

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MERRICK B. GARLAND,)
ATTORNEY GENERAL, ET AL.,)
) Petitioners,)
) v.) No. 20-322
ESTEBAN ALEMAN GONZALEZ, ET AL.,)
) Respondents.)
- - - - -

Pages: 1 through 66
Place: Washington, D.C.
Date: January 11, 2022

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MERRICK B. GARLAND,)

ATTORNEY GENERAL, ET AL.,)

Petitioners,)

v.) No. 20-322

ESTEBAN ALEMAN GONZALEZ, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Tuesday, January 11, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

CURTIS E. GANNON, Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioners.

MATTHEW H. ADAMS, ESQUIRE, Seattle, Washington; on
behalf of the Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll next hear arguments in the matter of 20-322, Garland versus Gonzalez.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF THE PETITIONERS

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

With respect to the original question presented, if the Court reaches it in this case, the government's position is, as Mr. Raynor has just explained in the first case this morning, Section 1231(a)(6) does not compel the bond hearing regime imposed by the Ninth Circuit, any more than the Third Circuit, after the removal period, not as a matter of the statute's text nor as a matter of constitutional avoidance.

With respect to the additional question, the courts below could not enter class-wide injunctive relief because, in Section 1252(f)(1), Congress has expressly limited the lower courts' jurisdiction to

1 enjoin or restrain the operation of certain
2 provisions of the INA, including those
3 governing post-order custody.

4 That limitation applies regardless of
5 the nature of the action or claim, so it is not
6 limited to constitutional challenges, and any
7 such limit would only encourage plaintiffs to
8 do what happened here, seek to avoid the bar by
9 advancing implausible statutory constructions
10 under the guise of constitutional avoidance.

11 Moreover, the statute's exception for
12 orders granting relief to an individual alien
13 against whom removal proceedings have been
14 initiated does not permit class-wide relief
15 simply because every current or future member
16 of a class could have qualified for individual
17 relief.

18 That would be inconsistent with
19 Congress's concern about allowing lower courts
20 to remake the immigration system under readings
21 that have not been adopted by this Court. And
22 this Court has stated as much about the
23 exception in 1252(f)(1) three times, most
24 recently in Jennings, as the Third Circuit
25 recognized in its decision two weeks ago in

1 Brito.

2 I welcome the Court's questions.

3 JUSTICE KAGAN: Mr. Gannon, as I
4 understand your jurisdictional argument, it
5 really all relies on the idea that "enjoin"
6 means both "stop" and "require." Is that
7 correct?

8 MR. GANNON: It -- it depends on that
9 with respect to "enjoin." Separately --

10 JUSTICE KAGAN: Yeah.

11 MR. GANNON: -- if the -- if the
12 question of the --

13 JUSTICE KAGAN: Putting aside the
14 individual issue.

15 MR. GANNON: No, even setting aside
16 the -- the exception, if -- if you just said
17 that it means that we have to enforce the
18 statute, if you go to their second argument,
19 that the -- that argument the court said below,
20 that the operation of the provisions means that
21 we can't be compelled to do this -- we can be
22 compelled to do the statute, that would still
23 be compulsion under -- that's the way we read
24 that, yes.

25 JUSTICE KAGAN: Okay. I -- I -- I

1 take that as a gloss on what I said. Is that
2 --

3 MR. GANNON: Yes.

4 JUSTICE KAGAN: Okay. So I'm just
5 going to -- I mean, of course, you're right
6 that if you look up the word "enjoin" in the
7 dictionary, you can find something that
8 suggests not stop but something like order or
9 require or something like that.

10 But I'm just looking at this phrase
11 "enjoin or restrain the operation of certain
12 statutory provisions," and let me -- let me
13 give you some examples about what the word
14 "enjoin" would mean in similar phrases.

15 The plaintiff seeks to enjoin
16 enforcement of the law. Does that mean stop?

17 MR. GANNON: I -- I think it's hard to
18 tell from that context whether it means that
19 they seek to have the law --

20 JUSTICE KAGAN: Really?

21 MR. GANNON: -- enforced --

22 JUSTICE KAGAN: If the plaintiff seeks
23 to enforce the law as opposed to the plaintiff
24 seeks to enjoin enforcement of the law --

25 MR. GANNON: Well, I think --

1 JUSTICE KAGAN: -- doesn't that
2 obviously mean stop enforcement?

3 MR. GANNON: No. If the plaintiff is
4 saying you are not enforcing the law, I want an
5 injunction that says enforce the law, then the
6 plaintiff would be asking for --

7 JUSTICE KAGAN: That's what -- that's
8 --

9 MR. GANNON: -- someone to be enjoined
10 to enforce the law.

11 JUSTICE KAGAN: Okay. You're -- okay,
12 let's go a few more. I mean, because, to me,
13 the plaintiff seeks to enjoin enforcement of
14 the law, it means, like, stop enforcing the
15 law.

16 MR. GANNON: Sometimes it does --

17 JUSTICE KAGAN: The plaintiff seeks --

18 MR. GANNON: -- and if -- if -- if it
19 were to say on --

20 JUSTICE KAGAN: -- the plaintiff seeks
21 to enjoin -- excuse me -- the agency seeks to
22 enjoin the aiding and abetting of securities
23 law violations.

24 MR. GANNON: In that context, I think
25 it's clear that the agency is trying to stop

1 something that it would be -- it would consider

2 --

3 JUSTICE KAGAN: Okay.

4 MR. GANNON: -- to be a violation of
5 the law.

6 JUSTICE KAGAN: The federal court
7 lacks jurisdiction to enjoin state court
8 proceedings.

9 MR. GANNON: I -- I think that they
10 could neither compel state court proceedings
11 nor stop state court proceedings --

12 JUSTICE KAGAN: That's really --

13 MR. GANNON: -- in that instance.

14 JUSTICE KAGAN: -- what it would mean?
15 Just like -- really? Either one?

16 MR. GANNON: Yeah, I think -- not --
17 they -- it could not compel a state court to
18 have proceeding -- if it is -- many of those
19 types of statutes that are limiting
20 interference with another court system, like
21 the Tax Injunction Act, you know, say that the
22 government -- say that a district court shall
23 not enjoin, suspend, or restrain the collection
24 of state taxes.

25 JUSTICE KAGAN: Okay. Now --

1 MR. GANNON: And I think that means
2 that they can't order collection of taxes any
3 more than it says that you can -- that they can
4 order the stopping of collection of state
5 taxes.

6 JUSTICE KAGAN: Now let's say that --
7 I mean, I guess, look, I -- I just -- I get the
8 point. It just seems to me that the ordinary
9 reading -- way of reading any of those three
10 would be, oh, you're obviously looking to stop
11 something.

12 But let's add some stuff because this
13 statute says enjoin or restrain the operation
14 of certain statutory proceeding -- provisions.
15 So you're essentially reading it to say the
16 court lacks jurisdiction to stop or require or
17 restrain. Now that would be sort of odd,
18 wouldn't it?

19 MR. GANNON: I think that --

20 JUSTICE KAGAN: Like, enjoin or
21 restrain, stop or restrain, that's a sensible
22 thing to say.

23 MR. GANNON: I -- I --

24 JUSTICE KAGAN: Stop or require or
25 restrain, that's not a sensible thing to say.

1 MR. GANNON: Well, I think, Justice
2 Kagan, that in this context, the -- the two
3 phrases, "enjoin" or "restrain," are often
4 thought of in terms of an injunction versus a
5 stay. I -- I agree with you that if you just
6 took these two words in isolation, you could
7 read it as you just said, that one would be
8 affirmative, one would be negative.

