No. 20-322

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,

Petitioners,

—v.—

ESTEBAN ALEMAN GONZALEZ, et al.,

Respondents.

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,

Petitioners,

—v.—

EDWIN OMAR FLORES TEJADA, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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INTRODUCTION

This case concerns whether immigration authorities can incarcerate noncitizens for prolonged periods without affording them any hearing on whether their confinement is necessary. Congress has *not* mandated the detention of the individuals involved here, and they are all are entitled to remain in the United States while litigating their immigration cases. Nonetheless, the government provides no hearing before a neutral decisionmaker to determine whether their confinement is actually justified. Because no neutral decisionmaker has even considered whether their detention is warranted, these individuals often languish in immigration jails for months or years for no legitimate reason.

The statute at issue, 8 U.S.C. 1231, provides that the agency "shall detain" noncitizens with final removal orders for an initial 90-day removal period, and thereafter "may detain" or release them "subject to the terms of supervision." When detention exceeds six months, the immigration officials responsible for detaining the individual make a determination as to whether continued detention is justified. But they do not afford the jailed immigrant an adversarial hearing before a neutral decisionmaker.

The question in this case is whether the statute requires such a hearing, particularly in light of the serious constitutional questions that would arise if it

were read to authorize prolonged incarceration without that minimal procedural safeguard.

This Court has already construed Section 1231(a)(6) to contain an "implicit 'reasonable time' limitation" of six months. *Zadvydas v. Davis*, 533 U.S. 678, 682, 700 (2001). However, Petitioners maintain that even if they detain Respondents beyond six months, the statute requires no hearing. In their view, it is constitutionally permissible for the detaining authority to decide to jail someone for months or years without an adversarial hearing before an independent decisionmaker. Petitioners claim they need only provide the noncitizen an opportunity to make an oral statement to a deportation officer.

This is incorrect. Where individuals are deprived of liberty for prolonged periods, they must be afforded an adversarial hearing before a neutral decisionmaker. *See Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). And "[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

The court of appeals correctly held that Section 1231(a)(6) is best read to require a custody hearing before an immigration judge (IJ) when detention becomes prolonged—presumptively at six months. The text and structure of the statute support reading the statute to require a custody hearing when detention

becomes prolonged. The plain language of the statute, which provides discretionary authority to detain based on traditional bond factors, contemplates that the authority will be implemented through a bond hearing. The statute's language parallels 8 U.S.C. 1226(a) in providing that the agency "may detain" or release on conditions. For more than a half century the government has interpreted that parallel language in Section 1226(a) to provide adversarial custody hearings before neutral decisionmakers. And the government reads Section 1231(a)(6)—the statute at issue here—to provide an adversarial hearing before an IJ to justify detention beyond six months for people it deems "specially dangerous." *See* 8 C.F.R. 241.14(f)–(i). That is all Respondents seek here.

Because incarcerating individuals for prolonged periods without any hearing to determine whether confinement is necessary creates serious due process concerns, the statute must be read to require custody hearings if that reading is "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). It is. The court of appeals therefore correctly construed Section 1231(a)(6) to require a bond hearing after six months of confinement, and affirmed the district courts' injunctions on that basis.

Finally, contrary to Petitioners' arguments, the relief granted below is fully consistent with Section 1252(f). Petitioners forfeited their Section 1252(f) argument by failing to raise and preserve the issue in the district courts and court of appeals. Regardless, by

its terms, Section 1252(f) prohibits only injunctions that interfere with the "operation of" the immigration laws. Because the injunctions below simply require compliance with Section 1231(a)(6), they do not interfere with the operation of the statute, and therefore do not implicate Section 1252(f). Additionally, Section 1252(f) contains an exception for an "individual alien against whom proceedings under such part have been initiated." Because each class member is such an individual, Section 1252(f) does not prohibit the injunctive relief issued below.

STATEMENT OF THE CASE

I. Legal Framework

A. Withholding-only proceedings

When a noncitizen who has previously been removed reenters the U.S. without authorization, the prior removal order may be "reinstated from its original date," and the individual is barred from seeking "any relief" from removal. 8 U.S.C. 1231(a)(5). In most cases, the reinstatement process results in summary removal without any opportunity to appear before an IJ. 8 C.F.R. 241.8(a).

Department of Homeland Security (DHS) regulations, however, provide an exception to summary removal for individuals DHS finds to have a reasonable fear of being persecuted or tortured in the country of removal. *Id.* 241.8(e). That exception

implements the government's nonrefoulement obligations under the Convention Against Torture (CAT) and the 1951 Refugee Convention. *See* 8 U.S.C. 1231(b)(3); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01 (Feb. 19, 1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (1998), Pub. L. No. 105-277, § 2242, 112 Stat 2681, 2681–823 (directing Attorney General to issue regulations to comply with CAT). When a DHS asylum officer determines that such an individual "has a reasonable fear of persecution or torture," she is entitled to "full consideration" by an IJ of her application for withholding of removal and protection under CAT. 8 C.F.R. 208.31(e); *see also id.* 1208.16(e). These proceedings are called "withholding-only" proceedings because the only questions the IJ decides are whether withholding or CAT relief is available.

Withholding is granted to individuals whose "life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). CAT protection is afforded where "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. 208.16(c)(2). Both forms of relief are mandatory: "the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility." *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

Following an IJ's decision in a withholding-only proceeding, either party may appeal to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. 1208.31(e). A noncitizen may also seek review of an adverse BIA decision before the court of appeals. *See* 8 U.S.C. 1252(a)(1). Individuals have a right to remain in the U.S. while the administrative proceedings are pending.[1] And if they seek judicial review of a denial, and the court of appeals stays their removal, they are also legally entitled to remain until the court resolves the appeal. *Nken v. Holder*, 556 U.S. 418, 425–27 (2009). This legal process often lasts much longer than six months, and may take years. *See infra* Part II (detailing named plaintiffs' prolonged confinement); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2295 (2021) (Breyer, J., dissenting) ("Th[e] procedure often takes over a year, with some proceedings lasting well over two years."); *see also* David Hausman, ACLU Immigrants' Rights Project, *Fact-Sheet: Withholding-Only Cases and Detention* 2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf (average duration of 447 days for 84 cases in which the BIA

[1] DHS may seek to remove a noncitizen to a third country but only where the person is first "notified of the identity of the prospective third country of removal and provided an opportunity to" apply for relief from removal to that country. *See* DHS, Security Bars and Processing, 85 Fed. Reg. 84,194 (Dec. 23, 2020) (to be codified at 8 C.F.R. 208.16(f)(2)); *see also Kossov v. INS*, 132 F.3d 405, 408-09 (7th Cir. 1998).

remanded a withholding-only claim to the immigration judge).

B. Statutory scheme under Section 1231

Section 1231 governs the detention and removal of noncitizens who have administratively final removal orders. The statute provides that DHS "shall remove" such individuals during a 90-day "removal period," during which DHS "shall detain" the noncitizen. 8 U.S.C. 1231(a)(1)(A)–(B), (a)(2).

"If the alien does not leave or is not removed within the removal period, the alien . . . shall be subject to supervision"—that is, released under conditions. *Id.* 1231(a)(3). But where the individual is deportable or inadmissible on certain grounds, or "has been determined . . . to be a risk to the community or unlikely to comply with the order of removal," the individual "*may be* detained beyond the [90-day] removal period." *Id.* 1231(a)(6) (emphasis added).

In *Zadvydas*, this Court found Section 1231(a)(6) "ambiguous" as to the length of post-removal-period detention it authorizes. 533 U.S. at 697. Applying the constitutional avoidance canon, the Court construed the statute to contain an "implicit 'reasonable time' limitation" of six months. *Id.* at 682, 700–01. The Court concluded that the statute does not permit continued incarceration after six months "if removal is not reasonably foreseeable." *Id.* at 699. And even "if removal is reasonably foreseeable," the Court

held, detention is permitted only if there is a sufficient "risk of the alien's committing further crimes." *Id.* at 700.

C. Regulations under Section 1231

The regulations implementing Section 1231 provide only limited review of noncitizens' continued incarceration beyond the removal period. At the end of the 90-day removal period, a local Immigration and Customs Enforcement (ICE) deportation officer conducts an initial "records review" to determine whether detention should continue. 8 C.F.R. 241.4(c)(1), (h)(1), (h)(5). The detaining authority, DHS, conducts additional reviews at 180 days of post-final-order detention and again one year thereafter. *Id.* 241.4(c)(2), (k)(2). Noncitizens who are released may be subject to conditions of supervision, including bond. *Id.* 241.5(a)–(b).

