No. 19-897

In the Supreme Court of the United States

MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
LAUREN FASCETT
BRIAN C. WARD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. 1231, or instead by 8 U.S.C. 1226.

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Matthew T. Albence, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement; William P. Barr, in his official capacity as Attorney General of the United States; Russell Hott, in his official capacity as Field Office Director, U.S. Immigration and Customs Enforcement; and the Department of Justice Executive Office for Immigration Review.[*]

Respondents (appellees below) are Rogelio Amilcar Cabrera Diaz, Jennry Francisco Moran Barrera, and Rodolfo Eduardo Rivera Flamenco, on behalf of themselves and all others similarly situated; and Maria Angelica Guzman Chavez, Danis Faustino Castro Castro, and Jose Alfonso Serrano Colocho.

Yvonne Evans, in her official capacity as Field Office Director, U.S. Immigration and Customs Enforcement, and Brenda Cook, in her official capacity as Court Administrator, Executive Office for Immigration Review, Baltimore Immigration Court, were respondents in the district court. Christian Flores Romero and Wilber A. Rodriguez Zometa were petitioners in the district court.

---

[*] Former Attorney General Jefferson B. Sessions III was a respondent in the district court and an appellant in the court of appeals. He was replaced in the court of appeals by Acting Attorney General Matthew G. Whitaker and then by Attorney General William P. Barr. Former Acting Director of U.S. Immigration and Customs Enforcement Thomas D. Homan was a respondent in the district court and an appellant in the court of appeals. He was replaced in the court of appeals by Acting Director Ronald D. Vitiello, then by Acting Director Matthew T. Albence, then by Acting Director Mark A. Morgan, and again by Acting Director Matthew T. Albence.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Romero v. *Evans*, 17-cv-754 (Nov. 17, 2017)

Diaz v. *Hott*, 17-cv-1405 (Feb. 26, 2018)

United States Court of Appeals (4th Cir.):

Chavez v. *Hott*, 18-6086 (Oct. 10, 2019)

Diaz v. *Hott*, 18-6419 (Oct. 10, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 19-897

MATTHEW T. ALBENCE, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 940 F.3d 867. A memorandum opinion of the district court (App., *infra*, 45a-72a) is published in the Federal Supplement at 280 F. Supp. 3d 835. An additional memorandum opinion of the district court (App., *infra*, 73a-91a) is published in the Federal Supplement at 297 F. Supp. 3d 618.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2019. On December 30, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 92a-100a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that, when the Department of Homeland Security (DHS) finds that an alien has illegally reentered the United States after having been removed, "the prior order of removal is reinstated from its original date." 8 U.S.C. 1231(a)(5). The reinstated order "is not subject to being reopened or reviewed"; the alien "is not eligible and may not apply for any relief" from the order; and the government may remove the alien under the order "at any time after the reentry." *Ibid.*

Notwithstanding those general restrictions, an alien subject to a reinstated removal order may seek withholding of removal under 8 U.S.C. 1231(b)(3) and withholding and deferral of removal under regulations promulgated pursuant to Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822, to implement the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988),

1465 U.N.T.S. 85. Those forms of protection ensure that aliens are not removed to places where they face persecution or torture. See 8 U.S.C. 1231(b)(3)(A); 8 U.S.C. 1231 note; *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006). A grant of withholding or deferral of removal provides country-specific protection; it precludes the government from returning the alien to the country of risk, but leaves the final order of removal undisturbed and leaves the government free to remove the alien to another country. See 8 U.S.C. 1231(b)(2)(E); 8 C.F.R. 1208.16(f), 1208.17(f); *In re I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (B.I.A 2008).

If an alien with a reinstated order of removal expresses a fear of returning to the country of removal, an asylum officer, subject to review by an immigration judge, interviews the alien to determine whether he has a "reasonable fear" of persecution or torture. 8 C.F.R. 208.31(b) and (f). If that initial screening process reveals no reasonable fear, DHS may remove the alien without further administrative review. 8 C.F.R. 208.31(g)(1). But if the alien establishes a reasonable fear in the screening process, the alien is placed in "withholding-only" proceedings before an immigration judge, with a right of appeal to the Board of Immigration Appeals, to determine the ultimate merits of the claim for relief. 8 C.F.R. 208.16, 1208.16.

2. This case involves a dispute over whether an alien placed in withholding-only proceedings is subject to the detention procedures set out in 8 U.S.C. 1231, or instead to the detention procedures set out in 8 U.S.C. 1226. Section 1231 authorizes the detention of an alien who "is ordered removed." 8 U.S.C. 1231(a)(1)(A). It provides that the government "shall" detain the alien during an

initial 90-day "removal period," and that the government "may" detain the alien beyond that initial period if the alien poses a "risk to the community" or is "unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6). This Court has held that discretionary detention beyond the initial 90-day period may last only for "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). The Court has recognized that a six-month period is presumptively reasonable; after that time, detention may continue only "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Under the applicable regulations, an alien may obtain administrative review to determine whether there is a significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. 241.13.

Section 1226(a), meanwhile, authorizes the detention of an alien "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). In general, the statute expressly authorizes the government, in its discretion, to "release the alien" on "bond" or "conditional parole." 8 U.S.C. 1226(a)(2). Under the applicable regulations, immigration officials make the initial determination whether to release the alien on bond, but an alien may seek a redetermination before an immigration judge. 8 C.F.R. 236.1(c)-(d).

3. Each respondent is an alien who was previously removed from the United States under an order of removal. App., *infra*, 6a-7a. Each illegally reentered the United States. *Id.* at 7a. Each was apprehended by the government, and each had the prior removal order reinstated. *Ibid.* Each then expressed a fear of persecution or torture in his or her native country. *Ibid.* In

each case, the asylum officer found, after an initial interview, that the alien had a reasonable fear of persecution or torture in his or her native country. *Ibid.* As a result, each respondent was placed in withholding-only proceedings before an immigration judge. *Ibid.* "[A]ll ultimately were detained by the government." *Ibid.* Each respondent sought an individualized bond determination before an immigration judge under Section 1226(a), but the government denied such a determination on the ground that respondents' detentions were instead governed by Section 1231. *Ibid.*

Respondents filed two separate cases—*Romero* v. *Evans*, No. 17-cv-754 (E.D. Va. June 29, 2017), and *Diaz* v. *Hott*, No. 17-cv-1405 (E.D. Va. Dec. 7, 2017)—challenging the government's decisions. App., *infra*, 8a & n.2. In both cases, respondents sought writs of habeas corpus, declarations that Section 1226 rather than Section 1231 governed their detention, and injunctions requiring individualized bond determinations consistent with Section 1226. *Id.* at 8a. In *Diaz*, the district court certified a Virginia-wide class of aliens detained during withholding-only proceedings. *Ibid.*

The district court awarded summary judgment to the *Romero* respondents in November 2017 and to the *Diaz* respondents in February 2018. App., *infra*, 45a-72a, 73a-91a. In *Romero*, the court stated that this case "presents a difficult question of statutory interpretation" and that the government's arguments "have some force." *Id.* at 65a, 71a. The court concluded, however, that Section 1226 rather than Section 1231 governs respondents' detention. *Id.* at 65a-71a. The court observed that Section 1226 governs the detention of an alien "detained pending a decision on whether the alien is

to be removed from the United States." *Id.* at 66a (quoting 8 U.S.C. 1226(a)). The court reasoned that, "until the government determines that there is a country to which [respondents] can legally be removed, the decision on whether they are 'to be removed' remains 'pending.'" *Ibid.* The court adopted similar reasoning in *Diaz*. *Id.* at 73a-91a.

4. The court of appeals consolidated *Romero* and *Diaz*. See App., *infra*, 11a. A divided court affirmed, holding that the detention of an alien in withholding-only proceedings is governed by Section 1226 rather than Section 1231. See *id.* at 1a-44a.

The court of appeals began by analyzing Section 1226, which authorizes detention "pending a decision on whether the alien is to be removed from the United States." App., *infra*, 18a. The court read Section 1226 "to focus on" the "practical question whether the government has the authority to execute a removal," rather than on "'whether the alien is *theoretically* removable.'" *Id.* at 18a-19a (citation omitted). The court reasoned that, although an alien in withholding-only proceedings is "clearly removable," the "practical" decision whether that alien "'is to be removed'" remains pending. *Id.* at 19a (citations omitted).

The court of appeals then concluded that Section 1231 confirmed that reading. App., *infra*, 19a. The court observed that Section 1231's detention provisions are triggered "only when the 'removal period' begins." *Ibid.* (quoting 8 U.S.C. 1231(a)(2)). The court stated that the removal period "does not begin until the government has the actual legal authority to remove a noncitizen from the country." *Ibid.* The court further

stated that, "until withholding-only proceedings conclude, the removal period has not begun and § 1231's detention provisions do not apply." *Id.* at 22a.

