

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TAE D. JOHNSON, ACTING DIRECTOR)
OF U.S. IMMIGRATION AND CUSTOMS)
ENFORCEMENT, ET AL.,)
)
) Petitioners,
) v.) No. 19-896
ANTONIO ARTEAGA-MARTINEZ,)
) Respondent.

Pages: 1 through 73
Place: Washington, D.C.
Date: January 11, 2022

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11

12 Washington, D.C.

13 Tuesday, January 11, 2022

14

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United
17 States at 10:00 a.m.

18

19 APPEARANCES:

20 AUSTIN RAYNOR, Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.;

22 on behalf of the Petitioners.

23 PRATIK A. SHAH, ESQUIRE, Washington, D.C.; on behalf

24 of the Respondent.

25

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Breyer and Justice Sotomayor are participating remotely this morning.

We'll hear argument first in Case 19-896, Johnson versus Arteaga.

Mr. Raynor.

ORAL ARGUMENT OF AUSTIN RAYNOR
ON BEHALF OF THE PETITIONERS

MR. RAYNOR: Mr. Chief Justice, and may it please the Court:

Section 1231(a)(6) states that certain categories of non-citizens, including inadmissible non-citizens like Respondent here, "may be detained beyond the removal period."

The question presented in this case is whether that language requires that non-citizens detained under Section 1231(a)(6) be afforded a bond hearing before an immigration judge after six months of detention, at which the government bears the burden of proving by clear and convincing evidence that the non-citizen is either a flight risk or a danger to the community. That

1 question answers itself.

2 Respondent implicitly recognizes the
3 absence of any textual support for his position
4 on the question presented. He accordingly
5 focuses on an altogether different issue,
6 namely, whether he is entitled to outright
7 release under this Court's decision in *Zadvydas*
8 because his removal is not reasonably
9 foreseeable.

10 That argument would require modifying
11 the judgment below, which afforded Respondent a
12 bond hearing, not outright release. Because he
13 did not file a cross-petition for a writ of
14 certiorari, that argument is not properly
15 presented here, and this Court should reject it
16 for that reason alone.

17 In any event, the argument is
18 mistaken. Unlike in *Zadvydas*, the detention
19 here pending a proceeding is not indefinite.
20 It has a logical termination point, the
21 conclusion of the proceeding. It therefore
22 does not trigger the *Zadvydas* rule.

23 This Court should reverse the judgment
24 below.

25 Starting with the text, here, in order

1 to succeed, Respondent has to both rewrite the
2 substantive standard contained in the statute,
3 as well as the procedural standard. The
4 statute enumerates four substantive bases for a
5 --

6 CHIEF JUSTICE ROBERTS: Well, I mean,
7 as an initial matter, haven't we crossed that
8 bridge in Zadvydas?

9 MR. RAYNOR: I don't think so, Mr.
10 Chief Justice. On his Zadvydas argument, it's
11 true the Court held that there is an implicit
12 limitation in the statute, that once removal is
13 not reasonably foreseeable, detention isn't
14 authorized. That argument isn't presented
15 here.

16 If the Court wanted to go down that
17 road, it would have to assess whether detention
18 pending a proceeding is indefinite within the
19 meaning of Zadvydas, and Demore answers that
20 question in the negative.

21 But, on the argument that responds to
22 the question presented and that was decided
23 below, he wants a bond hearing that affords him
24 release if he's not a flight risk or a danger
25 to the community, and that is a separate

1 substantive standard than was at issue in
2 Zadvydas.

3 CHIEF JUSTICE ROBERTS: I -- my
4 question is -- in your objections in your
5 brief, of course, is that the -- the provisions
6 that are at issue here are not in the statute,
7 and your -- your objection is that we shouldn't
8 read -- read them all in. And I just wonder if
9 we've already decided that the statute can be
10 expanded beyond its plain terms in Zadvydas.

11 MR. RAYNOR: I don't think so, Mr.
12 Chief Justice. In Jennings, this Court said
13 that Zadvydas was not a license to read in
14 whatever protections you think are warranted
15 under the Constitution.

16 And I think it's important here to
17 distinguish between the two different parts of
18 his claim. One is procedural. He wants a bond
19 hearing before an immigration judge at which we
20 bear the burden of proof by clear and
21 convincing evidence. Those are procedural
22 protections that he's trying to read into the
23 statute.

24 But the other portion of his claim is
25 substantive, and that doesn't involve reading

1 something into the statute. It involves a
2 rewriting of the statute.

3 So the statute enumerates four bases
4 for detention: inadmissibility, deportability
5 on specified grounds, flight risk, or danger.
6 But, according to Respondent, the first two
7 bases for detention stop at six months, and
8 only the latter two bases continue to apply
9 after six months.

10 So there's a serious Clark v. Martinez
11 problem with this approach because he's reading
12 the "may be detained" language to have
13 different meanings as applies to different
14 categories of non-citizens covered by the
15 statute. So, under Respondent's
16 interpretation, "may be detained" means may be
17 detained for up to six months to the extent
18 you're detained on inadmissibility or
19 deportability grounds. But, to the extent
20 you're detained on flight risk or danger
21 grounds, "may be detained" means may be
22 detained indefinitely as long as you are
23 accorded certain procedural protections.

24 JUSTICE KAGAN: But I -- I guess, you
25 know, just following up on what the Chief

1 Justice said, we're -- we're dealing here with
2 the same statute as we were dealing with under
3 -- in Zadvydas, a different statute from the
4 one we were dealing with in Jennings.

5 And -- and Zadvydas says "may"
6 involves some ambiguity. It gives discretion
7 but not unlimited discretion. And I can see
8 how one might argue with that conclusion in
9 Zadvydas, but that's very clearly what we said
10 in that case.

11 So, here, same statute, same word. It
12 seems as though -- you know, Zadvydas says
13 there's some ambiguity, there's -- the
14 discretion is not entirely unlimited. We get
15 to take into account constitutional
16 considerations because of that ambiguity that
17 Zadvydas found.

18 And that's what Mr. Shah is saying we
19 should do here, is -- is, you know -- and the
20 --the reason it applies to only a couple -- you
21 know, one category and not the other category
22 is because the Constitution has nothing to say
23 about the other category.

24 So why isn't that right?

25 MR. RAYNOR: Zadvydas is distinct in

1 an important respect in that there the Court --
2 it drew its interpretation from the logic of
3 the statute, and it said the purpose of this
4 statute is to ensure that the non-citizen is
5 present at the time of removal. And if removal
6 isn't reasonably foreseeable, the purpose is no
7 longer served, so the statutory authority runs
8 out. So there was a connection there between
9 the interpretation that the Court adopted and
10 the internal logic of the statute.

11 And that connection is absent here.
12 No one has attempted to draw a connection
13 between the purpose or the function of this
14 statute and the entire procedural framework
15 that the lower court engrafted onto the
16 statute.

17 JUSTICE KAGAN: Well, is -- was
18 Zadvydas really limited to that? I mean,
19 Zadvydas first talks about if removal is not
20 reasonably foreseeable, but then Zadvydas goes
21 on and there's a sentence in Zadvydas that says
22 even if -- even if removal is reasonably
23 foreseeable, the -- the court should consider
24 the risk of the alien's committing further
25 crimes, you know, essentially pointing to a

1 factor that's a very common factor in bail
2 hearings.

3 So Zadvydas seems to -- seemed to
4 think of itself as extending beyond that very
5 sort of core purpose of inquiry that you
6 referred to.

7 MR. RAYNOR: That second line that you
8 referenced, Justice Kagan, we agree with it.
9 The statute says that danger is a
10 consideration. And so, when it said you should
11 consider danger, the Court was just reiterating
12 one of the considerations in the statute.

13 And we definitely don't think that
14 that single line from Zadvydas can be read to
15 nullify the other three considerations in the
16 statute. Zadvydas didn't purport to do that.
17 And even if we were to focus in isolation on
18 that line, it doesn't support Respondent's test
19 because it doesn't mention flight risk. It
20 only mentions danger. It doesn't reiterate all
21 of the bond criteria that Respondent thinks are
22 traditional.

23 JUSTICE KAGAN: Well, maybe. I mean,
24 maybe it could have been a little bit more
25 comprehensive or a little bit more exact about

1 what it was referring to, but it seems to be
2 pretty clear in saying, you know, the kinds of
3 things that you worry about when you worry
4 about releasing people, which is exactly what a
5 bond hearing is supposed to do.

6 Now it didn't go through all the
7 procedures that Mr. Shah is asking for here
8 today. But, again, you know, it says "may" is
9 ambiguous. That ambiguity allows us to import
10 constitutional considerations. In doing that,
11 we should be thinking about bond hearing type
12 things.

