

NONCITIZENS' RIGHTS IN THE FACE OF PROLONGED DETENTION: *JOHNSON V. ARTEAGA-MARTINEZ*

SAMANTHA L. FAWCETT*

I. INTRODUCTION

Under the Immigration and Nationality Act (the “INA”), codified in part at 8 U.S.C. § 1231, the federal government generally has ninety days to successfully deport a detained noncitizen who has reentered illegally after being removed once before.¹ While exceptions to this time limit exist, the United States Supreme Court determined in 2001 that detention under Section 1231 cannot be indefinite.²

Now, more than two decades later, the Court must elaborate further. In *Johnson v. Arteaga-Martinez*,³ the Court must decide how long a detainee can last beyond the ninety-day statutory limit while a detainee seeks relief from deportation through a procedure called a ‘withholding of removal’ (also known as “withholding-only relief”). An immigration judge determines the outcome of a withholding of removal claim, and if granted, withholding-only relief provides that a person cannot be deported to their home country.⁴ To secure withholding-only relief, a noncitizen must establish a fear of violence in

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1. 8 U.S.C. § 1231(a)(1)(A). As a general note, “alien” is used throughout the statutes and cases at issue. In recognition of the dehumanization and harm the word inflicts, when not quoting directly from another source, the author will use the words “noncitizen” or “individual.”

2. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

3. *Arteaga-Martinez v. Warden York Cty. Prison*, No. 19-1054, 2019 WL 13031922, 1 (3d Cir. Aug. 20, 2019), *cert. granted sub nom. Johnson v. Arteaga-Martinez*, 142 S. Ct. 920 (Aug. 23, 2021) (No. 19-896).

4. AMERICAN IMMIGRATION COUNSEL AND NATIONAL IMMIGRANT JUSTICE CENTER, *THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL 2* (2020).

their home country.⁵ Once established, the United States government cannot deport the noncitizen to their home country without violating the United Nations Convention against Torture.⁶

Arteaga-Martinez concerns a specific part of the INA, codified as Section 1231, that allows the government to detain certain noncitizens past the original ninety day removal period.⁷ In the 2001 case *Zadvydas v. Davis*, the Supreme Court ruled that Section 1231 implicitly does not allow indefinite detention of a noncitizen.⁸ In reaching this conclusion, the Court relied on the doctrine of constitutional avoidance.⁹ Specifically, the Court held that, while the statute did not prescribe a time frame for detention, serious constitutional concerns would arise under the Fifth Amendment’s Due Process Clause if the government were to indefinitely hold a noncitizen.¹⁰ Because Section 1231 left room for ambiguity, the Court was able to utilize a reading that avoided consideration of whether the statute violated due process.

Noncitizens waiting for their withholding-only proceedings fall under the purview of the *Zadvydas* rule.¹¹ After *Zadvydas*, the Department of Homeland Security (“DHS”) created a process for those detained under Section 1231 with pending withholding-only relief applications to apply for interim release.¹² Recently, the Third and Ninth Circuits both found that this DHS process violates Section 1231 because it does not provide the opportunity for an impartial hearing on interim release after six months of detention.¹³ Though *Arteaga-Martinez* directly concerns only whether the Third Circuit’s interpretation is accurate, both Circuits will be affected by the decision of the Court. Ultimately, the Court should adopt the Third Circuit’s holding.¹⁴

5. 8 U.S.C. § 1231(b)(3)(A).

6. *Id.*

7. See 8 U.S.C. § 1231(a)(6) (allowing for the removal of a noncitizen “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.”).

8. *Zadvydas*, 533 U.S. at 690.

9. *Id.* at 689.

10. *Id.* at 680.

11. See *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021) (holding that these individuals fall under the purview of Section 1231).

12. See, e.g., 8 C.F.R. 241.13.

13. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

14. The Supreme Court also granted certiorari this term to another case arising from the Ninth Circuit that also concerns detention under Section 1231(a)(6). See generally *Garland v. Gonzalez*, No. 20-322 (U.S. argued Jan. 11, 2022). *Gonzalez* additionally poses a question

II. FACTS AND PROCEDURAL BACKGROUND

Respondent Antonio Arteaga-Martinez is a citizen of Mexico who has entered the United States four times.¹⁵ After living in the United States for ten years,¹⁶ Arteaga-Martinez left to visit an ill family member in Mexico.¹⁷ While there, Arteaga-Martinez and his family were attacked by a criminal street gang, and he was beaten, robbed, and had his car stolen.¹⁸ The gang left a note with a death threat, telling him not to report them to the police.¹⁹ Fearful of further violence, Arteaga-Martinez reentered the United States in 2012.²⁰ He was apprehended at the border and removed under an expedited removal order.²¹ However, Arteaga-Martinez alleges he reentered the United States later that same year.²² In 2018, Immigration and Customs Enforcement (“ICE”), an agency within DHS, arrested and detained him.²³

At the time of his arrest, Arteaga-Martinez had continuously lived in the United States for nearly six years, had no criminal record other than traffic violations, and was expecting the birth of his first child in the United States.²⁴ As an order of removal had previously been issued against him,²⁵ ICE reinstated his prior removal order.²⁶ While in detention, Arteaga-Martinez voiced his fear of violence in Mexico.²⁷

An asylum officer determined Arteaga-Martinez had reasonable fear of persecution and torture in Mexico during an interview.²⁸ Arteaga-Martinez applied for withholding of removal under Section

regarding class action lawsuits. *Id.* The two cases have not been consolidated.

15. These entries were as follows: 1) in February 2000, after which he was apprehended and voluntarily returned to Mexico; 2) in April 2001, after which he voluntarily returned to Mexico ten years later; 3) in July 2012, where he was stopped at the border and removed; and 4) in September 2012. Brief for Petitioners at 6, *Johnson v. Arteaga-Martinez*, No. 19-896 (U.S. argued Jan. 11, 2022) [hereinafter Brief for Petitioners].

16. Brief for Petitioners, *supra* note 15, at 6.

17. Brief for Respondent at 8, *Johnson v. Arteaga-Martinez*, No. 19-896 (U.S. argued Jan. 11, 2022) [hereinafter Brief for Respondent].

18. *Id.*

19. *Id.* at 8–9.

20. *Id.* at 8.

21. Brief for Petitioners, *supra* note 15, at 6.

22. *Id.*

23. *Id.*

24. *Id.*

25. See 8 U.S.C. § 1231(a)(5) (stating that when the government finds a noncitizen “has reentered the United States illegally after having been removed or having departed voluntarily[] under an order of removal, [this] prior order . . . is reinstated from its original date and is not subject to being reopened or reviewed.”). See also discussion *infra* III. Legal History.

26. Brief for Petitioners, *supra* note 15, at 6.

27. Brief for Respondent, *supra* note 17, at 8.

28. *Id.* at 9.