9 But, as we've been discussing, there
10 are contexts in which "enjoin" actually
11 means -- you know, it can mean either. And in
12 the adjacent provision, (f)(2), "enjoin"
13 clearly is about stopping removal.

14 JUSTICE KAGAN: Right. So you -- you
15 got exactly where I was going. I mean, I hate
16 to keep piling on. But now, in addition to,
17 like, just what this "enjoin" usually means in
18 similar sentences, plus the fact that
19 "restrain" is in here, plus there's this
20 provision right next door, 1252(f)(2), no court
21 shall enjoin the removal of any alien pursuant
22 to a final order unless the alien shows blah,
23 blah, blah. Now that obviously means stop,
24 right? It doesn't mean require?

25 MR. GANNON: Yes, in that context,

1 because we know -- as is -- like your SEC
2 example, we know that the -- the non-citizen in
3 that -- in that context would be asking for
4 only one direction of relief.

5 JUSTICE KAGAN: Yeah. So I just have
6 to say, like, the sort of normal meaning of
7 "enjoin" in similar kinds of sentences, the
8 fact that there is a "restrain" right next to
9 the word "enjoin," and the fact that
10 1252(f)(2), which obviously only means stop, is
11 right next to 1252(f)(1), put all those things
12 together, I don't know, it seems like you have
13 a tough row to hoe here.

14 MR. GANNON: Well, and so, if I can go
15 back to the gloss that -- that I confused it
16 with at the very beginning here, even assuming
17 that this is about only stopping or only
18 compelling, whichever direction you want to
19 pick, we think that the phrase "the operation
20 of the provisions" is a reference not just to
21 the statute itself but to the way that they are
22 being carried out.

23 So, in this instance, the injunction
24 is clearly changing how the statute operates.
25 And the operation of the provisions, they only

1 operate through the executive's actions. The
2 cross-referenced provisions are the sections of
3 the INA that deal with inspection,
4 apprehension, exclusion, and removal. None of
5 those things have any abstract content in the
6 world that is anything other than the way the
7 government enforces them.

8 And so we think here that if you want
9 to say that -- that you can't -- you can't
10 force -- that the "enjoin" only has the -- the
11 -- the one direction meaning, it would still be
12 a problem if the Court is enjoining the
13 operation of the statute as the government
14 carries it out.

15 And it's not just that we think that
16 the phrase "operation" is synonymous with
17 implementation in this context, but if you look
18 at the exception, it also says that it is --
19 this is other than with respect to the
20 application of such provisions to an individual
21 alien.

22 And so, again, the exception is about
23 the way these are being applied. And so we
24 think that in this context, consistent with
25 Congress's recognition that this is regardless

1 --

2 JUSTICE KAGAN: I -- I -- I guess I'm
3 only --

4 MR. GANNON: -- of the nature of the
5 action or claim --

6 JUSTICE KAGAN: -- I'm only half sure
7 I understand your argument, Mr. Gannon, which
8 I'm sure is -- is -- is my fault, not yours.

9 But, if I understand the normal,
10 natural meaning of "operation" as something
11 like the act of operating, you know, the act of
12 functioning, stop the operating of the statute,
13 stop the functioning, right?

14 MR. GANNON: And the functioning is
15 what the executive branch is doing to carry it
16 out. And we think Congress was concerned about
17 having lower courts order the executive to stop
18 operating this statute, to say you can't do
19 that provision the way you're doing it. We
20 think the statute generally was concerned --

21 JUSTICE KAGAN: Right. But wouldn't
22 that suggest that courts can't prohibit the
23 functioning of the statute, right, but they can
24 enjoin agency operation that's in derogation of
25 the statute? You can't -- you -- you know --

1 so -- so there's still some meaning here and
2 there's still something that a court has no
3 jurisdiction over because the court cannot
4 prohibit the functioning of a statute.

5 But what is also true is that the
6 court can prohibit agency action that's in
7 violation of the statute.

8 MR. GANNON: But I wouldn't read the
9 statute that far here, in part because Congress
10 left in the protection for individual cases.
11 And so we know that what Congress is concerned
12 about here is the distinction between a
13 programmatic challenge and an individual
14 challenge.

15 JUSTICE BARRETT: Mr. Gannon, can I
16 ask you another question about the enjoin or
17 restrain language?

18 So I understand we're dealing with an
19 injunction here, but I'd like to understand the
20 scope of the government's argument.

21 Do you agree that this language,
22 enjoin or restrain, would not apply to
23 class-wide declaratory relief?

24 MR. GANNON: We don't agree with that.
25 We haven't briefed it in this case. It's

1 beyond the scope of the QP, in part because, as
2 you just noted, these cases involve
3 injunctions. And in Aleman Gonzalez, it's
4 actually a preliminary injunction.

5 And so the lower courts, with the
6 exception of the Sixth Circuit, have not been
7 receptive to our -- our approach on that. And
8 the plurality in Preap seems to say that
9 declaratory judgments would not be covered by
10 1252(f).

11 But the argument that -- that -- that
12 we think is a reasonable one is that other
13 similar statutes also preclude declaratory
14 judgments when there's little practical
15 difference from an injunction. And a good
16 example is the Tax Injunction Act, which we
17 quote in our brief. This is 28 U.S.C. 1341. I
18 already mentioned it to Justice Kagan.

19 It says district courts shall not
20 enjoin, suspend, or restrain -- so the phrase
21 is very similar, it inserts one extra verb,
22 suspend -- but it otherwise says enjoin,
23 suspend, or refrain the collection of state
24 taxes.

25 And this Court has construed that

1 provision as preventing a declaratory judgment
2 that a state tax would be unconstitutional in
3 Grace Brethren Church.

4 And so, if in this context a
5 declaratory judgment would have -- would be
6 practically similar to an injunction and there
7 were class-wide declaratory relief against the
8 government that said that with respect to every
9 member of this class, the government is bound
10 by a decision that the statute means X rather
11 than not X, that that would be declaratory
12 relief that would -- would be binding on the
13 government, it would be -- it would not be an
14 injunction, it would not be enforceable by
15 contempt, but to the extent that it has the
16 practical effects of an injunction, it could,
17 as in Grace Brethren Church, be construed as
18 being sufficiently similar to be covered here.

19 And there are other contexts --

20 JUSTICE SOTOMAYOR: Counsel, your --

21 MR. GANNON: -- where the Court has
22 done that.

23 JUSTICE SOTOMAYOR: Counsel, I hate to
24 interrupt, but your answer is giving me more
25 concern because you're asking us to make a

1 ruling that would possibly be completely
2 advisory on something that by your own
3 admission is very complex.

4 If you win on the merits, wouldn't any
5 ruling by us on the question we add -- we
6 added, and I agree we added it, but wouldn't it
7 be completely advisory if we ruled on the
8 merits in your favor?

9 MR. GANNON: I wouldn't call it
10 advisory. I think, to the extent that this is
11 a jurisdictional statute, the Court could say
12 that -- that --

13 JUSTICE SOTOMAYOR: But it's not
14 jurisdictional in the normal sense of the word
15 jurisdictional. In -- in Avco -- are you
16 familiar with that case?

17 MR. GANNON: Yes.

18 JUSTICE SOTOMAYOR: You know what we
19 said is in a statute in which the court limited
20 relief, that it wasn't jurisdictional in the
21 traditional sense that the court is devoid of
22 -- of power over the parties or to hear the
23 issue. It's only -- it's only precluded from
24 giving a certain form of relief. And so it's
25 not jurisdictional in that sense of devoid of

1 power to hear the case at all.

2 MR. GANNON: Well, I -- I don't
3 disagree, Justice Sotomayor, that the Court
4 could decide the merits question here and avoid
5 having to decide the 1252(f) question.