The administrative reviews conducted by DHS lack safeguards generally deemed essential to due process. They provide:

- No in-person, adversarial hearing[2];

[2] Section 241.4 specifies that, if a noncitizen is not granted release at six months after an initial records review, Headquarters may designate two local ICE agents to conduct a personal interview of the noncitizen. *Id.* 241.4(i)(1), (3). "The scheduling of such interviews" is "at the discretion of the HQPDU Director." *Id.* 241.4(i)(3)(i). Under Section 241.13, there is no right to an interview; the regulations provide only that "HQPDU *may* grant the alien an interview . . . if the HQPDU determines that an interview would provide assistance in reaching a decision." *Id.*

- No neutral decisionmaker;
- No opportunity to call witnesses;
- No right to review or respond to the government's evidence of flight risk and danger[3]; and
- No administrative appeal.

Even where the noncitizen establishes that her release would not pose a danger to the community or a significant flight risk, the regulations provide that the agency "may release" her or "may also . . . continue [her] custody." 8 C.F.R. 241.4(d)(1).

In 2001, the government modified its regulations to implement *Zadvydas*. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967-01, 56968 (Nov. 14, 2001). The centerpiece of the regulatory revision was 8 C.F.R. 241.13, which provides for the *release* of noncitizens whose removal is not likely to occur in "the reasonably foreseeable future," absent special circumstances. 8 C.F.R. 241.13(g)(1).

The regulations provide a separate process for those whose removal is currently unlikely but are designated as "specially dangerous." *Id.* 241.14(f).

241.13(e)(5) (emphasis added). ICE routinely skips these "interviews." *See infra* Part I.C.3.

[3] In contrast to custody determinations made under 8 C.F.R. 241.13 (where "there is no significant likelihood of removal in the reasonably foreseeable future"), custody determinations made pursuant to 8 C.F.R. 241.4 do not provide the right to review or respond to the government's evidence.

That system provides for IJ custody hearings after six months of detention, and requires DHS to prove by clear and convincing evidence that the noncitizen should remain confined beyond that period. *Id.* 214.13(b)(2), 241.14(a), (g), (i)(1). The review procedure for "specially dangerous" individuals also affords the noncitizen the right to examine and present evidence and the right to appeal an adverse decision to the BIA. *Id.* 241.14(g)(3), (i)(4).

II. Factual Background

This case concerns two consolidated class actions, *Aleman Gonzalez* and *Flores Tejada*. In each, the named plaintiffs filed a complaint and habeas petition on behalf of themselves and similarly situated individuals.

The named plaintiffs all allege that they returned to the U.S. after being removed because they faced persecution or torture in their home countries. For example, after plaintiff Martinez was removed to Mexico, police officers kidnapped, beat, sodomized, and psychologically tortured him. Am. Compl. ¶ 60, *Martinez Baños v. Asher*, No. 16-cv-01454-JLR-BAT (W.D. Wash. Jan. 31, 2017), ECF No. 38. Plaintiff Gutierrez endured torture in Mexico due to his sexual orientation. Compl. ¶ 46, *Aleman v. Sessions*, No. 18-cv-01869-JSC (N.D. Cal. Mar. 27, 2018), ECF No. 1. Because they had reentered the U.S. without authorization, DHS reinstated their removal orders pursuant to Section 1231(a)(5). However, an asylum

officer determined that each had a "reasonable fear" of persecution or torture and transferred their cases to the immigration court for withholding-only proceedings. *See* 8 C.F.R. 208.31(e).

There is no requirement that class members be detained beyond an initial 90-day removal period. DHS nonetheless incarcerated plaintiffs for prolonged periods without ever affording them a hearing before an independent decisionmaker to determine whether there was any basis to continue their confinement. As a result, all plaintiffs have been jailed more than six months, and some for years. Mr. Flores was in custody for 407 days when he sued. Am. Compl. ¶ 14, *Martinez Baños v. Asher*, No. 16-cv-01454-JLR-BAT (W.D. Wash. Jan. 31, 2017), ECF No. 38. Mr. Aleman and Mr. Gutierrez were confined for over 200 days and 180 days, respectively, when they filed suit. Compl. ¶¶ 11–12, *Aleman v. Sessions*, No. 18-cv-01869-JSC (N.D. Cal. Mar. 27, 2018), ECF No. 1.

III. Procedural History

A. *Flores Tejada*

The *Flores* case commenced in September 2016, when Mr. Martinez filed a class action in the Western District of Washington challenging the legality of his prolonged confinement pending withholding-only proceedings. Pet. App. 137a. In an amended complaint, Mr. Flores and Mr. Ventura joined as named plaintiffs. Pet. App. 138a. Respondents argued that if Section

1231(a)(6) governed their detention, they were entitled by statute and the Due Process Clause to a bond hearing once their detention became prolonged. Pet. App. 137a. The district court certified a class of all individuals in the Western District of Washington in withholding-only proceedings and detained for six months or longer without a bond hearing.[4] Pet. App. 149a.

The court granted summary judgment for Respondents on their statutory claim that Section 1231(a)(6) required an IJ bond hearing for detention beyond six months. Pet. App. 122a–123a, 127a. The district court held that *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), established Respondents' entitlement to such custody hearings and that this Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), did not abrogate *Diouf*, as *Rodriguez* "expressly distinguished § 1231(a)(6)" from the statutes it interpreted. Pet. App. 108a (citing *Rodriguez*, 138 S. Ct. at 843–44). The court issued a permanent injunction requiring the government to provide periodic IJ hearings every six months. Pet. App. 123a. It did not reach Respondents' constitutional claims. *Id.*

The Ninth Circuit agreed that the class members were entitled by statute to a bond hearing after six months of detention. Pet. App. 100a–101a.

[4] The court dismissed Mr. Martinez's and Mr. Ventura's claims as moot. Pet. App. 138a, 146a.

However, it reversed the district court's conclusion that the statute required periodic bond hearings every six months thereafter. Pet. App. 101a–104a.

At no point in district court proceedings or on appeal did Petitioners argue that Section 1252(f)(1) precluded injunctive relief.

B. *Aleman Gonzalez*

In March 2018, Mr. Aleman and Mr. Gutierrez filed a class action in the Northern District of California challenging their prolonged confinement without a bond hearing in violation of Section 1231(a)(6) and the Due Process Clause. Pet. App. 7a–8a. The certified class in *Aleman* consists of individuals who have been detained in the Ninth Circuit for more than six months pursuant to Section 1231(a)(6), have "live claims" before the immigration court, BIA, or the court of appeals, and have not been provided a bond hearing. Pet. App. 8a, 72a, 84a. The vast majority are in withholding-only proceedings. The remaining class members are persons who had a final order of removal entered against them but now have a motion to reopen or other challenge pending on appeal, and have obtained an administrative or judicial stay of removal by making "a strong showing that [they are] likely to succeed on the merits." *Nken*, 556 U.S. at 434 (citation omitted).

On June 18, 2018, the district court granted class certification and issued a classwide preliminary

injunction requiring custody hearings after six months under Section 1231(a)(6). Pet. App. 67a–68a. As in *Flores,* the court did not reach Respondents' constitutional claim. The court of appeals affirmed the classwide preliminary injunction, holding that Section 1231(a)(6) requires bond hearings for incarceration exceeding six months. Pet. App. 24a–55a.

In *Aleman*, the government argued that Section 1252(f)(1) barred classwide relief only on Respondents' *constitutional* claims, not their *statutory* claims. *See* Resp'ts-Appellants' Op. Br. 23 n.5, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 1, 2019), ECF No. 14-1; Defs.' Opp'n to Pls.' Mot. For Class Cert. 20–21, *Aleman v. Sessions*, No. 18-cv-01869-JSC (N.D. Cal. May 3, 2018), ECF No. 28.

SUMMARY OF ARGUMENT

The court of appeals properly determined that Section 1231(a)(6) requires a custody hearing before an IJ when a noncitizen remains confined for more than six months. The parties' dispute is narrow. Section 1231(a)(6) provides that the government "may detain" or release class members on terms of supervision. Both sides agree the statute must be construed to provide some process for a custody determination at six months. They also agree that due process requires the custody determination be made by a neutral decisionmaker. They disagree only about who must provide that determination, and whether it requires a hearing.

The court of appeals correctly interpreted the statute to require a custody hearing before an IJ when a person with ongoing immigration proceedings faces prolonged detention, i.e., detention beyond six months. That reading is supported by the statutory text, the government's own regulations, and the doctrine of constitutional avoidance.