1231(b)(3).²⁹ Under this statute, with limited exceptions,³⁰ the American government cannot remove a noncitizen to a country where his or her life or freedom would be threatened.³¹ DHS informed Arteaga-Martinez of an upcoming administrative review to assess his flight risk.³² Although the DHS review process did permit his release,³³ Arteaga-Martinez was denied release without a hearing a month later.³⁴

As Arteaga-Martinez's time in detention neared six months without a withholding-only hearing, he moved unopposed for a bond hearing to determine if he could be released while waiting.³⁵ The magistrate judge noted that in accordance with *Guerrero-Sanchez v. Warden York County Prison*,³⁶ because Arteaga-Martinez was subject to a reinstated removal order and was detained under Section 1231(a), he was "entitled to a bond hearing before an Immigration Judge after prolonged detention, which is generally after six months of custody."³⁷ The magistrate judge thus recommended that Arteaga-Martinez receive a bond hearing.³⁸ The District Court then adopted the magistrate report and recommendation in its entirety, ordering an individualized bond hearing in accordance with *Guerrero-Sanchez*.³⁹ Arteaga-Martinez motioned, again unopposed, for summary affirmation of the order of the District Court, which the Third Circuit granted, noting that neither party disputed that *Guerrero-Sanchez* controls.⁴⁰

Arteaga-Martinez received a bond hearing in November 2018, in which it was ordered that he be released on bond until his withholding

29. *Id.*

30. The exceptions in this statute are not relevant in this case.

31. 8 U.S.C. 1231(b)(3)(A) ("Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

32. Brief for Respondent, *supra* note 17, at 9.

33. See discussion *infra* III. Legal History.

34. Brief for Respondent, *supra* note 17, at 9.

35. *Id.* at 10.

36. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018) (holding that Section 1231(a)(6) requires detainees awaiting withholding of removal decisions to receive impartial bond hearings by immigration judges after six months of detention).

37. Petition for Writ of Certiorari at Appendix C, 4a, *Johnson v. Arteaga-Martinez*, No. 19-896 (U.S. argued Jan. 11, 2022) [hereinafter *Petition for Writ of Certiorari*].

38. *Id.* at Appendix C, 5a.

39. *Id.* at Appendix B, 3a.

40. *Arteaga-Martinez v. Warden York Cty. Prison*, No. 19-1054, 2019 WL 13031922, 1 (3d Cir. Aug. 20, 2019).

of removal application was resolved.⁴¹ To this day, Arteaga-Martinez has not received a hearing on withholding-only relief: His hearing was postponed, then rescheduled to August 2021, and is now planned for May 2023.⁴²

In the interim, Petitioners (the acting director of ICE, the Warden of York County Prison, the Field Director of ICE, and the Acting Secretary of Homeland Security) appealed the Third Circuit's decision to the Supreme Court in 2020.⁴³ The Court granted certiorari.⁴⁴

III. LEGAL HISTORY

The Immigration and Nationality Act provides a framework for removal of noncitizens from the United States.⁴⁵ The Act prescribes a certain removal procedure for those who have entered the United States previously, were removed, but have since reentered.⁴⁶ Under 8 U.S.C. § 1231(a)(5), “[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily[] under an order of removal, the prior order . . . is reinstated . . . and is not subject to being reopened or reviewed.”⁴⁷ The statute mandates that the individual be removed within a period of ninety days, during which they may be detained.⁴⁸

However, there is an exception for a noncitizen who “expresses a fear of returning to the country [of origin].”⁴⁹ In such instances, “the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture.”⁵⁰ A “reasonable fear of persecution or torture” exists where

41. Brief for Respondent, *supra* note 17, at 10–11.

42. *Id.*

43. Petition for Writ of Certiorari, *supra* note 37, at II.

44. *Johnson v. Arteaga-Martinez*, 210 L. Ed. 2d 1009, 1 (Aug. 23, 2021).

45. *See* 8 U.S.C. § 1101 (describing the general provisions of the Act).

46. 8 U.S.C. § 1231(a)(5).

47. *Id.*

48. *Id.* (a)(1)–(2).

49. *Id.* (b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). There are exceptions to this general rule, none of which are relevant here, but are listed under 8 U.S.C. § 1231(b)(3)(B) (including items such as if “the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion,” among others).

50. 8 C.F.R. § 241.8(e) (noting reasonable fear of persecution or torture is to be determined “pursuant to § 208.31 of this [C]hapter.”).

the noncitizen “establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.”⁵¹ Once qualified, the noncitizen cannot be removed to the original country under any circumstance.⁵²

Under this legal regime, the question arises: how long past ninety days may a detainee be held as their application is evaluated? Section 1231(a)(6) allows the government to continue detention after ninety days, reading in full:

An alien ordered removed who is inadmissible under [S]ection 1182 of this title, removable under [the INA] . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may* be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

After the ninety day removal period expires, Section 1231(a)(6) provides that the government may either release a noncitizen under supervision *or* continue to detain a noncitizen who: 1) is inadmissible; 2) is removable (due to status, entry condition, criminal conduct, or national security concerns); or 3) is a danger to the public or a flight risk.⁵³ Noncitizens falling outside of these categories are automatically subject to release after the ninety day removal period, within terms of supervision.⁵⁴

For individuals who fall *within* these categories, the statute does not expressly prescribe how long they can be detained after the ninety-day

51. *Id.* § 208.31(c).

52. 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove . . . if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). But this provision does not stop removal to another country where there is no legitimate threat. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2286 (2021) (“[W]ithholding-only relief is country-specific It says nothing, however, about the antecedent question whether an alien is to be removed from the United States.”).

53. *See, e.g., Guzman Chavez*, 141 S. Ct. at 2281 (“[T]he statute provides that an alien may be detained beyond the removal period or released under supervision if he is (1) inadmissible, (2) removable as a result of violations of status requirements, entry conditions, or the criminal law, or for national security or foreign policy reasons, or (3) a risk to the community or unlikely to comply with the removal order.”).

54. *See* 8 U.S.C. § 1231(a)(6) (providing no means of detention for those falling outside the prescribed category); *Guzman Chavez*, 141 S. Ct. at 2286 (“If no exception applies, an alien who is not removed within the [ninety] day removal period will be released subject to supervision.”). The terms of supervision include items such as appearing periodically before an immigration official. 8 U.S.C. § 1231(a)(3).

removal period has expired.⁵⁵ But, in *Zadvydas v. Davis*, the Supreme Court held that Section 1231(a)(6) must be read with an “implicit limitation,” without which “serious” due process concerns would arise. The Court elaborated that detention past ninety days must be limited “to a period *reasonably necessary* to bring about that alien’s removal from the United States.”⁵⁶ The Court identified that a six-month detention would be presumptively reasonable, but that after six months, if it is determined that “there is no significant likelihood of removal in the reasonably foreseeable future,” the noncitizen must be released.⁵⁷ Importantly, this release does not then mean the noncitizen is entirely free.⁵⁸

The Department of Homeland Security has since provided regulations implementing the *Zadvydas* understanding of Section 1231(a)(6) in the context of applicants for withholding of removal. Under DHS regulations, such an applicant may file a written request for interim release and must show that “there is no significant likelihood of removal in the reasonably foreseeable future.”⁵⁹ The regulations provide for the possibility of an interview,⁶⁰ the factors that may be taken into consideration,⁶¹ and the process for a decision by DHS.⁶²

In 2018, however, the Third Circuit found these regulations inconsistent with Section 1231(a)(6) in *Guerrero-Sanchez*.⁶³ The Third Circuit noted that the regulations created due process issues by placing the burden on the noncitizen to apply for release, and by providing no basis for appeal from the decision of a “not ostensibly neutral” DHS employee.⁶⁴ The Third Circuit thus concluded the DHS process raised

55. See 8 U.S.C. § 1231(a)(6) (providing no period of time).

56. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (emphasis added).