6 I don't think that means that the
7 Court would be precluded from reaching the
8 1252(f) question. I think there are a couple
9 different ways the Court could avoid the
10 1252(f) question here.

11 One would be if -- if it ruled just on
12 Mr. Aleman Gonzalez's claim as an individual.
13 The other would be, even thinking of this as a
14 jurisdictional statute, that if the Court has
15 decided the statutory question in the companion
16 case, then it could apply that result here, and
17 that --

18 JUSTICE SOTOMAYOR: Well, one of my
19 colleagues already suggested that there are
20 reasons not to decide the merits in the
21 companion case but to decide it in this case.

22 MR. GANNON: If -- if you're referring
23 to Justice Gorsuch's reference to the question
24 of whether somebody was detained in this case
25 as opposed to the other case, if -- if I could

1 turn to that.

2 Justice Gorsuch, the individual
3 plaintiff here, Mr. Aleman Gonzalez, was also
4 released on bond, and -- and for the same
5 reason then essentially as the -- the -- the
6 named plaintiff in the Third Circuit case, the
7 respondent in the Third Circuit case, for the
8 same reason, he too is not expected to have his
9 withholding-only -- his next withholding-only
10 hearing is not going to be until June 2023.

11 And, again, that's because he is on
12 the non-detained docket. As Mr. Raynor was
13 explaining, the -- the -- the question of how
14 quickly the immigration judges in the Executive
15 Office for Immigration Review process cases is
16 -- is -- is significantly affected by the
17 question of whether the non-citizen in question
18 is detained.

19 And so the statistics that Mr. Raynor
20 was talking about that are cited in the other
21 side's brief, the study about withholding-only
22 proceedings up through 2015, those have
23 comparatively short hearing, detention periods,
24 because they were people who were detained.

25 And so, in these cases where the Third

1 Circuit and the Ninth Circuit was saying all of
2 these people are going to get bond hearings
3 and, to the extent that they are released, they
4 would then -- their withholding-only proceeding
5 would then be put in a slower queue. And so
6 that's what's happened here.

7 Now there are other class members. In
8 -- in this case, you wouldn't necessarily have
9 to just look at Mr. Aleman Gonzalez, and so
10 it's possible that there are -- there are --
11 there are people who have had their bond
12 hearings and been denied even under the bond
13 hearing regime that the -- the Ninth Circuit
14 has required here and, therefore, they could be
15 detained.

16 But I -- I presume then that their --
17 their withholding-only proceeding would be
18 moving more quickly.

19 JUSTICE BREYER: Well, I -- I just
20 wonder if you're on the merits there. This
21 seemed to me to be simpler than you have been
22 suggesting and was suggested. It's not really
23 a statutory case, Zadvydas. I mean, we're
24 talking about bail.

25 And the reason it becomes a statutory

1 case is because the words of the statute are
2 "may detain." So you can read that word "may"
3 to read in certain conditions that long have
4 been constitutionally required in other cases.

5 And the reason Demore is different and
6 the reason Rodriguez is different is it didn't
7 use those words, which is just what the court
8 says. "Shall be detained" are the words there.
9 "Shall be taken into custody." And so, of
10 course, the majorities thought that made a
11 difference, shall or may.

12 So, here, we deal with "may." Now
13 that's the statutory issue. As far as the
14 underlying issue, I mean, you know it as well
15 as I do, everybody gets bail hearings that
16 you're going to detain for a significant amount
17 of time, every criminal case.

18 Debtors used to in debtor prison.
19 Mental people being confined in hospitals have
20 the equivalent. Extradition people get the
21 hearing. I looked at every case we could find.
22 I didn't find any that said you don't get
23 eventually a bail hearing when you're detained
24 for a reasonably long length of time. And
25 that's why Blackstone in 1771 said that the

1 king's bench or its judges may bail in any case
2 whatsoever.

3 Okay. Now you think that's not in the
4 Constitution, the Eighth Amendment, liberty. I
5 mean, please.

6 MR. GANNON: Judge -- Justice --

7 JUSTICE BREYER: Okay. So the
8 question is, can you read that in? And the
9 really basic thing is, why in heaven's name
10 shouldn't you read that in here where it goes
11 the detention is too long? Now you can say,
12 well, we don't want to take six months
13 precisely or we don't have precisely this
14 proceeding or that proceeding. Fine, that's a
15 reasonable argument.

16 But given the history of this nation
17 and Britain, where you're going to detain a
18 person, not even a criminal, you know, for
19 months and months and months, why aren't they
20 at least entitled to a bail hearing? That's
21 all that's at issue.

22 MR. GANNON: Just --

23 JUSTICE BREYER: What do you say?

24 MR. GANNON: Well, the first thing I
25 would say, Justice Breyer, is that the Jennings

1 decision discussed three different provisions,
2 one of which included 1226(a), where the phrase
3 was "may release on bond." And --

4 JUSTICE BREYER: Yeah, but they had
5 other things. It had in there the exception
6 for -- a single exception only if -- only if
7 he's going to go into the witness program.

8 MR. GANNON: That -- that's a --

9 JUSTICE BREYER: All right. You can
10 -- we both can read what Justice Alito wrote.
11 He wrote a whole big thing about the "may," and
12 I read that and the other and I can make up my
13 mind on that. So can you. Okay.

14 MR. GANNON: Well, I -- I recall your
15 dissent in that case, so I --

16 JUSTICE BREYER: The dissent didn't go
17 on that basis.

18 MR. GANNON: But -- no.

19 JUSTICE BREYER: The dissent --

20 MR. GANNON: But what I'm trying to
21 say, Justice Breyer --

22 JUSTICE BREYER: Yeah.

23 MR. GANNON: -- is that 1226(a) is a
24 "may" provision, and that was one of the
25 provisions that the Jennings Court concluded

1 could not be construed as requiring the bond
2 hearing requirements --

3 JUSTICE BREYER: It wasn't. Yeah.
4 Correct.

5 MR. GANNON: -- that had been imposed
6 there. And the second thing I would say --

7 JUSTICE BREYER: The second thing is
8 not -- it's not because of the word "may" that
9 they concluded that, but people can go and read
10 that for themselves.

11 MR. GANNON: But --

12 JUSTICE BREYER: Okay? And I know
13 that my dissent tried to make light or tried to
14 make space to do the same thing as Zadvydas in
15 other words. And I do believe I wrote what I
16 discussed in the dissent. And I discussed all
17 of -- that I was wrong, I was dissenting. So
18 you're right about that. Now go ahead.

19 MR. GANNON: My point -- my point was
20 just that you had made up your mind. But I --
21 on the second issue of -- of the
22 constitutional -- underlying constitutional
23 entitlement here and whether there is a right
24 to a bond hearing the -- the way you're saying,
25 we do think that cases like Demore and Reno

1 against Flores make it clear that Congress can
2 make rules for non-citizens that it can't for
3 citizens and that detention during removal
4 proceedings is constitutionally permissible and
5 that the --

6 JUSTICE BREYER: Did the courts in
7 those cases -- did our Court decide that? Did
8 it decide -- did it discuss and decide the
9 constitutional issue?

10 MR. GANNON: It -- it -- it said that
11 detention during removal proceedings is
12 constitutionally permissible in Demore. We
13 acknowledge that there could be as-applied
14 constitutional challenges, as Justice Barrett
15 pointed out before. And the other thing I
16 would say is that they are getting review under
17 the administrative procedures that we have.

18 JUSTICE BREYER: I didn't read that --

19 MR. GANNON: And so we are not saying
20 that there is -- that they don't get any
21 review. We're saying that we have come up with
22 this regulatory framework under 241.4, and we
23 think that that would satisfy any
24 constitutional minimum here. But --

25 JUSTICE BREYER: Well, that's a

1 different point. But I want to get that first
2 point.