13 You put all that together, it seems
14 like, you know, there's a reasonable argument
15 here that Zadvydas points, you know, pretty
16 straight -- straightforwardly in the
17 Respondent's direction.

18 MR. RAYNOR: Justice Kagan, even if
19 you thought "may" was a license to pour in
20 these procedural protections, I still don't
21 think that would get you to the substantive
22 rewrite. So Zadvydas's rule applies across the
23 board to all non-citizens covered by the
24 provision. Once removal isn't reasonably
25 foreseeable, statutory authority runs out.

1 But, again, here, there's a Clark v.
2 Martinez problem that was not present in
3 Zadvydas, and that is "may be detained" means
4 one thing when it applies to inadmissible or
5 deportable non-citizens, but it means something
6 different when it applies to flight risk or
7 danger non-citizens. So they're trying to
8 parse this language and apply different rules
9 to different categories, and that's what Clark
10 v. Martinez rejects, and that wasn't present in
11 Zadvydas.

12 And although you -- you mention that
13 Jennings involves a different provision, I do
14 think it's instructive because 1226(a) is the
15 most on-point aspect of Jennings. There, the
16 language is "may be released on bond." And the
17 Court said the word "may" isn't a license to
18 just pour in whatever procedural protections
19 you want. At issue there were periodic bond
20 hearings and clear and convincing evidence
21 requirements, so very similar requirements to
22 the ones that the Court here poured in, and
23 Jennings said that wasn't permissible.

24 JUSTICE SOTOMAYOR: Counsel, you're
25 talking about pouring in all of these rewrites.

1 But, in essence -- and I think this is the
2 question that Zadvydas answered and that
3 Justice Kagan was alluding to -- the basic
4 point of Zadvydas is you really can't keep
5 someone indefinitely without a reason
6 basically.

7 And that reason, I think you would
8 concede, can't be just whim. We don't like
9 this person because -- easy to point to a
10 racial reason, but it could be something as
11 simple as we just don't like him.

12 Is it your position that there is no
13 process by which that type of judgment could be
14 challenged?

15 MR. RAYNOR: That is not our position,
16 Justice Sotomayor. We agree that, for example,
17 there -- I mean, there is a robust internal
18 review process here, and, obviously, a habeas
19 suit would be permissible if the non-citizen
20 wanted to challenge whether he fell within one
21 of the statutory grounds for detention.

22 And to the extent you're worried about
23 indefinite detention --

24 JUSTICE SOTOMAYOR: So what you're --
25 what you're worried about is that you think

1 that the government has no obligation, except
2 internally, to explain to a neutral arbitrator
3 at a certain point why they're keeping an
4 individual?

5 Because most of what procedures at the
6 Zadvydas hearing that the courts have
7 fashioned, except for the burden of proof, and
8 we can go to that later, are pretty sensical:
9 Government, come in and tell us why you're
10 keeping this person. This is a "may." It's
11 discretionary. But there can't be arbitrary
12 and capricious. Explain it.

13 And that to me seems like a fairly
14 simple process, not one that we're rewriting,
15 but which is in the nature of the question
16 presented, which is can you keep them
17 indefinitely.

18 MR. RAYNOR: To be clear, Justice
19 Sotomayor, the Zadvydas rule doesn't permit
20 courts to review an exercise of discretion.
21 All it permits courts to review is this --

22 JUSTICE SOTOMAYOR: But a discretion
23 can't be arbitrary and capricious, and so there
24 has to be a basis for the exercise of
25 discretion. And what these hearings are doing

1 is putting you to that test, isn't it?

2 MR. RAYNOR: No, Justice Sotomayor.

3 The purpose of a Zadvydas hearing is to
4 determine whether removal is reasonably
5 foreseeable. And that's -- that's just a limit
6 on statutory authority, and if --

7 JUSTICE SOTOMAYOR: That's not quite
8 true, because Zadvydas doesn't say you have to
9 let them out if they're a danger to the
10 community.

11 MR. RAYNOR: Correct. There is an
12 exception mentioned in Zadvydas for -- for
13 specially dangerous non-citizens, and that's --
14 that's an entirely separate set of regulations.
15 But the basic Zadvydas rule is about statutory
16 authority.

17 And we agree that the question of
18 statutory authority could be raised in a habeas
19 suit here. Respondent obviously hasn't done
20 that, because we clearly do have the statutory
21 authority to detain him. He is inadmissible,
22 which is one of the grounds for detention.

23 And to the extent you're -- you're
24 worried about indefinite detention, Zadvydas
25 already solves this problem. Zadvydas says, if

1 it's not reasonably foreseeable, you can't
2 detain the non-citizen.

3 That's fundamentally different than
4 what's going on here because this is detention
5 pending a proceeding, which Demore says has an
6 immigration-related purpose and is not
7 indefinite in the sense that the open-ended
8 detention in Zadvydas was. But --

9 JUSTICE BARRETT: But what if it --
10 what if it still doesn't have a reasonably
11 foreseeable conclusion? I mean, to pick up on
12 one theme of Justice Sotomayor's question, what
13 if the withholding of removal proceedings
14 continue to drag on and on and on or, you know,
15 in Zadvydas, there was no country willing to
16 take him, but he -- he was removable.

17 Are you arguing that the Zadvydas
18 right is particular only to that situation, or
19 would you concede that there's some point at
20 which, when someone is held in removal
21 proceedings and has, you know, sought
22 withholding of removal, that at some point a
23 Zadvydas-type determination must be made?

24 MR. RAYNOR: Our position is that
25 Zadvydas is limited to that first situation,

1 where it's just open-ended detention. Zadvydas
2 does not apply to detention pending a
3 proceeding. I think Demore makes this pretty
4 clear. But we would acknowledge the
5 possibility of an as-applied constitutional
6 challenge in extreme circumstances.

7 So, if the detention went on and on,
8 as you say, if the government were seeking
9 continuances, if the government were
10 responsible for the delay, there would be a
11 host of factors that a court could potentially
12 consider, and the lower courts are actively
13 considering these kinds of claims. We would
14 acknowledge that might be permissible.

15 JUSTICE BREYER: Well, I -- I don't
16 understand. If I can interrupt for a second.
17 I mean, this -- this individual here has
18 applied for -- for staying here, for asylum,
19 isn't that what it is?

20 MR. RAYNOR: No, Justice Breyer.

21 JUSTICE BREYER: What has he applied
22 for?

23 MR. RAYNOR: This is a withholding
24 only determination. He -- he has no
25 opportunity to have a legal entitlement to be

1 in the United States. This is not an asylum
2 application.

3 JUSTICE BREYER: Well --

4 MR. RAYNOR: He's subject to a final
5 order of removal, and that's -- that's not
6 going anywhere.

7 JUSTICE BREYER: And he's not said
8 that he's going to be persecuted -- and maybe I
9 have the wrong case here. This is --

10 MR. RAYNOR: He -- so he has asserted
11 the likelihood of persecution.

12 JUSTICE BREYER: Yeah.

13 MR. RAYNOR: But this is a withholding
14 only proceeding, which means the only form of
15 relief he has the ability to apply for --

16 JUSTICE BREYER: Yeah.

17 MR. RAYNOR: -- is withholding under
18 the convention against torture.

19 JUSTICE BREYER: All right. So
20 withholding of removal. So he wants to -- if
21 you withhold removal, he stays, right?

22 MR. RAYNOR: He does not obtain a
23 legal entitlement to stay.

24 JUSTICE BREYER: I know. Is he here
25 or does he go to Mexico if, in fact, they're

1 going to kill him when he gets to Mexico?

2 MR. RAYNOR: He will not go to Mexico.
3 But we retain the discretion to remove him to
4 another country.

5 JUSTICE BREYER: Yeah, you do. Okay.
6 And I would like to know when you think, as far
7 as the record is concerned, or anybody else,
8 he's going to breach -- you're going to reach a
9 decision as to whether he gets to stay in the
10 United States until you find another country,
11 and how long is it before you're likely to find
12 another country?

13 MR. RAYNOR: Justice Breyer, if -- so
14 his withholding only proceedings are still
15 ongoing. He has not obtained that relief.
16 But, if he were --

17 JUSTICE BREYER: I -- I asked you for
18 an estimate by the government as to when the
19 government is likely to find a place. I don't
20 care what place. Any place in the world
21 besides the United States where you will send
22 him.

23 MR. RAYNOR: The likeliest place that
24 we will send him, Justice Breyer, is to Mexico.

25 JUSTICE BREYER: And I asked you --

1 MR. RAYNOR: I mean, that's the
2 overwhelmingly --

3 JUSTICE BREYER: -- when it is likely
4 that the government will reach a final decision
5 on that.

6 MR. RAYNOR: So he's currently on the
7 non-detained docket, Justice Breyer, which
8 moves much more slowly. And his withholding
9 only --

10 JUSTICE BREYER: I'm asking you for an
11 estimate as just -- I -- I know these are
12 difficult to make. I'm not being -- trying to
13 be difficult. I want to know, as far as you
14 know, when do you think he will be finally sent
15 out of this country?

