

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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v.) No. 20-322

ESTEBAN ALEMAN GONZALEZ, ET AL.,)
Respondents.)

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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 argument 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"
9 or "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
20 limited relief, that it wasn't jurisdictional
21 in the traditional sense that the court is
22 devoid of -- of power over the parties or to
23 hear the issue. It's only -- it's only
24 precluded from giving a certain form of relief.
25 And so it's not jurisdictional in that sense of

1 devoid of 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 since --

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
24 periods because they were people who were
25 detained.

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

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

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

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

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

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

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

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

1 that's why Blackstone in 1771 said that the
2 king's bench or its judges may bail in any case
3 whatsoever.

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

7 MR. GANNON: Judge -- Justice --

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

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

23 MR. GANNON: Just --

24 JUSTICE BREYER: What do you say?

25 MR. GANNON: Well, the first thing I

1 would say, Justice Breyer, is that the Jennings
2 decision discussed three different provisions,
3 one of which included 1226(a), where the phrase
4 was "may release on bond." And --

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

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

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

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

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

19 MR. GANNON: But -- no.

20 JUSTICE BREYER: The dissent --

21 MR. GANNON: But what I am trying to
22 say, Justice Breyer --

23 JUSTICE BREYER: Yeah.

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

1 provisions that the Jennings Court concluded
2 could not be construed as requiring the bond
3 hearing requirements --

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

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

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

12 MR. GANNON: But --

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

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

1 we do think that cases like Demore and Reno
2 against Flores make it clear that Congress can
3 make rules for non-citizens that it can't for
4 citizens and that detention during removal
5 proceedings is constitutionally permissible and
6 that the --

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

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

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

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

1 JUSTICE BREYER: Well, that's a
2 different point. But I want to get that first
3 point.

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

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

18 JUSTICE BREYER: Even if they last for
19 10 years?

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

1 people in 1231 proceedings, by definition, they
2 have a final order of removal. They have --

3 JUSTICE GORSUCH: Mister --

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

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

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

25 JUSTICE GORSUCH: So -- so there could

1 both be a statutory claim and a constitutional
2 claim in a habeas petition, as applied, in the
3 government's view?

4 MR. GANNON: It could be, yes.

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

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

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

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

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

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

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

1 alien" superfluous but because these classes in
2 this case, they're constantly being refreshed
3 by new members who satisfy the definition of
4 the class, they come into the class, they get a
5 bond hearing, they go out.

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Breyer?

18 JUSTICE BREYER: No, thank you.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 Justice Sotomayor?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Okay. Thank you, counsel.

1 Mr. Adams.

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

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

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

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

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

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

1 concerns.

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

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

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

23 I welcome the Court's questions.

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

1 JUSTICE ALITO: Go back to the
2 jurisdictional question, where you -- you left
3 off a -- a -- a couple of seconds ago.

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

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

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

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

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

24 MR. ADAMS: I -- I -- I think so, but
25 I think it goes along with what Congress had

1 done with this overhaul of the judicial review.

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

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

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

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

23 JUSTICE ALITO: What's an example?

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

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

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

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

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

1 application questions to -- to the lower
2 courts.

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

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

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

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

1 language, absent the clearest command. And we
2 don't have that clear command.

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

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

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

23 JUSTICE SOTOMAYOR: Counsel, I agree
24 with you that when Congress wants to preclude
25 class actions, it tends to do so explicitly.

1 It did so in this same statute, in
2 1252(e)(1)(B), yet it didn't do it here.

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

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

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

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

1 And Congress did not do that here.

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

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

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

19 MR. ADAMS: Yes.

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

1 beyond a reasonable doubt, and I think that
2 Justice Alito's question was how does those
3 requirements by the courts below, how -- why
4 don't they violate Vermont Yankee?

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

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

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

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

1 of danger.

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

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

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

1 flight risk.

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

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 MR. ADAMS: Thank you.

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

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

23 Now the court didn't question the
24 integrity of the sheriff or prosecutor, no more
25 than we're questioning the integrity of the ICE

1 officials. But the point was that their law
2 enforcement responsibilities in arresting,
3 charging, and prosecuting the removal of these
4 individuals necessarily color the lens through
5 which they make their own custody
6 determination.

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

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

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

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

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

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

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

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

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

23 And yet, ICE --

24 JUSTICE GORSUCH: I --

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

1 JUSTICE GORSUCH: On -- on -- on --

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

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

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

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

1 Do you think the Constitution is
2 satisfied by an immigration judge, who is an
3 employee of the Department of Justice, conduct
4 the hearings?

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

15 JUSTICE GORSUCH: Yeah, in the context
16 of physical liberty, it's usually a good deal
17 more --

18 MR. ADAMS: Exactly.

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

23 MR. ADAMS: It -- it is true that it
24 -- it generally requires a judicial official to
25 make that physical liberty determination. But

1 it's also true that there's a system in place
2 that Congress has put in place to make custody
3 determinations in the immigration context.