57. *Id.* at 701.

58. See 8 U.S.C. § 1231(a)(3) (providing terms of supervision a noncitizen is subject to upon release).

59. 8 C.F.R. 241.13(d)(1).

60. *Id.* (e)(5).

61. *Id.* (f).

62. *Id.* (g).

63. See *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 227 (3d Cir. 2018) (declining to defer to DHS regulations in part because “[t]he DHS regulations that implement the Government’s detention authority under § 1231(a)(6) themselves ‘raise serious constitutional concerns.’”) (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011)).

64. *Id.* (“These regulations . . . provide administrative custody reviews after 90 days, 180 days, and 18 months . . . by DHS employees who are not ostensibly neutral decision makers such as immigration judges. Importantly, the regulations also place the burden on *the alien*, rather than the Government, to prove that he or she is *not* a flight risk or a danger to the society . . . and ‘there is no appeal from [the] . . . decision.’”) (internal citations omitted).

serious constitutional concerns.⁶⁵ Consequently, the Court held that *Chevron* deference, the typical judicial deference afforded to reasonable interpretations by an agency of an ambiguous statute,⁶⁶ could not be applied to the DHS regulations because a court cannot “defer to an agency’s interpretation of a statute that raise[s] serious constitutional doubts.”⁶⁷

The Third Circuit relied on the canon of constitutional avoidance to strike down the regulations as inconsistent with Section 1231(a)(6).⁶⁸ Specifically, the court declined to determine that, even if the DHS regulations were consistent with Section 1231(a)(6), the statute *itself* may be unconstitutional on due process grounds.⁶⁹ Instead, adopting the Ninth Circuit’s interpretation,⁷⁰ and influenced by *Zadvydas*,⁷¹ the Third Circuit held that Section 1231(a)(6) comports with due process⁷² because it requires detainees awaiting withholding of removal decisions to receive impartial bond hearings by immigration judges after six months of detention.⁷³ To continue to keep a noncitizen detained, the government has the burden of proving that the noncitizen is a flight risk or danger⁷⁴ by clear and convincing evidence.⁷⁵ If the government fails to do so, the noncitizen must be released under supervision until their hearing.⁷⁶

A recent Supreme Court case, *Johnson v. Guzman Chavez*, may

65. *Id.*

66. *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). The judiciary must reject administrative interpretations based on impermissible interpretations of the statute. *Id.*

67. *Guerrero-Sanchez*, 905 F.3d at 226.

68. *Id.* at 223.

69. *See id.* (“We therefore find that it may be the case that the Due Process Clause prohibits prolonged detention under § 1231(a)(6) without a bond hearing Despite the constitutional concerns raised . . . we decline to decide whether [] continued confinement violated the Due Process Clause We assume that Congress does not intend to pass unconstitutional laws We therefore invoke the canon of constitutional avoidance”).

70. *Id.* at 224.

71. *See id.* at 226 (“Indeed, in *Zadvydas*, the Supreme Court, while interpreting § 1231(a)(6) in a related context, adopted a presumption that aliens could be reasonably detained without a hearing for six months”).

72. *Id.* at 227.

73. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018).

74. *Id.*

75. *Id.* n. 12.

76. *Id.* at 224.

influence how the Court decides *Arteaga-Martinez*. In *Guzman Chavez*, the Court considered if 8 U.S.C. § 1226 or 8 U.S.C. § 1231 applied to deported noncitizens who reentered the United States and were ordered removed again, but who sought withholding of removal based on fear of persecution.⁷⁷ The Court held that these individuals, who were in situations similar to *Arteaga-Martinez*'s, are governed by Section 1231.⁷⁸ Notably, but in dicta, the Court stated that under Section 1231, an individual "is not entitled to a bond hearing."⁷⁹

IV. PETITIONERS' ARGUMENT

In *Arteaga-Martinez*, the Supreme Court must examine the Third Circuit's interpretation of Section 1231 and decide whether a noncitizen awaiting a withholding of removal decision is entitled to a bond hearing by an immigration officer after six months of detention to determine suitability for interim release. Petitioners contend that the Third (and Ninth) Circuits critically erred in their common interpretation of the statute and misused the doctrine of constitutional avoidance. They further assert that the DHS regulations are valid as written and should be followed. Their argument has four main components: 1) the circuit courts misinterpreted Section 1231; 2) new Supreme Court precedent requires upholding the DHS regulations; 3) the circuit courts erred in utilizing constitutional avoidance; and 4) *Zadvydas* does not require a bond hearing.

A. Statutory Argument

Petitioners argue that the Third and Ninth Circuits not only misinterpret Section 1231, but rewrite it.⁸⁰ They find four major statutory issues with the circuit courts' shared interpretation: 1) it creates additional unnecessary legal requirements, 2) it eliminates certain categories within the statute, 3) it shifts authority between agencies under the Executive Branch, and 4) by granting additional rights to noncitizens, it undermines the plain words of the statute.⁸¹

First, Petitioners argue that Section 1231(a)(6)'s plain language "says nothing about six-month cutoffs, bond hearings, exceptions for noncitizens whose release or removal is imminent, immigration judges,

77. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021).

78. *Id.*

79. *Id.*

80. Brief for Petitioners, *supra* note 15, at 10.

81. *Id.* at 9–13.

or proof by clear and convincing evidence.”⁸² They explain that Congress knows how to place these requirements into statutes, citing laws that explicitly require a hearing before an immigration judge⁸³ or proof by clear and convincing evidence.⁸⁴ Petitioners argue that, if Congress wanted to include these requirements in Section 1231(a)(6), they would have explicitly done so.

Next, Petitioners argue the circuit court decisions ignore key provisions in Section 1231. Petitioners assert that Section 1231(a)(6) only applies to certain noncitizens listed in the statute. They contend that the circuit court opinions only recognize danger to the community and flight risk as reasons for continually holding someone after the six-month period, effectively writing out the other grounds from the statute.⁸⁵

Third, Petitioners note that the circuit courts improperly shifted authority within the Executive Branch.⁸⁶ In Section 1231(a)(6), Congress initially allocated enforcement authority to the Department of Justice (“DOJ”),⁸⁷ but later transferred it to DHS under 6 U.S.C. § 557.⁸⁸ The circuit court opinions give power back to DOJ by requiring that an immigration judge decide if a noncitizen poses a flight risk or danger, rather than have DHS decide.⁸⁹

Fourth and finally, Petitioners point to Section 1231(h), which prescribes statutory construction: “[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”⁹⁰ Petitioners believe the circuit courts created a new right in contravention of this section when they each found that the statute requires a bond hearing overseen by a judge in which the government must meet the burden of proof.

82. *Id.* at 10.

83. *See id.* (citing as examples 8 U.S.C. § 1225(b)(1)(B)(iii)(III), § 1229a(a)(1), and § 1232(a)(5)(D)(i)).

