

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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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 74
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 -- and 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
20 we 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 --
21 you know, one category and not the other
22 category is because the Constitution has
23 nothing to say 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.

5 JUSTICE BREYER: So say --

6 MR. RAYNOR: But we would acknowledge
7 the possibility of an as-applied constitutional
8 challenge in extreme circumstances.

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

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

22 MR. RAYNOR: No, Justice Breyer.

23 JUSTICE BREYER: What has he applied
24 for?

25 MR. RAYNOR: This is a

1 withholding-only determination. He -- he has
2 no opportunity to have a legal entitlement to
3 be in the United States. This is not an asylum
4 application.

5 JUSTICE BREYER: Well --

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

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

12 MR. RAYNOR: He -- so he has asserted
13 the likelihood of persecution.

14 JUSTICE BREYER: Yeah.

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

19 JUSTICE BREYER: Yeah.

20 MR. RAYNOR: -- is withholding under
21 the Convention Against Torture.

22 JUSTICE BREYER: All right. So
23 withholding of removal. So he wants to -- if
24 you withhold removal, he stays, right?

25 MR. RAYNOR: He does not obtain a

1 legal entitlement to stay.

2 JUSTICE BREYER: I know. Is he here
3 or does he go to Mexico if, in fact, they're
4 going to kill him when he gets to Mexico?

5 MR. RAYNOR: He will not go to Mexico.
6 But we retain the discretion to remove him --

7 JUSTICE BREYER: Yeah, you do.

8 MR. RAYNOR: -- to another country.

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

17 MR. RAYNOR: Justice Breyer, if -- so
18 his withholding-only proceedings are still
19 ongoing. He has not obtained that relief.
20 But, if he were --

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

1 him.

2 MR. RAYNOR: The likeliest place that
3 we will send him, Justice Breyer, is to Mexico
4 --

5 JUSTICE BREYER: And I asked you --

6 MR. RAYNOR: -- because of the
7 overwhelmingly --

8 JUSTICE BREYER: -- when it is likely
9 that the government will reach a final decision
10 on that.

11 MR. RAYNOR: So he's currently on the
12 non-detained docket, Justice Breyer, which
13 moves much more slowly. And his withholding
14 only --

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

21 MR. RAYNOR: His next withholding-only
22 hearing is scheduled for 2023 --

23 JUSTICE BREYER: Oh, I see.

24 MR. RAYNOR: -- which is on the
25 non-detained docket.

1 JUSTICE BREYER: That's about a year
2 or so. Now, frankly, it's rather hard for me
3 to see the difference between the person who
4 they were trying to send to Cambodia, I think,
5 and finished his jail sentence in Zadvydas, and
6 we said, yeah, hey, fine, go look around for a
7 country for six months or so, and if you can't
8 find a country and there isn't one right on the
9 horizon, let him out. Or -- but -- now there
10 are exceptions, a lot of analogies to bail.

11 Okay? Why wouldn't that same thing
12 apply here? I mean, that's what it said. Same
13 situation.

14 MR. RAYNOR: Justice Breyer, with
15 respect, I don't agree that it's the same
16 situation.

17 JUSTICE BREYER: Because?

18 MR. RAYNOR: This is detention pending
19 a proceeding, which Demore says is --

20 JUSTICE BREYER: Well, so what?

21 MR. RAYNOR: Demore says that it is
22 fundamentally different from open-ended
23 detention in Zadvydas. These same arguments
24 were made by the dissent in Demore and
25 rejected. And dissent says that --

1 JUSTICE BREYER: You mean Demore
2 overruled Zadvydas?

3 MR. RAYNOR: No, Demore did not
4 overrule Zadvydas.

5 JUSTICE BREYER: I didn't think --

6 MR. RAYNOR: It dealt with a different
7 situation.

8 JUSTICE BREYER: -- it did either.
9 Mm-hmm. I didn't. All right. If I decide
10 that they are the same, then we should have the
11 same result, right?

12 MR. RAYNOR: If you --

13 JUSTICE BREYER: In my view.

14 MR. RAYNOR: -- wanted to overrule --
15 I think that would require overruling Demore
16 because --

17 JUSTICE BREYER: Well, I don't
18 understand the difference between Demore and
19 Zadvydas on your theory.

20 MR. RAYNOR: The difference, Justice
21 Breyer, is that Demore dealt with detention
22 pending proceedings, so there's a logical
23 termination point.

24 JUSTICE BREYER: Well, there was a --

25 JUSTICE KAGAN: Was Demore --

1 JUSTICE BREYER: -- logical
2 termination point in Zadvydas when they send
3 him to another country.

4 JUSTICE BARRETT: Has he actually
5 obtained withholding relief? Because there
6 would be a distinction, right, between --

7 JUSTICE BREYER: Yeah.

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

17 MR. RAYNOR: Correct --

18 JUSTICE BARRETT: Is that right?

19 MR. RAYNOR: -- Justice Barrett. We
20 agree with that. If he were to obtain
21 withholding-only relief, he wouldn't be in
22 Zadzy -- in Zadvydas land, so the --

23 JUSTICE BREYER: So, before he obtains
24 that, you can -- you can keep him in jail for
25 50 years? Is that your -- your -- your

1 response?

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

6 JUSTICE KAGAN: Was -- was Demore, Mr.
7 Raynor -- and I might be wrong about this. Was
8 Demore the one where the Solicitor General
9 provided wrong information to the Court and,
10 basically, the Court was operating on a false
11 understanding of how long some of these
12 detentions lasted?

13 MR. RAYNOR: You're correct, Justice
14 Kagan, that the Executive Office for
15 Immigration Review later provided updated
16 statistics to this office, which we provided to
17 the Court in Jennings.

18 JUSTICE KAGAN: So -- so, when Demore
19 said that, when Demore said, look, it's pending
20 a proceeding, Demore was thinking of, you know,
21 a proceeding that was going to happen pretty
22 soon.