3 It is the view of the government that
4 a right that has been in the common law and in
5 the law of the United States that I could find
6 no exceptions, that you cannot be detained
7 under our Constitution by the executive branch
8 for too long a time, maybe it's six months or
9 seven or eight months, without at least giving
10 you a bail hearing? It is the position of the
11 Government of the United States that it is
12 constitutional to cut that right off?

13 MR. GANNON: It is our position that
14 in this context, that detention during removal
15 proceedings is constitutionally permissible,
16 and that's true under 1226(c) --

17 JUSTICE BREYER: Even if they last for
18 10 years?

19 MR. GANNON: -- the "shall" provision
20 that you were talking about where Congress made
21 the determination as a categorical matter that
22 certain non-citizens posed risks, as Mr. Raynor
23 was explaining in *Guzman Chavez*, the Court
24 explained that the population at issue here,
25 people in 1231 proceedings, by definition, they

1 have a final order of removal. They have --

2 JUSTICE GORSUCH: Mister --

3 MR. GANNON: -- a greater likelihood
4 that they are going to be removed.

5 JUSTICE GORSUCH: I'm sorry to
6 interrupt, but just to follow up on -- on -- on
7 Justice Breyer's question, the government, is
8 it contesting -- I did not understand Mr.
9 Raynor to contest that a habeas petition
10 seeking relief on a constitutional ground could
11 be entertained by this Court on the basis that
12 detention has lasted too long without
13 sufficient explanation.

14 MR. GANNON: Yes, I -- I -- the other
15 thing that Mr. Raynor mentioned was that in --
16 in a habeas proceeding, the -- that the
17 non-citizen could challenge the lack of
18 statutory authority under Zadvydas on the
19 assumption that if there is not removal -- the
20 likely -- significant likelihood of removal in
21 the reasonably foreseeable future, that that's
22 something that the non-citizen has a statutory
23 right to that could be considered. That too --

24 JUSTICE GORSUCH: So -- so there could
25 both be a statutory claim and a constitutional

1 claim in a habeas petition, as applied, in the
2 government's view?

3 MR. GANNON: It could be, yes.

4 JUSTICE BREYER: That's very helpful.
5 Thank you.

6 MR. GANNON: It -- I --I didn't know
7 if there were any further questions about
8 1252(f). We had not discussed the exception of
9 the -- of the statute, which talks about -- is
10 what the Court has addressed three times,
11 including in Jennings, to say that it prohibits
12 federal courts from granting class-wide
13 injunctive relief against the operation of
14 these provisions.

15 And we do think that that was a
16 holding in Jennings because the Court would not
17 have needed to remand to the Ninth Circuit to
18 consider the scope of the prohibition if the
19 exception hadn't been made inapplicable by that
20 assumption in this Court's opinion.

21 And I do think that it's important
22 that the phrase here is "an individual alien."
23 That cannot be read without making the term
24 "individual" superfluous. If you just include
25 it -- if you just apply it to class actions --

1 JUSTICE SOTOMAYOR: I'm sorry,
2 counsel. In Jennings, I thought there were
3 individuals who were not in the same category
4 as this individual in a withholding proceeding,
5 and so the Court was remanding because it was
6 avoiding this very issue.

7 MR. GANNON: The Court in its
8 discussion of 1252(f) noted that it had
9 obviated the statutory ground for the Ninth
10 Circuit's decision but had remanded for
11 consideration of the constitutional question.
12 And, therefore, the Ninth Circuit's rationale,
13 which is the one that I was discussing with
14 Justice Kagan earlier, couldn't support the --
15 support the idea that 1252(f) was inapplicable,
16 but that was because the exception was
17 inapplicable.

18 And the other thing that I would say
19 about the -- the idea that a class that
20 includes only individual aliens against whom
21 proceedings have already been initiated should
22 come within the exception, the reason why we
23 think that doesn't make sense is not just
24 because it -- it -- it makes "an individual
25 alien superfluous" but because these classes in

1 this case, they're constantly being refreshed
2 by new members who satisfy the definition of
3 the class, they come into the class, they get a
4 bond hearing, they go out.

5 And that means that, by definition, at
6 the time the district court entered the
7 injunction here, not all individual aliens
8 before it were people who -- against whom
9 proceedings under such part have been
10 initiated, and, therefore, the class included
11 people to whom the individual exception didn't
12 apply at the time the injunction was entered.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Breyer?

17 JUSTICE BREYER: No, thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 Justice Sotomayor?

20 Justice Kagan?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 Okay. Thank you, counsel.

25 Mr. Adams.

1 ORAL ARGUMENT OF MATTHEW H. ADAMS
2 ON BEHALF OF THE RESPONDENTS

3 MR. ADAMS: Mr. Chief Justice, and may
4 it please the Court:

5 It's a bedrock principle in our legal
6 system that where the government seeks to lock
7 up a human being for a prolonged period, that
8 person is entitled to a hearing before an
9 independent decisionmaker to determine whether
10 detention is justified.

11 The court of appeals was correct to
12 read this statute to require such a hearing for
13 two reasons.

14 First, the text itself, it calls for a
15 determination to either detain or release such
16 individuals, and it identifies the traditional
17 bail hearing criteria for that decision.

18 Second, constitutional avoidance
19 requires this textual reading, as held in
20 *Zadvydas*. Interpreting the statute to permit
21 the agency to lock up persons for prolonged
22 periods at their discretion, often more than a
23 year, without the most basic prerequisite of
24 due process raises serious constitutional
25 concerns.

1 Petitioners concede the Due Process
2 Clause requires a neutral decisionmaker, yet
3 they contend that ICE officers qualify as such.
4 But just as the sheriff or prosecutor cannot
5 decide on bail, so too an ICE officer does not
6 qualify as the neutral or detached
7 decisionmaker free of the competitive
8 enterprise of law enforcement.

9 The agency's own regulations interpret
10 this very statute to require an adversarial
11 hearing before immigration judges for those it
12 seeks to detain beyond six months as especially
13 dangerous. It follows that others detained
14 under the same statute are entitled to similar
15 protection against unlawful detention.

16 Nor does 1252(f)(1) preclude the lower
17 courts from providing class-wide injunctions
18 here because the court's orders did not enjoin
19 the operation of the statute, only conduct that
20 violated the statute. It continued to apply to
21 all class members.

22 I welcome the Court's questions.

23 It is notable that the statute does
24 not require detention. Instead, it --

25 JUSTICE ALITO: Go back to the

1 jurisdictional question, where you -- you left
2 off a -- a -- a couple of seconds ago.

3 If the statute is read to mean that
4 what a court cannot do is to enter an order
5 that precludes the government from applying the
6 statute, right, what -- what is left? What is
7 the consequence of that?

8 MR. ADAMS: It makes clear that it
9 only enjoins attacks on the statute itself.
10 And I think this is illustrated --

11 JUSTICE ALITO: So it would only
12 enjoin -- it would only prevent the court from
13 entertaining constitutional challenges to the
14 statute, is that right?

15 MR. ADAMS: No, that's not right. You
16 could still have a statutory challenge that
17 seeks to trump, as it were, another provision
18 of the statute and enjoin that statute from
19 being applied against other individuals. But
20 it's important to look at the subsections --

21 JUSTICE ALITO: That's a very narrow
22 class, is it not?

23 MR. ADAMS: I -- I -- I think so, but
24 I think it goes along with what Congress had
25 done with this overhaul of the judicial review.

1 JUSTICE ALITO: I mean, if you have
2 two statutory provisions that seem to be in
3 tension, the court would, first of all, try
4 very hard to harmonize them.