16 MR. RAYNOR: His next withholding only
17 hearing is scheduled for 2023, which is on the
18 non-detained docket.

19 JUSTICE BREYER: Oh, I see. That's
20 about a year or so. Now, frankly, it's rather
21 hard for me to see the difference between the
22 person who they were trying to send to
23 Cambodia, I think, and finished his jail
24 sentence in Zadvydas, and we said, yeah, hey,
25 fine, go look around for a country for six

1 months or so, and if you can't find a country
2 and there isn't one right on the horizon, let
3 him out. Or -- but -- now there are
4 exceptions, a lot of analogies to bail.

5 Okay? Why wouldn't that same thing
6 apply here? I mean, that's what it said. Same
7 situation.

8 MR. RAYNOR: Justice Breyer, with
9 respect, I don't agree that it's the same
10 situation.

11 JUSTICE BREYER: Because?

12 MR. RAYNOR: This is detention pending
13 a proceeding, which Demore says is --

14 JUSTICE BREYER: Well, so what?

15 MR. RAYNOR: Demore says that it is
16 fundamentally different from open-ended
17 detention in Zadvydas. These same arguments
18 were made by the dissent in Demore and
19 rejected. And dissent says that --

20 JUSTICE BREYER: You mean Demore
21 overruled Zadvydas?

22 MR. RAYNOR: No, Demore did not
23 overrule Zadvydas.

24 JUSTICE BREYER: I didn't think --

25 MR. RAYNOR: It dealt with a different

1 situation.

2 JUSTICE BREYER: -- it did either. I
3 didn't -- or, if I decide that they are the
4 same, then we should have the same result,
5 right?

6 MR. RAYNOR: If you --

7 JUSTICE BREYER: In my opinion.

8 MR. RAYNOR: -- wanted to overrule --
9 I think that would require overruling Demore
10 because --

11 JUSTICE BREYER: Well, I don't
12 understand the difference between Demore and
13 Zadvydas on your theory.

14 MR. RAYNOR: The difference, Justice
15 Breyer, is that Demore dealt with detention
16 pending proceedings, so there's a logical
17 termination point.

18 JUSTICE BREYER: Well, there was a --

19 JUSTICE KAGAN: Was Demore --

20 JUSTICE BREYER: -- logical
21 termination point in Zadvydas when they send
22 him to another country.

23 JUSTICE BARRETT: Has he actually
24 obtained withholding relief? Because there
25 would be a distinction, right, between --

1 JUSTICE BREYER: Yeah.

2 JUSTICE BARRETT: -- proceedings that
3 are dragging on when he has not yet been said
4 to qualify for withholding of removal, and
5 then, if he is, I think, you know, Justice
6 Breyer's point about the similarity between
7 this situation and Zadvydas would be most acute
8 if he were determined eligible for withholding,
9 but you couldn't find a country besides Mexico
10 that would take him.

11 MR. RAYNOR: Correct --

12 JUSTICE BARRETT: Is that right?

13 MR. RAYNOR: -- Justice Barrett. We
14 agree with that. If he were to obtain
15 withholding-only relief, he wouldn't be in --
16 in Zadvydas land, so the --

17 JUSTICE BREYER: So, before he obtains
18 that, you can -- you can keep him in jail for
19 50 years? Is that your -- your -- your
20 response?

21 MR. RAYNOR: No, Justice Breyer. The
22 general rule under Demore is that we can keep
23 him in detention pending his proceeding. But,
24 as I discussed with Justice Barrett, if --

25 JUSTICE KAGAN: Was -- was Demore, Mr.

1 Raynor -- and I might be wrong about this. Was
2 Demore the one where the Solicitor General
3 provided wrong information to the Court and,
4 basically, the Court was operating on a false
5 understanding of how long some of these
6 detentions lasted?

7 MR. RAYNOR: You're correct, Justice
8 Kagan, that the Executive Office for
9 Immigration Review later provided updated
10 statistics to this office, which we provided to
11 the Court in Jennings.

12 JUSTICE KAGAN: So -- so, when Demore
13 said that, when Demore said, look, it's pending
14 a proceeding, Demore was thinking of, you know,
15 a proceeding that was going to happen pretty
16 soon.

17 JUSTICE BREYER: Six weeks.

18 JUSTICE KAGAN: And I think the -- the
19 question here is, what if we're in a different
20 situation than that? What if, in fact, it's
21 not going to happen pretty soon, 2023? We just
22 started 2022. That's a year away. He's
23 already been detained for some time.

24 I mean, now we're talking about, you
25 know, some significant time. And I'm not sure

1 it quite matters to the person who's in
2 detention whether you're in detention because
3 they can't find a country or whether they're in
4 detention because the immigration system is
5 backed up.

6 MR. RAYNOR: I think that, Justice --
7 Justice Kagan, Demore -- its front line
8 position was that detention pending proceeding
9 is different. And then it adverted to the
10 statistics, which were later modified, although
11 not in significant respects.

12 Here, even if you wanted to focus on
13 the empirical aspect of this, the data that
14 Respondent has submitted just suggests there's
15 not a -- not a big problem here. About
16 80 percent of these non-citizens don't appeal
17 IJ determinations from withholding-only
18 proceedings, and they're detained for an
19 average of 114 days according to Respondent's
20 data.

21 And then, even if you look at the
22 entire category of non-citizens, some who
23 appeal, some who do not, still the average
24 length of detention is 157 days. And both of
25 those numbers are well below the six months

1 that Zadvydas found presumptively reasonable.

2 So we don't --

3 JUSTICE BREYER: Well, that's what I
4 -- thank you. No, no, I -- thank you. That's
5 very helpful, the 157. And I think that's what
6 Demore thought, that all these people are
7 released within six months anyway. Those are
8 the figures the SG gave us. So that's not a
9 problem.

10 But, here, you're telling me that
11 maybe this person is going to be -- 2023 before
12 he gets a hearing? That's much more than six
13 months.

14 MR. RAYNOR: That's just --

15 JUSTICE BREYER: Let me ask you a
16 different question, and what -- what -- as to
17 what kind of proceeding you ought to have if
18 you -- if you can't keep the person there
19 forever and you're going to keep him for more
20 than six months or more than eight months or
21 something.

22 What Zadvydas actually says -- let me
23 find it here. What it actually says is -- and
24 this is still true. It's -- it's in the -- the
25 C.F.R. It says the sole procedural protections

1 available to the alien are found in
2 administrative proceedings where the alien
3 bears the burden of proving he is not dangerous
4 without, the government says, any significant
5 later judicial review, and then there's some
6 cites, et cetera.

7 And then it says the Constitution
8 demands greater procedural protection even for
9 property. And the serious constitutional
10 problem arising out of a statute that in these
11 circumstances permits an indefinite, perhaps
12 permanent, deprivation of human liberty without
13 any such protection, which means an independent
14 body deciding it or an independent person and
15 no burden of proof against the individual, is
16 obvious. The constitutional problem is
17 obvious.

18 All right. That's what Zadvydas says.
19 So what I don't see is how can the government,
20 given that language in Zadvydas, continue to
21 say, oh, yes, whether it's the Zadvydas type
22 case or anything else under (a)(6), continue to
23 say, oh, we will give you a hearing, oh, well,
24 not quite a hearing, well, you have the burden
25 of proof and, well, there is no judicial

1 review. I can't find an analogy for such a
2 thing in habeas corpus law or in bail law or in
3 any other detention law.

4 Now I -- I -- I -- I'm not wedded to
5 what -- it sounds as if I am, but I'm saying
6 this because I want to hear what you say.

7 MR. RAYNOR: Justice Breyer, you're
8 correct that 241.4, which is the post-order
9 custody review regulations, as well as 241.13,
10 which are the Zadvydas regulations, both
11 provide purely for an administrative review
12 process.

13 But that doesn't mean that the
14 non-citizen couldn't seek habeas review of
15 statutory authority. So, if the non-citizen
16 thinks, for example, that removal is not
17 reasonably foreseeable, that is a statutory
18 limit on our authority and he can file a habeas
19 suit for that, just like he did in Zadvydas.

20 Similarly here, if he thinks he's not
21 within one of the four grounds of detention, he
22 can file a habeas suit. He's not going to do
23 that because he is within the four grounds of
24 detention. There's no dispute. He is
25 inadmissible. Congress has authorized his

1 detention.