23 JUSTICE BREYER: Six weeks.

24 JUSTICE KAGAN: And I think the -- the
25 question here is, what if we're in a different

1 situation than that? What if, in fact, it's
2 not going to happen pretty soon, 2023? We just
3 started 2022. That's a year away. He's
4 already been detained for some time.

5 I mean, now we're talking about, you
6 know, some significant time. And I'm not sure
7 it quite matters to the person who's in
8 detention whether you're in detention because
9 they can't find a country or whether they're in
10 detention because the immigration system is
11 backed up.

12 MR. RAYNOR: I think that, Justice --
13 Justice Kagan, Demore -- its front-line
14 position was that detention pending proceeding
15 is different. And then it adverted to the
16 statistics, which were later modified, although
17 not in significant respects.

18 Here, even if you wanted to focus on
19 the empirical aspect of this, the data that
20 Respondent has submitted just suggests there's
21 not a -- not a big problem here. About
22 80 percent of these non-citizens don't appeal
23 IJ determinations from withholding-only
24 proceedings, and they're detained for an
25 average of 114 days according to Respondent's

1 data.

2 And then, even if you look at the
3 entire category of non-citizens, some who
4 appeal, some who do not, still the average
5 length of detention is 157 days. And both of
6 those numbers are well below the six months
7 that Zadvydas found presumptively reasonable.
8 So we don't --

9 JUSTICE BREYER: Well, that's what I
10 -- thank you. No, no, I -- thank you. That's
11 very helpful, the 157. And I think that's what
12 Demore thought, that all these people are
13 released within six months anyway. Those are
14 the figures the SG gave us. So that's not a
15 problem.

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

20 MR. RAYNOR: That's just a --

21 JUSTICE BREYER: Now let me ask you a
22 different question, and what -- what -- as to
23 what kind of proceeding you ought to have if
24 you -- if you can't keep the person there
25 forever and you're going to keep him for more

1 than six months or more than eight months or
2 something.

3 What Zadvydas actually says -- let me
4 find it here. What it actually says is this --
5 and this is still true. It's -- it's in the --
6 the C.F.R. It says the sole procedural
7 protections available to the alien are found in
8 administrative proceedings where the alien
9 bears the burden of proving he is not dangerous
10 without, the government says, any significant
11 later judicial review, and then there's some
12 cites, et cetera.

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

24 All right. That's what Zadvydas says.
25 So what I don't see is how can the government,

1 given that language in *Zadvydas*, continue to
2 say, oh, yes, whether it's the *Zadvydas*-type
3 case or anything else under (a)(6), continue to
4 say, oh, we will give you a hearing, oh, well,
5 not quite a hearing, well, you have the burden
6 of proof, and, well, there is no judicial
7 review. I can't find an analogy for such a
8 thing in habeas corpus law or in bail law or in
9 any other detention law.

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

13 MR. RAYNOR: Justice Breyer, you're
14 correct that 241.4, which is the post-order
15 custody review regulations, as well as 241.13,
16 which are the *Zadvydas* regulations, both
17 provide purely for an administrative review
18 process.

19 But that doesn't mean that the
20 non-citizen couldn't seek habeas review of
21 statutory authority. So, if the non-citizen
22 thinks, for example, that removal is not
23 reasonably foreseeable, that is a statutory
24 limit on our authority and he can file a habeas
25 suit for that, just like he did in *Zadvydas*.

1 Similarly here, if he thinks he's not
2 within one of the four grounds of detention, he
3 can file a habeas suit. He's not going to do
4 that because he is within the four grounds of
5 detention. There's no dispute. He is
6 inadmissible. Congress has authorized his
7 detention.

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

15 And that's what he can't do. In both
16 Demore and Reno v. Flores, this Court says that
17 detention pending proceedings is permissible so
18 long as it has a rational relationship to a
19 legitimate government purpose.

20 JUSTICE BREYER: Yeah. All right.
21 Just I'll -- just once, last time. I'm not
22 worried about why you say delete the ground.
23 What -- what Zadvydas seemed to say was, fine,
24 you have good grounds for holding him,
25 Government. Hold him. You're thinking of

1 sending him out of the country. Well, see if
2 you have -- can do it, and do it if you can.
3 But, while you're deciding that, don't keep him
4 forever in jail without a bail hearing. I
5 mean, maybe it's six months. Maybe it's five
6 months. Maybe it's seven months. Or maybe it
7 depends upon how likely it is that you will
8 reach a final decision soon.

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

16 MR. RAYNOR: Justice Breyer, Zadvydas
17 does not entitle a non-citizen to a bail
18 hearing about flight risk and danger to the
19 community. The only thing non- -- Zadvydas
20 entitles a non-citizen to is a hearing about
21 whether removal is reasonably foreseeable. And
22 Zadvydas quite pointedly says that you can
23 detain someone until removal is reasonably
24 foreseeable.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Breyer, anything further?

4 JUSTICE BREYER: No, thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 Justice Kagan?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: One question --
9 well, a question, counsel. You said that the
10 next hearing in this case, in this particular
11 Petitioner's case, was scheduled for 2023.

12 But earlier you said that the average
13 detention rate is below the six months. But
14 that's not true. Average means that it's true
15 for a lot of people, but it's not true for a
16 lot of people as well.

17 As I understood some of the figures I
18 reviewed, it -- when you talk about reasonably
19 foreseeable, some of these proceedings can last
20 years and years, couldn't they?

21 MR. RAYNOR: It is possible, but,
22 Justice Sotomayor, I just want to clarify his
23 current hearing date is because he's on the
24 non-detained docket. That hearing date was set
25 after he was released on bond.

1 So, when he was still in detention,
2 his hearing was much more imminent. But it is
3 true that the non-detained docket moves more
4 slowly.

5 JUSTICE SOTOMAYOR: You keep talking
6 about an individual challenge is adequate to
7 protect the rights of these individuals. Most
8 of these non-citizens are overwhelmingly
9 non-lawyers. And for virtually all of them,
10 English is not a first language. Most of them
11 are impoverished.