Zadvydas held that the text of Section 1231(a)(6) is ambiguous as to the length of detention it authorizes, and employed the constitutional avoidance canon to construe the statute to contain "an implicit 'reasonable time' limitation" of six months if the individual's removal is not "reasonably foreseeable." 533 U.S. at 682, 699–700. Section 1231(a)(6) is similarly ambiguous as to the procedures required for detention that exceeds six months.

To resolve this ambiguity, the Court should look first to the statute's text, structure, and implementing regulations, all of which support the court of appeals' reading of the statute. The plain text authorizes detention or release on terms of supervision and points to the traditional bail factors of flight risk and danger. Such determinations are ordinarily made by an independent arbiter after an adversarial hearing. The statute is therefore most naturally read to require that same process.

This interpretation is also supported by DHS's treatment of the parallel provision for detention of noncitizens without a final order of removal, 8 U.S.C.

1226(a). That statute uses the same operative language, and has long been interpreted to require an adversarial hearing before an independent official, i.e., an IJ, to determine whether a noncitizen should be detained during immigration proceedings.

These textual indications comport with the government's own regulations interpreting Section 1231(a)(6) to provide custody hearings before IJs for persons the government deems "specially dangerous." *See* 8 C.F.R. 241.14(a), (f)–(i). Section 241.14 construes the statute for those deemed specially dangerous just as the court of appeals did with respect to all class members: to provide an adversarial custody hearing before an IJ. *Id.* 241.14(g). If the statute is properly read to provide custody hearings for "specially dangerous" noncitizens, it should be construed the same way for those who do not present a heightened risk of danger—and have been found to have *bona fide* claims for relief.

The canon of constitutional avoidance requires Respondents' interpretation. Prolonged incarceration without any hearing to assess whether detention serves its purpose presents serious constitutional problems. Those problems are particularly acute here, as Respondents have been found to have *bona fide* claims for relief from removal and are legally entitled to remain pending resolution of their claims. Moreover, Congress has made no judgment permitting the government to presume class members pose either

a flight risk or danger. Indeed, many will prevail in their immigration proceedings and never be removed.

Petitioners acknowledge Respondents' right to have a custody determination conducted by a neutral decisionmaker, but their current practice fails to provide this critical safeguard. This Court's precedent establishes that government enforcement officers are not neutral arbiters, and that an interview by one's captor does not satisfy the hearing requirement.

Finally, Section 1252(f)(1) does not deprive the lower courts of authority to issue classwide injunctions requiring the agency to adhere to the statute. Petitioners forfeited the argument by failing to make it at any point below. In any event, Section 1252(f)(1) restricts only claims seeking to enjoin the "operation" of the immigration statutes—that is, claims seeking to enjoin the statute's operations on constitutional or other grounds that justify overriding what the statute requires. It does not address claims that seek merely to enjoin the agency to implement the statute consistent with its terms. In contrast to neighboring subsections, the bar applies only to injunctions against the "operation" of the statute, not those requiring that it be implemented.

And even as to claims challenging the "operation of" the statute itself, Section 1252(f)(1) contains an exception permitting injunctive relief on behalf of "an individual alien against whom proceedings under such part have been initiated."

Because each class member is "an individual alien against whom proceedings under such part have been initiated," they may seek injunctive relief. Where Congress sought to preclude classwide relief, it said so explicitly. *See* 8 U.S.C. 1252(e)(1)(B) (barring class relief for specified habeas claims challenging expedited removal orders). Here, it did not.

ARGUMENT

I. The Lower Courts Correctly Construed Section 1231(a)(6) to Require a Bond Hearing to Authorize Detention Beyond Six Months.

Section 1231(a)(6) authorizes, but does not mandate, detention after the 90-day removal period. The parties agree the statute authorizes a custody determination after six months, *see* Pet'rs Br. 41, and permits further detention when a noncitizen presents a danger or flight risk, *see* Pet'rs Br. 43. They dispute only whether the statute permits the jailing authority to decide, unilaterally, whether incarceration beyond six months is warranted, or whether an adversarial hearing before an independent arbiter is required.

The court of appeals correctly construed Section 1231(a)(6) to require a custody hearing before a neutral decisionmaker for individuals subjected to prolonged detention, i.e., detention beyond six months. That reading is the most consistent with the statutory text and structure, the government's own regulations,

and *Zadvydas*. It is further confirmed by the constitutional avoidance canon. Imprisoning human beings for prolonged periods without any hearing to assess whether their incarceration is justified violates the most elemental requisites of due process.

A. Section 1231(a)(6) is ambiguous as to the procedures required to justify prolonged detention.

Section 1231(a) establishes the detention framework for persons with final removal orders, but is ambiguous regarding the procedures required to justify prolonged detention. Section 1231(a)(2) directs that persons "shall" be detained during the 90-day removal period. Section 1231(a)(6) then provides the Attorney General "may" detain individuals "beyond the [90-day] removal period," or may release them under "terms of supervision" set forth in Section 1231(a)(3), and specifies that detention may be justified if the "risk to the community or [likelihood of] comply[ing] with the order of removal" warrant it—the traditional criteria applied in custody hearings.

The use of "the word 'may[]' . . . implies discretion." *Rodriguez*, 138 S. Ct. at 844 (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)); *cf. Lopez v. Davis*, 531 U.S. 230, 241 (2001) (comparing "Congress' use of the permissive 'may'" with the "use of a mandatory 'shall'" in the same statutory section). Because Section 1231(a)(6) authorizes either detention or release, it

"differs materially" from detention statutes providing that individuals "shall" be detained, like those the Court found unambiguous in *Rodriguez*. 138 S. Ct. at 843–44 (contrasting Section 1231(a)(6) with Sections 1225(b)(1) and (b)(2)).

Zadvydas held the word "may" in Section 1231(a)(6) "does not necessarily suggest unlimited discretion," and was in that respect "ambiguous" as to the scope of detention authority it provides. 533 U.S. at 697. In resolving that ambiguity, the Court applied the constitutional avoidance canon, construing Section 1231(a)(6) to contain an "implicit 'reasonable time' limitation" of six months where "removal is not reasonably foreseeable." *Id.* at 682, 699–700. And even where "removal is reasonably foreseeable," the Court interpreted the statute to require a finding that the "risk of the alien's committing further crimes" justifies continued detention. *Id.* at 700.

On four occasions in recent years, this Court has confirmed *Zadvydas*'s interpretation of Section 1231(a)(6). *See Clark v. Martinez*, 543 U.S. 371, 383 (2005) (applying *Zadvydas*'s construction to inadmissible noncitizens); *Demore v. Kim*, 538 U.S. 510, 527 (2003) (contrasting Section 1231(a)(6) with Section 1226(c)); *Rodriguez*, 138 S. Ct. at 838, 844, 850 (contrasting the mandatory language of "shall detain" in Sections 1225 and 1226(c) with Section 1231(a)(6)'s ambiguous "may detain"); *Guzman Chavez*, 141 S. Ct. at 2281 (observing that the Court "has 'read an implicit limitation' into 1231(a)(6) 'in light of the

Constitution's demands'" (quoting *Zadvydas*, 533 U.S. at 689)).

Zadvydas already determined that Section 1231(a)(6)'s text is ambiguous as to the government's authority to impose prolonged incarceration, and that any such authority should be read as limited to avoid constitutional concerns. Just as the statute does not on its face specify the length of permissible detention, it likewise does not specify the procedures required for prolonged detention. To resolve this ambiguity, the Court should look to the provision's text, structure, regulatory construction, and the constitutional concerns posed by prolonged detention without the most basic due process safeguards. All those considerations support the court of appeals' reading.

B. Section 1231(a)(6)'s text, structure, and regulatory construction demonstrate Congress required custody hearings to justify prolonged detention.

The text, structure, and regulatory interpretation of Section 1231(a)(6) demonstrate that the statute should be read to require a custody hearing before a neutral decisionmaker to authorize prolonged detention.

First, the statute plainly contemplates that some official will use a process to render the determinations customarily made by IJs in bond hearings—namely, whether individuals pose a flight risk or danger requiring detention, or whether they

should instead be released on terms of supervision. The text authorizes detention *or* release of noncitizens with final removal orders after the 90-day removal period. *See* 8 U.S.C. 1231(a)(6). In doing so, it expressly refers to the traditional factors that warrant detention pending trial or a similar proceeding: "risk to the community or [likelihood of] comply[ing] with the order of removal." *Id.* These terms strongly suggest that Congress envisioned the process normally used to make custody determinations: custody hearings before IJs.