2 So I think this goes back to what I
3 was saying earlier to Justice Kagan, which is
4 that a critical piece here is that more process
5 doesn't do him any good. He has to rewrite the
6 substance of the statute in order to get
7 relief. He has to delete the first two grounds
8 for detention.

9 And that's what he can't do. In both
10 Demore and Reno v. Flores, this Court says that
11 detention pending proceedings is permissible so
12 long as it has a rational relationship to a
13 legitimate government purpose.

14 JUSTICE BREYER: Yeah. All right.
15 Just I'll -- just once, last time. I'm not
16 worried about why you say delete the ground.
17 What -- what Zadvydas seemed to say was, fine,
18 you have good grounds for holding him,
19 Government. Hold him. You're thinking of
20 sending him out of the country. Well, see if
21 you have -- can do it, and do it if you can.
22 But, while you're deciding that, don't keep him
23 forever in jail without a bail hearing. I
24 mean, maybe it's six months. Maybe it's five
25 months. Maybe it's seven months. Or maybe it

1 depends upon how likely it is that you will
2 reach a final decision soon.

3 Now, as I read Zadvydas, that's all it
4 says. And I don't see why that wouldn't apply
5 to all the grounds under (a)(6) since (a)(6)
6 has language that's open to that. It uses the
7 word "may," not the word "shall," as is in --
8 true of Rodriguez and -- et cetera. That's
9 really the basic question in my mind.

10 MR. RAYNOR: Justice Breyer, Zadvydas
11 does not entitle a non-citizen to a bail
12 hearing about flight risk and danger to the
13 community. The only thing non- -- Zadvydas
14 entitles a non-citizen to is a hearing about
15 whether removal is reasonably foreseeable. And
16 Zadvydas quite pointedly says that you can
17 detain someone until removal is reasonably
18 foreseeable.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 Justice Breyer, anything further?

23 JUSTICE BREYER: No, thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 Justice Kagan?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: One question --
3 well, a question, counsel. You said that the
4 next hearing in this case, in this particular
5 Petitioner's case, was scheduled for 2023.

6 But earlier you said that the average
7 detention rate is below the six months. But
8 that's not true. Average means that it's true
9 for a lot of people, but it's not true for a
10 lot of people as well.

11 As I understood some of the figures I
12 reviewed, it -- when you talk about reasonably
13 foreseeable, some of these proceedings can last
14 years and years, couldn't they?

15 MR. RAYNOR: It is possible, but,
16 Justice Sotomayor, I just want to clarify his
17 current hearing date is because he's on the
18 non-detained docket. That hearing date was set
19 after he was released on bond.

20 So, when he was still in detention,
21 his hearing was much more imminent. But it is
22 true that the non-detained docket moves more
23 slowly.

24 JUSTICE SOTOMAYOR: You keep talking
25 about an individual challenge is adequate to

1 protect the rights of these individuals. Most
2 of these non-citizens are overwhelmingly
3 non-lawyers, and for virtually all of them,
4 English is not a first language. Most of them
5 are impoverished.

6 And without the ability, given that
7 the only opportunity they have is
8 administrative, and so they're unlikely to be
9 represented by lawyers, how are these aliens,
10 without the help of the courts and lawyers,
11 supposed to protect their rights?

12 MR. RAYNOR: Justice Sotomayor, the
13 regulations provide for an interpreter if the
14 non-citizen needs it. The non-citizen is
15 entitled to be represented if he so chooses.
16 And the non-citizen can submit information.

17 JUSTICE SOTOMAYOR: They are not
18 entitled to lawyers. They have to go find one.

19 MR. RAYNOR: It is correct that the
20 government does not pay for lawyers in this
21 context. But that -- that's obvious --

22 JUSTICE SOTOMAYOR: It's hard to see
23 how impoverished people, unfamiliar with the
24 workings of this government, of this country,
25 are going to find lawyers. It seems like a

1 theoric offering to say that an individual
2 hearing is of any benefit to them, counsel.

3 MR. RAYNOR: Justice Sotomayor, I
4 don't think Respondent agrees with that.
5 Respondent thinks an individual hearing is very
6 important. Respondent is represented, and
7 Respondent hasn't suggested the absence of
8 government-funded counsel is fatal to the
9 system here.

10 CHIEF JUSTICE ROBERTS: Justice Kagan,
11 anything further?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett? No?

15 Thank you, counsel.

16 Mr. Shah.

17 ORAL ARGUMENT OF PRATIK A. SHAH

18 ON BEHALF OF THE RESPONDENT

19 MR. SHAH: Mr. Chief Justice, and may
20 it please the Court:

21 Zadvydas interpreted the exact same
22 statutory provision at issue here to require
23 release, subject to conditions of supervision,
24 not outright release, when, after six months of
25 detention, there is no significant likelihood

1 of removal in the reasonably foreseeable
2 future. That is exactly the position my client
3 was in.

4 DHS determined that Mr.
5 Arteaga-Martinez had demonstrated a reasonable
6 fear of torture if removed to his home country,
7 a threshold standard that only 13 percent of
8 applicants satisfy.

9 That determination entitled him to
10 immigration court adjudication of his claim for
11 relief, which often takes a year or, as in this
12 case, much longer, during which time he cannot
13 be removed.

14 After six months of detention, without
15 any independent review, he had not yet even
16 received a hearing on his withholding claim,
17 let alone a decision or subsequent appeals, at
18 the end of which he might not be removed at
19 all.

20 Now, three years later, the government
21 still seeks the power to imprison him, despite
22 his significant family ties and lack of any
23 criminal record, pending his modified yet still
24 unadjudicated withholding-of-removal claim.

25 Section 1231(a)(6), as definitively

1 construed in *Zadvydas*, forecloses his unchecked
2 prolonged detention. The government responds
3 that *Zadvydas* dealt only with the risk of
4 permanent detention.

5 Although that risk certainly raised
6 due process concerns motivating the Court's
7 statutory construction, its construction was
8 not limited to that extreme scenario.

9 Section 1231(a)(6) prohibits continued
10 detention after six months where, as here,
11 there is "no significant likelihood of removal
12 in the reasonably foreseeable future," not at
13 just some point ever.

14 As Justice Scalia, who dissented in
15 *Zadvydas*, confirmed in *Clark v. Martinez*, that
16 same construction must apply to all
17 non-citizens subject to Section 1231(a)(6),
18 including Mr. Arteaga-Martinez.

19 I welcome the Court's questions.

20 CHIEF JUSTICE ROBERTS: Counsel, you
21 didn't mention 1231(h). How do you get around
22 that?

23 MR. SHAH: Sure, Your Honor.

24 CHIEF JUSTICE ROBERTS: Nothing in
25 this -- nothing in this section shall be

1 construed to create any substantive or
2 procedural right or benefit that is legally
3 enforceable by any party against the United
4 States or its agencies or officers or any other
5 person.

6 MR. SHAH: Sure. A couple responses
7 on 1231(h).

8 First of all, that provision was also
9 raised in Zadvydas, and this Court rejected its
10 application. It rejected its application
11 because what 1231(h) is doing is it's saying
12 you can't have some separate -- use -- use this
13 statute to create some implied cause of action.

14 Here, we're not talking about any
15 implied cause of action. This is a habeas
16 claim. And so habeas is how he got into court.
17 And now the question is, can you just enforce
18 what the statute says? And, of course, the
19 answer is you can enforce whatever limits --

20 CHIEF JUSTICE ROBERTS: Well, what the
21 stat --

22 MR. SHAH: -- are within the statute.

23 CHIEF JUSTICE ROBERTS: -- what the
24 statute says, I mean --

25 MR. SHAH: Or how the statute has been

1 construed by this Court in Zadvydas. And what
2 this Court said in Zadvydas is, even though it
3 read a substantive limitation you can't detain
4 after six months, 1231(h) isn't a bar. 1231(h)
5 applies equally to substantive or procedural
6 limitations. That's the exact text of 1231(h).

7 So, if 1231(h) worked in -- did not
8 work in Zadvydas, it cannot work here. And, by
9 the way, the --

10 CHIEF JUSTICE ROBERTS: Well, but --
11 well, Zadvydas, I mean, so the statute has been
12 construed to create a substantive or procedural
13 right and it was defined in Zadvydas.

14 MR. SHAH: Correct.

15 CHIEF JUSTICE ROBERTS: So you think
16 because it was done in that respect in Zadvydas
17 that all bets are off and that 1231(h)
18 essentially has been read out of the statute
19 books?

20 MR. SHAH: Two responses.

21 First of all, Your Honor, this Court
22 did reject the 1231(h) argument in Zadvydas.
23 It has to apply equally here because the
24 1231(h) applies equally to substantive or
25 procedural limitations.