12 And without the ability, given that
13 the only opportunity they have is
14 administrative, and so they're unlikely to be
15 represented by lawyers, how are these aliens,
16 without the help of the courts and lawyers,
17 supposed to protect their rights?

18 MR. RAYNOR: Justice Sotomayor, the
19 regulations provide for an interpreter if the
20 non-citizen needs it. The non-citizen is
21 entitled to be represented if he so chooses.
22 And the non-citizen can submit information.

23 JUSTICE SOTOMAYOR: They are not
24 entitled to lawyers. They have to go find one.

25 MR. RAYNOR: It is correct that the

1 government does not pay for lawyers in this
2 context. But that -- that's obvious --

3 JUSTICE SOTOMAYOR: It's hard to see
4 how impoverished people, unfamiliar with the
5 workings of this government, of this country,
6 are going to find lawyers. It seems like a
7 theoretic offering to say that an individual
8 hearing is of any benefit to them, counsel.

9 MR. RAYNOR: Justice Sotomayor, I
10 don't think Respondent agrees with that.
11 Respondent thinks an individual hearing is very
12 important. Respondent is represented, and
13 Respondent hasn't suggested the absence of
14 government-funded counsel is fatal to the
15 system here.

16 CHIEF JUSTICE ROBERTS: Justice Kagan,
17 anything further?

18 Justice Gorsuch?

19 Justice Kavanaugh?

20 Justice Barrett? No?

21 Thank you, counsel.

22 Mr. Shah.

23 ORAL ARGUMENT OF PRATIK A. SHAH

24 ON BEHALF OF THE RESPONDENT

25 MR. SHAH: Mr. Chief Justice, and may

1 it please the Court:

2 Zadvydas interpreted the exact same
3 statutory provision at issue here to require
4 release, subject to conditions of supervision,
5 not outright release, when, after six months of
6 detention, there is no significant likelihood
7 of removal in the reasonably foreseeable
8 future.

9 That is exactly the position my client
10 was in. DHS determined that Mr.
11 Arteaga-Martinez had demonstrated a reasonable
12 fear of torture if removed to his home country,
13 a threshold standard that only 13 percent of
14 applicants satisfy.

15 That determination entitled him to
16 immigration court adjudication of his claim for
17 relief, which often takes a year or, as in this
18 case, much longer, during which time he cannot
19 be removed.

20 After six months of detention, without
21 any independent review, he had not yet even
22 received a hearing on his withholding claim,
23 let alone a decision or subsequent appeals, at
24 the end of which he might not be removed at
25 all.

1 Now, three years later, the government
2 still seeks the power to imprison him, despite
3 his significant family ties and lack of any
4 criminal record, pending his modified yet still
5 unadjudicated withholding of removal claim.

6 Section 1231(a)(6), as definitively
7 construed in *Zadvydas*, forecloses his unchecked
8 prolonged detention. The government responds
9 that *Zadvydas* dealt only with the risk of
10 permanent detention.

11 Although that risk certainly raised
12 due process concerns motivating the Court's
13 statutory construction, its construction was
14 not limited to that extreme scenario.

15 Section 1231(a)(6) prohibits continued
16 detention after six months where, as here,
17 there is "no significant likelihood of removal
18 in the reasonably foreseeable future," not at
19 just some point ever.

20 As Justice Scalia, who dissented in
21 *Zadvydas*, confirmed in *Clark v. Martinez*, that
22 same construction must apply to all
23 non-citizens subject to Section 1231(a)(6),
24 including Mr. Arteaga-Martinez.

25 I welcome the Court's questions.

1 CHIEF JUSTICE ROBERTS: Counsel, you
2 didn't mention 1231(h). How do you get around
3 that?

4 MR. SHAH: Sure, Your Honor.

5 CHIEF JUSTICE ROBERTS: Nothing in
6 this -- nothing in this section shall be
7 conscrewed -- construed to create any
8 substantive or procedural right or benefit that
9 is legally enforceable by any party against the
10 United States or its agencies or officers or
11 any other person.

12 MR. SHAH: Sure. A couple responses
13 on 1231(h).

14 First of all, that provision was also
15 raised in Zadvydas, and this Court rejected its
16 application. It rejected its application
17 because what 1231(h) is doing is it's saying
18 you can't have some separate -- use -- use this
19 statute to create some implied cause of action.

20 Here, we're not talking about any
21 implied cause of action. This is a habeas
22 claim. And so habeas is how he got into court.
23 And now the question is, can you just enforce
24 what the statute says? And, of course, the
25 answer is you can enforce whatever limits --

1 CHIEF JUSTICE ROBERTS: Well, what the
2 stat --

3 MR. SHAH: -- are within the statute
4 --

5 CHIEF JUSTICE ROBERTS: -- what the
6 statute says, I mean --

7 MR. SHAH: -- or how the statute has
8 been construed by this Court in Zadvydas. And
9 what this Court said in Zadvydas is, even
10 though it read a substantive limitation you
11 can't detain after six months, 1231(h) isn't a
12 bar. 1231(h) applies equally to substantive or
13 procedural limitations. That's the exact text
14 of 1231(h). So, if 1231(h) worked in -- did
15 not work in Zadvydas, it cannot work here.

16 And, by the way, the --

17 CHIEF JUSTICE ROBERTS: Well, but --
18 well, Zadvydas, I mean, so the statute has been
19 construed to create a substantive or procedural
20 right and it was defined in Zadvydas.

21 MR. SHAH: Correct.

22 CHIEF JUSTICE ROBERTS: So you think
23 because it was done in that respect in Zadvydas
24 that all bets are off and that 1231(h)
25 essentially has been read out of the statute

1 books?

2 MR. SHAH: Two responses.

3 First of all, Your Honor, this Court
4 did reject the 1231(h) argument in Zadvydas.
5 It has to apply equally here because the --
6 1231(h) applies equally to substantive or
7 procedural limitations.