Petitioners assert the court of appeals' construction of Section 1231(a)(6) reads out the authority to detain individuals who are inadmissible or removable on specified grounds, separate from those who present a risk of danger or flight. *See* Pet'rs Br. 35–36. It does no such thing. Those terms instruct who may be *initially* detained beyond the removal period, as they would have otherwise been entitled to release at 90 days pursuant to Section 1231(a)(3). Petitioners conflate the basis for initial detention under Section 1231(a)(6), with the separate inquiry required at the point detention becomes prolonged.

Interpreting Section 1231(a)(6) to require a hearing before an IJ is also supported by the government's longstanding interpretation of similar language in Section 1226(a), which governs detention prior to a final removal order. Congress enacted that provision at the same time as Section 1231(a)(6). It uses the same operative phrase, "may detain," and

similarly contemplates detention or release. As the government has acknowledged, "the operative language of [Section] 1231(a)(6) directly mirrors that of [Section] 1226(a)." Resp'ts-Appellants' Op. Br. 18, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 1, 2019), ECF No. 14-1.

The government has long interpreted Section 1226(a), as well as its predecessor statute, to provide an adversarial hearing before a neutral adjudicator to determine whether a noncitizen should be detained pending immigration proceedings. The government has done so even though Section 1226(a), like Section 1231(a)(6), does not specify *who* makes custody determinations under the statute, and does not explicitly require a hearing. *See* 8 C.F.R. 1236.1(d)(1) (establishing IJ bond hearings to review DHS's initial custody determinations), 1003.19(a) (same).[5]

That Congress used the same operative "may detain" language in Section 1226(a) against the backdrop of decades of agency practice providing bond hearings before IJs provides powerful evidence favoring Respondents' interpretation. This Court

[5] The regulations first established bond hearings before special inquiry officers in 1969, *see* Proceedings to Determine Deportability of Aliens in the United States, Release From Custody by Special Inquiry Officer, 34 Fed. Reg. 8037 (May 22, 1969), and then replaced those officers with IJs in 1973, *see* INS Definitions, Immigration Judge, 38 Fed. Reg. 8590 (Apr. 4, 1973). *See also* INS, Immigration Review Function, 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (establishing the Executive Office for Immigration Review).

"normally presume[s] that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Petitioners object that Section 1231(a)(6), unlike 1226(a), does not expressly mention "bond." Pet'rs Br. 38–39. But Section 1226(a) specifies "bond" as a condition of release. Section 1231(a)(6) likewise authorizes release on the "terms of supervision" referenced in Section 1231(a)(3), which includes "bond" under the agency's own regulations. *See* 8 C.F.R. 241.5(b). Bond, after all, is just another term of supervision. Thus, the agency itself has construed both Sections 1231(a)(6) and 1226(a) to authorize release on bond.

There is therefore no material difference between the two statutes: both authorize detention or release on terms of supervision without specifying the process for making that determination. If Section 1226(a) requires a custody hearing before an independent adjudicator, so too does Section 1231(a)(6).

Indeed, for two decades, Petitioners themselves have read Section 1231(a)(6) to require custody hearings for a subset of those facing prolonged

detention. Implementing regulations provide for IJ custody hearings at six months for any individual designated "specially dangerous." 8 C.F.R. 241.13(b)(2), 241.14(a), (f)–(i). The regulation provides an adversarial custody review hearing before an IJ where DHS has the burden to justify continued detention by demonstrating the noncitizen's dangerousness by clear and convincing evidence. *Id.* 241.14(i)(1). The noncitizen may present evidence, *id.*, and may appeal an adverse decision, *id.* 241.14(i)(4). If ordered released, DHS may impose terms of supervision. *Id.* 241.14(j). The agency "decided that it [was] necessary to provide [these] specific procedural protections" because it recognized that, even for those considered "specially dangerous," "freedom from bodily restraint" remains "at the core of the liberty protected by the Due Process Clause." Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. at 56,974.

If the statute requires custody hearings to address the constitutional concerns "long-term detention" presents for "specially dangerous" noncitizens, it requires the same for those who are not "specially dangerous"—especially those, like class members, with *bona fide* claims to relief from removal. *See Abramski v. United States*, 573 U.S. 169, 202–03 (2014) (Scalia, J., dissenting) ("[T]he fact that the agency charged with enforcing the Act read it, over a period of roughly 25 years, not to apply to the type of conduct at issue here is powerful evidence that

interpreting the Act in that way is natural and reasonable . . . ."); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relying in part on "over 60 years" of government interpretation and practice to reject government's new proposed interpretation of the Clayton Act).

Petitioners argue that Section 1231(a)(6)'s reference to the "Attorney General" refers to DHS, and not the Department of Justice's immigration judges. Pet'rs Br. 36. Petitioners forfeited this argument by failing to raise it below. *See Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021) (declining to address new arguments, noting "we are a court of review, not of first view" (citation omitted)). In any event, the argument is incorrect. When Congress transferred the predecessor agency's functions to DHS, it explained that DOJ retained the "authorities and functions" that were "exercised by the Executive Office for Immigration Review [EOIR] or by the Attorney General with respect to [EOIR]" prior to the effective date of the Homeland Security Act. 8 U.S.C. 1103(g)(1). This power included the authority under the detention statutes, specifically Sections 1226(a) and 1231(a)(6). And as their own treatment of "specially dangerous" noncitizens illustrates, Petitioners themselves recognize that IJs may conduct custody hearings under Section 1231(a)(6). *See* 8 C.F.R. 241.14(g). Indeed, Petitioners concede that "DHS and DOJ could choose to adopt . . . bond hearings before immigration judges." Pet'rs Br. 40.

The legislative history of Section 1231 is also consistent with the court of appeals' interpretation. Section 1231 was enacted as part of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) to "liberalize[]" the pre-existing detention regime by reducing the removal period from six months to 90 days, and to make detention beyond the removal period permissive rather than mandatory. *Zadvydas*, 533 U.S. at 698. The House Judiciary Committee report accompanying H.R. 2202, the bill that ultimately became IIRIRA, "strongly recommend[ed] that the INS *and immigration judges* be charged with the requirement to impose conditions that will ensure the alien is available for deportation when all proceedings are complete and travel documents have been obtained" for individuals detained under what is now Section 1231(a)(6). H.R. Rep. 104-469, pt. 1, at 161 (1996) (emphasis added).

In short, the text of Section 1231(a)(6), the parallel language in Section 1226(a), and the agency's implementing regulations all support reading the statute to require a custody determination by an independent adjudicator in an adversarial hearing. At a minimum, they demonstrate that this interpretation of the statute is fairly possible, and as explained below, must be adopted to avoid the serious constitutional concerns that are otherwise presented.

C. The court of appeals properly construed the statute to avoid constitutional concerns.

Respondents' construction is required by the canon of constitutional avoidance. "A statute must be construed . . . so as to avoid . . . the conclusion that it is unconstitutional" so long as that construction is "fairly possible." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). An "otherwise acceptable" statutory interpretation that raises constitutional concerns must be rejected "unless [doing so] is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Prolonged incarceration of noncitizens without any hearing to determine whether detention is justified, especially when those detained are legally entitled to remain in the country pending their proceedings, presents "obvious" constitutional problems. *Zadvydas*, 533 U.S. at 692. Nowhere else does our legal system tolerate incarceration of such lengths without the minimal protection of an adversarial hearing before an independent adjudicator—especially where Congress has not mandated confinement. Prolonged confinement without process was unacceptable at common law, and remains alien to our legal system.

1. The Due Process Clause prohibits prolonged executive detention without a hearing.

The Due Process Clause protects, at a minimum, "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). The common law did not permit prolonged confinement without a hearing before a neutral decisionmaker to assess whether detention was necessary. *See generally* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 966–68 (1965) (detailing pre-founding English history and practices regarding bail). Blackstone recognized the right to bail "in any Case whatsoever." 4 William Blackstone, Analysis of the Laws of England 148 (6th ed. 1771). The right to a bail hearing before a magistrate historically served as a fundamental check against arbitrary detention. *See* 3 Blackstone, Commentaries 291 (1768).

The Framers incorporated this legal tradition in the Constitution, recognizing that "the practice of arbitrary imprisonments, [has] been, in all ages," among "the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Alexander Hamilton). The Fifth Amendment addressed this problem by prohibiting the government from depriving *any* "person"—not only citizens—of "liberty" without "due process of law." U.S. Const. amend. V; *see also*

U.S. Const. amend. VIII (providing that "[e]xcessive bail shall not be required").