1 Point number two is we haven't read
2 it, neither this Court --

3 CHIEF JUSTICE ROBERTS: Well, hold --
4 hold. Because the statute says you can't
5 create substantive or procedural limitations --

6 MR. SHAH: Correct.

7 CHIEF JUSTICE ROBERTS: -- and what
8 did it do in Zadvydas? Which of those types
9 did it --

10 MR. SHAH: Well --

11 CHIEF JUSTICE ROBERTS: -- provide?

12 MR. SHAH: -- the government describes
13 Zadvydas as a substantive right, a substantive
14 decision, but a substantive limit on detaining
15 after six months of detention.

16 So what I'm saying here, the Court
17 rejected 1231(h), and the government says,
18 well, this case is different because it's
19 procedural limitations.

20 But 1231(h) says -- applies equally to
21 substantive or procedural limitations. So, if
22 the Court said --

23 CHIEF JUSTICE ROBERTS: Well, did it
24 in Zadvydas?

25 MR. SHAH: The Court rejected it. It

1 said it doesn't apply.

2 CHIEF JUSTICE ROBERTS: No, no, but
3 both substantive and procedural?

4 MR. SHAH: Well, Zadvydas --

5 CHIEF JUSTICE ROBERTS: I mean, when
6 I'm looking at it --

7 MR. SHAH: Yeah.

8 CHIEF JUSTICE ROBERTS: -- I mean, if
9 -- if -- obviously, the force of Zadvydas is
10 central to the --

11 MR. SHAH: Yeah.

12 CHIEF JUSTICE ROBERTS: -- discussions
13 here.

14 MR. SHAH: Yes.

15 CHIEF JUSTICE ROBERTS: And I'm
16 wondering if Zadvydas -- if you think that
17 Zadvydas should be limited, as opposed to
18 Zadvydas should be overruled, my question is,
19 how do you distinguish the applicability of
20 1231(h)?

21 And you're saying, well, Zadvydas did
22 this. But how much of 1231(h) did Zadvydas --

23 MR. SHAH: It's --

24 CHIEF JUSTICE ROBERTS: One might --
25 your friend on the other side might say

1 obliterate. The other, you presumably would
2 say construed.

3 MR. SHAH: Right. So, if we're
4 talking about 1231(h), the bar provision, as I
5 said, this Court rejected its application. But
6 it -- it didn't read it out of the statute.
7 What 1231(h) was designed to do -- and this is
8 explained in the legislative history of 1231(h)
9 -- it was specifically --

10 CHIEF JUSTICE ROBERTS: Well, it gets
11 better. But go on.

12 MR. SHAH: It specifically was enacted
13 to address the Ninth Circuit's use of mandamus
14 at that time to require the government to do
15 expeditious removal of aliens because the
16 predecessor to this statute had language that
17 said expeditious removal.

18 And what Congress did is said we
19 disagree with that Ninth Circuit practice of
20 using mandamus to enforce this limitation, what
21 the Ninth Circuit had perceived as a
22 limitation.

23 So we're not reading 1231(h) out of
24 the statute. 1231(h) still does work. You
25 can't use it as an implied cause of action to

1 willy-nilly enforce a statute. This is a
2 habeas petition, just like in Zadvydas.

3 And habeas, of course, you can enforce
4 the statute. That's the purpose of -- of -- of
5 habeas. So I don't think 1231(h) does the
6 government any good here.

7 I think the central point here is the
8 one that Justice Kagan made when ask -- when
9 questioning the government, which is this
10 statute has already been construed.

11 The test -- and this is at page 701 of
12 -- of -- of -- of Zadvydas -- the test is
13 crystal-clear in interpreting 1231(a)(6).

14 Here is what the Court says: "After
15 the six-month period, once the alien provides
16 good reason to believe that there is no
17 significant likelihood of removal in the
18 reasonably foreseeable future, the government
19 must respond with evidence or release him with
20 -- subject to conditions of supervision."

21 That is precisely the situation. In
22 Clark v. Martinez, this Court said that
23 provision, even though it was written with the
24 Zadvydas-type petitioners, it has to apply to
25 all people subject to 1231(a)(6) because that

1 was a statutory construction.

2 Certainly, the Zadvydas petitioners
3 are one class of people whose removal was not
4 reasonably foreseeable after six months of
5 detention. My client is yet another example of
6 someone who -- there was no significant
7 likelihood of removal in the reasonably
8 foreseeable future after he had been detained
9 at six months.

10 And that is because he had not even
11 been given a hearing while detained. We're not
12 talking about the non-detained docket; we are
13 talking about detained. He had been detained
14 not -- for six months, the government had not
15 given him a hearing on his withholding claim.

16 There is no chance he could have been
17 removed in the reasonably foreseeable future
18 because you can't remove him until he has a
19 hearing, has an IJ decision, has his BIA
20 appeal. We are talking months, if not years,
21 until that happens.

22 JUSTICE KAGAN: But, Mr. Shah, this
23 argument that you make, and it's the first
24 argument you make in your brief, that there's
25 no reasonable likelihood -- no reasonable

1 foreseeability of -- of -- of removal, was that
2 the way this case was presented below? Has
3 anybody -- has any other court had an
4 opportunity to deal with the claim as you're
5 making it now?

6 MR. SHAH: Your Honor, it wasn't
7 pitched in this way below, and that's because
8 of the procedural posture of this case. How
9 this came -- case came up to the Third Circuit,
10 it came up on an unopposed motion filed by my
11 client for summary affirmance after he had
12 already been released. The government didn't
13 oppose it because of binding Third Circuit
14 precedent.

15 So what happened here, he has already
16 been released on bond. He files an unopposed
17 motion for summary affirmance. The government
18 consents. He has then continued to be on
19 release. So there wasn't any occasion to kind
20 of air out any of these arguments, actually,
21 because it was unopposed motion of summary
22 affirmance.

23 So the answer is your question is no,
24 it wasn't fleshed out below, but none of this
25 was.

1 JUSTICE KAGAN: Yeah. So, for
2 whatever reason, if it wasn't fleshed out below
3 and it -- it sounds awfully factual the way
4 you're making it and not the kind of thing we
5 usually do, to decide a -- a pretty fact-bound
6 question that's never really been addressed by
7 anybody else.

8 MR. SHAH: Sure.

9 JUSTICE KAGAN: What does that
10 suggest?

11 MR. SHAH: So I guess two responses.

12 First, let me just address the
13 predicate of the question that it's fact-bound.
14 Your Honor, I don't think it's really all that
15 fact-bound because the question is -- again,
16 the test is significant likelihood of removal
17 in the reasonably foreseeable future.

18 Nobody, not even the government, can
19 get up here with a straight face and tell you
20 after six months that his removal would happen
21 in the reasonably foreseeable future, however
22 you want to define "reasonably foreseeable
23 future." He hadn't been given a hearing, let
24 alone an IJ decision, let alone a BIA appeal.

25 We know from Zadvydas this Court's

1 opinion said it's presumptively
2 unconstitutional after six months. We know
3 that at the six-month point, we are talking
4 months, if not years, before he could be
5 removed.

6 So it's not really factual at all
7 because, if "reasonably foreseeable" means
8 anything, it has to mean at least within a
9 year. And -- and the government cannot say --
10 Justice Breyer asked him, even on the detained
11 docket -- and we have statistics from --
12 through 2015, if you talk to any immigration
13 lawyer, those numbers have skyrocketed since
14 then. The government has that data. It hasn't
15 disclosed it. You -- we can ask them again,
16 how long does it take?

17 JUSTICE BARRETT: Well, can I ask you
18 a question about that --

19 MR. SHAH: Yes.

20 JUSTICE BARRETT: -- Mr. Shah,
21 because, when I asked Mr. Raynor about
22 proceedings that would drag on like this --

23 MR. SHAH: Yeah.

24 JUSTICE BARRETT: -- he said, well,
25 the government doesn't rule out, in fact,

1 accepts, the possibility of as-applied
2 constitutional challenges to extend to
3 detentions of the sort that you're identifying.

4 So could you have brought that kind of
5 challenge, and do you think it would have
6 succeeded and -- and, if so, why didn't you?

7 MR. SHAH: Well, Your Honor, we are
8 here on an as-applied challenge. This
9 challenge was brought after six months of
10 detention. It's an as-applied challenge to his
11 continuing detention.

12 Now it can't be the case -- Your
13 Honor, the test is, at the six-month mark, is
14 there a significant likelihood of removal in
15 the reasonably foreseeable future? Again,
16 there is no one could argue that there was a
17 reasonably foreseeable prospect of removal in
18 the reasonably foreseeable future.