8 Point number two is we haven't read it
9 -- neither this Court --

10 CHIEF JUSTICE ROBERTS: Well, hold --
11 hold. Because the statute says you can't
12 create substantive or procedural limitations --

13 MR. SHAH: Correct.

14 CHIEF JUSTICE ROBERTS: -- and what
15 did it do in Zadvydas? Which of those types
16 did it --

17 MR. SHAH: Well, the --

18 CHIEF JUSTICE ROBERTS: -- provide?

19 MR. SHAH: -- the government describes
20 Zadvydas as a substantive right, a substantive
21 decision, but a substantive limit on detaining
22 after six months of detention.

23 So what I'm saying here, the Court
24 rejected 1231(h), and the government says,
25 well, this case is different because it's

1 procedural limitations.

2 But 1231(h) says -- applies equally to
3 substantive or procedural limitations. So, if
4 the Court said --

5 CHIEF JUSTICE ROBERTS: Well, did it
6 in Zadvydas?

7 MR. SHAH: The Court rejected it. It
8 said it doesn't apply.

9 CHIEF JUSTICE ROBERTS: No, no, but
10 both substantive and procedural?

11 MR. SHAH: Well, Zadvydas --

12 CHIEF JUSTICE ROBERTS: I mean, when
13 I'm looking at it --

14 MR. SHAH: Yeah.

15 CHIEF JUSTICE ROBERTS: -- I mean, if
16 -- if -- obviously, the force of Zadvydas is
17 central to the --

18 MR. SHAH: Yeah.

19 CHIEF JUSTICE ROBERTS: -- discussions
20 here.

21 MR. SHAH: Yes.

22 CHIEF JUSTICE ROBERTS: And I'm
23 wondering if Zadvydas -- if you think that
24 Zadvydas should be limited, as opposed to
25 Zadvydas should be overruled, my question is,

1 how do you distinguish the applicability of
2 1231(h)? And you're saying, well, Zadvydas did
3 this. But how much of 1231(h) did Zadvydas --

4 MR. SHAH: It -- it's --

5 CHIEF JUSTICE ROBERTS: One might --
6 your friend on the other side might say
7 obliterate. The other, you presumably would
8 say construed.

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

16 CHIEF JUSTICE ROBERTS: Oh, it gets
17 better. But go on.

18 MR. SHAH: It specifically was enacted
19 to address the Ninth Circuit's use of mandamus
20 at that time to require the government to do
21 expeditious removal of aliens because the
22 predecessor to this statute had language that
23 said expeditious removal.

24 And what Congress did is said we
25 disagree with that Ninth Circuit practice of

1 using mandamus to enforce this limitation, what
2 the Ninth Circuit had perceived as a
3 limitation.

4 So we're not reading 1231(h) out of
5 the statute. 1231(h) still does work. You
6 can't use it as an implied cause of action to
7 willy-nilly enforce a statute. This is a
8 habeas petition, just like in Zadvydas.

9 And habeas, of course, you can enforce
10 the statute. That's the purpose of -- of -- of
11 habeas. So I don't think 1231(h) does the
12 government any good here.

13 I think the central point here is the
14 one that Justice Kagan made when ask -- when
15 questioning the government, which is this
16 statute has already been construed.

17 The test -- and this is at page 701 of
18 -- of -- of Zadvydas -- the test is
19 crystal-clear in interpreting 1231(a)(6).
20 Here's what the Court says: "After the
21 six-month period, once the alien provides good
22 reason to believe that there is no significant
23 likelihood of removal in the reasonably
24 foreseeable future, the government must respond
25 with evidence or release him with -- subject to

1 conditions of supervision."

2 That is precisely the situation. In
3 Clark v. Martinez, this Court said that
4 provision, even though it was written with the
5 Zadvydas-type petitioners, it has to apply to
6 all people subject to 1231(a)(6) because that
7 was a statutory construction.

8 Certainly, the Zadvydas petitioners
9 are one class of people whose removal was not
10 reasonably foreseeable after six months of
11 detention. My client is yet another example of
12 someone who -- there was no significant
13 likelihood of removal in the reasonably
14 foreseeable future after he had been detained
15 at six months.

16 And that is because he had not even
17 been given a hearing while detained. We're not
18 talking about the non-detained docket; we are
19 talking about detained. He had been detained
20 not -- for six months, the government had not
21 given him a hearing on his withholding claim.

22 There is no chance he could have been
23 removed in the reasonably foreseeable future
24 because you can't remove him until he has a
25 hearing, has an IJ decision, has his BIA

1 appeal. We are talking months, if not years,
2 until that happens.

3 JUSTICE KAGAN: But, Mr. Shah, this
4 argument that you make, and it's the first
5 argument you make in your brief, that there's
6 no reasonable likelihood -- no reasonable
7 foreseeability of -- of -- of removal, was that
8 the way this case was presented below? Has
9 anybody -- has any other court had an
10 opportunity to deal with the claim as you're
11 making it now?

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

21 So what happened here, he's already
22 been released on bond. He files an unopposed
23 motion for summary affirmance. The government
24 consents. He has then continued to be on
25 release. So there wasn't any occasion to kind

1 of air out any of these arguments, actually,
2 because it was unopposed motion of summary
3 affirmance.

4 So the answer to your question is no,
5 it wasn't fleshed out below, but none of this
6 was.

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

14 MR. SHAH: Sure.

15 JUSTICE KAGAN: -- what does that
16 suggest?

17 MR. SHAH: So I guess two responses.

18 First, let me just address the
19 predicate of the question that it's fact-bound.
20 Your Honor, I don't think it's really all that
21 fact-bound because the question is -- again,
22 the test is significant likelihood of removal
23 in the reasonably foreseeable future.

24 Nobody, not even the government, can
25 get up here with a straight face and tell you

1 after six months that his removal would happen
2 in the reasonably foreseeable future, however
3 you want to define "reasonably foreseeable
4 future." He hadn't been given a hearing, let
5 alone an IJ decision, let alone a BIA appeal.