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

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

22 So let's say that we think that some
23 of the -- let's -- let's say that we think that
24 your argument pushes that limit and is maybe
25 asking us to rewrite the statute. Why just not

1 bring the constitutional challenge? Is it just
2 because, to do that, you would run into the
3 class action bar and so maybe that's -- you
4 know, the government says that it's the class
5 action bar that's actually -- or -- or that's
6 actually causing these kind of contorted
7 arguments of the statute. Why -- why isn't a
8 habeas proceeding the better way to handle
9 this?

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

14 JUSTICE GORSUCH: But put that aside.

15 MR. ADAMS: Mm-hmm.

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

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

1 JUSTICE GORSUCH: I'm not saying it's
2 easy, okay?

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

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

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

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

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

24 JUSTICE GORSUCH: All right.

25 MR. ADAMS: -- because this Court had

1 already construed this.

2 JUSTICE GORSUCH: I -- I -- I got that
3 argument.

4 JUSTICE BREYER: All right.

5 JUSTICE GORSUCH: Thank you, counsel.

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

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

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

1 What about that?

2 MR. ADAMS: Well, we certainly believe
3 there is a constitutional right. As -- as I
4 stated, both of the habeas classes brought an
5 alternative constitutional challenge.

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

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

24 JUSTICE ALITO: Well, just to take the
25 most obvious part of what the lower courts have

1 held or the part of what the lower courts have
2 held that may stray the furthest from the word
3 "may," how do you get clear and convincing
4 evidence out of "may"?

5 MR. ADAMS: I -- I would like to make
6 two points on that.

7 First, that the court of appeals in
8 the Ninth Circuit did not rely upon the statute
9 to make that interpretation. Instead, that
10 derives from a separate decision, Singh, which
11 was a constitutional finding. And for that
12 very reason, it -- the government disavowed
13 raising that issue in Aleman Gonzalez in
14 Footnote 3 of their petition for cert. So the
15 lower courts did not interpret the statute to
16 require any specific burden.

17 JUSTICE ALITO: Then where did it come
18 from? It's a constitutional requirement?

19 MR. ADAMS: As a constitutional --

20 JUSTICE ALITO: Clear and convincing
21 evidence is a constitutional requirement?

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

24 JUSTICE ALITO: Constitution -- the
25 Constitution requires the clear and convincing

1 evidence burden?

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

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

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

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

17 MR. ADAMS: But it --

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

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

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

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

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

21 Earlier, the Petitioners' counsel
22 asserted that there's an entitlement to counsel
23 at -- at these interviews.

24 Well, that -- that is wrong. Even
25 their own regulations say that the individual

1 may be accompanied at the discretion of both
2 ICE and the detaining institution, so only if
3 ICE affords you that right.

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

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

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

25 All of these are clear interpretations

1 from the government that demonstrate the
2 statute is no longer tethered to its lawful
3 purpose.

4 If you look at Mr. Aleman, he was
5 denied release on custody after six months
6 based solely on the fact that he continued to
7 be in withholding-only proceedings. There was
8 no individualized analysis of risk of -- or --
9 or of danger to the community, risk of flight
10 or danger to the community. All it was was a
11 rubber stamp by the same agency affirming its
12 prior decision to 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 detention is no
21 longer tethered to its lawful purpose.

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

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

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

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

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

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

1 Zadvydas, there were -- up until now, we've
2 received 756 class member bond hearings.

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

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

18 In Zadvydas, it referred it back to
19 the two petitioners. And every -- contrary to
20 Petitioners' statements early -- earlier, every
21 class member is already in proceedings. Both
22 class definitions require that those, in order
23 to -- to -- to qualify as a class member,
24 required that the individual already be subject
25 to detention under 1231(a)(6).

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

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: No, Chief.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer, anything further?

1 JUSTICE BREYER: No, thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito?
3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: No, thank you.

5 CHIEF JUSTICE ROBERTS: Okay. Justice
6 Gorsuch?

7 Thank you, counsel.

8 MR. ADAMS: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
10 Gannon?

11 REBUTTAL ARGUMENT OF CURTIS E. GANNON
12 ON BEHALF OF THE PETITIONERS

13 MR. GANNON: Thank you, Mr. Chief
14 Justice.

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

22 I would point out that the phrase
23 there is a reference to operation or
24 implementation of an order of removal, not of
25 the statute itself. And so I don't think the

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

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

21 And so this is a standing instruction
22 that is renewed every time somebody satisfies
23 its criteria, and -- and that means that at the
24 time the district court was entering that
25 injunction, it was applying it to individuals

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

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

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

25 So there is no -- there should be no

1 assumption, we think, that these are
2 individuals who are reasonably likely to get
3 withholding relief and, therefore, to stay in
4 the United States at the end of that
5 proceeding.

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

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

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

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

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

24 And to the extent that any individual
25 isn't getting the procedures that are required

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 12:11 p.m., the case
18 was submitted.)

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