19 That was his as-applied challenge, and
20 it should be granted. There isn't any magical
21 --

22 JUSTICE BARRETT: But is that the --
23 is that a -- that's not a constitutional claim?

24 MR. SHAH: No. It -- it's the
25 statutory provision that was -- that's a

1 statutory test that this Court used,
2 constitutional avoidance, in light of due
3 process concerns to interpret 1231(a)(6).

4 JUSTICE BARRETT: But I guess, unless
5 I misunderstood what Mr. Raynor was saying, I
6 thought I understood him to be saying that
7 there could be an as-applied constitutional
8 challenge, that at some point, it would violate
9 your client's constitutional rights.

10 MR. SHAH: Sure. If the government
11 could keep him locked up for years and you
12 denied the statutory claim, perhaps after some
13 indefinite time that the government believes
14 has to be close to permanent detention, perhaps
15 he could bring an as-applied due process
16 challenge that he's been locked up years.

17 But you shouldn't have to be wait --
18 you shouldn't have to wait until you're locked
19 up for years. Under Zadvydas, the six-month
20 mark is when you can bring the claim. And if
21 there's no significant likelihood that you're
22 going to be removed in the reasonably
23 foreseeable future --

24 JUSTICE KAVANAUGH: How are you
25 defining "reasonably foreseeable future" and on

1 what are you basing that?

2 MR. SHAH: Sure. So I think the best
3 place to look is Zadvydas itself, and what
4 Zadvydas says is, well, is 90 days when it's
5 presumptively unconstitutional? Is it six
6 months? And Zadvydas takes the longer limit,
7 right? At page 701, it says we're going to
8 presume that six months is when it's
9 presumptively unconstitutional. But we're not
10 going to hold that court -- the government to
11 that rigid line because we realize that
12 sometimes removal is in the works. So we're
13 going to ask after the six-month period, is
14 there a significant likelihood he'll be removed
15 in the reasonably foreseeable future? And then
16 the next sentence says that period shrinks as
17 the detention grows longer.

18 So I think the one thing, Justice
19 Kavanaugh --

20 JUSTICE KAVANAUGH: Well, what --

21 MR. SHAH: -- that we can safely
22 say --

23 JUSTICE KAVANAUGH: -- I mean, are we
24 -- in terms of the lower courts, if we are --

25 MR. SHAH: Yeah.

1 JUSTICE KAVANAUGH: -- fleshing out
2 reasonably foreseeable future --

3 MR. SHAH: Sure.

4 JUSTICE KAVANAUGH: -- I think there
5 could be chaos unless we say something more
6 specific.

7 MR. SHAH: So --

8 JUSTICE KAVANAUGH: And what would you
9 advise and on what are you basing that?

10 MR. SHAH: Sure. Okay. So two -- two
11 things.

12 One thing, I think what you can safely
13 say is "reasonably foreseeable" has to be less
14 than six months because the Court already set
15 the presumptive constitutional line at six
16 months and then said we're going to allow a
17 residual buffer. So it would be weird to think
18 that the reasonably foreseeable period can be
19 longer than the presumptively constitutional
20 period. That's one possible line.

21 But the other line you could adopt,
22 which is clear as day, as applied to our
23 client, is when you are in withholding of
24 removal proceedings, which, again, often take
25 years, if you had not even had a hearing by the

1 time of the six-month mark, then you satisfy
2 that test.

3 That is a bright line that would apply
4 in a lot of these cases because, as the
5 government can tell you, you can ask them, how
6 many of these people get hearings by the
7 six-month mark, the answer is not very many
8 today if you talk to any immigration lawyer.
9 So that is another bright line.

10 If they haven't even had a hearing on
11 their withholding-of-removal claim, let alone
12 an IJ decision, let alone appeals, they're not
13 going to be released in the reasonably
14 foreseeable future.

15 JUSTICE ALITO: One of the
16 government's arguments is that these procedural
17 requirements that you are reading into the
18 statute would violate Vermont Yankee. And you
19 didn't respond to that. Do you have a response
20 to it?

21 MR. SHAH: Your Honor, yeah. So I --
22 I guess two things.

23 One is now we're not talking about the
24 antecedent argument. I think we're talking
25 about the bond hearing argument.

1 Our bond hearing argument, Your Honor,
2 just flows from the other part of the Zadvydas
3 decision, not -- putting aside all other kind
4 of reading in implicit limitations and all of
5 that, if you just look at Zadvydas at page 700,
6 what it says is this -- and we've now been
7 arguing mostly about the -- the -- the holding
8 that says if there's no significant likelihood
9 of removal in the reasonably foreseeable
10 future, which, again, I don't think there's any
11 argument that we're not in that box, but we're
12 -- if we're not in that box, then the question
13 is, even if removal is reasonably foreseeable,
14 then what happens? And --

15 JUSTICE ALITO: Well, I'm not sure I
16 really understand your -- your answer. One --
17 we took this to decide about bond hearings and
18 about the clear and convincing evidence
19 standard. Are those requirements consistent
20 with Vermont Yankee?

21 MR. SHAH: So, Your Honor, here's what
22 -- I guess my response is here's what the Court
23 said: If removal is reasonably foreseeable, so
24 we're assuming we're in that second box, the
25 habeas court should consider the risk of the

1 alien's committing further crimes as a factor
2 potentially justifying confinement within that
3 reasonable removal period.

4 So I would just ask that this Court
5 apply that part of Zadvydas if you disagree
6 with me somehow that we're not in the
7 reasonably foreseeable removal box. And then
8 the question is --

9 JUSTICE ALITO: So you -- you read
10 Zadvydas to alter what the Court said in
11 Vermont Yankee?

12 MR. SHAH: Well, Your Honor, I -- I
13 don't -- I don't view it as altering or not. I
14 think it's a separate sort of inquiry here.
15 We're in a habeas court. The habeas court has
16 to -- and -- and the Court specifically talks
17 about the court making this inquiry, resolving
18 -- looking at, in order to justify continued
19 detention, those factors.

20 So I'm not sure how you -- I don't --
21 I think you just apply -- in -- in a case
22 that's directly on point, you apply those
23 circumstances. I guess that would be my
24 response.

25 And, Justice Kagan, I never finished

1 my response to your question because I was
2 fighting the predicate that there had to be
3 factual development.

4 But you asked me, okay, look, if -- if
5 you decide there -- this is too messy to
6 decide, well, the right thing to do is not, as
7 the government suggests on page 12 of their
8 reply, just to remand this issue to the Third
9 Circuit to decide.

10 But I think you would have to DIG the
11 case, because it doesn't make sense to decide
12 the logically downstream issue of bond hearings
13 and all the procedural requirements that might
14 go into that without deciding the logically
15 antecedent question is, do they satisfy the
16 main test of Zadvydas?

17 There is no significant likelihood of
18 removal in the reasonably foreseeable future
19 for a client -- for someone like my client.
20 You have to decide that first before deciding
21 the downstream question about bond hearings.

22 So, to answer your question directly,
23 I think, if the Court is not inclined to decide
24 that logically antecedent and, to me, a -- a
25 slam-dunk inquiry, if the Court isn't inclined

1 to decide that, then I think it should DIG both
2 this case and the Aleman Gonzalez case because
3 in neither case was this threshold issue
4 litigated because of the unique posture of how
5 those cases came to this Court.

6 CHIEF JUSTICE ROBERTS: Well, Mr.
7 Shah, if -- if we do decide the downstream
8 issue before the upstream one, it would hardly
9 be the first time. And it's not necessarily an
10 inappropriate use of our certiorari
11 jurisdiction to resolve downstream
12 disagreements or other reasons for cert while
13 not addressing upstream ones. We do that -- I
14 don't want to say all the time -- but --

15 MR. SHAH: Sure.

16 CHIEF JUSTICE ROBERTS: -- no one is
17 shocked when it happens.

18 MR. SHAH: Well, I think -- Your
19 Honor, I think there's a couple specially good
20 reasons not to do that here. One is because
21 what you say in the downstream, resolving the
22 downstream issue, it's hard to do that without
23 thinking about the upstream issue, if you will,
24 about whether there is a significant likelihood
25 of removal in the reasonably foreseeable future

1 because, again, those two inquiries in Zadvydas
2 are connected, right?

3 It was the -- they're in the same
4 paragraph. They're logically connected. And
5 it's hard to put yourself to -- to assume
6 you're not even going to think about that
7 before deciding the bond hearing question.

8 The reality is there was no -- not
9 even close to a significant likelihood of
10 removal in the reasonably foreseeable future
11 when you haven't had a bond hearing. And then
12 to decide what the procedural protections are,
13 if you artificially assume that he could have
14 been removed in the reasonably foreseeable
15 future, I think, is a difficult inquiry to
16 undertake.

17 And I would -- I would also mention
18 that the Sixth Circuit, at the time this
19 Court -- the government filed its petition,
20 there was no circuit split. There were only
21 two circuits that decided this issue. Since
22 then, to my knowledge, only one other circuit
23 has come into play even on the bond hearing
24 issue.