84. *See id.* (citing as an example 8 U.S.C. § 1229a(c)(3)(A)).

85. Brief for Petitioners, *supra* note 15, at 11. Petitioners list these grounds for holding after the removal period to include “when the noncitizen is (1) ‘inadmissible’; (2) ‘removable’ for national-security or foreign-policy reasons or for violating status requirements, entry conditions, or certain criminal laws; (3) ‘a risk to the community’; or (4) ‘unlikely to comply with the order of removal’ (i.e., a flight risk).” *Id.*

86. *Id.*

87. 8 U.S.C. § 1231(a)(6).

88. 6 U.S.C. § 557.

89. Brief for Petitioners, *supra* note 15, at 12.

90. 8 U.S.C. § 1231(h).

B. Supreme Court Precedent

In addition to their statutory arguments, Petitioners cite both recent and longstanding Supreme Court precedent to support their position. Specifically, Petitioners assert the lower court interpretation contradicts the Court's 2021 decision in *Guzman Chavez*.⁹¹ As noted earlier, *Guzman Chavez* concerned whether individuals like Arteaga-Martinez fell under the purview of Section 1231.⁹² The Court in dicta stated that, if so, such individuals would not be entitled to a bond hearing.⁹³ Further, Petitioners cite the 1978 case *Vermont Yankee v. Natural Resources Defense Council*,⁹⁴ in which the Court held that, while agencies could grant additional procedural rights, "reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."⁹⁵ While there may be circumstances where a reviewing court could do so, the Supreme Court noted that such circumstances would be "extremely rare."⁹⁶ Petitioners thus argue that while DHS can create procedures like bond hearings, courts cannot.⁹⁷

C. Incorrect Use of Constitutional Avoidance

Both the Third and Ninth Circuits used the canon of constitutional avoidance to read Section 1231 to require a bond hearing.⁹⁸ Petitioners, however, note that this canon should only be used when a statute has many possible interpretations, allowing a court to choose one that does not violate the Constitution.⁹⁹ Here, Petitioners assert there is *no* plausible interpretation of Section 1231(a)(6) that would require a bond hearing, and so the circuit courts created, rather than chose, an interpretation.¹⁰⁰ Petitioners emphasize that the DHS regulations *do*

91. Brief for Petitioners, *supra* note 15, at 14.

92. *See, supra*, III. Legal History.

93. *Id.*

94. Brief for Petitioners, *supra* note 15, at 15.

95. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (citing *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), and *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973)).

96. *Id.*

97. Brief for Petitioners, *supra* note 15, at 15.

98. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223–24 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011).

99. Brief for Petitioners, *supra* note 15, at 16 ("Constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction[.]' It helps a court 'choose between competing plausible interpretations of a statutory text.'") (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842–43 (2018)) (internal citations omitted).

100. *Id.* at 17.

comply with due process.¹⁰¹ While acknowledging the Due Process Clause requires a neutral adjudicator, Petitioners contend that administrative agencies frequently execute both investigative and adjudicative functions without bias, and assert that Respondent has provided no explanation as to why ICE cannot do so as well.¹⁰² Petitioners conclude that the “existing regulations provide . . . all the process that the Constitution requires.”¹⁰³

D. Zadvydas Does Not Require the Third and Ninth Circuit Rules

Finally, Petitioners assert that *Zadvydas* comprehensively explained detention time limits present in Section 1231(a)(6).¹⁰⁴ Petitioners note *Zadvydas* held continued detention is impermissible after removal is no longer foreseeable, and that after six months without “significant likelihood of removal in the reasonably foreseeable future,” the government must either rebut the showing that removal is no longer foreseeable or release the noncitizen.¹⁰⁵ But Petitioners assert that a bond requirement is *not* constitutionally mandated by *Zadvydas*,¹⁰⁶ and that the DHS regulations as currently written fully address all *Zadvydas* requirements.¹⁰⁷

V. RESPONDENT’S ARGUMENT

Meanwhile, Respondent asserts that a straightforward application of *Zadvydas* requires the Third and Ninth Circuit’s interpretation of Section 1231, as holding otherwise would make the statute violate due process. Specifically, Respondent argues that: 1) *Zadvydas* interpreted Section 1231(a)(6) to disallow unreviewable *prolonged* detention; 2) Section 1231(a)(6) requires either release or a bond hearing after prolonged detention; and 3) *Zadvydas* should be upheld, and neither the DHS regulations nor recent Supreme Court precedent require

101. *See id.* (arguing Section 1231(a)(6) satisfies the substantive component of the Due Process Clause and the existing regulations by DHS do not violate the procedural component of the Due Process Clause).

102. *Id.*

103. *Id.* at 21 (additionally noting “[t]o the extent exceptional cases arise, courts could consider as-applied constitutional challenges to continued detention under Section 1231(a)(6).”).

104. *Id.* at 22.

105. Brief for Petitioners, *supra* note 15, at 22 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)).

106. *Id.* at 23.

107. *See id.* at 23–24 (“This case instead involves the procedural protections accorded to detainees. *Zadvydas* . . . does not speak to that issue. And under this Court’s decisions that do address that issue, the existing regulations raise no serious constitutional doubts.”).

otherwise.

A. Zadvydas Interpreted Section 1231(a)(6) to Disallow Unreviewable Prolonged Detention

Respondent identifies the central holding of *Zadvydas* to be “that Section 1231(a)(6) implicitly limits the government’s authority to detain noncitizens beyond six months.”¹⁰⁸ Respondent notes that to allow prolonged detention would violate the Due Process Clause, which protects all “persons” within the United States.¹⁰⁹ The *Zadvydas* Court held that after six months, detention loses its presumption of reasonability.¹¹⁰ Respondent asserts that the Due Process Clause concerns at the center of *Zadvydas* are just as relevant, if not more, in the instant case.¹¹¹ Respondent emphasizes that, in his case, there is a risk of prolonged detention that bears no relation to a valid government objective such as preventing detainee flight or danger to the community.¹¹² Prolonged detention here creates “an impossible choice: [to] remain imprisoned (possibly for years) while the government adjudicates a right to withholding[-only] relief, or to submit to immediate removal despite the risk of persecution and torture.”¹¹³ Respondent concludes that the Petitioners’ approach subjects a noncitizen legally pursuing a withholding of removal claim to a prolonged detention that, in effect, “is no different from imprisonment.”¹¹⁴

B. Section 1231(a)(6) Requires Either Release or a Bond Hearing After Prolonged Detention

Respondent next argues that, for Section 1231(a)(6) to be constitutional, detention beyond six months *must* trigger either release or a bond hearing before a neutral decisionmaker.¹¹⁵ Respondent contends that under *Zadvydas*, the applicable question for release is whether removal is “reasonably foreseeable.”¹¹⁶ Respondent identifies

108. Brief for Respondent, *supra* note 17, at 14.

109. *Id.* at 14–15 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693–94, 697 (2001)).

110. *Id.* at 16.

111. *Id.*

112. *Id.* at 17.

113. *Id.* at 18.