6 We know from Zadvydas this Court's
7 opinion said it's presumptively
8 unconstitutional after six months. We know
9 that at the six-month point, we are talking
10 months, if not years, before he could be
11 removed.

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

23 JUSTICE BARRETT: Well, can I ask you
24 a question about that --

25 MR. SHAH: Yes.

1 JUSTICE BARRETT: -- Mr. Shah,
2 because, when I asked Mr. Raynor about
3 proceedings that would drag on like this --

4 MR. SHAH: Yeah.

5 JUSTICE BARRETT: -- he said, well,
6 the government doesn't rule out, in fact,
7 accepts, the possibility of as-applied
8 constitutional challenges to extend to
9 detentions of the sort that you're identifying.

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

13 MR. SHAH: Well, Your Honor, we are
14 here on an as-applied challenge. This
15 challenge was brought after six months of
16 detention. It's an as-applied challenge to his
17 continuing detention.

18 Now it can't be the case -- Your
19 Honor, the test is, at the six-month mark, is
20 there a significant likelihood of removal in
21 the reasonably foreseeable future? Again,
22 there is no one could argue that there was a
23 reasonably foreseeable prospect of removal in
24 the reasonably foreseeable future.

25 That was his as-applied challenge, and

1 it should be granted. There isn't any magical

2 --

3 JUSTICE BARRETT: But is that the --
4 is that a -- that's not a constitutional claim?

5 MR. SHAH: No. It -- it's the
6 statutory provision that was -- that's a
7 statutory test that this Court used,
8 constitutional avoidance, in light of due
9 process concerns to interpret 1231(a)(6).

10 JUSTICE BARRETT: But I guess, unless
11 I misunderstood what Mr. Raynor was saying, I
12 thought I understood him to be saying that
13 there could be an as-applied constitutional
14 challenge, that at some point, it would violate
15 your client's constitutional rights.

16 MR. SHAH: Sure. If the government
17 could keep him locked up for years and you
18 denied the statutory claim, perhaps after some
19 indefinite time that the government believes
20 has to be close to permanent detention, perhaps
21 he could bring an as-applied due process
22 challenge that he's been locked up years.

23 But you shouldn't have to be wait --
24 you shouldn't have to wait until you're locked
25 up for years. Under Zadvydas, the six-month

1 mark is when you can bring the claim. And if
2 there's no significant likelihood that you're
3 going to be removed in the reasonably
4 foreseeable future --

5 JUSTICE KAVANAUGH: How are you
6 defining "reasonably foreseeable future" and on
7 what are you basing that?

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

24 So I think the one thing, Justice
25 Kavanaugh --

1 JUSTICE KAVANAUGH: Well, what --

2 MR. SHAH: -- that we can safely
3 say --

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

6 MR. SHAH: Yeah.

7 JUSTICE KAVANAUGH: -- fleshing out
8 "reasonably foreseeable future" --

9 MR. SHAH: Sure.

10 JUSTICE KAVANAUGH: -- I think there
11 could be chaos unless we say something more
12 specific.

13 MR. SHAH: So --

14 JUSTICE KAVANAUGH: And what would you
15 advise and on what are you basing that?

16 MR. SHAH: Sure. Okay. So two -- two
17 things.

18 One thing, I think what you can safely
19 say is "reasonably foreseeable" has to be less
20 than six months because the Court already set
21 the presumptive constitutional line at six
22 months and then said we're going to allow a
23 residual buffer. So it would be weird to think
24 that the reasonably foreseeable period can be
25 longer than the presumptively constitutional

1 period. That's one possible line.

2 But the other line you could adopt,
3 which is clear as day, as applied to our
4 client, is when you are in withholding of
5 removal proceedings, which, again, often take
6 years, if you had not even had a hearing by the
7 time of the six-month mark, then you satisfy
8 that test.

9 That is a bright line that would apply
10 in a lot of these cases because, as the
11 government can tell you, you can ask them, how
12 many of these people get hearings by the
13 six-month mark, the answer is not very many
14 today if you talk to any immigration lawyer.
15 So that is another bright line.

16 If they haven't even had a hearing on
17 their withholding of removal claim, let alone
18 an IJ decision, let alone appeals, they're not
19 going to be released in the reasonably
20 foreseeable future.

21 JUSTICE ALITO: One of the
22 government's arguments is that these procedural
23 requirements that you are reading into the
24 statute would violate Vermont Yankee. And you
25 didn't respond to that. Do you have a response

1 to it?

2 MR. SHAH: Your Honor, yeah. So I --
3 I guess two things.

4 One is now we're not talking about the
5 antecedent argument. I think we're talking
6 about the bond hearing argument.

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

21 JUSTICE ALITO: Well, I'm not sure I
22 really understand your -- your answer. One --
23 we took this to decide about bond hearings and
24 about the clear and convincing evidence
25 standard. Are those requirements consistent

1 with Vermont Yankee?

2 MR. SHAH: So, Your Honor, here's what
3 -- I guess my response is here's what the Court
4 said: If removal is reasonably foreseeable, so
5 we're assuming we're in that second box, the
6 habeas court should consider the risk of the
7 alien's committing further crimes as a factor
8 potentially justifying confinement within that
9 reasonable removal period.

10 So I would just ask that this Court
11 apply that part of Zadvydas if you disagree
12 with me somehow that we're not in the
13 reasonably foreseeable removal box. And then
14 the question is --

15 JUSTICE ALITO: So you -- you read
16 Zadvydas to alter what the Court said in
17 Vermont Yankee?

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

1 So I'm not sure how you -- I don't --
2 I think you just apply -- in -- in a case
3 that's directly on point, you apply those
4 circumstances. I guess that would be my
5 response.

6 And, Justice Kagan, I never finished
7 my response to your question because I was
8 fighting the predicate that there had to be
9 factual development. But you asked me, okay,
10 look, if -- if you decide there -- this is too
11 messy to decide, well, the right thing to do is
12 not, as the government suggests on page 12 of
13 their reply, just to remand this issue to the
14 Third Circuit to decide.