Judge Richardson dissented. App., *infra*, 33a-44a. He concluded that "[b]oth the plain language and the structure of the Immigration and Nationality Act compel the conclusion that § 1231, not § 1226, governs the detention of aliens with reinstated orders of removal." *Id.* at 33a. He observed that "Section 1231 applies 'when an alien is ordered removed.'" *Id.* at 44a. He explained that, because respondents' prior orders of removal had been "'reinstated,'" and because those removal orders are "'not subject to being reopened,'" respondents "have, once and for all, been ordered removed." *Id.* at 33a-34a. He further explained that the withholding-only proceedings do not change that analysis, because "withholding does not address whether an alien is ordered removed—that has already been determined. It only addresses how, and more specifically where, the removal will occur." *Id.* at 36a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the detention of an alien who is subject to a reinstated order of removal, and who has been placed in withholding-only proceedings, is governed by 8 U.S.C. 1226 rather than 8 U.S.C. 1231. The court's decision misconstrues both Section 1226 and Section 1231. The court's decision also deepens a circuit conflict: The Second and now the Fourth Circuits have held that Section 1226 governs the detention of an alien in withholding-only proceedings, while the Third and Ninth Circuits have held that Section 1231 does so. This Court's review is warranted.

A. The Court Of Appeals' Decision Is Incorrect

The court of appeals erred in holding that Section 1226, rather than Section 1231, governs the detention of an alien in withholding-only proceedings.

1. Section 1226 governs the detention of aliens who are awaiting a decision on whether they will be ordered removed from the United States. By contrast, Section 1231, with limited exceptions inapplicable here, governs the detention of aliens who, like respondents here, have already been ordered removed from the United States.

That conclusion follows from the plain terms of the statutory provisions. Section 1226 authorizes the detention of an alien "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). "The term 'pending' means 'remaining undecided; awaiting decision.'" *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (brackets and citation omitted). Section 1226 thus applies to an alien who is awaiting a decision on whether he will be ordered removed from the United States.

Section 1231 takes over once an order of removal is in place. Section 1231(a)'s caption reads: "Detention, release, and removal of aliens *ordered removed*." 8 U.S.C. 1231(a) (capitalization and emphasis altered). Section 1231 states that, "when an alien is *ordered removed*," the government must remove that alien. 8 U.S.C. 1231(a)(1)(A) (emphasis added). Section 1231 directs the Attorney General (now the Secretary of Homeland Security[1]) to remove the alien within a period of 90 days, termed the "removal period." *Ibid.* The

[1] Congress has transferred from the Attorney General to the Secretary of Homeland Security the enforcement of the INA, but the

removal period begins on "[t]he date the *order of removal* becomes administratively final" (subject to exceptions for cases where the removal is stayed or where the alien is detained for other reasons, such as when serving a criminal sentence). 8 U.S.C. 1231(a)(1)(B)(i) (emphasis added). Finally, Section 1231 provides that the Secretary "shall detain" the alien during the removal period, 8 U.S.C. 1231(a)(2), and that the alien "may be detained" beyond the removal period if the alien has been determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal. 8 U.S.C. 1231(a)(6).

2. An alien who is subject to a reinstated order of removal is subject to detention under Section 1231, not Section 1226. The INA provides that, for such an alien, "the prior order of removal is reinstated from its original date"; the order "is not subject to being reopened or reviewed"; and the government may remove the alien under the order "at any time after the reentry." 8 U.S.C. 1231(a)(5). Because the prior order of removal has been "reinstated," *ibid.* the alien has been "ordered removed" within the meaning of Section 1231. And because the order "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), a decision on whether the alien is to be removed is in no sense "pending" within the meaning of Section 1226. The decision has already been made.

The statutory structure confirms that reading. The provision authorizing the reinstatement of a removal order itself appears in Section 1231, see 8 U.S.C. 1231(a)(5)

Attorney General retains authority over the administration of removal proceedings under 8 U.S.C. 1229a and questions of law. See, *e.g.*, 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

—suggesting that an alien subject to such an order is subject to the procedures set out in the nearby provisions of Section 1231. In addition, as Judge Richardson observed, Section 1226 and Section 1231 both appear in a part of the INA entitled "Inspection, Apprehension, Examination, Exclusion, and Removal." App., *infra*, 43a. "As the title implies, this part provides a timeline of events that spans eleven statutory provisions from § 1221 to § 1232." *Ibid.* Sections 1221 to 1224 address the arrival of aliens. *Ibid.* Section 1225 addresses the inspection of arriving aliens. *Ibid.* Next, Section 1226 addresses the detention of aliens pending a decision on removal. *Id.* at 43a-44a. Section 1229 sets forth the structure of the alien's removal proceedings; Section 1230 explains what happens if the alien is admitted; and Section 1231 explains what happens if the alien is ordered removed. *Id.* at 44a. "This series of events reflects that, once the alien has been ordered removed from the United States in a removal proceeding under § 1229a and that order has been reinstated under § 1231(a)(5), the alien cannot go back in time, so to speak, to § 1226." *Ibid.*

The alien's placement in withholding-only proceedings does not change that textual and structural analysis. As Judge Richardson explained, "[a] withholding proceeding permits an alien to seek protection from being removed to a particular country," but it does not permit the alien to "attack a reinstated order requiring removal from the United States." App., *infra*, 36a. "In other words, withholding does not address whether an alien is ordered removed—that has already been determined. It only addresses how, and more specifically where, the removal will occur." *Ibid.* Even if such withholding-only proceedings remain ongoing—indeed,

even if the alien succeeds in obtaining withholding—the government remains free to remove the alien to any country apart from the country of risk. See p. 3, *supra*. As a result, an alien in withholding-only proceedings has still been "ordered removed." 8 U.S.C. 1231(a). The "decision on *whether* the alien is to be removed" is no longer "pending." 8 U.S.C. 1226(a) (emphasis added).

3. The court of appeals' contrary analysis is flawed. The court read Section 1226 "to focus on" the "practical question of whether the government has the authority to execute a removal," rather than on "'whether the alien is *theoretically* removable.'" App., *infra*, 18a-19a. (citation omitted). That test lacks a sound basis in the statutory text. Section 1226 asks if "a decision on whether the alien is to be removed" is still "pending"—not whether the government has acquired the "practical" ability to remove an alien. Indeed, the very purpose of the removal period under Section 1231 is to enable the government to detain the alien while it resolves "practical" questions about when, where, and how to execute the order of removal.

The court of appeals also reasoned that Section 1231's detention provisions are triggered "only when the 'removal period' begins," and that the removal period, in turn, "does not begin until the government has the actual legal authority to remove a noncitizen from the country." App., *infra*, 19a. That is incorrect. "The removal period begins on the latest of the following": (1) "[t]he date the order of removal becomes administratively final," (2) "[i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order," and (3) "[i]f the alien is detained or confined" for non-immigration reasons, "the date the alien is released from detention

or confinement." 8 U.S.C. 1231(a)(1)(B). For each respondent in this case, the reinstated removal order is "administratively final," 8 U.S.C. 1231(a)(1)(B)(i); the order "is reinstated from its original date and is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5); and respondents have not been detained for non-immigration reasons. Under the plain terms of the statute, then, the removal period has begun, and the detention provisions in Section 1231(c)(6) have been triggered. As Judge Richardson explained, the court of appeals' contrary analysis of Section 1231 rested on a "sleight of hand"—converting the three specific "triggering events" for the removal period into "some amorphous final 'authority'" for removal. App., *infra*, 41a.

4. Applying Section 1231 to aliens in withholding-only proceedings does not leave them unprotected or subject to indefinite detention. As an initial matter, mandatory detention under Section 1231 lasts only for 90 days (subject to suspension under certain circumstances). See 8 U.S.C. 1231(a)(1)-(2). After that period, continued detention of the alien becomes discretionary. See 8 U.S.C. 1231(a)(6). Federal regulations set forth a framework for the exercise of that discretion. See 8 C.F.R. 241.4. Under that framework, the relevant field office of U.S. Immigration and Customs Enforcement (ICE) conducts an initial review at the outset of the discretionary detention; further periodic reviews are conducted by a review panel at ICE headquarters. See 8 C.F.R. 241.4(i)(3) and (k)(1)-(2). During those reviews, officials must decide whether to release or detain the alien on the basis of both "[f]avorable factors" (such as "close relatives residing here lawfully") and unfavorable factors (such as the likelihood that "the alien is a

significant flight risk" or that he would "[e]ngage in future criminal activity"). 8 C.F.R. 241.4(f)(5), (7), and (8)(iii). During those reviews, the alien may submit information that he believes provides a basis for release; may be assisted by an attorney or other representative; and may, if appropriate, seek a government-provided translator. 8 C.F.R. 241.4(h)(2) and (i)(3).

Quite apart from those regulations, this Court held in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), that Section 1231 "does not permit indefinite detention." *Id.* at 689. It concluded that, if detention lasts for more than six months and "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. Federal regulations set out special review procedures to implement that holding. See 8 C.F.R. 241.13. Under those procedures, an eligible alien "may submit a written request for release," together with "whatever documentation" he wishes "in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. 241.13(d)(1). Adjudicators at ICE headquarters must then review the alien's case, allow the alien to respond to the government's evidence, allow the alien to submit additional relevant evidence, allow the alien to be represented by an attorney, and, ultimately, "issue a written decision based on the administrative record." 8 C.F.R. 241.13(g); see 8 C.F.R. 241.13(d)-(e). The regulations expressly provide that these special review procedures supplement, rather than supplant, the discretionary release framework discussed in the preceding paragraph; thus, under that framework, the govern-

ment may release an alien "without regard to the likelihood of the alien's removal in the reasonably foreseeable future." 8 C.F.R. 241.13(b).