5 MR. ADAMS: And -- and I think, in
6 harmonizing the statute, it's essential to look
7 at the neighboring subsections. In
8 1252(a)(2)(A) and in 1252(e)(3), there,
9 Congress specified that it barred challenges
10 not just to the operation of the statute but to
11 the operation and implementation of the
12 statute. And it made clear when discussing
13 implementation, it was discussing the policies
14 and procedures of the Attorney General to
15 implement the statute.

16 JUSTICE ALITO: Do you have any
17 examples of cases in which a court has said
18 you, the government, cannot apply Statute A
19 because it has been implicitly repealed by
20 Statute B?

21 MR. ADAMS: Yes. Yes. In fact --

22 JUSTICE ALITO: What's an example?

23 MR. ADAMS: -- Duran Gonzalez, in the
24 Ninth Circuit, a case we litigated, was a class
25 action challenging whether the neighboring

1 provision in 1231, 1231(a)(5), the
2 reinstatement orders, could be applied to a
3 group who had already applied for adjustment of
4 status under a separate immigration provision.

5 JUSTICE ALITO: And did it just say
6 that that was the wrong provision, or did it
7 say that a provision had been implicitly
8 repealed?

9 MR. ADAMS: It said that -- the
10 challenge was that 1255(i) enjoined the
11 government from reinstating those orders unless
12 the government first adjudicated and lawfully
13 completed the application process for those
14 adjustment applications.

15 JUSTICE KAGAN: But, Mr. Adams, I
16 presume that what's lying behind Justice
17 Alito's question is some notion that you might
18 be able to come up with a few cases here or
19 there and there might be this separate category
20 of statute versus statute kind of litigation,
21 but -- but mostly your reading of the provision
22 is going -- is -- is -- is -- is -- is -- is
23 going to put constitutional questions in this
24 Court and only this Court and is going to leave
25 application questions to -- to the lower

1 courts.

2 In other words, you know, questions of
3 is the agency complying with the statute, that
4 goes to the lower courts, and questions of is
5 the statute constitutional, that skips the
6 lower courts and comes to us.

7 And I guess, you know, one thing that
8 Mr. Gannon and the -- the government says about
9 this is, well, isn't that weird, because it
10 disfavors constitutional review? So what's the
11 answer to that?

12 MR. ADAMS: Well, the answer is
13 constitutional review is still available at the
14 lower courts. Even under the government's
15 theory, individuals can bring those
16 constitutional challenges, and there can still
17 be applications for declaratory relief under
18 the Constitution. So the lower courts still
19 retain that authority.

20 In addition, I would point out that
21 this Court has repeatedly affirmed the rule
22 that where a statute may be read to infringe
23 upon the court's equitable authority, the Court
24 assumes that it does not, absent express
25 language, absent the clearest command, and we

1 don't have that clear command.

2 In contrast, you look at 1252(a)(2),
3 you look at 1252(e)(3), and there, Congress was
4 explicit where it talked about challenges to
5 implementation, to policies and procedures, to
6 determine whether they are consistent with the
7 statute. That's precisely the type of
8 challenge we have here.

9 But Congress chose not to use that
10 language in 1252(f)(1). Instead, it only
11 sought to limit injunctions as to the operation
12 of the statute itself.

13 And that is, again, when we look at --
14 in Rodriguez, it was instructive because it
15 highlighted that distinction. In remanding the
16 case to the court of appeals, it distinguished
17 between an injunction that would enjoin the
18 statute itself, as the remaining constitutional
19 challenge would, as opposed to an injunction
20 that only sought to enjoin conduct that a court
21 had found had violated the statute.

22 JUSTICE SOTOMAYOR: Counsel, I agree
23 with you that when Congress wants to preclude
24 class actions, it tends to do so explicitly.
25 It did so in this same statute, in

1 1252(e)(1)(B), yet it didn't do it here.

2 Here, it talked about individual
3 actions, and this is much closer to the
4 Yamasaki case, isn't it?

5 MR. ADAMS: It is. And that goes to
6 the second reason why 1252(f)(1) does not apply
7 to this case, because Congress's reference
8 carved out the possibility for anyone who is
9 already subjected to these detention or
10 deportation provisions to seek injunctive
11 relief for themselves.

12 Now the government seeks to limit that
13 by referencing -- that exception by referencing
14 the "individual alien" phrase. But, again, in
15 Califano versus Yamasaki, this Court in another
16 judicial review statute made clear that a
17 reference to the individual applicant and even
18 reference to case-by-case claims adjudication
19 is not sufficient.

20 There must be a clear -- an expression
21 of Congress's intent to eliminate the default
22 rule that class procedure -- that class
23 certification is available or class relief is
24 available.

25 And Congress did not do that here.

1 And, as Justice Sotomayor pointed out, that's
2 illustrated amply by the fact in the
3 neighboring subsection, in 1252 --

4 JUSTICE SOTOMAYOR: Counsel --
5 counsel, can I cut you off, because I think
6 you've answered that part of my question. But
7 I had a different -- a more important one to
8 raise with you, which is earlier you were
9 getting to constitutional questions as to
10 whether the agency's procedures were adequate
11 or not.

12 But these cases, no one has reached
13 the constitutional issues below. And I don't
14 know why we should. Why don't we go back to
15 the statutory rulings in these cases. And
16 Justice Alito raised an important question on
17 Vermont Yankee.

18 MR. ADAMS: Yes.

19 JUSTICE SOTOMAYOR: Could you address
20 that, meaning the cons -- the statutory reading
21 of both circuits, this one -- the Third and the
22 Ninth, is that bond hearings are required and
23 bond hearings are required before IJs and the
24 government needs to bear the burden of proof
25 beyond a reasonable doubt, and I think that

1 Justice Alito's question was how does those
2 requirements by the courts below, how -- why
3 don't they violate Vermont Yankee?

4 MR. ADAMS: In Vermont Yankee, this
5 Court clarified that the government could not
6 be required to provide additional procedural
7 protections, but it made clear that that was
8 absent constitutional constraints.

9 And it clarified that without such a
10 constitutional challenge, there was no claim to
11 require an agency, in that rulemaking posture
12 of that case, to require more.

13 But what's important here is that the
14 statute itself provides these rights. As this
15 Court has construed the statute in Zadvydas, at
16 the point detention becomes prolonged, at six
17 months, there must be a determination as to the
18 reasonable foreseeability and the risk of
19 danger.

20 The Court in that case remanded the
21 matter to the habeas courts to make that
22 determination. That's essential to understand.
23 The -- the Court did not instruct INS officials
24 to determine reasonable foreseeability and risk
25 of danger.

1 At the point detention became
2 prolonged, the habeas court retained the
3 authority to make that determination. And
4 that's what we have here. We have a habeas
5 class that was before the lower courts, two
6 habeas classes, and those courts found that
7 those class members are entitled to that same
8 determination.

9 Now the court itself did not conduct
10 the bail hearing. As is often the case in
11 habeas challenges, a federal court will grant
12 the writ and instruct an immigration judge to
13 conduct the bail hearing that's required if a
14 bail hearing is required.

15 But what's clear from this statute, as
16 this Court held in *Zadvydas*, is that in order
17 to ensure that detention remains tethered to
18 its lawful purpose and, as all agreed in
19 *Zadvydas*, the lawful purpose was either to
20 guard against risk to the community or a
21 failure to appear for removal, so what is
22 required to guard against that risk? At the
23 point detention becomes prolonged, there must
24 be a determination as to removability or to
25 flight risk.

1 And that's precisely what the lower
2 courts have ordered, a determination for each
3 one of these individuals at the point their
4 detention becomes prolonged, which this Court
5 held in Zadvydas is at six months. And so --

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 MR. ADAMS: Thank you.