25 And so I think these entire slate of

1 issues would benefit from further percolation
2 and development if this Court isn't going to
3 decide the logically antecedent issue. And, in
4 fact, the dissent in the Sixth Circuit case
5 adopted our view of reasonable foreseeability,
6 that if you haven't had a hearing at six
7 months, you can't say that there's any
8 likelihood, let alone a significant likelihood,
9 of release in the reasonably foreseeable
10 future. We're talking about years, years here.

11 JUSTICE GORSUCH: Mr. Shah, another
12 upstream issue for you.

13 MR. SHAH: Yes.

14 JUSTICE GORSUCH: What is the status
15 of your client? Has he, in fact, received a
16 bond hearing and is he, in fact, at liberty
17 currently?

18 MR. SHAH: Yes, Your Honor. So what
19 happened, Your Honor, is, after the six-month
20 mark, under the Third Circuit's precedent, he
21 did receive a bond hearing. He was released.
22 The government never appealed his release, by
23 the way. And so he has been free under
24 supervised conditions of release since that
25 time.

1 JUSTICE GORSUCH: So I -- I certainly
2 understand we have similar issues in the next
3 case where we have someone who is currently
4 being detained, as I understand it.

5 But, with respect to your client, does
6 that moot his claim and, if not, why not?

7 MR. SHAH: I don't think, legally, it
8 moots the claim, Your Honor, because the
9 government still seeks the power to re-detain
10 him. And so, if you were to rule against us,
11 in the government's view, it could simply put
12 him back into custody.

13 JUSTICE GORSUCH: Is it --

14 MR. SHAH: And so, from a legal
15 standpoint --

16 JUSTICE GORSUCH: I -- I under -- I
17 understand that.

18 MR. SHAH: Yeah.

19 JUSTICE GORSUCH: But -- but normally
20 we -- we ask about how speculative that would
21 be. And so we'd have to speculate, I think,
22 that the government would detain him, or we'd
23 have to -- we'd have to be -- have some
24 assurance he -- he -- he's likely to be
25 detained again and that he would be held for

1 more than six months without another bond
2 hearing, having already received one at six
3 months.

4 MR. SHAH: Well, the -- the six-month
5 limit --

6 JUSTICE GORSUCH: Is that a bit of a
7 --

8 MR. SHAH: Sorry, Your Honor.

9 JUSTICE GORSUCH: I'm just -- I'm just
10 curious.

11 MR. SHAH: Yeah.

12 JUSTICE GORSUCH: Is that, under our
13 -- our precedents in terms of how speculative
14 something has to be before it's moot or not
15 moot, where does that fall on the line?

16 MR. SHAH: So, Your Honor, I -- I
17 don't think it is actually a mootness problem
18 because, again, I think, from the government's
19 standpoint, this is a question of their power
20 and they exercise their discretion either way
21 in all sorts of cases. Perhaps that might be
22 better directed to the government.

23 But what will I -- what I will say is
24 it's not a question of whether he'll receive a
25 bond hearing within six months. It's whether

1 he'll receive a hearing on his substantive
2 claim for withholding relief. And I don't
3 think that's at all certain that he would get
4 that within six months given the backlog in the
5 immigration courts even on the detained docket.
6 The --

7 JUSTICE GORSUCH: But you have no
8 information that he's likely to be detained
9 again or that he wouldn't receive at least a
10 bail hearing again if he were detained after
11 six months?

12 MR. SHAH: Your -- Your Honor, under
13 the government's view, that would be purely
14 within their discretion, and I don't know how
15 they would exercise their discretion.

16 JUSTICE GORSUCH: Okay. Thank you.

17 MR. SHAH: One other point I want to
18 make is about *Demore v. Kim*.

19 JUSTICE SOTOMAYOR: I'm sorry,
20 counsel.

21 MR. SHAH: Oh, sorry.

22 JUSTICE SOTOMAYOR: I think your point
23 is, if the Court rules in the government's
24 favor in this case, there will be no
25 opportunity for a further hearing, bond

1 hearing, correct?

2 MR. SHAH: Correct. The government
3 has made clear that it does not believe --

4 JUSTICE GORSUCH: Well, to be clear, I
5 understand that.

6 MR. SHAH: Okay, yeah.

7 JUSTICE GORSUCH: My question to you
8 was not if we rule in the government's favor
9 but whether we should rule in this --

10 MR. SHAH: Sure.

11 JUSTICE GORSUCH: -- particular case
12 as opposed to the next one. You understood
13 that, right?

14 MR. SHAH: Yeah. Yes, Your Honor.
15 Thank you.

16 The -- the one other point I would
17 make is about Demore v. Kim. The government
18 argues that Demore v. Kim is now somehow more
19 on point than Zadvydas.

20 First of all, Demore v. Kim dealt with
21 a different statute, 1226(c), and -- and that's
22 fundamentally important because that dealt with
23 mandatory detention of criminal aliens.

24 The -- Congress -- and this is heavily
25 -- this is the main rationale in Demore v. Kim.

1 There are two rationales in Demore v. Kim for
2 allowing that detention. One is Congress had
3 made the categorical judgment that categorical
4 -- that criminal aliens were too dangerous to
5 release, one major distinction.

6 Second major distinction is the period
7 of detention. The Court functioned on the
8 premise that in the vast majority of cases
9 these people were detained less than two
10 months, about a month or month and a half.

11 And in the outer limit case, they were
12 detained at five months. So they didn't even
13 hit the presumptive unconstitutional line that
14 this Court set up in Zadvydas. So I don't see
15 how Demore v. Kim is even in the ballpark of
16 why we would be talking about it because
17 Zadvydas kicks in only for people who have been
18 detained longer than six months.

19 That is not the Demore class, the
20 class of criminal aliens that Congress had
21 categorically said we can't release because
22 they're a danger to society.

23 Here, we're talking about 1231(a)(6),
24 a statute that has discretionary detention,
25 and, here, we're talking about my client, who

1 has no criminal record at all.

2 If there are no --

3 JUSTICE KAGAN: Mr. -- Mr. Shah --

4 MR. SHAH: Yeah.

5 JUSTICE KAGAN: -- suppose that this
6 Court thinks about Zadvydas as, you know, a
7 precedent that needs to be applied but not one
8 that is altogether comfortable and should not
9 be extended.

10 MR. SHAH: Yeah.

11 JUSTICE KAGAN: I mean, suppose that
12 that's the view of Zadvydas on this Court.
13 What does that suggest about your case? You
14 know, is even the preliminary argument you
15 make, let alone the second argument, an
16 extension of Zadvydas? If not, why not?

17 MR. SHAH: Your Honor, I am not asking
18 this Court to extend Zadvydas one millimeter.
19 And in Clark v. Martinez, this Court was
20 situated in a very similar place. It was not
21 fond of Zadvydas at that time. Justice Scalia
22 wrote Clark v. Martinez. He dissented in
23 Zadvydas. And what he said is this, is, like
24 it or not and whether you disagree with it or
25 not, Zadvydas construed 1231(a)(6). And you

1 cannot pick and choose.

2 It's ironic that the government
3 invokes Clark v. Martinez because it is
4 categorically violating Clark v. Martinez,
5 saying that it only -- that Section 1231(a)(6)
6 interpretation of Zadvydas only applies to
7 petitioners who are situated like Zadvydas.

8 Clark v. Martinez says, no, it applies
9 to all people who fall within 1231(a)(6)
10 because it's a statutory -- it's a statutory
11 construction.

12 So what I'm asking you to do, Justice
13 Kagan, what I'm asking this Court to do, is not
14 revisit Zadvydas at all, not extend it at all,
15 but apply the test that is set out in black and
16 white at page 701 of Zadvydas.

17 This is the core holding of Zadvydas:
18 At the six-month period, once the alien
19 provides good reason to believe there is no
20 significant likelihood of removal in the
21 reasonably foreseeable future, the government
22 must respond with evidence or release them
23 subject to conditions of supervised release.

24 JUSTICE BARRETT: What about the
25 burden of proof, the clear and convincing?

1 MR. SHAH: Well, Your Honor, under --
2 under -- under this inquiry, that would fall
3 away. The -- the burden of proof is -- is just
4 this, the alien has to provide good reason to
5 believe there's no significant likelihood of
6 removal, and then the government has to rebut
7 it.

8 And so we -- we accept that in that
9 situation, under the logically antecedent
10 argument, we have to show a good reason of no
11 significant likelihood of removal in the
12 reasonably foreseeable future, but we've amply
13 met that here given that he had not even been
14 given a hearing on his substantive claim at the
15 six-month mark.