114. *Id.*

115. Brief for Respondent, *supra* note 17, at 18.

116. *Id.* at 19.

that detainees who pursue a withholding of removal “have ‘no significant likelihood of removal in the reasonably foreseeable future’ for two reasons: [] the protracted and undefined duration of withholding-only proceedings, and [] the potential elimination of any meaningful chance of removal.”¹¹⁷

Withholding-only proceedings are time consuming: On average, the entire process lasts close to three years when reviewed by an appellate court.¹¹⁸ Respondent contends that this makes future removal “far from ‘reasonably foreseeable,’” and makes a withholding-only proceeding “indefinite” because the individual faces a detention of “unknown and protracted duration.”¹¹⁹ Further, once a noncitizen is successful in his or her claim, removal is close to impossible.¹²⁰ Respondent acknowledges that while removal to a third-party country is plausible, this outcome only results in 1.6 percent of cases; it is far more likely for individuals granted relief to live in the United States and legally work here.¹²¹ Thus, Respondent concludes that after a six-month period, there is more than sufficient evidence to show removal is not “reasonably foreseeable.”¹²²

Respondent further notes that outside of a national security context, the Court has never “authorized prolonged detention without an individualized hearing, before a neutral adjudicator, [and] at which the detainee has a meaningful opportunity to participate.”¹²³ Respondent argues Petitioners are unable to find an example of the Supreme Court supporting Petitioners’ position on this issue because the Court has never done so in light of due process concerns.¹²⁴

With these constitutional considerations in mind, Respondent

117. *Id.*

118. *Id.* at 20 (“The process regularly exceeds six months. A recent study found that detention following a reasonable fear determination lasted an average of 114 days when neither party appealed the immigration judge’s decision; 301 days when at least one party appealed and the BIA issued a final decision; 447 days when the BIA remanded the case and the immigration judge made a final decision; and 1,065 days when a U.S. court of appeals granted a petition for review.”).

119. *Id.* at 20–21.

120. *See id.* at 21 (noting that removal almost never occurs).

121. Brief for Respondent, *supra* note 17, at 21–22.

122. *See id.* at 22 (concluding that removal is “virtually certain never to occur” for these individuals).

123. *Id.* at 24.

124. *See id.* at 26 (“The government’s failure to identify a case consistent with its position is no surprise. Compared to the rights of individuals facing prolonged detention while they pursue statutory withholding-of-removal relief, the government has (at best) a weak interest in denying a bond hearing before a neutral decisionmaker. In fact, such a hearing promotes, rather than compromises, the government’s interests in preventing flight and protecting the public.”).

concludes that the circuit courts appropriately practiced constitutional avoidance by interpreting Section 1231(a)(6) as requiring a bond hearing before a neutral decisionmaker.¹²⁵ Because serious constitutional concerns would arise from prolonged detention with no chance for a neutral adjudication,¹²⁶ and since there is a possible construction of the statute that requires adjudication, the statute can be saved from unconstitutionality.¹²⁷ Respondent emphasizes that “the bond review contemplated by Section 1231(a)(6) must be performed by a neutral party, not the jailer.”¹²⁸ The Third and Ninth Circuits thus properly interpreted the statute to comply with due process by requiring immigration judges to oversee bond hearings, since such judges have traditionally and impartially done so.¹²⁹

Respondent also argues that the circuit courts’ shared requirement that a clear and convincing standard be applied during bond hearings is proper for two reasons: 1) degree of proof in a proceeding is typically a judicial, not statutory, question;¹³⁰ and 2) since the bond hearings would concern a due process issue (civil detention), the burden is particularly appropriate.¹³¹

Lastly, Respondent refutes Petitioners’ claim that the Third and Ninth Circuits rewrote Section 1231(a)(6) by noting that the Supreme Court has already significantly interpreted the statute, and that circuit courts need not adopt a *tabula rasa* approach to interpretation.¹³² Rather, courts may continue to faithfully apply and interpret the statute in light of Supreme Court precedent.¹³³

125. *Id.* at 28.

126. *Id.*

127. Brief for Respondent, *supra* note 17, at 29–30. Citing the Third Circuit’s interpretation, Respondent asserts there are two textual footholds in Section 1231(a)(6) implying the need for a bond hearing: 1) two of the grounds that Section 1231(a)(6) gives for allowing continued detention include finding “a risk to the community or [that the alien is] unlikely to comply with the order of removal,” an assessment typically determined at a bond hearing; and 2) the statute provides for “terms of supervision,” which is the function of a bond hearing to determine. *Id.* at 30.

128. *Id.* at 31.

129. *See Id.* at 32 (“Despite the uniform practice, [Petitioners] now argue[] that Congress could not have intended immigration judges to perform custody reviews under Section 1231(a)(6) [Petitioners] did not raise that argument below, presumably because it is inapt And if there were any question whether Congress intended to eliminate that key due process protection of a neutral adjudicator, constitutional avoidance would compel the conclusion that Congress did not.”).

130. *Id.*

131. *Id.* at 33.

132. Brief for Respondent, *supra* note 17, at 34.

133. *See id.* at 34–35 (asserting that the *Zadvydas* decision demonstrated the Court’s

C. The DHS Regulations are an Unconstitutional Interpretation of the Statute, and Zadvydas Should be Affirmed.

Respondent asserts that the DHS regulations do not solve the due process issue within Section 1231(a)(6) for two reasons.¹³⁴ First, the regulations do not provide neutral review because DHS employees are not neutral decisionmakers:¹³⁵ ICE, “as the jailer, cannot be ‘neutral’ as a matter of law or logic.”¹³⁶ Second, the regulations place the burden of proof on the detainee,¹³⁷ a practice the Court has struck down in similar cases.¹³⁸

Respondent refutes Petitioners’ claim that recent Court decisions warrant a departure from *Zadvydas*.¹³⁹ He notes the issue in *Guzman Chavez* was whether noncitizens like himself were subject to detention under either Section 1226 or 1231. Since the Court in that case did not actually reach the issue of bond hearings, Respondent concludes that Petitioners improperly rest their argument on dicta.¹⁴⁰

Respondent also concludes that Section 1231(a)(6) bars prolonged detention, either by providing for supervised release or for a bond hearing before a neutral decisionmaker.¹⁴¹ He asserts that if the Court holds otherwise, on remand the Third Circuit must consider whether his prolonged detention without opportunity for an impartial bond hearing violates the Due Process Clause: in other words, whether Section 1231(a)(6), as written, is unconstitutional.¹⁴²

Thus, Respondent argues that Section 1231, to be constitutional, requires a bond hearing, while Petitioners argue that the plain language of Section 1231 does not permit a bond hearing requirement to be read into it.

VI. ORAL ARGUMENT

During oral arguments, the Justices focused on several issues. Some

willingness to interpret the statute and that the circuits are within their power to do the same in line with Supreme Court precedent).

134. *Id.* at 39.

135. *Id.*

136. *Id.* at 41.

137. *Id.* at 39.

138. Brief for Respondent, *supra* note 17, at 39 (citing *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001)).

139. *Id.* at 42.

140. *Id.*

141. *Id.* at 44.

142. *Id.*

expressed due process-related concerns, while others focused on the language of the statute, procedural posture, and how to apply caselaw precedent to the issue at hand.