B. The Question Presented Warrants Review

1. As a result of the decision below, there is now a 2-2 circuit conflict over which statutory provision governs the detention of aliens with reinstated removal orders who are in withholding-only proceedings. The Second Circuit and now the Fourth Circuit have held that Section 1226 governs the detention of such aliens. See *Guerra* v. *Shanahan*, 831 F.3d 59 (2d Cir. 2016); App., *infra*, 31a-32a. In contrast, the Third and Ninth Circuits have both held that Section 1231 governs the detention of such aliens. See *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208, 213-219 (3d Cir. 2018); *Padilla-Ramirez* v. *Bible*, 882 F.3d 826, 829-837 (9th Cir.), cert. denied, 139 S. Ct. 411 (2018). The courts of appeals have acknowledged that conflict of authority. See App., *infra*, 11a ("The courts of appeals are divided on this question."); *Guerrero-Sanchez*, 905 F.3d at 214 ("We note at the outset that this is a question that has divided our sister circuits."); *Padilla-Ramirez*, 882 F.3d at 835 ("[W]e respectfully disagree with the Second Circuit's reading of section 1226(a).").

The Third and Ninth Circuits have both held that, even under Section 1231, an alien may still be entitled to a bond hearing in some circumstances. See *Guerrero-Sanchez*, 905 F.3d at 219-228; *Diouf* v. *Napolitano*, 634 F.3d 1081, 1084-1092 (9th Cir. 2011). As discussed below, the government is seeking review of that reading of Section 1231 in a separate certiorari petition filed simultaneously with this one. See pp. 16-17, *infra*. Irrespective of those decisions, however, the conflict over

whether Section 1226 or Section 1231 governs detentions remains significant. Each provision triggers a different set of substantive and procedural standards under the statute and the regulations, and the relevant differences go beyond the availability of bond hearings. See pp. 3-4, 12-14, *supra*. In addition, even focusing solely on bond hearings, the source of the government's detention authority still matters. An alien detained under Section 1226 ordinarily may obtain a bond determination from an immigration judge "at any time" after the "initial custody determination." 8 C.F.R. 236.1(d)(1). In contrast, the Third and Ninth Circuits have read Section 1231 to require bond determinations only after a "prolonged detention"—which they have defined as a detention lasting "six months." *Guerrero-Sanchez*, 905 F.3d at 211, 226; see *Diouf*, 634 F.3d at 1091-1092.

2. This Court's review is warranted to resolve that circuit conflict. The question presented is important. The United States has an overriding interest in protecting its territorial sovereignty through the use of all the tools made available by Congress, including detention of aliens, to address and diminish illegal immigration. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). The Fourth Circuit's interpretation compromises that interest by providing a new mechanism for aliens in withholding-only proceedings to obtain release over DHS's objection. Those aliens have been ordered removed from the United States—meaning that they would have a strong incentive to abscond in order to avoid removal. And those aliens, by definition, have already "reentered the United States illegally after having been removed," 8 U.S.C. 1231(a)(5)—meaning that they have demonstrated a willingness to evade federal

immigration law and authorities and a disregard for their removal orders, and thus present a distinct risk that they will fail to comply with an order of removal. Moreover, ICE would have to identify, track, and re-apprehend the released aliens, diverting the agency's resources from other immigration enforcement actions.

The question presented also has significant operational consequences for the federal government. DHS and the Department of Justice have explained that "the U.S. immigration system" already faces an "extraordinary," "extreme," and "unsustainable" administrative "strain." *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829, 33,831, 33,838, 33,841 (July 16, 2019). The Fourth Circuit's decision adds to those administrative burdens by requiring the government to address the continued detention of aliens such as respondents under Section 1226 rather than the more streamlined procedures of Section 1231. Further, the existence of a circuit conflict over the question presented itself poses significant operational challenges. An alien's illegal reentry, detention, and withholding-only proceedings could each occur in a different circuit. This Office has been informed by DHS and EOIR that, as a result, immigration officials and immigration judges now must often resolve complex choice-of-law questions about which circuit's precedents apply to a given alien.

On a number of other occasions, this Court has granted review to address the substantive and procedural rules that govern the detention of aliens in connection with their removal from the United States. See, *e.g.*, *Nielsen* v. *Preap*, 139 S. Ct. 954 (2019); *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018); *Demore* v. *Kim*,

538 U.S. 510 (2003); *Zadvydas*, *supra*. The same course is appropriate here.

3. In addition to warranting review in its own right, the question presented warrants review in connection with the government's petition for a writ of certiorari in *Albence* v. *Arteaga-Martinez* (filed Jan. 17, 2020), which the government is filing simultaneously with the petition in this case. The petition in *Arteaga-Martinez* presents the question whether, when the government detains an alien for more than six months under Section 1231, it must provide the alien with a bond hearing at which the government bears the burden of proving, by clear and convincing evidence, that the alien poses a risk of flight or a danger to the community. As noted earlier, the Third and Ninth Circuits have both read Section 1231 to impose a bond-hearing requirement. See pp. 14-15, *supra*.

The question presented in *Arteaga-Martinez* is closely related to the question presented in this case. This case concerns which aliens Section 1231 covers, while *Arteaga-Martinez* concerns what procedures Section 1231 makes available to the aliens covered by that provision. As a practical matter, the category of people affected by this case (aliens with reinstated orders of removal seeking withholding or deferral of removal) significantly overlaps with the category of people affected by *Arteaga-Martinez* (all aliens who have been ordered removed and whom the government has detained for more than six months). Moreover, the issues posed by both cases often come up in tandem. For instance, in *Guerrero-Sanchez*, the Third Circuit held that the detention was governed by Section 1231 (contributing to the circuit split at issue in this case), but also that Section 1231 contained implicit bond-hearing

and clear-and-convincing-evidence requirements (raising the question presented in *Arteaga-Martinez*). See 905 F.3d at 213-219. Because the issues raised in the two cases are closely related, the government respectfully requests that the Court grant review in this case as well as *Arteaga-Martinez*, and hear the cases in tandem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
LAUREN FASCETT
BRIAN C. WARD
Attorneys

JANUARY 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6086

MARIA ANGELICA GUZMAN CHAVEZ; DANIS FAUSTINO CASTRO CASTRO; JOSE ALFONSO SERRANO COLOCHO, PETITIONERS-APPELLEES

AND

CHRISTIAN FLORES ROMERO; WILBER A. RODRIGUEZ ZOMETA, PETITIONERS

v.

RUSSELL HOTT, FIELD OFFICE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; DOJ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; RONALD D. VITIELLO, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; WILLIAM P. BARR, ATTORNEY GENERAL, RESPONDENTS-APPELLANTS

AND

BRENDA COOK, COURT ADMINISTRATOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BALTIMORE IMMIGRATION COURT, RESPONDENT

AMERICAN IMMIGRATION COUNCIL; AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AMICI SUPPORTING APPELLEES

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(1:17-cv-00754-LMB-JFA)

No. 18-6419

ROGELIO AMILCAR CABRERA DIAZ; JENNRY FRANCISCO MORAN BARRERA; RODOLFO EDUARDO RIVERA FLAMENCO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PETITIONERS-APPELLEES

v.

RUSSELL HOTT, FIELD OFFICE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; WILLIAM P. BARR, ATTORNEY GENERAL,
RESPONDENTS-APPELLANTS

AMERICAN IMMIGRATION COUNCIL; AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
AMICI SUPPORTING APPELLEES

Argued: Mar. 21, 2019
Decided: Oct. 10, 2019

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(1:17-cv-01405-LMB-MSN)

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Floyd joined. Judge Richardson wrote a dissenting opinion.

Before FLOYD, HARRIS, and RICHARDSON, Circuit Judges.

PAMELA HARRIS, Circuit Judge:

The petitioners in this case are a class of noncitizens subject to reinstated removal orders, which generally are not open to challenge. The petitioners may, however, pursue withholding of removal if they have a reasonable fear of persecution or torture in the countries designated in their removal orders. Availing themselves of that right, these petitioners sought withholding of removal, and they are being detained by the government while they await the outcome of their "withholding-only" proceedings. The question before us is whether they have the right to individualized bond hearings that could lead to their release during those proceedings.

Answering that question requires that we determine the statutory authority under which the government detains noncitizens who seek withholding of removal after a prior removal order has been reinstated. The petitioners argue that their detention is governed by 8 U.S.C. § 1226, which authorizes detention "pending a decision on whether the alien is to be removed," and would allow them to seek release on bond and to make their case before an immigration judge. The government, on the other hand, points to 8 U.S.C. § 1231, which applies "when an alien is ordered removed"—as the petitioners were, the government says, by virtue of their

reinstated removal orders—and makes that detention mandatory during a 90-day "removal period."

The district court granted summary judgment to the petitioners, holding that they are detained under § 1226 because a decision on removal remains "pending" until their withholding-only proceedings are complete. We agree with the district court's careful analysis of the relevant statutes and affirm its judgment.

I.

A.