16 There is no chance, not even a
17 significant likelihood, there is no chance he
18 could have been removed in the reasonably
19 foreseeable future because the law bars you to
20 be removed until you've gotten a hearing, an IJ
21 decision, and a BIA appeal. So we're talking
22 comfortably months, if not years, from that
23 six-month mark.

24 So, Justice Kagan, hopefully, I've
25 answered the question.

1 JUSTICE KAGAN: So I think you did --

2 MR. SHAH: Yeah.

3 JUSTICE KAGAN: -- answer it as to
4 your primary argument. I think what Justice
5 Barrett may have asked you about is your
6 secondary argument and suggesting that the
7 clear and convincing evidence standard, some of
8 these other procedures --

9 MR. SHAH: Sure.

10 JUSTICE KAGAN: -- that have been
11 articulated by the Ninth Circuit, that that
12 goes beyond what Zadvydas said as to the second
13 category of people.

14 MR. SHAH: Sure. So, as to the -- as
15 to the bond hearing-related argument, I don't
16 think the core of our argument has to do with
17 the -- the burden of -- of proof and clear and
18 convincing evidence, which I agree with you is
19 not articulated in Zadvydas.

20 Quite frankly, Your Honor, I don't
21 think this Court has to reach that issue
22 because the government has never argued that
23 the bond hearing in our case turned on whether
24 it had a clear and convincing burden of proof.
25 The government didn't even submit a brief in

1 opposition to the bond hearing. It didn't even
2 appeal our client's release on a bond.

3 Clear and convincing had nothing to do
4 with it. He had no criminal record. And,
5 again, the government didn't contest it in
6 writing or on appeal.

7 So I don't think you would have to set
8 forth clear and convincing. And as we know, in
9 the vast majority of statutes which don't set
10 forth a burden of -- of -- of -- of -- a burden
11 of proof, courts figure it out. And so I don't
12 think the Court has to reach that.

13 I think the core part of the second
14 argument, the bond hearing requirement, is the
15 requirement of a neutral adjudicator in that
16 adversarial hearing. That's the core part of
17 that.

18 And Zadvydas does speak directly to
19 that at page 700 when it says even in -- if you
20 assume removal were reasonably foreseeable,
21 unlike in this case, but even if you were to
22 assume removal were reasonably foreseeable,
23 then the court -- the court should consider the
24 risk of aliens committing further crimes as a
25 factor potentially justifying continued

1 confinement.

2 And so -- so that's the part of
3 Zadvydas that I think you would be applying if
4 you were in the logically downstream argument
5 of bond hearings.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 JUSTICE THOMAS: Mr. Shah, would you
10 prevail had Zadvydas not been decided?

11 MR. SHAH: Your Honor, if this Court
12 -- if Zadvydas had not been decided, I think we
13 would need the Court to embrace the same
14 holding that Zadvydas did reach in order for us
15 to prevail at least under our logically
16 antecedent argument. It's built directly upon
17 this Court's holding in Zadvydas.

18 So, yes, the answer to your question
19 is our argument does depend on applying
20 Zadvydas as it was written.

21 JUSTICE THOMAS: So you would have to
22 make the Zadvydas arguments under the statute
23 but for our precedent?

24 MR. SHAH: Yes, Your Honor. If this
25 Court were to overrule Zadvydas, we lose. But,

1 of course, the government has not asked this
2 Court to overrule *Zadvydas*. It has asked this
3 Court to apply it just as we do.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer, anything further?

7 JUSTICE BREYER: No.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: No.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 Justice Gorsuch?

13 Justice Barrett? No.

14 Thank you, counsel.

15 MR. SHAH: Thank you, Your Honors.

16 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
17 Raynor.

18 REBUTTAL ARGUMENT OF AUSTIN RAYNOR

19 ON BEHALF OF THE PETITIONERS

20 MR. RAYNOR: Thank you, Mr. Chief
21 Justice.

22 I'd like to begin just by focusing on
23 the two different arguments in this case. The
24 argument on which we sought certiorari and
25 which the lower court ruled on was the argument

1 that, after six months of detention, a
2 non-citizen is entitled to a bond hearing at
3 which he can prove that he's not a flight -- or
4 at which the government has to prove that he's
5 not a flight risk or that he is a flight risk
6 or a danger to the community.

7 Now Respondent has virtually abandoned
8 his defense of the court of appeals' decision
9 on that point. His entire presentation ignored
10 that argument and focused on a new argument
11 that they interjected at the merits stage in
12 this Court, that under a straightforward
13 application of *Zadvydas*, removal is not
14 reasonably foreseeable.

15 That argument is procedurally barred.
16 They didn't file a cross-petition, and it would
17 derail this Court's consideration of the QP.
18 It is a narrower argument. It is specific to
19 non-citizens in withholding only proceedings.
20 And it would not allow this Court to decide the
21 broader question that it granted cert on and
22 that we sought cert on about the Third
23 Circuit's ruling that all non-citizens covered
24 by Section 1231 are entitled to a bond hearing.

25 Setting aside the fact that it is

1 procedurally barred, it's also incorrect on the
2 merits. Removal here is reasonably foreseeable
3 because this is detention pending proceedings.
4 This is just fundamentally distinct from the
5 open-ended detention in Zadvydas.

6 If this Court were to hold that
7 Zadvydas applies to detention pending
8 proceedings, that would be a watershed ruling
9 in immigration law. Detention pending
10 proceedings is common in immigration. We have
11 1225(b), we have 1226(a), we have 1226(c), we
12 have 1231 as it applies to withholding-only
13 non-citizens. And if the Court were to import
14 Zadvydas to that realm, it would upset all of
15 these statutory frameworks.

16 Respondent has suggested that if the
17 Court is not willing to decide his new
18 argument, it should DIG the case. With
19 respect, that's a preposterous argument. The
20 Court sought cert on a question -- excuse me --
21 the government sought cert on a question. This
22 Court granted cert on the question. Respondent
23 should not be able to come in and derail the
24 consideration of that question with an
25 altogether new argument.

1 Lastly, I just want to speak briefly
2 about Demore. Respondent suggested that Demore
3 is not on point because it dealt with criminal
4 non-citizens, and Congress had before it
5 findings about criminal non-citizens. But,
6 here, I think it's important to remember that
7 Congress also had good reasons for treating
8 this category of non-citizens differently, just
9 as, in Demore, Congress had good reasons for
10 treating those non-citizens differently.

11 In Guzman Chavez, at page 2290, the
12 Court says precisely this. It says: Look,
13 1231 applies only to non-citizens with final
14 orders of removal. Categorically, they have a
15 heightened flight risk because they lack any
16 meaningful opportunity to obtain the legal
17 entitlement to be in the United States.

18 And that is especially true with
19 respect to the narrower class of non-citizens
20 at issue here, which are those in
21 withholding-only proceedings with reinstated
22 removal orders. For people like Respondent,
23 they were already removed, they were already
24 subject to a removal order, they illegally
25 reentered the United States, that is a

1 statutory condition for reinstatement. You
2 only get reinstatement if you illegally reenter
3 the United States.

4 And then, once back in the United
5 States, they were apprehended again and ordered
6 removed again. We know, by definition, those
7 non-citizens pose a greater risk of flight
8 based on their past conduct.

9 JUSTICE KAVANAUGH: Can I ask one
10 question?

11 MR. RAYNOR: Yes.

12 JUSTICE KAVANAUGH: You -- you said
13 the reasonably foreseeable standard doesn't
14 work in this detention pending proceedings
15 context, would be watershed and upend the
16 immigration system. Can you explain that,
17 spell that out a little bit?

18 MR. RAYNOR: Yes, Justice Kavanaugh.
19 So, as we discussed, in Demore, the Court says
20 detention pending proceedings is just a
21 different beast than open-ended detention. And
22 detention pending proceedings is very common in
23 the immigration system. There's a host of
24 different provisions that allow for it. And
25 this Court addressed several of them in

1 Jennings.

2 1225(b) allows for detention pending
3 proceedings for a certain category of
4 non-citizens. 1226 allows for detention
5 pending proceedings. 1231 is a mixed bag. For
6 Zadvydas category non-citizens, they don't have
7 any pending proceedings. But, for people like
8 Respondent, who are in withholding-only
9 proceedings, that is detention pending a
10 proceeding.

11 So, in Jennings, a good example of
12 this, the Court didn't talk about Zadvydas, the
13 Court didn't suggest that Zadvydas was a
14 limitation, the Court didn't even reach the
15 constitutional concerns in Jennings. It just
16 stuck with the text, and it stopped with the
17 text being unambiguous.

18 And we submit that the Court should do
19 the same thing here.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:06 a.m., the case
23 was submitted.)

24

25

Official - Subject to Final Review

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