9 Importantly, the agency's procedures
10 themselves as -- and the regulations with --
11 that -- that provide the government's
12 interpretation fail miserably to ensure that
13 the statute remains tethered to its lawful
14 purpose. They do not provide for an
15 independent decisionmaker.

16 Time and again, this Court has
17 confirmed that when making a custody
18 determination, because physical liberty goes to
19 the core of the Due Process Clause, it requires
20 an independent decisionmaker, and that can't be
21 a law enforcement officer.

22 Now the court didn't question the
23 integrity of the sheriff or prosecutor, no more
24 than we're questioning the integrity of the ICE
25 officials. But the point was that their law

1 enforcement responsibilities in arresting,
2 charging, prosecuting the removal of these
3 individuals necessarily color the lens through
4 which they make their own custody
5 determination.

6 JUSTICE ALITO: Well, why -- why don't
7 you just make a constitutional argument? All
8 of this sounds to me like a constitutional due
9 process argument.

10 MR. ADAMS: In Califano versus
11 Yamasaki, this Court clarified that when
12 interpreting a statute that is ambiguous but
13 impacts a liberty interest, it assumes
14 congressional solicitude for fair procedures
15 absent explicit statutory language to the
16 contrary.

17 And -- and that is what we have here.
18 We have Congress making clear that we --

19 JUSTICE ALITO: Yeah, okay, but you
20 have to -- under that, don't you have to
21 identify an ambiguity in the statute? Does
22 constitutional avoidance mean, oh, we look at
23 this statute and we think it might be unfair as
24 written, so -- but we also don't want to go so
25 far as to say that there's a constitutional

1 right to this, so we're just going to say
2 constitutional avoidance and say that this is
3 in the statute already?

4 MR. ADAMS: In -- in looking at a
5 statute --

6 JUSTICE ALITO: What's the ambiguity
7 here?

8 MR. ADAMS: The ambiguity is that
9 Congress made clear that there must be a
10 custody determination, either detain or
11 release. But it did not specify how that
12 determination must be made.

13 Now that lack of precision must be
14 read against the backdrop of our legal heritage
15 that says when you're making a custody
16 determination, you're looking at someone's
17 physical liberty, especially with prolonged
18 detention, it requires an independent
19 decisionmaker. It requires someone who's not
20 already involved in arresting and charging and
21 prosecuting these individuals.

22 And yet, ICE --

23 JUSTICE GORSUCH: I --

24 MR. ADAMS: -- has not provided that.

25 JUSTICE GORSUCH: On -- on -- on --

1 MR. ADAMS: They've retained the
2 authority themselves.

3 JUSTICE GORSUCH: I'm sorry to
4 interrupt, but on that score, I've heard that
5 -- that point a number of times. It resonates
6 with me, but I would have thought that the
7 Constitution, if it does apply, would require a
8 truly neutral magistrate perhaps. And -- and
9 -- and you keep referring to other ICE
10 employees as neutral magistrates, and I just
11 wonder about that.

12 MR. ADAMS: I think the -- the
13 important or the critical distinction is that
14 the officials who are assigned to adjudicate
15 the custody determinations, not share the law
16 enforcement responsibilities, that is, their
17 responsibilities don't include involvement --

18 JUSTICE GORSUCH: And sometimes that's
19 true in administrative agencies and sometimes
20 it's not, right? I mean, ALJs don't share
21 responsibilities, but other administrative
22 judges often do and -- and can from case to
23 case. That's not -- not -- not so here, I
24 understand, but it can be the case.

25 Do you think the Constitution is

1 satisfied by an immigration judge, who is an
2 employee of the Department of Justice, conduct
3 the hearings?

4 MR. ADAMS: We do think that it is
5 satisfied by that because the immigration
6 judges are an independent unit within the
7 Department of Justice that is not involved in
8 arresting or bringing charges regarding the
9 individuals that are before it. And,
10 ultimately -- there certainly are agencies that
11 require less for their adjudicators, but never
12 in the context of physical liberty.

13 JUSTICE GORSUCH: Yeah, in the context
14 of physical liberty, it's usually a good deal
15 more.

16 MR. ADAMS: Exactly.

17 JUSTICE GORSUCH: A good deal more
18 than an immigration judge, with all respect to
19 those who work day in and day out in the
20 trenches as immigration judges.

21 MR. ADAMS: It -- it is true that it
22 -- it generally requires a judicial official to
23 make that physical liberty determination. But
24 it's also true that there's a system in place
25 that Congress has put in place to make custody

1 determinations in the immigration context.

2 JUSTICE BARRETT: But, Mr. Adams --
3 and this, I think, picks up on the questions
4 that both Justice Alito and Justice Gorsuch are
5 asking -- in a 2241 proceeding, you know, if
6 you're bringing a habeas action, you do have a
7 judge. So you have a truly neutral
8 decisionmaker, as Justice Gorsuch is
9 suggesting, not someone who's a member of the
10 executive branch.

11 And kind of to Justice Alito's
12 questions, I mean, I think Justice Alito's
13 questions reflect the concern that some of our
14 post-Zadvydas cases have articulated that you
15 can't rewrite a statute because of avoidance
16 questions. So, at some point, the statute is
17 either unconstitutional or it's constitutional.
18 You can't rewrite it to avoid constitutional
19 problems.

20 So let's say that we think that some
21 of the -- let's -- let's say that we think that
22 your argument pushes that limit and is maybe
23 asking us to rewrite the statute. Why just not
24 bring the constitutional challenge? Is it just
25 because, to do that, you would run into the

1 class action bar and so maybe that's -- you
2 know, the government says that it's the class
3 action bar that's actually -- or -- or that's
4 actually causing these kind of contorted
5 arguments of the statute. Why -- why isn't a
6 habeas proceeding the better way to handle
7 this?

8 MR. ADAMS: Because this Court has
9 already construed the statute in Zadvydas to
10 allow for a challenge to the statutory
11 authority.

12 JUSTICE GORSUCH: But put that aside.

13 MR. ADAMS: Mm-hmm.

14 JUSTICE GORSUCH: Okay? I think
15 that's what Justice Barrett's asking you to do
16 and I'm asking you to do at any rate. Put that
17 aside. In the abstract, on first principles,
18 why wouldn't that be the more natural and maybe
19 the more efficacious route, the -- the better
20 route for your clients?

21 MR. ADAMS: Well, when you speak of
22 more efficacious, I can tell you from our own
23 clients that bringing a habeas is in itself --

24 JUSTICE GORSUCH: I'm not saying it's
25 easy, okay?

1 MR. ADAMS: It's -- and it --

2 JUSTICE GORSUCH: I -- I'm not saying
3 it's easy. I understand that. I do. But we
4 have had this case now before us in three
5 different iterations, I think, since I've been
6 here. The -- the --the statutory case doesn't
7 seem easy either with respect. It's been up,
8 it's been down, it's been back, and it's been
9 forth.

10 And -- and I -- you know, just one
11 more chance or thoughts about why not a -- a
12 constitutional challenge to the statutory
13 regime.

14 MR. ADAMS: To be clear, there is a
15 constitutional challenge that was brought in
16 these actions, and there's an alternative claim
17 that the courts did not reach because they
18 followed this Court's guidance of first
19 addressing the statutory claims.

20 And I -- I don't want to push back
21 against you, but it goes back to Zadvydas --

22 JUSTICE GORSUCH: All right.

23 MR. ADAMS: -- because this Court had
24 already construed this.

25 JUSTICE GORSUCH: I -- I -- I got that

1 argument.