For context, we begin with a brief description of the law governing reinstated removal orders and withholding-only proceedings under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*

When a noncitizen who has been ordered removed from the United States reenters the country without authorization, the "prior order of removal is reinstated from its original date." *Id.* § 1231(a)(5). That reinstated order "is not subject to being reopened or reviewed," and the noncitizen "may not apply for any relief" but instead "shall be removed under the prior order." *Id.* Implementing regulations track the statute, providing that a noncitizen who unlawfully reenters after a prior removal order "shall be removed from the United States by reinstating the prior order" without any right to a hearing before an immigration judge. 8 C.F.R. § 241.8(a). In the great majority of cases, this process plays out exactly as contemplated, and a noncitizen facing a reinstated removal order is removed from the country without further legal proceedings.

But there is an exception to that rule, which produces the issue we face today. Consistent with our country's

obligations under international law, Congress has provided that a noncitizen may not be removed to a country where she would be persecuted—that is, her "life or freedom . . . threatened" based on a protected ground, such as race or religion, 8 U.S.C. § 1231(b)(3)(A)—or tortured, *see* 8 U.S.C. § 1231 note (United States Policy With Respect to Involuntary Return of Persons in Danger of Subjection to Torture); *see also* 8 C.F.R. § 208.16(c) (implementing regulations). Where an individual meets the high standard for showing that she will face persecution or torture in a given country, relief is mandatory, and the government must withhold removal to that country. *See Salgado-Sosa v. Sessions*, 882 F.3d 451, 456 (4th Cir. 2018); *Dankam v. Gonzales*, 495 F.3d 113, 115-16 (4th Cir. 2007).

Thus, as the district court explained, although a noncitizen "cannot otherwise challenge a reinstated removal order, he can seek protection from having that order executed to a particular country by initiating a withholding-only proceeding." *Romero v. Evans*, 280 F. Supp. 3d 835, 843 (E.D. Va. 2017); *see Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006) ("[E]ven an alien subject to [a reinstated removal order] may seek withholding of removal."). Those proceedings ensure that removal complies with the limited statutory restrictions outlined above; if a claim is successful, it bars the government from removing an individual only to the specific country designated in the removal order. *See* 8 C.F.R. § 208.31. A grant of withholding of removal with respect to one country does not preclude the government from removing a noncitizen to a third country, *see id.* § 208.16(f), nor affect a noncitizen's status as a removable individual, *see id.* § 208.2(c)(2)-(3).

The process works as follows. When a noncitizen subject to a reinstated removal order expresses a fear of persecution or torture in the country designated on the order, an asylum officer conducts a screening interview to make a "reasonable fear" determination. *Id.* § 208.31(b). If the asylum officer identifies a "reasonable possibility" of torture or persecution in the designated country, then the noncitizen is permitted to apply for withholding of removal. *See id.* § 208.31(c), (e). At that point, the case goes to an immigration judge for an administrative hearing to determine whether the noncitizen can meet her burden of establishing eligibility for withholding of removal. *Id.* § 208.31(e). The noncitizen may appeal the immigration judge's determination to the Board of Immigration Appeals, *id.*, and the Board's decision is subject to judicial review, 8 U.S.C. § 1252(a)(1), (a)(4). Throughout, the only issue that may be raised is eligibility for withholding of removal; the underlying (and now reinstated) removal order is not subject to collateral attach during these "withholding-only" proceedings. *See* 8 C.F.R. § 208.2(c)(3)(i).[1]

B.

1.

We turn now to the facts underlying this appeal, which are similar for each petitioner and may be sketched out briefly. Each petitioner was removed from the United

---

[1] We use "withholding-only" proceedings and "withholding of removal" to encompass three distinct forms of relief: persecution-based withholding of removal under the INA, *see* 8 C.F.R. § 1208.16(b); torture-based withholding of removal under the Convention Against Torture, *see id.* § 1208.16(c); and torture-based deferral of removal under the Convention, *see id.* § 1208.17. The details of these forms of relief vary, but not in ways material to the issues before us.

States pursuant to an order of removal. On their return to their designated countries of removal, the petitioners allege, they were confronted with persecution or torture, or threats of persecution or torture that in several cases included death threats. Fearing for their safety, the petitioners returned to the United States, reentering without authorization and despite their prior removal orders.

When the government discovered the petitioners' presence, their original removal orders were reinstated under 8 U.S.C. § 1231(a)(5). As noted above, those orders are "not subject to being reopened or reviewed," *id.*, so the petitioners could not challenge their underlying removability. But they did initiate the withholding-only process by expressing fear of persecution or torture in their native countries, designated as their countries of removal. In every case, the asylum officer, after an initial screening interview, found that the petitioner had a "reasonable fear" of persecution or torture. Accordingly, the petitioners were placed in withholding-only proceedings before immigration judges.

Although some of the petitioners initially were granted supervised release, all ultimately were detained by the government.

2.

This case arose out of a dispute over whether the petitioners could seek release on bond—and do so in hearings before immigration judges—while their withholding-only proceedings were pending. The government took the position that they could not, because they were subject to mandatory detention under 8 U.S.C. § 1231, and bond hearings were denied.

Two sets of petitioners then filed habeas petitions in the same district court in Virginia. Each sought a declaration that 8 U.S.C. § 1226, rather than 8 U.S.C. § 1231, governs their detention, and an injunction ordering individualized bond hearings consistent with § 1226. The second set of petitioners also moved to certify a Virginia-wide class of individuals detained during withholding-only proceedings. The district court certified the class, and that decision is unchallenged on appeal.

In November 2017, the district court entered summary judgment in favor of the first set of petitioners and ordered the requested relief. *See Romero v. Evans*, 280 F. Supp. 3d 835 (E.D. Va. 2017).[2] The district court began its merits analysis by identifying the statutory issue at the heart of this case. According to the petitioners, they were being detained under 8 U.S.C. § 1226, which provides for detention "pending a decision on whether the alien is to be removed from the United States" and, critically, allows for discretionary release on bond. 8 U.S.C. § 1226(a). But the government pointed to a different statute—8 U.S.C. § 1231—which applies "when an alien is ordered removed" and provides for *mandatory* detention during a 90-day "removal period" within which the noncitizen "shall" be removed. 8 U.S.C. § 1231(a)(1)(A), (a)(2). So the "deceptively simple question" in this case, the court explained, is this: Are the petitioners—subject to reinstated removal orders, but with pending claims for withholding of

[2] The district court issued a separate decision on the second petition before it, relying on its reasoning in *Romero*. *See Diaz v. Hott*, 297 F. Supp. 3d 618 (E.D. Va. 2018). Both those decisions are before us now on appeal. Because the district court first spelled out its analysis in *Romero*, we focus on that decision here.

removal—"detained under 8 U.S.C. § 1226[ ] or under 8 U.S.C. § 1231?" *Romero*, 280 F. Supp. 3d at 846.

The answer, the district court concluded, is § 1226, which by plain terms covers detention when a "decision on whether the alien is to be removed from the United States" is "pending." *Id.* (quoting 8 U.S.C. § 1226(a)). "[T]his text governs petitioners' detention because until withholding-only proceedings are complete, a decision has not been made on whether they will in fact be removed from the United States." *Id.* The court recognized that by virtue of their reinstated removal orders, the petitioners' "removability" already had been determined. *Id.* But the text of § 1226 is concerned with the "more concrete determination whether petitioners will actually be removed," the court reasoned, and that decision "remains 'pending'" during withholding-only proceedings and "until the government determines that there is a country to which [the] petitioners can legally be removed." *Id.* (quoting 8 U.S.C. § 1226(a)).

That conclusion, the court went on, is reinforced by the structure of § 1231—the provision mandating detention during a 90-day "removal period." Under § 1231, the "removal period" begins on the latest of three dates: the date a removal order becomes "administratively final," the date any judicial stay of a removal order is lifted, or the date on which a noncitizen is released from non-immigration detention. 8 U.S.C. § 1231(a)(1)(B)(i)-(iii); *see also Romero*, 280 F. Supp. 3d at 846. Each of those triggers, the court explained, relates to "a different legal impediment to actual removal": the administrative process is not complete, or a judicial stay prevents removal, or a noncitizen is in criminal custody and so cannot be removed. *Romero*, 280 F. Supp. 3d at 846.

Under § 1231, in other words, it is not enough that the agency "may have already determined that the noncitizen is, like petitioners here, removable." *Id.* Instead, § 1231 does not come into play until the government has "the present and final legal authority to actually execute that order of removal." *Id.*

That reading, the court determined, also makes sense of the standard 90-day removal period during which the government "shall" remove a noncitizen from the country, 8 U.S.C. § 1231(a)(1)(A) ("Except as otherwise provided . . . when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days."). Limiting that period to 90 days is reasonable if § 1231 is intended to "govern only the final logistical period, in which the government has actual authority to remove the alien and need only schedule and execute the deportation." *Romero*, 280 F. Supp. 3d at 846. Noncitizens like the petitioners in this case, on the other hand, are detained during withholding-only proceedings that "typically far exceed 90 days." *Id.* at 847.

The court rejected the government's argument that a reinstated removal order, because it is "not subject to being reopened or reviewed," 8 U.S.C. § 1231(a)(5), is an "administratively final" order of removal that triggers § 1231's 90-day removal period and mandatory detention provision, *see id.* § 1231(a)(1)(B)(i) (listing "date the order of removal becomes administratively final" as potential start of removal period). For purposes of judicial review, the court explained, it is widely accepted that a reinstated removal order is not final and reviewable until *after* the adjudication of any withholding applications.