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

22 There is no significant likelihood of
23 removal in the reasonably foreseeable future
24 for a client -- for someone like my client.
25 You have to decide that first before deciding

1 the downstream question about bond hearings.

2 So, to answer your question directly,
3 I think, if the Court is not inclined to decide
4 that logically antecedent and, to me, a -- a
5 slam-dunk inquiry, if the Court isn't inclined
6 to decide that, then I think it should DIG both
7 this case and the Aleman Gonzalez case because
8 in neither case was this threshold issue
9 litigated because of the unique posture of how
10 those cases came to this Court.

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

20 MR. SHAH: Sure.

21 CHIEF JUSTICE ROBERTS: -- no one is
22 shocked when it happens.

23 MR. SHAH: Well, I think -- Your
24 Honor, I think there's a couple specially good
25 reasons not to do that here. One is because

1 what you say in the downstream, resolving the
2 downstream issue, it's hard to do that without
3 thinking about the upstream issue, if you will,
4 about whether there is a significant likelihood
5 of removal in the reasonably foreseeable future
6 because, again, those two inquiries in Zadvydas
7 are connected, right?

8 It was the -- they're in the same
9 paragraph. They're logically connected. And
10 it's hard to put yourself to -- to assume
11 you're not even going to think about that
12 before deciding the bond hearing question.

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

22 And I would -- I would also mention
23 that the Sixth Circuit, at the time this
24 Court -- the government filed its petition,
25 there was no circuit split. There were only

1 two circuits that decided this issue. Since
2 then, to my knowledge, only one other circuit
3 has come into play even on the bond hearing
4 issue.

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

16 JUSTICE GORSUCH: Mr. Shah --

17 MR. SHAH: -- years here.

18 JUSTICE GORSUCH: -- another upstream
19 issue for you.

20 MR. SHAH: Yes.

21 JUSTICE GORSUCH: What is the status
22 of your client? Has he, in fact, received a
23 bond hearing and is he, in fact, at liberty
24 currently?

25 MR. SHAH: Yes, Your Honor. So what

1 happened, Your Honor, is, after the six-month
2 mark, under the Third Circuit's precedent, he
3 did receive a bond hearing. He was released.
4 The government never appealed his release, by
5 the way, and so he has been free under
6 supervised conditions of release since that
7 time.

8 JUSTICE GORSUCH: So I -- I certainly
9 understand we have similar issues in the next
10 case where we have someone who is currently
11 being detained, as I understand it.

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

14 MR. SHAH: I don't think, legally, it
15 moots the claim, Your Honor, because the
16 government still seeks the power to re-detain
17 him. And so, if you were to rule against us,
18 in the government's view, it could simply put
19 him back into custody.

20 JUSTICE GORSUCH: Is it --

21 MR. SHAH: And so, from a legal
22 standpoint --

23 JUSTICE GORSUCH: I -- I under -- I
24 understand that.

25 MR. SHAH: Yeah.

1 JUSTICE GORSUCH: But -- but normally
2 we -- we ask about how speculative that would
3 be. And so we'd have to speculate, I think,
4 that the government would detain him, or we'd
5 have to -- we'd have to be -- have some
6 assurance he -- he -- he is likely to be
7 detained again and that he would be held for
8 more than six months without another bond
9 hearing, having already received one at six
10 months.

11 MR. SHAH: Well, the -- the six-month
12 limit --

13 JUSTICE GORSUCH: Is that a bit of a
14 --

15 MR. SHAH: Sorry, Your Honor.

16 JUSTICE GORSUCH: I'm just -- I'm just
17 curious.

18 MR. SHAH: Yeah.

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

23 MR. SHAH: So, Your Honor, I -- I
24 don't think it is actually a mootness problem
25 because, again, I think, from the government's

1 standpoint, this is a question of their power,
2 and they exercise their discretion either way
3 in all sorts of cases. Perhaps that might be
4 better directed to the government.

5 But what will I -- what I will say is
6 it's not a question of whether he'll receive a
7 bond hearing within six months. It's whether
8 he'll receive a hearing on his substantive
9 claim for withholding relief. And I don't
10 think that's at all certain that he would get
11 that within six months given the backlog in the
12 immigration courts even on the detained docket.
13 The --

14 JUSTICE GORSUCH: But you have no
15 information that he's likely to be detained
16 again or that he wouldn't receive at least a
17 bail hearing again if he were detained after
18 six months?

19 MR. SHAH: Your -- Your Honor, under
20 the government's view, that would be purely
21 within their discretion, and I don't know how
22 they would exercise their discretion.

23 JUSTICE GORSUCH: Okay. Thank you.

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

1 JUSTICE SOTOMAYOR: I'm sorry,
2 counsel.

3 MR. SHAH: Oh, sorry.

4 JUSTICE SOTOMAYOR: I think your point
5 is, if the Court rules in the government's
6 favor in this case, there will be no
7 opportunity for a further hearing, bond
8 hearing, correct?

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

11 JUSTICE GORSUCH: Well, to be clear, I
12 understand that.

13 MR. SHAH: Okay, yeah.

14 JUSTICE GORSUCH: My question to you
15 was not if we rule in the government's favor
16 but whether we should rule in this --

17 MR. SHAH: Sure.

18 JUSTICE GORSUCH: -- particular case
19 as opposed to the next one. You understood
20 that, right?

21 MR. SHAH: Yeah. Yes, Your Honor.
22 Thank you.

23 The -- the one other point I would
24 make is about Demore v. Kim. The government
25 argues that Demore v. Kim is now somehow more

1 on point than Zadvydas.

2 First of all, Demore v. Kim dealt with
3 a different statute, 1226(c), and -- and that's
4 fundamentally important because that dealt with
5 mandatory detention of criminal aliens.

6 The -- Congress -- and this is heavily
7 -- this is the main rationale in Demore v. Kim.
8 There are two rationales in Demore v. Kim for
9 allowing that detention. One is Congress --
10 Congress had made the categorical judgment that
11 categorical -- that criminal aliens were too
12 dangerous to release, one major distinction.