The Due Process Clause thus embodies the English common law tradition affording core protections to noncitizens and citizens alike. *See United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) ("Such allegiance and protection . . . were not restricted to natural-born subjects and naturalized subjects, . . . but were predicable of aliens in amity, so long as they were within the kingdom."); 1 Blackstone, Commentaries 368–70 (1768) ("[F]or so long time as he continues within the king's dominion," the king "affords his protection to an alien . . . during his residence in this realm."). Likewise, at common law, the writ of habeas corpus was available to noncitizens "to challenge Executive and private detention in civil cases as well as criminal," including to contest "the erroneous application or interpretation of statutes." *INS v. St. Cyr*, 533 U.S. 289, 302 (2001). The protection against "arbitrary detention is [thus] as ancient and important a right as any found within the Constitution's boundaries." *Rodriguez*, 138 S. Ct. at 863 (Breyer, J., dissenting).

This Court's modern civil detention jurisprudence has remained faithful to this original understanding. This Court has repeatedly recognized that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690.

That principle applies with equal force to immigration detention, because "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added); *see also Zadvydas*, 533 U.S. at 690–91 (applying civil commitment and pretrial detention caselaw to immigration context).

In keeping with that understanding, this Court has repeatedly refused to permit prolonged imprisonment by executive officials without a hearing before an independent decisionmaker to assess whether the detention "bear[s] [a] reasonable relation" to a valid government purpose—such as preventing flight or protecting the community against dangerous individuals. *Zadvydas*, 533 U.S. at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

While the Due Process Clause governs any deprivation of liberty—even for a short period—this Court has required heightened procedures for individuals faced with *prolonged* confinement, in order to ensure that the length of detention remains reasonable in relation to its purpose. *See McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249–50 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."); *Jackson*, 406 U.S. at 736, 738 (holding that detention beyond the "initial commitment" for an individual found

incompetent to stand trial requires additional safeguards).

The principle that prolonged deprivations of liberty require greater procedural protections runs throughout this Court's precedent. For example, an individual can be initially arrested on a police officer's finding of probable cause, but only for a brief period, presumptively 48 hours. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 55–56 (1991). Any further detention must be authorized by a "neutral and detached magistrate." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Further detention pending trial requires a "prompt" judicial hearing both to validate the police officer's probable cause finding and to determine whether the detainee presents too great a flight risk or danger to be released pretrial. *See United States v. Salerno*, 481 U.S. 739, 747 (1987). Where trial proceedings become lengthy, courts consider whether additional prolonged detention is warranted. *See, e.g.*, *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (per curiam); *see also Hutto v. Finney*, 437 U.S. 678, 686 (1978) (holding in Eighth Amendment context that "[i]t is equally plain . . . that the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

For these reasons, the Court in *Zadvydas* held that prolonged detention presents serious constitutional concerns and interpreted a statute that

was silent on the length of detention to contain a presumptive six-month limit. 533 U.S. at 701 (observing that "Congress previously doubted the constitutionality of detention for more than six months"). The Court has repeatedly used six months as a benchmark to require additional protections against the loss of liberty. S*ee Muniz v. Hoffman*, 422 U.S. 454, 477 (1975) ("It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ."); *see also McNeil*, 407 U.S. at 249–52 (recognizing six months as an outer limit for confinement without individualized inquiry for civil commitment); *cf. Foucha*, 504 U.S. at 82 (noting that civil detention must be "strictly limited in duration").

The constitutional concerns that animated *Zadvydas* are not limited to cases involving "indefinite and potentially permanent detention," as Petitioners claim. Pet'rs Br. 48. Due process concerns are raised by "long-term" detention. *Zadvydas*, 533 U.S. at 697, 690–91. *Zadvydas* relied on *Salerno*, *id.* at 690–91, a case concerning detention with "stringent time limitations," 481 U.S. at 747. Indeed, Respondents' entitlement to process here is even stronger than in *Zadvydas,* which involved noncitizens whose proceedings had ended and were indisputably subject to removal. By contrast, Respondents have been found to have *bona fide* claims to relief from removal, and are legally entitled to remain in the U.S. while their claims are adjudicated. Detaining them for more than six months without providing even the most elemental

requisites of due process therefore raises substantial constitutional concerns.

2. Petitioners' authorities are inapposite.

Petitioners rely on cases upholding Congress's authority to *mandate* the detention, for *brief* periods, of certain specified individuals without an individualized finding of danger or flight risk. But those decisions provide no support here, where Congress did *not* mandate detention, and where the government incarcerates class members for *prolonged* periods.

Petitioners rely heavily on *Demore v. Kim*. *See* Pet'rs Br. 42. However, *Demore* relied on Congress's categorical determination that individuals with certain qualifying criminal convictions necessarily presented a flight risk requiring detention pending completion of proceedings. 538 U.S. at 531. Congress has made no such categorical determination here. On the contrary, it provided that class members "may" be detained or released on terms of supervision, depending on whether they present a flight risk or danger.

Moreover, *Demore* repeatedly emphasized the brevity of confinement under the statute, citing statistics that even outlier cases would typically conclude in "about five months." *Id.* at 529–30.[6] In

[6] The Government later confessed error in the representations it made to this Court regarding detention lengths in *Demore*, asking that the reference to the five month time period be deleted from the

contrast, this case concerns *prolonged* incarceration (over six months), where greater procedural protections are routinely required. Indeed, the government itself has previously conceded that "longer detention" permits a "court" to "scrutinize the fit between the means and the ends more closely." Br. for Pet'rs at 47, *Rodriguez*, 138 S. Ct. 830 (No. 15-1204).[7]

Carlson v. Landon, 342 U.S. 524 (1952), similarly provides Petitioners no support. It upheld detention under a statute targeting a narrow category of people who pose a national security threat, and only upon a showing that the individual in fact fell within that category. Moreover, the hearings required under that statute resulted in the "allowance of bail in the

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opinion. *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court 1–3 (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

[7] Although *Demore* notes "Congress regularly makes rules that would be unacceptable if applied to citizens," 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)), the Due Process Clause protects "persons," whether or not they are citizens. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (applying void for vagueness doctrine irrespective of citizenship status); *see also id.* at 1228–31 (Gorsuch, J., concurring in part and concurring in the judgment); *Mathews*, 426 U.S. at 77 ("The Fifth Amendment . . . protects" the "millions" of noncitizens in this country "from deprivation of life, liberty, or property without due process of law."). A noncitizen—particularly one found to have a *bona fide* claim to relief from removal—and a citizen have the same interest in physical liberty, while the government's interests in incarcerating individuals facing removal are the same as its interests in other civil detention settings—avoiding danger or flight risk.

large majority of cases," even for individuals who were found to fall within this category. *Id.* at 542. The Court further relied on the availability of independent review, noting that "the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.* at 543. And *Carlson* explicitly did not concern cases involving "unusual delay" in the proceedings. *Id.* at 546. Thus, *Carlson* does not show that custody hearings are unnecessary to ensure prolonged incarceration remains tethered to a valid purpose.

Guzman Chavez also does not contradict this long line of due process precedent. Indeed, the decision contains no constitutional analysis. *See* 141 S. Ct. at 2284–91 & n.9. Rather, it considered the statutory question whether individuals in withholding-only proceedings are entitled to a bond hearing at the *outset* of detention pursuant to Section 1226(a) or are instead subject to detention during the 90-day removal period under Section 1231(a)(2) that *Zadvydas* had approved. *Id.* at 2280; *see also Zadvydas*, 533 U.S. at 683.[8] All

[8] *Guzman Chavez* makes clear that it addresses detention during the 90-day removal period, as it notes that "[e]ven assuming respondents are correct that withholding-only proceedings are not usually completed in 90 days . . . § 1231 expressly authorizes DHS to release under supervision or continue the detention of aliens if removal cannot be effectuated within the 90 days." 141 S. Ct. at 2291.

class members here have been detained well beyond the 90-day removal period.[9]

3. Petitioners' existing custody review procedures fail to provide vital protections required by the Due Process Clause.

Petitioners' regulations do not satisfy due process. Petitioners acknowledge that "[t]he Due Process Clause does, of course, require neutral administrative adjudicators," and—at least in some contexts—an opportunity for the individual "to state his position orally." Pet'rs Br. 44–45. They also do not dispute the stakes involved: if the ICE officer orders detention after the 180-day review, the regulations authorize an *additional year* of incarceration. 8 C.F.R. 241.4(k)(2)(iii).