A. *Petitioners' Argument*

During their oral argument, Petitioners identified the question presented as whether language in Section 1231(a)(6)—that some categories of noncitizens “may be detained beyond the removal period”—permits the requirement of a bond hearing after six months where the government bears the burden of presenting clear and convincing evidence.¹⁴³ They asserted the answer is simply no.¹⁴⁴ Chief Justice Roberts asked Petitioners whether the Court had already determined that the statute can be expanded past its plain terms in *Zadvydas*.¹⁴⁵ Justice Kagan reacted to Chief Justice Roberts’s inquiry, noting that the Court is dealing with the same statute as in *Zadvydas*, where the Court asserted the word “may” necessarily provides the ambiguity needed to take constitutional considerations into account.¹⁴⁶

In response, Petitioners asserted that *Zadvydas* is distinct from *Artega-Martinez* because in the former case, the Court based its decision on what it considered to be the purpose of Section 1231(a)(6): ensuring that the noncitizen is present for removal.¹⁴⁷ However, Petitioners contended that this consideration is not present in the instant case.¹⁴⁸ Justice Kagan immediately pushed back, asking if *Zadvydas* did not go further.¹⁴⁹ Petitioners responded that even if one takes the word “may” as an invitation to interpretation, this reading still does not permit the procedural rewrite proposed by Respondent.¹⁵⁰ Justice Sotomayor continued discussion of the *Zadvydas* holding, stating that “the basic point of *Zadvydas* is [that] you really can’t keep someone indefinitely without a reason,” and concluded by asking if the

143. Transcript of Oral Argument at 3, *Johnson v. Artega-Martinez*, No. 19-896 (argued Jan. 11, 2022).

144. *See id.* at 3–4 (asserting that the question answers itself and the lower court should be reversed).

145. *Id.* at 6.

146. *Id.* at 7–8.

147. *See id.* at 8–9 (“*Zadvydas* is distinct in an important respect in that there the Court . . . drew its interpretation from the logic of the statute, and it said the purpose of this statute is to ensure that the non-citizen is present at the time of removal And that connection is absent here.”).

148. *Id.*

149. Transcript of Oral Argument, *supra* note 143, at 9–10 (“So *Zadvydas* seems to . . . think of itself as extending beyond that very sort of core purpose of inquiry that you referred to.”).

150. *Id.* at 11.

Petitioners’ “position [is] that there is no process by which that type of judgment could be challenged?”¹⁵¹ Justice Barrett similarly wondered what would happen if a withholding procedure continued indefinitely or if there was no country available to take a detainee.¹⁵²

Justice Breyer asked for an estimate of how long it typically takes the government to find a place to remove someone like Respondent Arteaga-Martinez,¹⁵³ before remarking that both *Zadvydas* and the case here present the “same situation.”¹⁵⁴ Justice Breyer then asked Petitioners whether, before Arteaga-Martinez obtains withholding-only relief, they could hold him for as long as fifty years.¹⁵⁵ Petitioners asserted this case is different from *Zadvydas*, because here, Arteaga-Martinez is in detention pending a proceeding, whereas the detainee in the former case was experiencing open-ended detention.¹⁵⁶ Petitioners also clarified their position, arguing that holding a detainee pending a proceeding¹⁵⁷ is a process that takes on average 157 days, which is within the six month threshold.¹⁵⁸

Justice Breyer noted that Arteaga-Martinez’s hearing is not until 2023, “much more than six months [away].”¹⁵⁹ Justice Breyer then asserted *Zadvydas* recognizes that “an indefinite, perhaps permanent, deprivation of human liberty without any [] protection” presents an “obvious” constitutional issue.¹⁶⁰

Justice Sotomayor finished her questioning of Petitioners by bringing up practical considerations. She noted Petitioners were wrong to say the “average” case involving a detainee pending a proceeding is resolved within six months, as this is untrue for many people.¹⁶¹ Additionally, Justice Sotomayor noted that it is “hard to see how impoverished people, unfamiliar with the workings of this government, of this country, are going to find lawyers.”¹⁶² Justice Sotomayor concluded by calling Petitioners’ proposed DHS hearing akin to a

151. *Id.* at 13.

152. *Id.* at 16.

153. *Id.* at 19–20.

154. *Id.* at 21.

155. Transcript of Oral Argument, *supra* note 143, at 23.

156. *Id.* at 21.

157. *Id.*

158. *Id.* at 25–26.

159. *Id.* at 26.

160. *Id.* at 27–28. In contrast to this strong language, Justice Breyer then noted he is not “wedded” to Respondent’s interpretation but wanted to hear what the response was. *Id.* at 28.

161. Transcript of Oral Argument, *supra* note 143, at 31.

162. *Id.* at 32.

“theore[t]ic[al] offering” of benefit.¹⁶³

B. Respondent’s Argument

Respondent began his oral argument by asserting that he was in the exact same situation as the detainee in *Zadvydas*, and that Section 1231(a)(6) prohibits detention when there is “no significant likelihood of removal in the reasonably foreseeable future.”¹⁶⁴ Chief Justice Roberts asked about Section 1231(h), noting its command that nothing in Section 1231 should “be construed to create any substantive or procedural right.”¹⁶⁵ Respondent answered that this line of argument was rejected in *Zadvydas*,¹⁶⁶ but Chief Justice Roberts responded that this does not mean that Section 1231(h) has been read off the books.¹⁶⁷

Justices Kagan and Kavanaugh both expressed worry over the vagueness of the “reasonably foreseeable future” standard. Justice Kagan showed concern that Respondent was invoking a fact-based question—namely, whether he had no significant likelihood of removal in the “reasonably foreseeable future”—and that fact-based questions are “not the kind of thing we [the Supreme Court] usually do.”¹⁶⁸ Respondent identified this inquiry as a legal test rather than a fact-based question.¹⁶⁹ Justice Kavanaugh looked for clarification on the meaning of “reasonably foreseeable future,”¹⁷⁰ and emphasized “there could be chaos unless we say something more specific.”¹⁷¹

Justice Alito asked Respondent to reply to Petitioners’ argument that reading the bond hearing requirement into the statute violated *Vermont Yankee*.¹⁷² Respondent answered by arguing that *Vermont Yankee* does not bear on the question at hand, but if the Court were to find that it does, the Court should dismiss the writ of certiorari as improvidently granted, as the case would then present a threshold issue that was never “litigated because of the unique posture” of the case.¹⁷³

163. *Id.* at 33.

164. *Id.* at 33–34.

165. *Id.* at 35–36.

166. *Id.* at 36.

167. Transcript of Oral Argument, *supra* note 143, at 37.

168. *Id.* at 44.

169. *Id.* at 45.

170. *Id.* at 47–48.

171. *Id.* at 49.