The court found no reason to adopt a "bifurcated definition of finality" that would render the same orders "administratively final" under § 1231 *before* withholding-only proceedings conclude. *Romero*, 280 F. Supp. 3d at 847 (internal quotation marks omitted). Nor are the petitioners' removal orders "final" under general administrative law principles, the court reasoned, because the agency's "decisionmaking process" has yet to be consummated while withholding-only proceedings are pending before an immigration court. *Id.*

Having concluded that § 1226, rather than § 1231, provides the statutory authority for the petitioners' detention, the court granted the petitioners' requested relief in two separate decisions, ordering the government to provide individualized bond hearings under § 1226. The government timely appealed both cases, which we consolidated for purposes of appeal.

II.

This appeal requires that we resolve a single question of statutory interpretation: whether § 1226 or § 1231 governs the petitioners' detention and, specifically, their entitlement to individualized bond hearings. We review that legal question de novo. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009).

The courts of appeals are divided on this question. *Compare Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016) (holding that § 1226 applies), *with Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018), *and Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017) (both holding that § 1231 applies). "The statutory scheme governing the [petitioners'] detention . . . is not a model of clarity," *Prieto-Romero v. Clark*,

534 F.3d 1053, 1058 (9th Cir. 2008) (analyzing same provisions), and as the district court recognized, there are arguments of at least "some force" on both sides of the issue, *Romero*, 280 F. Supp. 3d at 846. But reading the two provisions together, we conclude, like the district court and the Second Circuit, that it is § 1226 that governs the petitioners' detention, entitling them to bond hearings. Section 1231's "removal period"—and with it, the requirement of mandatory detention—begins only when the government acquires the "present and final legal authority" to execute a removal order, *id.*, and so long as withholding-only proceedings are pending, the government lacks that authority.

A.

We begin with a description of the two statutory sections at issue and, in particular, their provisions regarding release on bond. Like the parties and the district court, we have used general terms in framing the question as whether § 1226 or § 1231 applies to the petitioners. But that is shorthand for the parties' more specific dispute: whether the petitioners are entitled to individualized bond hearings before immigration judges, which might lead to their release during the pendency of their withholding-only proceedings. Our focus here is on the provisions bearing directly on that question.

Section 1226, as noted above, authorizes the arrest and detention of noncitizens "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). For certain individuals with criminal histories, that detention is mandatory. *See id.* § 1226(c) (providing, with limited exceptions, for mandatory detention of noncitizens who have committed

specified criminal offenses). But for all other noncitizens, detention under § 1226 is not mandatory; instead, § 1226 permits discretionary release on bond or conditional parole. *Id.* § 1226(a)(1)-(2).[3]

Agency regulations set out the procedures governing discretionary release under § 1226. *See* 8 C.F.R. § 236.1. Most important here, a noncitizen detained under § 1226 is entitled to an individualized hearing before an immigration judge to determine whether continued detention is necessary while immigration proceedings continue. *See id.* § 236.1(d)(1). At that hearing, the noncitizen bears the burden of showing that her release would pose no danger to the public and that she is likely to appear for future proceedings. *Id.* § 236.1(c)(8). And even if she makes that showing, agency officials retain broad discretion in deciding whether to grant release and on what conditions. *See id.*

---

[3] Specifically, § 1226(a) provides in relevant part:

> (a) Arrest, detention, and release
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) ["Detention of criminal aliens"] and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole. . . .

8 U.S.C. § 1226(a).

Section 1231, on the other hand, authorizes the detention of a noncitizen who "is ordered removed," 8 U.S.C. § 1231(a)(1)(A), and it makes that detention mandatory during a statutory "removal period," *id.* § 1231(a)(2) ("During the removal period, the Attorney General *shall* detain the alien." (emphasis added)). The "removal period" is defined as "a period of 90 days" during which "the Attorney General *shall* remove the alien from the United States." *Id.* § 1231(a)(1)(A) (emphasis added).[4] That 90-day window for removal begins on the latest of three dates: the date the removal order becomes "administratively final"; the date of a reviewing court's final order, if that court has issued a stay of removal; or the date on which a noncitizen subject to removal is released from non-immigration detention. *Id.* § 1231(a)(1)(B)(i)-(iii).[5]

---

[4] The removal period may be extended beyond 90 days in certain cases involving a noncitizen's refusal to cooperate with efforts to arrange for removal. *See* 8 U.S.C. § 1231(a)(1)(C). There is no indication that this exception applies here, and the government has not argued otherwise. Accordingly, we refer throughout to a 90-day removal period.

[5] The full text of the relevant portion of § 1231 provides:

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

Again, during that 90-day period, detention is mandatory. Once the 90-day window closes, however, a noncitizen who has not been removed normally is subject to supervised release. *Id.* § 1231(a)(3); *see also* 8 C.F.R. § 241.5 (governing release on bond after expiration of removal period). Detention beyond the 90-day removal period is governed by § 1231(a)(6), which allows for the discretionary extension of detention in certain cases, including those in which the government determines that a noncitizen is a "risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6) (certain noncitizens "*may* be detained beyond the removal period and, if released, shall be subject to [supervised release]") (emphasis added); *see also Zadvydas v. Davis*, 533 U.S. 678, 683-84 (discussing post-removal-period detention provisions).[6] But—critically

---

> (B) Beginning of period
>
> The removal period begins on the latest of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(A)-(B).

[6] The dissent suggests that the petitioners may have been detained under a different portion of § 1231(a)(6), providing for discretionary detention of noncitizens "inadmissible under section 1182." Section 1182(a)(9), to which the dissent points, governs certain noncitizens previously removed who "seek[] admission" to the United States. 8 U.S.C. § 1182(a)(9)(A)(i)-(ii). It is not clear to us that

for this case—while detainees seeking release on bond under § 1226 are entitled to individualized hearings before immigration judges, such hearings are not afforded in connection with § 1231(a)(6) determinations. *See* 8 C.F.R. § 241.4 (establishing custody review procedures under § 1231(a)(6)); *see also Zadvydas*, 533 U.S. at 683-84 (describing procedures); *Prieto-Romero*, 534 F.3d at 1057 (whether § 1226 or § 1231 governs "can affect whether . . . detention is mandatory or discretionary, as well as the kind of review process available").[7]

In short, if the petitioners are detained "pending a decision on whether [they are] to be removed from the United States" under § 1226, then they are eligible to seek discretionary release during their withholding-only proceedings and to do so before immigration judges in individualized bond hearings. If, on the other hand, § 1231's 90-day "removal period" governs, then they are not entitled to those hearings—either because their detention is mandatory (if the 90-day window has not yet

---

this provision applies to noncitizens in withholding-only proceedings, who may not seek any substantive change in their immigration status but only "protection from having [a prior removal order] executed to a particular country," *Romero*, 280 F. Supp. 3d at 843. In any event, there is no dispute that all post-removal-period detention under § 1231(a)(6), whatever the precise basis, is discretionary and not mandatory.

[7] Even under § 1231, however, there is an agency process to ensure compliance with the due process rights of noncitizens, providing for conditional release when "there is no significant likelihood of removal" in the "reasonably foreseeable future." 8 C.F.R. § 241.13(a); *see also Zadvydas*, 533 U.S. at 701 ("[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."). The petitioners here have not raised *Zadvydas*-based claims.

closed) or (if it has) because the government may extend their detention beyond the removal period under § 1231(a)(6) without affording them a hearing.[8]

B.

The government's central argument on appeal can be summarized like this: Each of the petitioners is subject to a reinstated removal order which may not be "reopened or reviewed," 8 U.S.C. § 1231(a)(5). It follows, according to the government, that there is no "pending" decision on removability under § 1226(a). Instead, the petitioners already have been "ordered removed" within the meaning of § 1231(a), and those removal orders are "administratively final," triggering the 90-day "removal period" under § 1231(a)(1)(B). It is thus § 1231's detention provisions, and not those of § 1226, that govern the petitioners' claim for individualized bond hearings. That is a perfectly straightforward argument, and as noted above, it has been adopted by some of our sister circuits.

---

[8] Before the district court, the government argued that the petitioners are subject to mandatory detention under 8 U.S.C. § 1231. But if, as the government also contends, each petitioner's 90-day removal period was triggered upon reinstatement of her removal order, then that removal period has come and gone, and with it, § 1231(a)(2)'s mandatory detention provision. Accordingly, we understand the government's current position to be that the petitioners are detained under § 1231(a)(6), which makes detention discretionary but does not provide for individualized hearings. Though the government was unable to clarify this point at argument, it pointed to no other source of authority for the petitioners' detention once the 90-day removal period has expired.

We are persuaded, however, that the district court's reading of the two statutory provisions—also adopted by a sister circuit—is the better one. That reading fully effectuates the plain text of the provisions and also ensures that § 1226 and § 1231 fit together to form a workable statutory framework: Before the government has the actual authority to remove a noncitizen from the country, § 1226 applies; once the government has that authority, § 1231 governs. Because the government lacks the authority to "actually execute . . . order[s] of removal" while withholding-only proceedings are ongoing, *Romero*, 280 F. Supp. 3d at 846, the petitioners are detained under § 1226.

1.