Yet their current process provides neither a neutral decisionmaker nor an adversarial hearing. Enforcement officers do not qualify as neutral decisionmakers. Moreover, the opportunity to speak to one's jailer does not constitute a meaningful opportunity to contest the need for detention, let alone

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[9] *Zadvydas* also forecloses Petitioners' assertion that Section 1231(h) precludes the Court from determining whether the statute requires custody hearings. Pet'rs Br. 37, 47. *Zadvydas* held that Section 1231(h) merely establishes that Section 1231 itself does not create a cause of action; it does not render Section 1231 unenforceable where another statute, like the habeas statute, permits suits challenging whether prolonged detention "is without statutory authority." 533 U.S. at 688. Indeed, were Petitioners correct, it would bar claims under *Zadvydas* itself.

provide the adversarial hearing due process requires. *See supra* Part I.C.1.

This Court's civil detention cases have repeatedly made clear that the Constitution does not permit the government to rely on enforcement officers to determine the validity of prolonged immigration detention without any adversarial hearing. In *Foucha*, for example, the Court invalidated a civil commitment scheme because, among other things, it provided no "adversary hearing" in which the state had to justify continued detention before state judges. 504 U.S. at 81–82; *see also Jackson*, 406 U.S. at 738 (individual deemed incompetent to stand trial was entitled to "formal commitment proceedings" before state judge to determine whether continued detention was justified); *Addington*, 441 U.S. at 432–33 (holding that due process required state to justify civil commitment by clear and convincing evidence in adversarial hearing before state trial judge); *Application of Gault*, 387 U.S. 1, 29, 57 (1967) (juvenile delinquency proceedings violated Due Process Clause because they lacked adversarial hearings that provided an opportunity for confrontation and cross-examination before state juvenile court).

Similarly, cases upholding such schemes have relied on the state's compliance with those same fundamental requirements: an adversarial hearing before a neutral decisionmaker. Thus, *Salerno* upheld the constitutionality of the Bail Reform Act *because* it required the government to justify detention in a "full-

blown adversary hearing" before a "neutral decisionmaker"—a federal judge. 481 U.S. at 750; *see also Kansas v. Hendricks*, 521 U.S. 346, 356–60 (1997) (upholding civil commitment scheme for individuals likely to engage in sexually predatory acts because it required adversarial hearing where state was required to justify continued detention before state judge and jury); *Schall v. Martin*, 467 U.S. 253, 277, 279–81 (1984) (upholding detention pending juvenile delinquency determination because a "Family Court judge" had to find probable cause and "whether continued detention is necessary" at "adversarial" hearing).

Zadvydas makes clear that the principles on which these cases rest apply equally in the immigration context. *See* 533 U.S. at 690–91 (citing, *inter alia*, *Hendricks*, *Salerno*, *Foucha*, and *Jackson* in holding that due process requires "strong procedural protections" in civil detention schemes).

Petitioners ignore this well-established historical tradition, claiming that ICE officers qualify as neutral decisionmakers as long as they are not personally biased, Pet'rs Br. 44, and that there is no need for a hearing because those officers *might* provide an interview (but no adversarial hearing) to a detainee, *id.* at 45. Both assertions are wrong.

First, consistent with the long line of civil detention cases discussed above, this Court has held that the "government enforcement agent"—here, the

jailer—cannot be responsible for custody reviews. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971); *Shadwick*, 407 U.S. at 350. This is true irrespective of whether the officer harbors any personal financial interest or other bias. In all the civil detention schemes this Court has upheld, the individual adjudicating the validity of confinement was a judge or a person with comparable structural independence vis-à-vis the jailing authority. *See, e.g.*, *Hendricks*, 521 U.S. at 352–53; *Schall*, 467 U.S. at 264, 270. As *Gerstein* explained in the probable cause hearing context, police officers cannot serve as "neutral and detached" arbiters in custody reviews because they are "engaged in the often competitive enterprise of ferreting out crime." 420 U.S. at 112–13 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Similarly, in *Hamdi v. Rumsfeld*, the plurality emphasized that "[a]n interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." 542 U.S. 507, 537 (2004) (plurality).

Petitioners rely on *Withrow v. Larkin*, 421 U.S. 35 (1975), and *Schweiker v. McClure*, 456 U.S. 188 (1982). But neither case involved any deprivation of physical liberty—which "lies at the heart of the liberty [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690—let alone the prolonged deprivation at issue here. *Withrow* concerned medical licensing procedures. It establishes simply that there is "a

presumption of honesty and integrity" for hearing officers in a wide variety of administrative proceedings. 421 U.S at 47. *Schweiker* rejected the claim that hearing officers in Medicare reimbursement proceedings were unable to serve as neutral arbiters merely because they were employed by private carriers. 456 U.S. at 196.

While the prohibition on biased decisionmakers described in those cases also applies here, it does not set the *only* due process constraint—especially in cases involving incarceration. "That even purportedly fair adjudicators 'are disqualified by their interest in the controversy to be decided is, of course, the general rule.'" *Hamdi*, 542 U.S. at 538 (plurality) (quoting *Tumey v. Ohio*, 273 U.S. 510, 522 (1927)). After all, police officers and prosecutors are entitled to the same presumption of integrity, but the Constitution nonetheless prohibits them from deciding whether to continue the confinement of people they arrest or whose arrest they authorize. Likewise, immigration enforcement officers cannot unilaterally determine whether a detainee should be subject to prolonged detention. Because ICE is responsible for the arrest, detention, and removal of noncitizens, it is an "interested" party in whether detention should continue.

Second, interviews with ICE agents—available at the agents' discretion—do not satisfy the requirement for an adversarial hearing, even if they permit the jailed immigrant "to state his position

orally" to a deportation officer. Pet'rs Br. 44–45. This Court has upheld prolonged civil detention schemes only where they include not just neutral decisionmakers, but also *adversarial hearings*, where the jailed person can present evidence and witnesses and confront the government's evidence. *See, e.g.*, *Salerno*, 481 U.S. at 742, 750; *Foucha*, 504 U.S. at 80–82; *Jackson*, 406 U.S. at 738; *Hendricks*, 521 U.S. at 352–53. That the deportation officer has discretion to speak to the jailed immigrant does not ensure these critical protections.

Indeed, even where physical liberty is not at stake, the Court has identified an adversarial hearing as the touchstone of due process. As *Zadvydas* observes, "[t]he Constitution demands greater procedural protection even for property." 533 U.S. at 692; *see also Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (even as to property rights, "due process generally requires a hearing" (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993))); *Califano v. Yamasaki*, 442 U.S. 782, 696 (1979) (in-person hearing required for recovery of excess Social Security payments); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"). The Due Process Clause does not permit the government to confine individuals for years based on *less* process than what it requires to terminate welfare benefits.

Even were the ability to speak to one's jailer sufficient to satisfy the hearing requirement, officers routinely fail to provide them. In many cases, ICE officers approve prolonged detention based solely on a paper review. *See* Tr. of Mot. Hrg. 20:18–22, *Calderon v. Nielsen*, No. 1:18-cv-10225-MLW (D. Mass. Oct. 18, 2019), ECF No. 412-1 (ICE Headquarters Removal and International Operations chief testifying that interviews occur "[n]ot often . . . . It's something that we have not done to my knowledge"). In some cases, ICE has failed to conduct any 180-day review at all. *See* DHS Office of Inspector General, OIG-07-28, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States 34 (Feb. 2007) (finding no evidence that "post-180-day reviews are consistently conducted" and concluding that "[c]ontinued detention . . . is not closely monitored").

These practices are consistent with the record below. The government provided copies of the custody reviews for the two named plaintiffs in Aleman but they included only a 90-day review for one plaintiff and only a 180-day review for the other. *See* Ex. F & Ex. L to Resp. to Mot. for Prelim. Inj., *Aleman v. Sessions*, No. 18-cv-01869-JSC (N.D. Cal. May 3, 2018), ECF No. 27-6 & ECF. No. 31-1. Moreover, the government submitted no evidence that any plaintiffs were interviewed as part of their 180-day reviews.

Even where ICE provides an interview, the noncitizen cannot present witnesses, or even see—let

alone challenge—the government's evidence. *See supra* n.3. Nor is there any right of appeal. 8 C.F.R. 241.4(d). Indeed, the agency's regulations provide that, even where the noncitizen makes a showing that she does not present a flight risk or danger, DHS may choose to "continue in custody any alien described in . . . this section." 8 C.F.R. 241.4(d)(1). Where prolonged detention is at stake, this is not due process. S*ee Zadvydas*, 533 U.S. at 692 ("[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'" (quoting *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 450 (1985))).