172. *Id.* at 50 (referencing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

173. See Transcript of Oral Argument, *supra* note 143, at 52–54 (“[I]t doesn’t make sense to decide the logically downstream issue of bond hearings and all the procedural requirements that

Chief Justice Roberts commented in response that it would not be the first time the Court took up “the downstream issue before the upstream one.”¹⁷⁴

Justice Gorsuch asked whether the fact that Respondent is currently released moots his claim.¹⁷⁵ Respondent stated that the claim is not moot because “the government still seeks the power to re-detain him,”¹⁷⁶ noting this may be a better question for the Petitioner.¹⁷⁷ Justice Kagan separately remarked that “this Court [could think] about *Zadvydas* as . . . a precedent that needs to be applied but not one that is altogether comfortable and [that] should not be extended.”¹⁷⁸ Respondent took Justice Kagan’s comment as an opportunity to clarify that he is not asking the Court “[to] revisit *Zadvydas* at all . . . but [to] apply the . . . core holding of *Zadvydas*.”¹⁷⁹ Justice Thomas asked along similar lines to Justice Kagan’s comment whether Respondent could “prevail had *Zadvydas* not been decided?”¹⁸⁰ Respondent frankly replied that if the Court were to overrule *Zadvydas*, he would lose, but that Petitioners have not asked the Court to overrule the case.¹⁸¹

C. Petitioners’ Rebuttal

During rebuttal, Justice Kavanaugh asked Petitioners to elaborate on their position that “the reasonably foreseeable standard” does not apply well in detention-pending proceedings, and if applied, would be a “watershed and upend the immigration system.”¹⁸² Petitioners replied that detention-pending proceedings are very common in the immigration system, and multiple statutes allow for them to take place.¹⁸³

VII. ANALYSIS OF ORAL ARGUMENTS

The Court’s questioning during oral arguments indicated a significant split in thinking amongst the Justices, but it appears that the

might go into that without deciding the logically antecedent question [], do they satisfy the main test of *Zadvydas*?”).

174. *Id.* at 54.

175. *Id.* at 57.

176. *Id.*

177. *Id.* at 58.

178. *Id.* at 62.

179. Transcript of Oral Argument, *supra* note 143, at 63.

180. *Id.* at 67.

181. *Id.* at 67–68.

182. *Id.* at 72.

183. *Id.* at 72–73.

Court may ultimately be poised to strip the rights of noncitizens. Chief Justice Roberts, and Justices Alito, Kavanaugh, and Thomas seemed to position themselves squarely with Petitioners. First, Justice Alito¹⁸⁴ and Chief Justice Roberts¹⁸⁵ focused on both the clear and convincing standard and *Vermont Yankee*, which could enable the Court to rule for Petitioners without addressing the holding of *Zadvydas*.

Second, Justice Kavanaugh found the implications of the “reasonably foreseeable future” standard “chaotic,”¹⁸⁶ and asked for expansion on the “watershed” implications for immigration matters.¹⁸⁷ Because the Justice not only indicated distaste with the “reasonably foreseeable future” standard, an element necessary for Respondent’s argument, but also focused on the impacts to ICE rather than the impact on detainees, Justice Kavanaugh likely will vote with Petitioners. Third, Justice Thomas’s only questions related to whether *Zadvydas* was necessary for Respondent to prevail,¹⁸⁸ indicating a willingness to treat *Zadvydas* as an outlier case, meaning he may side with Petitioners.

Meanwhile, Justices Sotomayor and Breyer indicated they favored Respondent’s position. Justice Sotomayor strongly criticized the practical impacts of Petitioners’ argument,¹⁸⁹ and while Justice Breyer indicated he was not “wedded” to Respondent’s argument, he expressed strong concern about constitutionality¹⁹⁰ and emphasized the similarities between the case at hand and *Zadvydas*.¹⁹¹

The two swing votes will likely be Justices Barrett and Kagan. Justice Barrett expressed concern over the possibility of indefinite detention,¹⁹² but also indicated interest in an as-applied constitutional rule.¹⁹³ Justice Kagan showed a willingness to consider bond hearings,¹⁹⁴ but expressed a discomfort with the *Zadvydas* holding.¹⁹⁵

Finally, Justice Gorsuch’s views remain unclear, as he only asked about the procedure of the case and indicated that the issue could be

184. *Id.* at 50.

185. Transcript of Oral Argument, *supra* note 143, at 54.

186. *Id.* at 49.

187. *Id.* at 72.

188. *Id.* at 67.

189. *Id.* at 44–45.

190. *Id.* at 27.

191. Transcript of Oral Argument, *supra* note 143, at 20.

192. *Id.* at 16.

193. *Id.* at 47.

194. *Id.* at 11.

195. *Id.* at 62.

moot,¹⁹⁶ wondering if the issue should be decided under a different case.¹⁹⁷ Since four Justices appeared to favor Petitioners, and only two seemed to side with Respondent, numbers favor Petitioners in reaching five votes. Therefore, it is likely that Petitioners will win in *Arteaga-Martinez*.

VIII. ANALYSIS

A better course of action is for the Supreme Court to rule in favor of Respondent Arteaga-Martinez and find that when removal is no longer foreseeable, Section 1231(a)(6) requires a bond hearing before a neutral party, namely an immigration officer, where the government bears the burden to prove by clear and convincing evidence the noncitizen does not pose a danger or a flight risk. It should do so both because the Due Process Clause requires it and because Petitioners' argument to the contrary is fundamentally flawed.

The Due Process Clause protects all people in the United States, regardless of citizenship status. The Fifth Amendment commands, "No person shall . . . be deprived of life, liberty, or property, without due process of law."¹⁹⁸ It is no defense for a detainer that a noncitizen detainee is the person claiming a due process violation. When the Constitution means "citizen," it says "citizen." In fact, the Constitution's main, unamended body and the Bill of Rights together feature the word "citizen" eleven times.¹⁹⁹ If the Founders had meant to restrict due process rights to "citizens," they would have done so explicitly. This proposition, applicable to both the Fifth and Fourteenth Amendment Due Process Clauses,²⁰⁰ is well understood by the Court.²⁰¹

196. *Id.* at 58.

197. Transcript of Oral Argument, *supra* note 143, at 60.

198. U.S. CONST. amend. V.

199. See U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen"); *id.* art. I § 3 ("No Person shall be a Senator who shall not have . . . been nine Years a Citizen"); *id.* art. II, § 1 ("No Person except a natural born Citizen, or a Citizen of the United States . . . shall be eligible to the Office of President"); *id.* art. III, § 2 ("The judicial Power shall extend to all Cases . . . between a State and Citizens of another State, —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); *id.* art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

200. The Fifth Amendment applies to the federal government, while the Fourteenth Amendment applies to state governments. Both contain a Due Process Clause.

201. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of

Perhaps the Court put it best when it said:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects *every one of these persons* from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.²⁰²

Although noncitizens, unlike American citizens, are subject to deportation, their right to due process of law is not diminished: “Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch . . . must respect the *procedural safeguards of due process*.”²⁰³

The Due Process Clause has teeth. “Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.”²⁰⁴ The “[d]eprivation of liberty, even conditional liberty, is the harshest action the state can take against the individual through the administrative process.”²⁰⁵ Because “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,”²⁰⁶ the Court mandates that a detainee held by the government before their case is heard has a right to a hearing before a neutral decisionmaker,²⁰⁷ in which the government must prove need for further detainment.²⁰⁸ This requirement often comes with a heightened procedural standard of “clear and convincing evidence.”²⁰⁹

The current DHS regulations make a mockery of both the Due

the protection of equal laws.”); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“[S]ince he is a ‘person,’ an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen.”).

202. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (internal citations omitted) (emphasis added).

203. *Galvan*, 347 U.S. at 531 (emphasis added).

204. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

205. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975).

206. *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

207. *Id.* at 81 (“In addition to first demonstrating probable cause, the Government was required, in a ‘full-blown adversary hearing,’ to convince a *neutral decisionmaker* by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, i.e., that the ‘arrestee presents an identified and articulable threat to an individual or the community.’”) (quoting *Salerno*, 481 U.S. at 751) (emphasis added).

208. *Id.* at 86 (“Similarly, the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists.”).

209. *Id.*

Process Clause and the holding in *Zadvydas* when they allow a noncitizen to be held indefinitely. The regulations provide that a DHS agent makes the determination of whether an individual should be released before their withholding-only proceeding.²¹⁰ This procedure fails to meet the basic standards required by due process. By definition, a neutral arbitrator must be impartial. Yet, based on ICE’s mission alone— “to protect America from the cross-border crime and illegal immigration that threaten national security and public safety”— the agency prefers caution (e.g., detention) in its decision-making.²¹¹ The agency’s preference for caution indicates DHS arbitrators cannot be neutral when making decisions about detention and imprisonment, which unacceptably infringes on imprisoned persons’ due process rights. In short, when asking for freedom, no one should have to make the case to their jailor rather than to a judge.

The Third and Ninth Circuits require an immigration judge to proceed over a hearing after six months of detention.²¹² In support of Respondents, former immigration judges submitted a Brief as Amici Curiae arguing that immigration judges are best equipped to make determinations at bond hearings based on their experience with immigration laws.²¹³ These judges made three additional points: 1) long detentions make it difficult for noncitizens to obtain legal representation, which is crucial for fair and efficient resolution of a case; 2) bond hearings would allow the government to prove detention is necessary while mitigating the harms from detention; and 3) bond hearings would not impose a significant burden on immigration judges.²¹⁴ Further, Petitioners erroneously assert that bond hearings in withholding-only proceedings would create a “watershed” change in the legal system.²¹⁵ In fact, these withholding-only cases account for a mere 1 percent of immigration-related proceedings.²¹⁶

210. 8 C.F.R. § 241.13(d).

211. U.S. DEPT. OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT 2021, <https://www.dhs.gov/topic/immigration-and-customs-enforcement>.

212. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011).

213. Brief for Former Immigration Judges and Board of Immigration Appeals Members as Amici Curiae Supporting Respondent, *Johnson v. Arteaga-Martinez*, No. 19-896 (argued Jan. 11, 2022) at 2–3 [hereinafter Brief of Former Immigration Judges].

214. *Id.* at 3–4.

215. See Transcript of Oral Argument, *supra* note 143, at 70 (“If this Court were to hold that *Zadvydas* applies to detention pending proceedings, that would be a watershed ruling in immigration law.”).

216. Brief of Former Immigration Judges, *supra* note 213, at 7 (“Because one must first establish a reasonable fear of persecution or torture before an asylum officer to qualify for a

The DHS regulations also wrongly invert the standard of proof, placing the burden on the detained noncitizen to request review by a DHS agent. This situation ignores the reality that a noncitizen faces practical issues while detained. Noncitizens in detention are significantly less likely to obtain counsel than their released counterparts, negatively impacting them in the process: Only 14 percent of those in detention obtain a lawyer, while those who are ultimately released have legal representation in 66 percent of cases.²¹⁷ And legal representation, as one would expect, significantly changes the outcome of a case: those who obtain legal help during their detention win in their withholding-only proceeding 21 percent of the time, compared to those without legal help only winning 2 percent of the time.²¹⁸

Petitioners believe a detention is not indefinite if there is a date on the calendar for a withholding-only hearing.²¹⁹ But ultimately, their argument's premise falls on its back. There is no difference between an "indefinite holding" and a "holding until a withholding-only procedure takes place" when such procedure is continually delayed. Indeed, Respondent Arteaga-Martinez's hearing has already been pushed back three times.²²⁰ Further, data examining the average number of days spent in detention undermine Petitioners' assertion that these procedures happen quickly and under a six-month period.²²¹ In making their argument, Petitioners make a point in favor of Respondent: If a noncitizen does receive a withholding-only hearing and a determination within six months, the due process issue does not come

withholding-only hearing, withholding-only proceedings are relatively uncommon. In recent years, approximately 3,000 new withholding-only cases have been initiated each year, representing less than [1] percent of all new cases in immigration court. Moreover, while the total number of new immigration cases has increased significantly in recent years, the number of withholding-only proceedings has held steady.").

217. AMERICAN IMMIGRATION COUNSEL AND NATIONAL IMMIGRANT JUSTICE CENTER, *THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL* 6 (2020) ("A 2016 study revealed that just 14 percent of individuals held in detention managed to hire counsel, compared to 66 percent of individuals whose cases proceeded outside of detention.").

218. *Id.*

219. See Transcript of Oral Argument, *supra* note 143, at 17 ("Our position is that *Zadvydas* is limited to . . . open-ended detention. *Zadvydas* does not apply to detention pending a proceeding.").

220. See Brief for Respondent, *supra* note 17, at 10–11 (noting that the hearing was first postponed before his release date, then rescheduled to August 2021, and then pushed back further to May 2023).

221. David Hausman, *Fact-Sheet: Withholding-Only Cases and Detention*, ACLU IMMIGRANT'S RIGHTS PROJECT, Apr. 19, 2015 at 2 (showing that days in detention can span from an average of 114 days in the most simple of scenarios to an average of 1,065 days in the most complicated).

into play in the first instance. Instead, it is the failure of Petitioners' own processes to comply with the protection of life and liberty that requires the due process issue be fleshed out.

Respondent correctly argues Petitioners cannot win without the Court overturning *Zadvydas*.²²² Yet, the Court cannot overturn *Zadvydas* without contradicting one of the Court's longstanding judicial tenets: Under the United States Constitution, the guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"²²³ means that absent special justification, the government cannot indefinitely detain an individual.²²⁴

IX. CONCLUSION

The Supreme Court has an opportunity to affirm the fundamental rights at stake in *Johnson v. Arteaga-Martinez*. In American society, the government must justify the prolonged detention of a noncitizen before their immigration-related hearing. Petitioners recognize that current regulations leave room for possible due process violations but argue that instances of said violations should be resolved on an as-applied basis.²²⁵ The system of government detention, however, should not be one in which due process violations are an expected outcome. This concept is not particularly radical, and the Third and Ninth Circuits illustrate this by requiring a bond hearing for detainees, a procedure traditionally used to determine if detention prior to a proceeding is necessary. In *Johnson v. Arteaga-Martinez*, the Supreme Court should affirm the Third Circuit and, in doing so, affirm its own precedent by holding that Section 1231(a)(6) requires a bond hearing before a neutral arbiter after prolonged detention.

222. See Brief for Respondent, *supra* note 17, at 42, n. 7 (noting amici emphasize that Petitioners can only succeed by overturning the case, which they did not ask to do).

223. U.S. CONST. amend. V. (emphasis added).

224. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'") (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)) (internal citations omitted).

225. Transcript of Oral Argument, *supra* note 143, at 17.