We begin, like the district court, with the plain text of § 1226, which authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). There is no question that the petitioners are legally "removable" from the United States; they are subject to reinstated and unreviewable removal orders, and may not relitigate their removability. *See id.* § 1231(a)(5). But at the same time, thanks to the exception allowing for withholding-only relief notwithstanding reinstated removal orders, there are now "pending" immigration proceedings that must be concluded before the petitioners may be removed. And we agree with the district court that the language of § 1226(a) is better read to focus on this "more concrete determination," *Romero*, 280 F. Supp. 3d at 846. Subsection 1226(a) does not reference legal "removability," or use other language that captures "whether the alien is *theoretically* removable." *Guerra*,

831 F.3d at 62 (emphasis added). Instead, the statute applies "pending a decision on whether the alien *is to be removed*," 8 U.S.C. § 1226(a) (emphasis added), invoking the practical question of whether the government has the authority to execute a removal. As the Second Circuit explained, "[a]n alien subject to a reinstated removal order is clearly removable, but the purpose of withholding-only proceedings is to determine precisely whether 'the alien is to be removed from the United States.'" *Guerra*, 831 F.3d at 62 (quoting 8 U.S.C. § 1226(a)).

That reading is confirmed by the text and structure of § 1231. The government sees it differently, emphasizing that the introductory language of § 1231(a)(1)(A) refers to "an alien [who] is ordered removed," and arguing that a noncitizen subject to a reinstated removal order by definition has been "ordered removed." But whether the petitioners are a match for this introductory phrase does not control the outcome here. As explained above, the issue in this case is not whether § 1231 applies in the abstract; it is whether § 1231's detention provisions govern the petitioners. And under § 1231, those detention provisions are triggered not when "an alien is ordered removed," as the government would have it, but only when the "removal period" begins. *See* 8 U.S.C. § 1231(a)(2) (providing for mandatory detention "[d]uring the removal period"); *id.* § 1231(a)(6) (providing for discretionary detention "beyond the removal period").

So our focus is on § 1231's "removal period," and that period does not begin until the government has the actual legal authority to remove a noncitizen from the country. It is only when all of three potential legal impediments to removal have been overcome, that is—the

removal order has become "administratively final," any court-issued stay of removal has been lifted, and the noncitizen has been released from any non-immigration custody so that there is jurisdiction to remove—that the 90 days of the removal period start to run. *Id.* § 1231(a)(1)(B)(i)-(iii) (listing three conditions that must be met before removal period starts). As the district court explained, those preconditions are concerned with "legal impediment[s] to actual removal" rather than initial determinations of removability. *Romero*, 280 F. Supp. 3d at 846. A noncitizen in criminal custody, for instance, may already have been determined (and finally so) to be "removable." Nevertheless, the 90-day removal period will not begin, and § 1231's detention provisions will not apply, until that noncitizen is released from non-immigration custody so that immigration authorities will have jurisdiction to execute the removal order. *See id.*; *see also* 8 U.S.C. § 1231(a)(1)(B)(iii).

Thus, the text and structure of § 1226 and § 1231 align: Section 1226 applies when there is still "pending" a legal determination that must be made before a noncitizen may be removed; and once there are no remaining legal impediments to removal, § 1231's 90-day removal period begins. That result also is consistent with the nature and duration of the removal period itself. As the Second Circuit explained, § 1231 is concerned primarily not with detention at all, but with defining the 90-day removal period within which the government *must* remove a noncitizen. *Guerra*, 831 F.3d at 62-63 (government "shall remove the alien" during removal period (quoting 8 U.S.C. § 1231(a))). But at the same time, if a noncitizen prevails on a withholding-only claim, then she may *not* be removed to the country designated on the removal order. *See Salgado-Sosa*,

882 F.3d at 456 (persecution-based withholding of removal is mandatory when noncitizen makes necessary showing); *Dankam*, 495 F.3d at 115-16 (same for torture-based withholding of removal). Reading § 1226, rather than § 1231, to apply to noncitizens in withholding-only proceedings is "more logical," *Guerra*, 831 F.3d at 63, than an alternative that could leave agency officials caught between competing mandates.

Similarly, the fact that the removal period is limited to 90 days strongly suggests that it is intended to apply only when all legal barriers to removal are cleared away, leaving just the "travel, consular, and various other administrative arrangements that are necessary" to execute a removal order, *Diouf v. Mukasey*, 542 F.3d 1222, 1231 (9th Cir. 2008) (explaining that purpose of 90-day removal period is to "afford the government a reasonable amount of time" for administrative arrangements associated with execution of removal order). As the district court reasoned, the 90-day limitation "makes sense if the removal period is only meant to govern the final logistical steps of physically removing an alien." *Romero*, 280 F. Supp. 3d at 846. But "it is obvious that withholding-only proceedings take substantially longer than 90 days." *Id.* at 847. The government does not dispute this common-sense assessment, and we have no reason to doubt it: Withholding-only proceedings are lengthy, beginning, as here, with a screening interview by an asylum officer, followed by referral to an immigration judge for an administrative hearing, a subsequent decision by that judge, and the opportunity for appeal to the Board of Immigration Appeals. *See* 8 C.F.R. § 208.31.

So if § 1231's removal period—and its associated detention provisions—apply to noncitizens in withholding-

only proceedings, then agency officials regularly and predictably will find themselves unable to meet the 90-day removal deadline. That does not mean that § 1231 cannot bear that meaning; as the government argues, the statute expressly contemplates that there will be at least some instances in which the removal process exceeds 90 days. *See* 8 U.S.C. § 1231(a)(6) (providing in certain cases for detention "beyond the removal period"). But absent a clearer textual command, we are most reluctant to adopt a construction of § 1231 that in an entire class of cases will put government officials—routinely and completely foreseeably—in dereliction of their statutory duties.

The result is that until withholding-only proceedings conclude, the removal period has not begun and § 1231's detention provisions do not apply. Instead, the decision regarding whether petitioners are "to be removed" remains "pending," and § 1226 governs.

2.

The government has a two-fold response to this understanding of § 1226 and § 1231 and the way in which they work together. First, the government argues, it misconceives the nature of withholding-only proceedings and relief. Section 1226 applies only when there is a pending decision on *whether* the alien is to be removed, the government emphasizes, whereas withholding-only proceedings are about the *where* of removal: Removability is not and may not be contested, and all that remains "pending" is a determination of the specific countries to which the petitioners will be removed. And while § 1226 by terms does not apply to the petitioners, the government finishes, § 1231 does, because

the petitioners' reinstated removal orders are "administratively final" and thus trigger the removal period under § 1231(a)(1)(B)(i). We disagree.

The government's first argument centers on the limited nature of relief available in withholding-only proceedings. As the government emphasizes and we explain above, withholding-only proceedings are country-specific: A grant of withholding to a petitioner would mean only that the government could not remove that petitioner to the country designated on her order of removal, usually the country from which she arrived. It would not preclude the government from taking steps to remove the petitioner to some third country, in which she would not face persecution or torture. *See* 8 C.F.R. § 208.16(f); *see also* 8 U.S.C. § 1231(b)(2) (describing alternative countries for removal). It follows, the government argues—and two circuits have agreed—that while withholding-only proceedings are ongoing, the only question "pending" is to *where* and not "*whether* the alien is to be removed," 8 U.S.C. § 1226(a) (emphasis added). *See Guerrero-Sanchez*, 905 F.3d at 216 ("[T]he decision that was before the Immigration Judge [in withholding-only proceedings] was not whether [the noncitizen] should be removed from the United States—as is required to trigger § 1226(a)—but rather, whether he may be removed to Mexico, i.e., *to where* he should be removed." (internal quotation marks omitted)); *Padilla-Ramirez*, 882 F.3d at 832 ("This narrow question of *to where* an alien may be removed is distinct from the broader question of *whether* the alien may be removed.").

We do not think the "whether" and "where" questions can be separated so cleanly. Instead, we agree

with the district court that both legally and practically, the two are intertwined: Because the government's removal authority turns on the ultimate identification of an appropriate country for removal, "it is not clear" while withholding-only proceedings are pending "that petitioners are in fact 'to be removed' from the United States." *Romero*, 280 F. Supp. 3d at 848 (quoting 8 U.S.C. § 1226(a)). First, as the district court explained, the provisions allowing for removal to third countries put "sharp limitations" on the countries that may be designated for such removal. *Id.* (internal quotation marks omitted); *see, e.g.*, 8 U.S.C. § 1231(b)(2)(D) (allowing for removal to "country of which alien is a subject, national, or citizen," but only with permission of that country); *id.* § 1231(b)(2)(E) (allowing for removal to countries from which noncitizen was admitted or in which noncitizen resided or was born). And as a practical matter, the government generally cannot "simply *sua sponte* deport an alien to a country where he or she does not have citizenship; instead, the government must typically get permission to deport from the third country." *Romero*, 280 F. Supp. 3d at 848; *see also* 8 U.S.C. § 1231(b)(2)(E)(vii) (where no other alternative country is available, government may remove to a "country whose government will accept the alien into that country"); *Zadvydas*, 533 U.S. at 684-86 (explaining that detainees had not been removed because their designated countries refused to accept them or lacked a repatriation treaty with the United States). The bottom line, according to the district court, is that the government has not shown that there are "any countries that meet those limitations for petitioners"—that is, third countries to which they could be removed were they to succeed

in their withholding-only proceedings. *Romero*, 280 F. Supp. 3d at 848.[9]

Second, the prohibition on removal to a country where a noncitizen would face persecution or torture remains absolute. And precisely because withholding of removal is country-specific, as the government says, if a noncitizen who has been granted withholding as to one country faces removal to an alternative country, then she must be given notice and an opportunity to request withholding of removal to *that* particular country. *See Kossov v. INS*, 132 F.3d 405, 409 (7th Cir. 1998). At a minimum, as the district court explained, "third-country removal would require additional proceedings," including the opportunity for a hearing—which means that the government lacks the "present and final legal authority" to remove the petitioners during their initial withholding-only proceedings. *Romero*, 280 F. Supp. 3d at 846, 847. Unless and until the government can ensure that third-country removal would comply with the statutory torture- and persecution-based limits on its removal authority, in other words, "it is not clear . . . that petitioners are in fact 'to be removed' from the United States." *Id.* at 848. That determination remains "pending," and § 1226(a) applies.