This cursory review by ICE routinely results in unjustified prolonged detention. For example, after six months of confinement, a DHS official ordered Mr. Aleman's detention for another year, citing nothing other than the fact that he had a pending claim for withholding—a fact that plainly does not establish either flight risk or danger, and is true of everyone awaiting a withholding-only hearing. Excerpts of Record 43, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 5, 2019), ECF No. 15. In fact, the official did not even *address* whether Mr. Aleman presented a danger or flight risk. *Id.* When Mr. Aleman received an IJ hearing pursuant to the preliminary injunction, and was able to present evidence and confront the government's case, the IJ ordered him released on bond, finding that he presented no danger or flight

risk. *See also Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951–52 (9th Cir. 2008) (petitioner detained for seven years based on a single DHS file review deeming him a flight risk, with no notice, no interview or opportunity to contest the government's findings, and no appeal); *Diouf*, 634 F.3d at 1092 (individual detained nearly two years based on DHS's paper custody reviews, who was then released after adversarial IJ hearing).

To imprison a human being found to have a *bona fide* claim to relief—and a right to remain in the U.S. while that claim is adjudicated—for more than a year without any meaningful opportunity to contest the necessity for detention in a hearing before a neutral decisionmaker violates the most fundamental principles of due process.

4. Section 1231's text, the implementing regulations, and this Court's precedent demonstrate the lower court's statutory construction is "fairly possible."

In light of the constitutional concerns detailed above, Section 1231 must be read to require individualized custody hearings before a neutral decisionmaker for prolonged detention as long as that interpretation is "fairly possible." *Jin Fuey Moy*, 241 U.S. at 401. As explained above, the text and structure of the statute, the agency's longstanding interpretation of the phrase "may detain" in Section

1226(a), and the agency's interpretation of the statute to provide custody hearings before IJs for those deemed "specially dangerous," all make clear that Respondents' reading is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. *See supra* Part I.B.

For all the above reasons, the court of appeals correctly interpreted Section 1231(a)(6) to require a custody hearing before an independent decisionmaker to justify detention beyond six months. That interpretation avoids the serious due process concerns that would arise were this Court to interpret the statute to authorized prolonged detention without even the most basic requisites of due process—an adversarial hearing before a neutral arbiter.

II. 8 U.S.C. 1252(f)(1) Does Not Preclude Lower Courts from Enjoining the Unlawful Implementation of a Statute.

This Court should not decide whether Section 1252(f)(1) deprived the lower courts of authority to issue classwide injunctions on Respondents' statutory claims because Petitioners never asserted this argument below. They objected only to a classwide injunction on the constitutional claims. They have therefore forfeited this issue.

In any case, Section 1252(f)(1) does not bar relief here. By its plain terms, it restricts only claims that enjoin the "operation" of the immigration

statutes, not claims, like Respondents', that seek to ensure that the agency implements the statute as properly interpreted. Moreover, the relief provided here falls comfortably within the statute's exception permitting relief for individuals in removal proceedings. All class members fit that exception.

A. Petitioners forfeited any argument that Section 1252(f)(1) precludes classwide injunctive relief for claims against statutory violations.

Petitioners forfeited any argument that the injunctions exceeded the lower courts' statutory authority, as they never advanced that argument below. While this Court has an "independent obligation" to assess whether a statute deprives it or the lower courts of jurisdiction, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), Section 1252(f)(1) does not concern jurisdiction. It only limits the relief courts may provide. "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968); *see also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998).

In *Flores*, Petitioners did not raise Section 1252(f)(1) before either the district court or the court of appeals. In *Aleman*, Petitioners raised Section 1252(f)(1) in the district court, but only with respect to

whether to grant class certification on the *constitutional* claims. Defs.' Opp'n to Pls.' Mot. For Class Cert. 20–21, *Aleman v. Sessions*, No. 18-cv-01869-JSC (N.D. Cal. May 3, 2018), ECF No. 28 ("Finally, Plaintiffs cannot satisfy Rule 23(b)(2) because this Court does not have jurisdiction to grant relief on Plaintiffs' constitutional claims on a classwide basis."). On appeal, Petitioners only referenced Section 1252(f)(1) in a footnote, and effectively conceded that its bar did not apply to statutory claims, asserting that "because [Respondents'] 'statutory' claim fails, the district court's rationale for circumventing § 1252(f)(1)'s prohibition on classwide injunctive relief against the operation of § 1231(a)(6) must also fail." Resp'ts-Appellants' Op. Br. 23 n.5, *Aleman v. Barr*, No. 18-16465 (9th Cir. Mar. 1, 2019), ECF No. 14-1.

Accordingly, Petitioners have forfeited any argument that the lower courts lacked remedial power to require the agency to implement the statute consistent with its terms. "'Mindful that this is a court of final review and not first view' . . . [the Court will] decline to reach the merits of petitioner's present challenge." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).[10]

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[10] Moreover, because Petitioners did not present this question pursuant to Supreme Court Rule 14.1(a), and because the Court need not address it to resolve the question presented, the additional question is not properly before this Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *see also Madison v. Alabama*, 139 S. Ct. 718, 734 (2019) (Alito, J., dissenting).

B. Section 1252(f)(1) applies only to injunctions that enjoin the operation of the referenced sections of the Act.

Section 1252(f)(1) directs that

> no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221–1231] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. 1252(f)(1).

The plain text limits only orders that would "enjoin or restrain the operation" of Sections 1221 through 1231. It does not limit injunctions that merely require the agency to *adhere* to the statute as properly interpreted. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Section 1252(f)(1) does not, either by its words or by "a necessary and inescapable inference," bar injunctive relief here. Rather, the statute prohibits lower courts from "enjoin[ing] or restrain[ing] the *operation* of the statute," such as where the court invalidates the

statute itself, but not where the court merely requires the agency to comply with the statute.

A court order requiring the agency to enforce the statute in accordance with its terms does not enjoin the "operation" of the statute; it requires the agency to conform its extra-legal conduct to the statute's terms. *See Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020) (explaining that 1252(f)(1) "refers only to 'the operation of the provisions'—i.e., the statutory provisions themselves, and thus places no restriction on the district court's authority to enjoin *agency action* found to be unlawful"); *Texas v. Biden*, -- F. Supp. 3d --, 2021 WL 3603341, at *15 (N.D. Tex. Aug. 13, 2021) ("[T]his section does not apply because Plaintiffs are not seeking to *restrain* Defendants from enforcing Section 1225. Plaintiffs are attempting to make Defendants *comply* with Section 1225."); *see also Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015) (classwide injunction correcting IJs' erroneous interpretation that release under Section 1226(a)(2) necessarily requires a monetary bond, ignoring the conditional parole clause at 1226(b)(2)(B)).

Petitioners err in arguing that the court of appeals' interpretation rests on a distinction between prohibitory and compulsory injunctions. Pet'rs Br. 17. The critical distinction is not whether the court orders the agency to take or refrain from taking action, but rather whether the injunction interferes with the *operation* of the statute, or instead merely orders the agency to implement the statute.

Contrasting language in neighboring provisions of Section 1252, enacted at the same time, reinforces this point. Other subsections bar judicial review of *both* the "implementation" and "operation" of another section of the statute. *See* 8 U.S.C. 1252(a)(2)(A)(i) (specifying no court shall have jurisdiction to review any "cause or claim relating to the *implementation or operation* of an [expedited order of removal]" (emphasis added)); *see also id.* 1252(e)(3) (specifying the forum for challenges to regulations, policies and procedures to "implement" expedited removal statute). In contrast, 1252(f)(1) addresses only injunctive relief that would enjoin or restrain "the operation of" the statute. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). Petitioners' argument that the "term 'operation,' in this context, is synonymous with . . . implementation," Pet'rs Br. 18, cannot be squared with Congress's deliberate choice to use more circumscribed language in Section 1252(f)(1). Petitioners' interpretation would impermissibly render the term "implementation" superfluous.

Petitioners argue that the statute's first phrase, "[r]egardless of the nature of the action or claim or identity of the party or parties," is evidence that it encompasses more than challenges to the statute

itself. Pet'rs Br. 19. But that language simply means that where a claim would enjoin the statute's operation, it cannot support injunctive relief, regardless of the action or claim and identity of the parties. It provides no reason to distort the meaning of Congress's choice to limit its restriction to suits enjoining "the operation" of the relevant statutes. As long as the relief requested does not enjoin the operation of Section 1231(a)(6), it is permitted.

