circuits' Bond-Hearing Regime

The Ninth and Third Circuits rested their analysis largely on *Zadvydas*. See *Diouf*, 634 F.3d at 1087-1092; *Guerrero-Sanchez*, 905 F.3d at 219-221, 223-226. But it does not justify their bond-hearing regime.

In *Zadvydas*, this Court concluded that Section 1231(a)(6) is ambiguous as to the length of the detention authorized. 533 U.S. at 696-699. It also explained that the statute would raise serious constitutional doubts if it permitted indefinite detention of noncitizens who had been admitted to the United States and ordered removed, but whom no country was willing to accept. *Id.* at 690-696. The Court resolved the ambiguity by holding that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court specified that, six months after the removal period begins, if the noncitizen "provides good reason to believe that there is no sig-

nificant likelihood of removal in the reasonably foreseeable future," the government must either rebut the showing or release the noncitizen. *Id.* at 701.

This case differs from *Zadvydas* in several ways. In *Zadvydas*, the Court explained that the constitutional-avoidance canon applies only when alternative interpretations are "fairly possible." 533 U.S. at 689 (citation omitted). After reviewing Section 1231(a)(6)'s text, history, and purposes, the Court concluded that, although the statute could be read to authorize indefinite detention, it could also plausibly be read to authorize detention only as long as removal remains "reasonably foreseeable." *Id.* at 699; see *id.* at 696-699. The Court reasoned that the statute's primary purpose is "preventing flight," and that purpose is "weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. Here, by contrast, only one reading of Section 1231(a)(6) is plausible: The statute does not require bond hearings.

Zadvydas also explained how its reading of Section 1231(a)(6) was consistent with the rule of construction in Section 1231(h), but that explanation does not apply here. Section 1231(h) provides that "[n]othing in this section shall be construed to create any * * * procedural right." 8 U.S.C. 1231(h). *Zadvydas* distinguished a ruling that Section 1231 confers an enforceable procedural right (forbidden by Section 1231(h)) from a ruling that a noncitizen is entitled to release on a writ of habeas corpus because the detention "is without statutory authority" (allowed). 533 U.S. at 688; see *id.* at 687-688. *Zadvydas* fell on the correct side of that line: The Court held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Ninth and Third Circuits'

bond-hearing regime, by contrast, falls on the wrong side of that line: On their own account, the courts "constru[ed] § 1231(a)(6) to include additional procedural protections during the statutorily authorized detention period." Pet. App. 48a (quoting *Guerrero-Sanchez*, 905 F.3d at 221) (emphasis omitted). But construing Section 1231 to include enforceable procedural protections is exactly what Section 1231(h) unambiguously forbids.

In addition, *Zadvydas* applied the constitutional-avoidance canon only after concluding that "indefinite and potentially permanent" detention—*i.e.*, detention with "no obvious termination point"—would raise a "serious question" under the Due Process Clause. 533 U.S. at 696-697. This case, by contrast, does not involve indefinite and potentially permanent detention. After all, *Zadvydas* has already cured that potential problem by holding that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." 533 U.S. at 699; see *Diouf*, 634 F.3d at 1084 (acknowledging that the detention at issue here is "not indefinite"). This case instead involves the procedural protections accorded to detainees. *Zadvydas*'s limitation on the length of detention does not speak to that issue. And under this Court's decisions that do address that issue, the existing regulations raise no serious constitutional doubts. See pp. 41-46, *supra*.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 2021

APPENDIX

1. 8 U.S.C. 1231 provides in pertinent part:

Detention and removal of aliens ordered removed

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

(1) Removal period

(A) In general

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

(B) Beginning of period

The removal period begins on the latest of the following:

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

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

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

(C) Suspension of period

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

(2) Detention

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

(3) Supervision after 90-day period

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

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

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

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

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

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),".

(other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

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[3] So in original. Probably should be followed by a closing parenthesis.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

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

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

* * * * *

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

* * * * *

2. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relat-

ing to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland

Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later

than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitu-

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[1] See References in Text note below.

tional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such

further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not

later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the

petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

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.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from

the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

3. 8 C.F.R. 241.4 provides:

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

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

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

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

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

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

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

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

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under

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

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

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

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the dis-

trict director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

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

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

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

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

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

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

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

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

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

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

(2) The detainee is presently a nonviolent person;

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

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

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

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

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

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

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

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

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

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

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other

proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

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

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

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

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

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) the date the order becomes administratively final;

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

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

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under

section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

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

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such

document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

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

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

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

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

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

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

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

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a

person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

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

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

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical areas of responsibility. This

includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

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

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director

or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

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

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

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

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody

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

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

(j) *Conditions of release*—(1) *In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions

of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

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

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

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

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

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period, or is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

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

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral*

for further review. When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

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

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration

based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

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

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

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

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible*

or Practicable, February 3, 1999; *Supplemental Detention Procedures,* April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews,* August 6, 1999; *Review of Long-term Detainees,* October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at *http://www.ins.usdoj.gov*). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

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

return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

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

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

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

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

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (1)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been

or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.