2 JUSTICE BREYER: All right.

3 JUSTICE GORSUCH: Thank you, counsel.

4 JUSTICE BREYER: But I'd say the same
5 question. I mean, the words in Zadvydas, in
6 the statute, that were ambiguous was the word
7 "may," "may detain." And that suggests
8 sometimes detain, sometimes not.

9 So what I believe the Court did was
10 read into those words, "may detain," read in
11 the words that have been historically part of
12 not detaining someone without bail, which goes
13 back hundreds of years.

14 Now that's all that happened. And so,
15 if we're going to get variations on that theme,
16 why not say, well, when you'd have to have a
17 hearing and who would do it and all those
18 questions which have been part of our history?
19 We ought to stop worrying about the language of
20 the statute and just say there is a
21 constitutional right to this kind of thing.
22 You can't keep people in prison forever without
23 a hearing, without 90 -- anything.

24 What about that?

25 MR. ADAMS: Well, we certainly believe

1 there is a constitutional right. As -- as I
2 stated, both of the habeas classes brought an
3 alternative constitutional challenge.

4 But, again, this Court has repeatedly
5 instructed the lower courts to address the
6 statutory issue first. And the statutory issue
7 here has already been addressed by this Court.
8 And those courts followed this Court's
9 instructions, finding that six months had been
10 reached under the statute. Per *Zadvydas*, they
11 were entitled to a determination, is their
12 removal reasonably foreseeable? If not, they
13 wrote, there is a presumption of release there.
14 But even if their removal is reasonably
15 foreseeable, then there must be a
16 determination.

17 And, again, the Court instructed --
18 this Court instructed the habeas courts to make
19 that determination as to whether there were
20 factors of risk to the community that justified
21 continued detention.

22 JUSTICE ALITO: Just to take the most
23 obvious part of what the lower courts have
24 held, the part of what the lower courts have
25 held that may stray the furthest from the word

1 "may," how do you get clear and convincing
2 evidence out of "may"?

3 MR. ADAMS: I -- I would like to make
4 two points on that. First, that the court of
5 appeals in the Ninth Circuit did not rely upon
6 the statute to make that interpretation.
7 Instead that derives from a separate decision,
8 Singh, which was a constitutional finding.

9 And for that very reason, it -- the
10 government disavowed raising that issue in
11 Aleman Gonzalez in footnote 3 of their petition
12 for cert. So the lower courts did not
13 interpret the statute to require any specific
14 burden.

15 JUSTICE ALITO: Then where did it come
16 from? It's a constitutional requirement --

17 MR. ADAMS: As a constitutional --

18 JUSTICE ALITO: -- clear and
19 convincing evidence is a constitutional
20 requirement?

21 MR. ADAMS: I'm sorry, I missed the
22 last part.

23 JUSTICE ALITO: Constitution -- the
24 Constitution requires the clear and convincing
25 evidence burden?

1 MR. ADAMS: That -- that was the
2 holding of the lower courts in Singh. And it
3 follows cases like Addington, Santosky, where
4 the Court has found that, in the absence of
5 language in the statute that specifies the
6 burden, it is the role of the court to --

7 JUSTICE ALITO: In an illegal entry
8 case -- an illegal reentry case the government
9 has clear and convincing burden, evidence
10 burden?

11 MR. ADAMS: I -- I'm sorry. I -- I
12 don't follow.

13 JUSTICE ALITO: Where the -- where the
14 alien has illegally entered the country,
15 reentered the country, after removal --

16 MR. ADAMS: But it --

17 JUSTICE ALITO: -- does the government
18 have a clear and convincing evidence burden to
19 show that this alien is not a flight risk?

20 MR. ADAMS: Where that person has
21 already been found by a DHS official to have a
22 bona fide claim for protection under -- and is
23 entitled under statute to seek relief because
24 of their fear of persecution or torture and is,
25 therefore, transferred before the immigration

1 court, and every single one of these
2 individuals have those proceedings because they
3 passed that initial screening because they have
4 bona fide claims, and where they are facing
5 prolonged detention, then -- then, yes, I would
6 confirm that the Constitution requires the
7 government to bear that burden, as this Court
8 made clear in Addington, because civil liberty
9 -- physical liberty is at the heart of the Due
10 Process Clause. And civil detention requires
11 the government to shoulder that responsibility
12 when dealing with this fundamental right.

13 But, again, that is a separate finding
14 that does not go to the Ninth Circuit's
15 statutory interpretation of this statute.

16 And I would go back to the agency's
17 regulations. Not -- not only do they not
18 provide an independent decisionmaker. They do
19 not provide an adversarial hearing.

20 Earlier the Petitioner's counsel
21 asserted that there's an entitlement to counsel
22 at -- at these interviews.

23 Well, that -- that is wrong. Even
24 their own regulations say that the individual
25 may be accompanied at the discretion of both

1 ICE and the detaining institution. So only if
2 ICE affords you that right.

3 And in my experience that never
4 happens. You are never notified that ICE is
5 going to drop by the cell at 2:30 tomorrow
6 afternoon to show up. That simply does not
7 occur. There is no right to confront the
8 evidence.

9 If the agency has decided that you are
10 to remain detained because you present a risk
11 because of a burglary charge against you, you
12 don't have the opportunity to even learn of
13 that charge or that basis for the agency's
14 reasoning.

15 You don't have the opportunity to
16 present the documents to show that that charge
17 was subsequently dismissed, or, if they are
18 relying on the fact that your case is on
19 appeal, you don't have the opportunity to then
20 confront that evidence and point out that you
21 actually prevailed before the lower court but
22 now the government has appealed your case,
23 dragging it out for another year.

24 All of these are clear interpretations
25 from the government that demonstrate the

1 statute is no longer tethered to its lawful
2 purpose.

3 If you look at Mr. Aleman, he was
4 denied release on custody after six months
5 based solely on the fact that he continued to
6 be in withholding-only proceedings.

7 There was no individualized analysis
8 of risk of -- or -- or of danger to the
9 community, risk of flight or danger to the
10 community. All it was was a rubber stamp by
11 the same agency affirming its prior decision to
12 keep him in custody.

13 And, indeed, the regulations themselves
14 assert -- under 241.4(d)(1), under the custody
15 determination, states that even though an
16 individual must demonstrate they are not a
17 flight risk or a danger to the community, in
18 order to be released, that the agency retains
19 the discretion to continue their detention,
20 illustrating amply that their -- their
21 detention is no longer tethered to its lawful
22 purpose.

23 In *Zadvydas*, both the majority and the
24 dissent clearly agreed that the purpose of the
25 statute was to prevent risk of flight or

1 danger.

2 And just as this Court found it is
3 arbitrary to detain someone who may no longer
4 be removed, it is equally arbitrary and
5 unlawful to detain someone who does not present
6 a flight risk or a danger to the community.

7 And because of this, it is clear that
8 the government's interpretation fails to
9 satisfy basic constitutional concerns.

10 And because it raises those
11 constitutional concerns and because the text of
12 the statute, this Court's construction in
13 *Zadvydas*, and the agency's own implementing
14 regulations, demonstrate that the court of
15 appeals' construction is more than fairly
16 possible, that construction should be affirmed.

17 The lower courts had the authority and
18 the responsibility under *Zadvydas* to make those
19 independent determinations, at the point the
20 individual is before them, the class members
21 detention became prolonged.

22 And that does not mean they're going
23 to get out at six months. It only indicates
24 that they will have a neutral decisionmaker
25 deciding whether, in fact, their detention

1 remains tethered to its lawful purpose. In
2 Zadvydas there were, up until now, we've
3 received 756 class member bond hearings.

4 JUSTICE SOTOMAYOR: Counsel, could you
5 turn back to the question we asked, because
6 you've spent very little time on the injunction
7 question.