Petitioners contend that the court of appeals' interpretation disfavors constitutional claims as compared to statutory claims. *See id.* at 21. Not so. Classwide injunctions are prohibited if they seek to enjoin the statute's operation, regardless of whether the claim for that injunction arises under the Constitution or a statute that would otherwise require an injunction against the statute's enforcement (as might the Religious Freedom Restoration Act, Rehabilitation Act, or other immigration statutes). At the same time, injunctions for claims under both the Constitution and statutes remain available if they do *not* enjoin the "operation of" Sections 1221–1231. Nor does the court's interpretation run "counter to IIRIRA's 'theme' of protecting the Executive's discretion," *see* Pet'rs Br. 25, as the agency has no discretion to violate the statute, *see Owen v. City of Independence*, 445 U.S. 622, 649 (1980) (observing that a governmental entity "has no 'discretion' to violate the Federal Constitution").

Petitioners also err in asserting that the court of appeals' interpretation "seriously undermines Section 1252(f)(1)'s function as a jurisdictional bar." Pet'rs Br. 21. As explained *supra* Part II.A., Section 1252(f)(1) is not a jurisdictional bar, but rather a limit on relief. Indeed, even under Petitioners' reading, courts may address the merits with respect to declaratory relief, and may grant injunctions on behalf of individual plaintiffs. Petitioners' complaint that litigants may seek to cloak a constitutional claim in statutory clothing, *see id.* at 23, fails to recognize that the constitutional avoidance canon is a tool for interpreting statutes, not enjoining them.[11]

The legislative history of Section 1252(f)(1) further supports this interpretation. The House Committee report on the bill that produced Section 1252(f)(1) includes the following explanation:

> [The provision] also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal *procedures established in this legislation*. . . . [S]ingle district courts or courts of appeal do not have authority to enjoin *procedures established by Congress* to reform the process of removing illegal aliens from the U.S.

[11] Similarly, the court of appeals' ruling does not undermine the statute's "channeling" functions. *See* Pet'rs Br. 14. In *Rodriguez*, this Court has already recognized that these kinds of claims are not justiciable in removal proceedings, but must instead be brought in federal court. 138 S. Ct. at 840.

H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (emphasis added). As Professor Neuman stated,

> This explanation suggests the purpose of the provision was to prohibit injunctions that would broadly prevent the application of the new statutory procedures designed by Congress, on the basis of constitutional challenges that the Supreme Court had not yet resolved, rather than to prevent injunctions against unlawful implementation of those procedures by regulations that conflict with the statute.

Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1683 (2000). Here, the court of appeals did not "enjoin procedures established by Congress"; rather, it simply required the agency to conform its conduct to the statute as properly interpreted.

The Court recognized this distinction in *Rodriguez*, as it did not question the court of appeals' conclusion that 1252(f)(1) "did not affect its jurisdiction over respondents' *statutory* claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.'" 138 S. Ct. at 851 (citation omitted). Here too, the lower courts did not "enjoin or restrain the operation of" Section 1252(f)(1). Instead, they merely required that the agency comply with Section 1231(a)(6).

C. Section 1252(f)(1) does not bar classwide injunctive relief for persons who are already in removal proceedings.

Finally, Section 1252(f)(1) does not apply because it contains an exception, even where relief does "enjoin or restrain the operation of" an enumerated statute, so long as the relief is limited to individuals who already face the enforcement action. Because each class member is "an individual alien against whom proceedings under such part have been initiated," the injunction falls within the statute's exception.

By its terms, the exception clause ensures that Section 1252(f)(1)'s limitation on relief extends only to those who are *not* in removal proceedings. "Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied." *Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000). In short, Congress sought to restrict *pre-enforcement* challenges to certain immigration statutes by persons *not* in removal proceedings, and by organizations, in light of recent cases brought by such individuals and organizational plaintiffs. *See, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 47–51 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487–88 (1991); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1026 (5th Cir. 1982).

Petitioners contend this Court already decided the scope of Section 1252(f)(1) in *Rodriguez*, Pet'rs Br. 26, but "[t]his mistakes the reservation of a question with its answer," *Clark*, 543 U.S. at 378. *Rodriguez* made clear that the question is unresolved, quoting dicta in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999),[12] and remanding to the court of appeals to consider "in the first instance" "whether it may issue classwide injunctive relief based on respondents' constitutional claims." 138 S. Ct. at 851. In *Rodriguez*, as in *AADC*, this Court had no occasion to address the exception clause.

Petitioners also err in reading the exception clause to prohibit all classwide injunctive relief under the statute. When Congress has sought to prohibit class relief in the immigration setting, it has said so unequivocally. A neighboring subsection of Section 1252, adopted by the same Congress, bars courts from "certify[ing] a class under Rule 23 . . . in any action for which judicial review is authorized under a subsequent paragraph of this subsection." 8 U.S.C. 1252(e)(1)(B). Section 1252(f)(1) cannot be read to create a *sub silentio* ban on injunctive relief for class actions when the same Congress *explicitly* imposed

[12] *AADC* was not a class action, and its reference to Section 1252(f)(1) stated only that the statute did not provide an affirmative grant of subject matter jurisdiction. 525 U.S. at 481–82.

limits on class actions in another subsection of the very same statute. *See Nken*, 556 U.S. at 430–31.

Petitioners' attempt to find a classwide injunction prohibition in the phrase "an individual alien" also fails. If Petitioners were correct that the statute limits injunctive relief to only one individual at a time, it would bar such relief not just in class actions, but in any case involving *two or more* plaintiffs. If two noncitizens filed suit together raising the same claim—perhaps because they are in the same family—the court could not issue a single injunction affording both the same relief. And if class members filed dozens of separate but materially indistinguishable lawsuits challenging detention without a custody hearing, Section 1252(f)(1) would, under Petitioners' reasoning, prohibit courts from consolidating the cases and issuing one injunction, and instead require district courts to enter dozens of identical "individual" injunctive orders. *Cf. Zadvydas*, 533 U.S. at 686 (describing lower court decision where "panel of five judges in the Federal District Court . . . considering Ma's and about 100 similar cases together, issued a joint order"). Congress would have to speak far more clearly to require such a truly bizarre outcome involving tremendous waste of judicial resources. *See United States v. Wilson*, 503 U.S. 329, 334 (1992).

Moreover, Congress wrote Section 1252(f)(1) against the backdrop of this Court's holding that references to "any individual" or "any plaintiff" do *not* eliminate courts' authority under Rule 23 to address

claims by a class of individuals. *See Califano*, 442 U.S. at 700 ("The fact that the statute speaks in terms of an action brought by 'any individual' . . . does not indicate that the usual Rule providing for class actions is not controlling . . . ."). "Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them." *Id*. The Court thus made clear the word "individual" does not constitute an "express limitation on class relief." *Id.* at 699–700.

Petitioners seek to distinguish *Califano* by emphasizing that the statute at issue used "individual" as a noun rather than an adjective. Pet'rs Br. 30. But they cannot explain why Congress would elsewhere have used the modifier "individual" in a way that plainly adds no independent content, such that it can be deleted with no effect on a statute's meaning. *See, e.g.*, 8 U.S.C. 1601(4) (statutory pronouncement that public-benefits rules were "incapable of assuring that individual aliens not burden the public benefits system"); *cf*. *id*. 1446(a) (allowing Attorney General to "waive a personal investigation in an individual [naturalization] case or in such cases or classes of cases as may be designated by him"). As "[t]he Court has often recognized: 'Sometimes the better overall reading of the statute contains some redundancy.'"

Barton v. Barr, 140 S. Ct. 1442, 1453 (2020) (citation omitted).[13]

Thus, the statute's reference to an "individual alien" does not preclude relief to more than one individual in the same case as long as each class member seeking relief is an individual noncitizen against whom the government has initiated proceedings.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Dated: November 22, 2021

[13] Moreover, Title 8 routinely uses the terms "individual" and "alien" interchangeably. *See, e.g.*, 8 U.S.C. 1738 (providing that "immediately upon the arrival in the United States of an *individual* admitted [as a refugee], or immediately upon an *alien* being granted asylum . . . , *the alien* will be issued an employment authorization document" (emphases added)); 8 U.S.C. 1252c(a) (authorizing State and local law enforcement officials to detain certain noncitizens "only for such period of time as may be required for the Service to take the *individual* into Federal custody for purposes of deporting or removing the *alien* from the United States" (emphases added)).

Respectfully submitted,

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