The government's second argument focuses not on § 1226 but on § 1231, and specifically on the subsection of § 1231 that makes an "administratively final" order of removal a trigger for the 90-day removal period. *See*

---

[9] Given the restrictions on third-country removal, that is not surprising. Other courts have suggested that noncitizens who prevail in withholding-only proceedings are only very rarely removed to third countries. *See Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006).

8 U.S.C. § 1231(a)(1)(B)(i). According to the government, a reinstated removal order, which cannot be "reopened or reviewed," *id.* § 1231(a)(5), constitutes an "administratively final" order that initiates § 1231's 90-day removal period and related detention provisions. *See Guerrero-Sanchez*, 905 F.3d at 217; *Padilla-Ramirez*, 882 F.3d at 831-32. Like the district court and the Second Circuit, we disagree.

To be clear, we do not doubt that in most cases, a reinstated removal order will qualify as "administratively final" and—so long as there is no other legal impediment to removal, *see* 8 U.S.C. § 1231(a)(1)(B)(ii) (judicial stay); *id.* § 1231(a)(1)(B)(iii) (non-immigration detention)—will start the § 1231 removal-period clock, giving agency officials 90 days to make travel and administrative arrangements. That would explain why Congress located § 1231(a)(5), governing reinstatement of removal orders, in the same provision that establishes the 90-day removal period. In the ordinary case, reinstatement of a removal order, which does not allow for review of the underlying removal determination, will "mark the consummation of the agency's decisionmaking process," *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted) (defining "finality" for administrative law purposes), leaving for the 90-day window only administrative execution of the removal order.

But the question here is about the exceptional case, not the ordinary case: The small percentage of cases in which—notwithstanding § 1231(a)(5)'s general bar against relief from reinstated removal orders—a noncitizen with a "reasonable fear" of persecution or torture is permitted to apply for withholding of removal. In those cases, "the reinstated removal order is not final in

the usual legal sense because it cannot be executed until further agency proceedings are complete." *Luna-Garcia v. Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015). As the district court explained, "[i]n agency law, finality is generally achieved when an action both 'mark[s] the consummation of the agency's decisionmaking process' and also determines legal rights or obligations." *Romero*, 280 F. Supp. 3d at 847 (quoting *Bennett*, 520 U.S. at 177-78. The petitioners' legal status as "removable" already has been determined. But the decisionmaking process in their cases remains "ongoing —*i.e.*, it has *not* been consummated—as the agency is still determining whether petitioners will be granted withholding of removal or will be removed." *Id.* (emphasis added); *see also Guerra*, 831 F.3d at 63 (treating reinstated removal orders as "final" under § 1231 during withholding-only proceedings "runs counter to principles of administrative law which counsel that to be final, an agency action must mark the consummation of the agency's decisionmaking process" (internal quotation marks omitted)).

Consistent with this general definition of administrative finality, courts routinely have held—and the government has agreed, *see Luna-Garcia*, 777 F.3d at 1183 —that a reinstated order of removal is not "final" for purposes of judicial review until the agency completes adjudication of a noncitizen's request for withholding of removal. *See Romero*, 280 F. Supp. 3d at 847; *see also Guerra*, 831 F.3d at 63; *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016) (per curiam); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012). Under 8 U.S.C. § 1252, judicial review is limited to "final order[s] of removal," 8 U.S.C. § 1252(a)(1), and must be sought no more than 30 days after the date of a "final

order," *id.* § 1252(b)(1). In holding that a reinstated removal order is not "final" under § 1252 until after the completion of withholding-only proceedings, some courts have expressed concern that the 30-day deadline otherwise would make it impossible to timely petition for review of those proceedings. *See, e.g.*, *Ortiz-Alfaro*, 694 F.3d at 958. As the Tenth Circuit has explained, however, those decisions also rest on the more general administrative-law proposition that an order is not "final" when there are pending applications for relief. *See Luna-Garcia*, 777 F.3d at 1186; *see also Ortiz-Alfaro*, 694 F.3d at 958 (noting that holding is consistent with cases determining finality in "different contexts than the one presented here").

The government does not dispute that a removal order is "final" under § 1252's judicial review provisions only when withholding-only proceedings end.[10] Instead,

---

[10] The dissent, unlike the government, does suggest that a reinstated removal order becomes "final" for purposes of judicial review under § 1252 before withholding-only proceedings conclude, which presumably would render the withholding-only determination nonreviewable. But as the district court explained, *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017), on which the dissent relies, applied § 1252's finality provision and time bar to an underlying removal order, not to a withholding-only determination. *Romero*, 280 F. Supp. 3d at 847 n.23; *see Mejia*, 866 F.3d at 588-89 (declining to "allow[ ] a challenge to an underlying removal order any time a reinstated order is issued"). *Mejia* did not address finality in the context of a challenge to withholding-only proceedings, and so had no occasion to consider the line of cases described above. Without more, we do not read *Mejia* as putting us in conflict with the circuits that have held, in agreement with the government, that when a noncitizen seeks review of a withholding-only determination, the reinstated order of removal is not "final" for purposes of appellate review until withholding-only proceedings are completed.

it argues that we should adopt a "bifurcated definition of finality," *Guerra*, 831 F.3d at 63, under which a reinstated removal order is simultaneously final for purposes of detention under § 1231 and not final for purposes of judicial review under § 1252. The district court, like the Second Circuit, *see id.*, rejected that proposal, and so do we. It is possible, of course, for the same word—here, "final"—to mean two different things in two different parts of this statute; context matters, and not all the arguments that support the case law on finality under § 1252 translate directly to § 1231. *See Padilla-Ramirez*, 882 F.3d at 833-34 (adopting government's bifurcated definition of "finality"). But the presumption is that finality should mean the same thing in both these provisions, *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004), making for a far more workable statutory structure. And as described above, we find no clear indication that Congress intended § 1231 to apply while withholding-only proceedings remain pending; indeed, we think the better reading is that § 1226 governs such cases. *Cf. id.* (explaining that presumption of same meaning "yields" to indications of contrary congressional intent (internal quotation marks omitted)). Without some compelling reason to do so, we decline to graft a two-tiered system of finality onto immigration cases involving withholding-only proceedings. *See Guerra*, 831 F.3d at 63 (because noncitizens with pending withholding-only proceedings clearly fall under § 1226 and not § 1231, court "need not create new principles parsing administrative finality").[11]

---

[11] The government also argues that the petitioners' reinstated removal orders are "administratively final" under § 1231(a)(1)(B)(i),

In addition to the two primary arguments addressed above, the government has a fallback position: Even if the text and structure of § 1226 and § 1231 do not make clear that the petitioners' detention is governed by § 1231, we should adopt that position as a matter of deference to reasonable agency regulations. Although the courts are divided, as we have discussed, on the ultimate merits of this dispute, there is one point on which they are unanimous: The regulations cited by the government do not actually specify which section—§ 1226 or § 1231—authorizes detention of noncitizens subject to reinstated removal orders who have been placed in withholding-only proceedings. *See Romero*, 280 F. Supp. 3d at 845 ("These regulations do not answer the question raised by petitioners."); *see also Guerrero-Sanchez*, 905 F.3d at 215 ("*Chevron* deference is inapplicable . . . because [the regulation] does not resolve the question of whether § 1226(a) or § 1231(a) governs [the petitioner's] detention."); *Padilla-Ramirez*, 882 F.3d at 831 ("This regulation therefore does not answer the question of *when* the removal period begins."); *Guerra*, 831 F.3d at 63 ("The regulations [the government] cite[s],

---

triggering the 90-day removal period, by virtue of the INA's definitions provision, which makes a removal order "final" when it is affirmed by the Board of Immigration Appeals or the time for such review has passed. *See* 8 U.S.C. § 1101(a)(47)(B). But as even one court that otherwise agreed with the government has explained, that general definition has "limited utility in the context of reinstated removal orders" because the underlying removal order in most circumstances may *not* be reviewed by the Board of Immigration Appeals. *Padilla-Ramirez*, 882 F.3d at 831; *see also Luna-Garcia*, 777 F.3d at 1185. And because the same definition applies equally to the judicial review provision at § 1252 as it does to § 1231, one position that § 1101(a)(47)(B) clearly cannot support is the government's: that finality means something different under those two provisions.

however, do not provide which section authorizes detention of aliens in [the petitioner's] position."). We agree. Because there are no regulations to which we could defer under *Chevron*, we must "conduct our own review of the statute." *Padilla-Ramirez*, 882 F.3d at 831.[12]

III.