8 MR. ADAMS: Yes. With respect to the
9 injunction, I think there's three basic points
10 as to why the lower court's injunction -- and
11 we talked about operation of the statute versus
12 implementation -- but with respect to the prior
13 point of the -- of whether it's adding
14 additional procedures, I would just emphasize
15 that the court's injunction is making certain
16 that every class member before it receives the
17 determination that this Court required in
18 Zadvydas.

19 In Zadvydas, it referred it back to
20 the two Petitioners. And every -- contrary to
21 Petitioner's statements early -- earlier, every
22 class member is already in proceedings. Both
23 class definitions require that those, in order
24 to qualify as a class member, required that the
25 individual already be subject to detention

1 under 1231(a)(6).

2 And so by the express language of the
3 statute, they qualify for that exception.
4 Every single one of them has already suffered
5 the brunt of the detention provision at issue
6 and is, therefore, entitled to seek relief from
7 this Court.

8 And as this Court has repeatedly
9 affirmed, unless there are clear words to the
10 contrary or words that provide the necessary
11 and inescapable inference, as this Court said
12 in Mitchell, it will not interpret a statute to
13 infringe or to limit its equitable authority.

14 And yet that is what the government is
15 asking this Court to do, to broadly read
16 1252(f)(1) to limit this Court's equitable
17 authority even though the neighboring
18 subsections in contrasting the language
19 demonstrate that Congress was not targeting
20 class actions and that it was only targeting
21 challenges that would impede the operation,
22 that is, attack the statute itself as opposed
23 to those statutes -- those challenges against
24 the policies and procedures that the Attorney
25 General implemented to, purportedly, to fulfill

1 the scope of the statute.

2 JUSTICE ALITO: How many members are
3 there in the class?

4 MR. ADAMS: In the Aleman class, there
5 -- we get quarterly reports and there has been
6 756 bond hearings provided. There's roughly --
7 there's a little less than a thousand, but not
8 everyone gets a bond hearing because sometimes
9 they are immediately removed after six months
10 or it's clear their removal is imminent or they
11 don't seek it.

12 So there's been 756 of those class
13 members who have received a bond. Of those --

14 JUSTICE ALITO: Well, the statute says
15 "an individual." So you think an individual
16 covers at least 756 people?

17 MR. ADAMS: Yes. There is 756
18 individuals, every single one of them who's a
19 member of the certified class who is subject to
20 these provisions.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 JUSTICE THOMAS: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer, anything further?

2 JUSTICE BREYER: No, thank you.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: No, thank you.

6 CHIEF JUSTICE ROBERTS: Okay. Justice

7 Gorsuch?

8 Thank you, counsel.

9 MR. ADAMS: Thank you.

10 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

11 Gannon?

12 REBUTTAL ARGUMENT OF CURTIS E. GANNON

13 ON BEHALF OF THE PETITIONERS

14 MR. GANNON: Thank you, Mr. Chief

15 Justice.

16 I'll start with a couple points about
17 the 1252(f) question. My friend talked about
18 another provision that he says reads on the
19 question of what operation means. And he cited
20 1252(a)(2)(A)(i) as a provision that refers to
21 operation or implementation, suggesting that
22 we're wrong to equate those two terms.

23 I would point out that the phrase
24 there is a reference to operation or
25 implementation of an order of removal, not of

1 the statute itself. And so I don't think the
2 analogy is quite as clear as my friend
3 suggests. And we do think otherwise, that
4 everything I was saying before about the scope
5 of this provision in talking about the way the
6 statute is applied and the fact that the
7 exception is about application to individuals,
8 shows that we're talking about not just the
9 statute in the abstract but the way the statute
10 is being implemented.

11 Second, with respect to the exception,
12 my friend says that every member of the class
13 is an individual who satisfies the exception
14 because he or she is someone against whom
15 proceedings have been initiated. And the point
16 that I was making before is that that was not
17 true at the time that the injunctive relief was
18 entered by the district court or when it was
19 affirmed by the court of appeals. There are
20 750 some people who've come in and out of the
21 class.

22 And so this is a standing instruction
23 that is renewed every time somebody satisfies
24 its criteria. And -- and that means that at
25 the time the district court was entering that

1 injunction, it was applying it to individuals
2 who did not satisfy the exception. Some future
3 person who is going to, you know, come into
4 being and then satisfy the definition of the
5 class. And so I don't think that even that
6 understanding of a class that includes only
7 individuals, again -- for whom a court could
8 enter relief would be satisfied in these
9 circumstances with a rolling class like that.

10 Turning to questions on the merits, my
11 friend mentions that everyone here is somebody
12 who by definition has what he calls a bona fide
13 claim. That means that there's been a
14 reasonable fear determination. And Mr. Shah
15 mentioned in the first argument that that's a
16 small percentage of non-citizens who even
17 satisfy that. Thirteen percent, I think, is
18 the figure that he used.

19 And that is true, but even among that
20 category, those are the ones who are referred
21 to IJs for withholding-only proceedings. Even
22 within that category, in their withholding
23 proceeding, the success rate is on the order of
24 11 to 25 percent, depending upon which
25 statistics you're talking about.

1 So there is no -- there should be no
2 assumption, we think, that these are
3 individuals who are reasonably likely to get
4 withholding relief and, therefore, to stay in
5 the United States at the end of that
6 proceeding.

7 The other side also focuses on the
8 need for an independent decisionmaker and had a
9 colloquy with Justice Gorsuch about that. And
10 I do think that it's important here that this
11 Court, long ago in Marcello in the 1950s, said
12 that special inquiry officers at the
13 Immigration Service could make deportation
14 decisions when this -- all of this function was
15 still in DOJ.

16 DOJ, INS made the decision to put
17 these types of post-order custody reviews
18 before officials in INS, officials that then
19 later on moved on to become ICE. They did not
20 put this function under IJs.

21 And so the idea that they're at the
22 same agency and therefore they can't make the
23 decision, we -- we don't think applies here in
24 this context, as the Court has contemplated
25 what is -- what is consistent with the

1 tradition of our immigration laws.

2 And the hearing here that is being had
3 is not the Zadvydas hearing. This is not the
4 page 700 hearing that you're -- you're hearing
5 this quotation about the habeas courts could
6 consider danger. And that is not what is
7 happening under the bond hearing regime ordered
8 by the Third Circuit and the Ninth Circuit.
9 That is not the habeas court making that
10 determination. They have said that even though
11 the statute says this is a decision to be made
12 by the Secretary, the Secretary may detain if
13 somebody satisfies one of the four categories,
14 the courts have said no, that's a decision that
15 needs to be made by an IJ. And it is not the
16 habeas court that is making that decision.

17 And to the extent that the
18 regulations -- my friend says that his client
19 didn't get an interview. The -- since the
20 facts that gave rise to this case, the agency
21 has circulated a memorandum to the field
22 reminding everyone and reiterating the
23 importance of the personal interview
24 requirements.

25 And to the extent that any individual

1 isn't getting the procedures that are required
2 in our regulations, that's an Accardi claim
3 that the other side is not advancing in this
4 case. They are making a statutory claim, that
5 we aren't complying with a statute, not that
6 we're not complying with our regulations.

7 And, finally, I would say that on this
8 bond hearing question, that we don't dispute
9 that DHS and DOJ could choose to implement a
10 decision-making process that looks more like
11 the bond hearing regime imposed by the courts
12 below. But that doesn't mean the statute or
13 the Constitution compels it.

14 We urge the Court to reverse the
15 judgment of the court of appeals.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 The case is submitted.

19 (Whereupon, at 12:11 p.m., the case
20 was submitted.)

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