13 Second major distinction is the period
14 of detention. The Court functioned on the
15 premise that in the vast majority of cases
16 these people were detained less than two
17 months, about a month or month and a half.

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

1 That is not the Demore class, the
2 class of criminal aliens that Congress had
3 categorically said we can't release because
4 they're a danger to society.

5 Here, we're talking about 1231(a)(6),
6 a statute that has discretionary detention,
7 and, here, we're talking about my client, who
8 has no criminal record at all.

9 If there are no --

10 JUSTICE KAGAN: Mr. -- Mr. Shah --

11 MR. SHAH: Yeah.

12 JUSTICE KAGAN: -- suppose that this
13 Court thinks about Zadvydas as, you know, a
14 precedent that needs to be applied but not one
15 that is altogether comfortable and should not
16 be extended.

17 MR. SHAH: Yeah.

18 JUSTICE KAGAN: I mean, suppose that
19 that's the view of Zadvydas on this Court. I
20 mean, what does that suggest about your case?
21 You know, is even the preliminary argument you
22 make, let alone the second argument, an
23 extension of Zadvydas? If not, why not?

24 MR. SHAH: Your Honor, I am not asking
25 this Court to extend Zadvydas one millimeter.

1 And in Clark v. Martinez, this Court was
2 situated in a very similar place. It was not
3 fond of Zadvydas at that time. Justice Scalia
4 wrote Clark v. Martinez. He dissented in
5 Zadvydas. And what he said is this, is, like
6 it or not and whether you disagree with it or
7 not, Zadvydas construed 1231(a)(6). And you
8 cannot pick and choose.

9 It's ironic that the government
10 invokes Clark v. Martinez because it is
11 categorically violating Clark v. Martinez,
12 saying that it only -- that Section 1231(a)(6)
13 interpretation of Zadvydas only applies to
14 petitioners who are situated like Zadvydas.

15 Clark v. Martinez says, no, it applies
16 to all people who fall within 1231(a)(6)
17 because it's a statutory -- it's a statutory
18 construction.

19 So what I'm asking you to do, Justice
20 Kagan, what I'm asking this Court to do, is not
21 revisit Zadvydas at all, not extend it at all,
22 but apply the test that is set out in black and
23 white at page 701 of Zadvydas.

24 This is the core holding of Zadvydas:
25 At the six-month period, once the alien

1 provides good reason to believe there is no
2 significant likelihood of removal in the
3 reasonably foreseeable future, the government
4 must respond with evidence or release them
5 subject to conditions of supervised release.

6 JUSTICE BARRETT: What about the
7 burden of proof, the clear and convincing?

8 MR. SHAH: Well, Your Honor, under --
9 under -- under this inquiry, that would fall
10 away. The -- the burden of proof is -- is just
11 this, the alien has to provide good reason to
12 believe there's no significant likelihood of
13 removal, and then the government has to rebut
14 it.

15 And so we -- we accept that in that
16 situation, under the logically antecedent
17 argument, we have to show a good reason of no
18 significant likelihood of removal in the
19 reasonably foreseeable future, but we've amply
20 met that here given that he had not even been
21 given a hearing on his substantive claim at the
22 six-month mark.

23 There is no chance, not even a
24 significant likelihood, there is no chance he
25 could have been removed in the reasonably

1 foreseeable future because the law bars you to
2 be removed until you've gotten a hearing, an IJ
3 decision, and a BIA appeal. So we're talking
4 comfortably months, if not years, from that
5 six-month mark.

6 So, Justice Kagan, hopefully, I've
7 answered the question.

8 JUSTICE KAGAN: So I think you did --

9 MR. SHAH: Yeah.

10 JUSTICE KAGAN: -- answer it as to
11 your primary argument. I think what Justice
12 Barrett may have asked you about is your
13 secondary argument and suggesting that the
14 clear and convincing evidence standard, some of
15 these other procedures --

16 MR. SHAH: Sure.

17 JUSTICE KAGAN: -- that have been
18 articulated by the Ninth Circuit, that that
19 goes beyond what Zadvydas said as to the second
20 category of people.

21 MR. SHAH: Sure. So, as to the -- as
22 to the bond hearing-related argument, I don't
23 think the core of our argument has to do with
24 the -- the burden of -- of proof and clear and
25 convincing evidence, which I agree with you is

1 not articulated in Zadvydas.

2 Quite frankly, Your Honor, I don't
3 think this Court has to reach that issue
4 because the government has never argued that
5 the bond hearing in our case turned on whether
6 it had a clear and convincing burden of proof.
7 The government didn't even submit a brief in
8 opposition to the bond hearing. It didn't even
9 appeal our client's release on a bond.

10 Clear and convincing had nothing to do
11 with it. He had no criminal record. And,
12 again, the government didn't contest it in
13 writing or on appeal.

14 So I don't think you would have to set
15 forth clear and convincing. And as we know, in
16 the vast majority of statutes which don't set
17 forth a burden of -- of -- of -- of -- a burden
18 of proof, courts figure it out. And so I don't
19 think the Court has to reach that.

20 I think the core part of the second
21 argument, the bond hearing requirement, is the
22 requirement of a neutral adjudicator in that
23 adversarial hearing. That's the core part of
24 that.

25 And Zadvydas does speak directly to

1 that at page 700 when it says even in -- if you
2 assume removal were reasonably foreseeable,
3 unlike in this case, but even if you were to
4 assume removal were reasonably foreseeable,
5 then the court -- the court should consider the
6 risk of aliens committing further crimes as a
7 factor potentially justifying continued
8 confinement.

9 And so -- so that's the part of
10 Zadvydas that I think you would be applying if
11 you were in the logically downstream argument
12 of bond hearings.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

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

18 MR. SHAH: Your Honor, if this Court
19 -- if Zadvydas had not been decided, I think we
20 would need the Court to embrace the same
21 holding that Zadvydas did reach in order for us
22 to prevail at least under our logically
23 antecedent argument. It's built directly upon
24 this Court's holding in Zadvydas.

25 So, yes, the answer to your question

1 is our argument does depend on applying
2 Zadvydas as it was written.

3 JUSTICE THOMAS: So you would have to
4 make the Zadvydas arguments under the statute
5 but for our precedent?

6 MR. SHAH: Yes, Your Honor. If this
7 Court were to overrule Zadvydas, we lose. But,
8 of course, the government has not asked this
9 Court to overrule Zadvydas. It has asked this
10 Court to apply it just as we do.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer, anything further?

14 JUSTICE BREYER: No.

15 CHIEF JUSTICE ROBERTS: Justice Alito?
16 Justice Sotomayor?

17 JUSTICE SOTOMAYOR: No.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 Justice Barrett? No.

21 Thank you, counsel.

22 MR. SHAH: Thank you, Your Honors.

23 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
24 Raynor.

25

1 REBUTTAL ARGUMENT OF AUSTIN RAYNOR
2 ON BEHALF OF THE PETITIONERS

3 MR. RAYNOR: Thank you, Mr. Chief
4 Justice.

5 I'd like to begin just by focusing on
6 the two different arguments in this case. The
7 argument on which we sought certiorari and
8 which the lower court ruled on was the argument
9 that, after six months of detention, a
10 non-citizen is entitled to a bond hearing at
11 which he can prove that he's not a flight -- or
12 at which the government has to prove that he's
13 not a flight risk -- or that he is a flight
14 risk or a danger to the community.

15 Now Respondent has virtually abandoned
16 his defense of the court of appeals' decision
17 on that point. His entire presentation ignored
18 that argument and focused on a new argument
19 that they interjected at the merits stage in
20 this Court, that under a straightforward
21 application of *Zadvydas*, removal is not
22 reasonably foreseeable.

23 That argument is procedurally barred.
24 They didn't file a cross-petition, and it would
25 derail this Court's consideration of the QP.

1 It is a narrower argument. It is specific to
2 non-citizens in withholding-only proceedings.
3 And it would not allow this Court to decide the
4 broader question that it granted cert on and
5 that we sought cert on about the Third
6 Circuit's ruling that all non-citizens covered
7 by Section 1231 are entitled to a bond hearing.

8 Setting aside the fact that it is
9 procedurally barred, it's also incorrect on the
10 merits. Removal here is reasonably foreseeable
11 because this is detention pending proceedings.
12 This is just fundamentally distinct from the
13 open-ended detention in Zadvydas.

14 If this Court were to hold that
15 Zadvydas applies to detention pending
16 proceedings, that would be a watershed ruling
17 in immigration law. Detention pending
18 proceedings is common in immigration. We have
19 1225(b), we have 1226(a), we have 1226(c), we
20 have 1231 as it applies to withholding-only
21 non-citizens. And if the Court were to import
22 Zadvydas to that realm, it would upset all of
23 these statutory frameworks.

24 Respondent has suggested that if the
25 Court is not willing to decide his new

1 argument, it should DIG the case. With
2 respect, that's a preposterous argument. The
3 Court sought cert on a question -- excuse me --
4 the government sought cert on a question. This
5 Court granted cert on the question. Respondent
6 should not be able to come in and derail the
7 consideration of that question with an
8 altogether new argument.

9 Lastly, I just want to speak briefly
10 about Demore. Respondent suggested that Demore
11 is not on point because it dealt with criminal
12 non-citizens, and Congress had before it
13 findings about criminal non-citizens. But,
14 here, I think it's important to remember that
15 Congress also had good reasons for treating
16 this category of non-citizens differently, just
17 as, in Demore, Congress had good reasons for
18 treating those non-citizens differently.

19 In *Guzman Chavez*, at page 2290, the
20 Court says precisely this. It says: Look,
21 1231 applies only to non-citizens with final
22 orders of removal. Categorically, they have a
23 heightened flight risk because they lack any
24 meaningful opportunity to obtain the legal
25 entitlement to be in the United States.

1 And that is especially true with
2 respect to the narrower class of non-citizens
3 at issue here, which are those in
4 withholding-only proceedings with reinstated
5 removal orders. For people like Respondent,
6 they were already removed. They were already
7 subject to a removal order. They illegally
8 reentered the United States. That is a
9 statutory condition for reinstatement. You
10 only get reinstatement if you illegally reenter
11 the United States.

12 And then, once back in the United
13 States, they were apprehended again and ordered
14 removed again. We know, by definition, those
15 non-citizens pose a greater risk of flight
16 based on their past conduct.

17 JUSTICE KAVANAUGH: Can I ask one
18 question?

19 MR. RAYNOR: Yes.

20 JUSTICE KAVANAUGH: You -- you said
21 the reasonably foreseeable standard doesn't
22 work in this detention pending proceedings
23 context, would be watershed and upend the
24 immigration system. Can you explain that,
25 spell that out a little bit?

1 MR. RAYNOR: Yes, Justice Kavanaugh.
2 So, as we discussed, in Demore, the Court says
3 detention pending proceedings is just a
4 different beast than open-ended detention. And
5 detention pending proceedings is very common in
6 the immigration system. There's a host of
7 different provisions that allow for it, and
8 this Court addressed several of them in
9 Jennings.

10 1225(b) allows for detention pending
11 proceedings for a certain category of
12 non-citizens. 1226 allows for detention
13 pending proceedings. 1231 is a mixed bag. For
14 Zadvydas category non-citizens, they don't have
15 any pending proceedings. But, for people like
16 Respondent, who are in withholding-only
17 proceedings, that is detention pending a
18 proceeding.

19 So, in Jennings, that's a good example
20 of this, the Court didn't talk about Zadvydas,
21 the Court didn't suggest that Zadvydas was a
22 limitation, the Court didn't even reach the
23 constitutional concerns in -- in Jennings. It
24 just stuck with the text, and it stopped with
25 the text being unambiguous.

1 And we submit that the Court should do
2 the same thing here.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:06 a.m., the case
6 was submitted.)

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