For the foregoing reasons, we agree with the district court that the relevant provisions of § 1226, rather than § 1231, govern the petitioners' detention, entitling the petitioners to individualized bond hearings. Accordingly, we affirm the district court's judgments.

Our holding does not, of course, guarantee the petitioners' release from custody. The petitioners must carry their burden of proving that they are eligible for conditional release, and agency officials enjoy broad discretion in making detention-related decisions. *See* 8 C.F.R. § 236.1(c)(8); *see also* 8 U.S.C. § 1226(a). All that is at issue in this appeal is whether the petitioners are entitled to make their case for release on bond to

---

[12] The government also argues that this question was resolved by *Zadvydas v. Davis*, in which the Supreme Court addressed a challenge to indefinite post-removal-period detention under § 1231(a)(6). 533 U.S. at 682. In that case, the parties assumed, and the Court did not question, that § 1231(a)(6) governed the post-90-day detention of two noncitizens who had yet to be removed because their designated countries of removal (as well as alternative third countries) refused to accept them. *Id.* at 684-86. But unlike the petitioners here, those detainees never challenged their designated countries of removal, and never were placed in withholding-only proceedings; as a result, there never was any question that the government had the actual legal authority to remove them. *Zadvydas*, in other words, does not implicate the withholding-only proceedings and persecution- and torture-based restrictions on removal that are at the heart of this appeal.

immigration judges in individualized hearings. Like the district court and the Second Circuit, we find that the statutory framework entitles them to that process.

AFFIRMED

RICHARDSON, Circuit Judge, dissenting:

This case presents a question of statutory interpretation. Are previously removed aliens, who are subject to a reinstated order of removal from the United States, entitled to a bond hearing when they seek withholding of removal? The answer turns on which provision of the Immigration and Nationality Act governs their detention. Section 1231 applies "when an alien is ordered removed" and provides no right to a bond hearing. On the other hand, § 1226 applies to an alien awaiting "a decision on whether the alien is to be removed" and permits the alien's release on bond after a hearing. The majority holds that § 1226 controls.

I respectfully dissent. Both the plain language and the structure of the Immigration and Nationality Act compel the conclusion that § 1231, not § 1226, governs the detention of aliens with reinstated orders of removal. Petitioners are thus not entitled to a bond hearing while they seek withholding of removal under their reinstated orders of removal.

I.

A.

Petitioners are aliens previously ordered removed from the United States. After their removal, each returned illegally. When they were later located by immigration authorities, each "prior order of removal [was] reinstated from its original date." 8 U.S.C. § 1231(a)(5). Once reinstated, the removal order "is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under [the Immigration and Nationality Act]." *Id.*; *see Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35

(2006). Instead, "the alien shall be removed under the prior order." § 1231(a)(5). Thus, Petitioners have, once and for all, been ordered removed.

Section 1231(a) governs the "[d]etention, release, and removal of aliens ordered removed." It provides for a ninety-day "removal period," during which "the Attorney General *shall* detain" an alien and then "*shall* remove the alien from the United States." §§ 1231(a)(1)(A), (a)(2) (emphasis added). The "removal period" begins on the "date the *order of removal* becomes administratively final," unless the alien is confined for non-immigration reasons or the "removal order" is stayed during judicial review. § 1231(a)(1)(B) (emphasis added).

Two paths may extend detention beyond ninety days. First, § 1231(a)(1)(C) requires that the "removal period shall be extended . . . and the alien may remain in detention" if the alien "acts to prevent the alien's removal subject to an order of removal."[1] Second, even where the removal period is not extended, § 1231(a)(6) authorizes continued detention: an alien ordered removed "may be detained beyond the removal period" if the alien is either (i) "inadmissible" under § 1182 or (ii) found to be a risk to the community or unlikely to comply with the removal order. § 1231(a)(6).

But extended detention is not indefinite detention. The Supreme Court has held that under § 1231(a)(6) "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal

---

[1] Section 1231(a)(1)(C)'s language suggests that seeking withholding of removal qualifies as an "act[ ] to prevent the alien's removal," which would extend the removal period. The parties have not argued this issue, and it is left for a future case.

in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). So an alien detained beyond the removal period may seek release from custody by showing that "there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future." 8 C.F.R. § 241.13(a); *see also Zadvydas*, 533 U.S. at 701. In other words, an alien granted withholding of removal to his native country can seek release from detention if no substitute country can be found. Despite this potential avenue for relief, Petitioners chose not to make a claim under *Zadvydas*. J.A. 210 n.8.

As long as removal remains likely in the foreseeable future, § 1231's commands easily apply to an alien who illegally returns to the United States after being removed. The alien's prior order of removal must be "reinstated from its original date" under § 1231(a)(5). This reinstated order may not be challenged. *Id.* Inside the removal period, the alien must be detained and removed from the United States. §§ 1231(a)(1)(A), (a)(2). Outside the removal period, the returning alien is inadmissible and may be detained beyond that period. § 1231(a)(6).

B.

Despite the seemingly "absolute terms" of § 1231's bar on applying for relief from the reinstated removal order and the mandate to remove the alien, the Supreme Court has recognized that aliens like Petitioners may seek withholding of removal under § 1231(b)(3)(A). *Fernandez-Vargas*, 548 U.S. at 35 n.4. Section 1231(b)(3)(A) bars removing an alien to a particular country if 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." *See also* 8 C.F.R. § 208.17 (deferral of removal under the Convention Against Torture). This limitation on how the order of removal is executed provides for the withholding proceeding that Petitioners have invoked.

This withholding proceeding permits an alien to seek protection from being removed to a particular country. 8 C.F.R. § 1208.31; Majority Op. at 6. The alien cannot attack a reinstated order requiring removal from the United States. *See Mejia v. Sessions,* 866 F.3d 573, 578-79 (4th Cir. 2017). The alien cannot raise any other issues, "including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief." 8 C.F.R. § 1208.2(c)(3)(i). In other words, withholding does not address whether an alien is ordered removed—that has already been determined. It only addresses how, and more specifically where, the removal will occur.

Moreover, this withholding proceeding does not affect the *finality* of the order of removal that was reinstated from its original date. *See Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 216-17 (3d. Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826, 831 (9th Cir. 2017). An order of removal "shall become final" under the Immigration and Nationality Act when either the order is affirmed by the Board of Immigration Appeals or the period for review expires, whichever occurs first. § 1101(a)(47)(B) (The order of deportation "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of

Immigration Appeals."). And for each Petitioner, the order of removal was "final" long ago—either because the Board has already affirmed the order or the time for any review has passed, *see* 8 C.F.R. § 1003.38(b) (notice of appeal shall be filed with the Board of Immigration Appeals within thirty days of the Immigration Judge's decision).

The order of removal applicable here is the same order that *already* removed Petitioners. Section 1231(a)(5) directs that "the prior order of removal is reinstated from its original date." That reinstatement does not create a new or second order of removal. It simply *reinstates* the prior order. And it is the original "date the *order of removal* be[came] administratively final" that triggers Petitioner's detention and removal. § 1231(a)(1)(B)(i) (emphasis added). The order was final then and is final now.

C.

The Majority rejects this plain application of § 1231's dictates and the statutory definition of finality in § 1101(a)(47)(B). Instead, the Majority suggests that the otherwise final order of removal is converted into a non-final order once a withholding proceeding begins. But none of the bases for this suggestion is convincing.

The Majority first claims that reinstatement somehow resets finality for the order of removal. If reinstatement somehow creates a separate and "new" order of removal, they argue, then the statutory definition of finality's focus on Board review does not fit because § 1231(a)(5) prohibits the Board from reviewing the reinstated order at all. But § 1231(a)(5) does not create

a new order of removal; it simply "restore[s]" the old order, to its "former state." *Reinstate*, BLACK'S LAW DICTIONARY (11th ed. 2019). There is only one order of removal, and the opportunity for review by the Board of Immigration Appeals has long since passed.

Also flowing from this false premise is the Majority's claim that applying the statutorily required definition of finality would not make sense under the finality requirements for judicial review under § 1252. As we just discussed, the single order of removal is not reset by § 1231(a)(5). So it is final as of when it originally became final. And the finality required under § 1252(b)(1) runs from the original finality, not the date of reinstatement.

We addressed this relationship between the reinstatement provision, § 1231(a)(5), and the judicial review provision, § 1252, in *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017).[2] There, we explained that "§ 1231(a)(5)

---

[2] Mejia was an alien with a prior order of removal reinstated under § 1231(a)(5). *Mejia*, 866 F.3d at 577. She then applied for asylum and withholding of removal and was placed in withholding-only proceedings. *Id.* at 578. The immigration judge granted her withholding of removal but rejected her asylum claim. *Id.* Mejia sought review of both her asylum claim and her challenge to the validity of her removal order based on defects in the underlying removal order. *Id.* at 576. As for the latter, the Court found that it had no jurisdiction to consider this issue because Mejia did not timely file her challenge. *Id.* at 588. Mejia urged the Court to read "§ 1252(b)(1)'s deadline to refer to the date on which the reinstated order of removal —not the original order—becomes final." *Id.* at 589. But the Court held that "the 30-day deadline runs from the date an original order of removal becomes final." *Id.* As this Court explained, it is "feasible that an individual removed to her home country could illegally

doesn't deprive us of jurisdiction to review the constitutional claims and questions of law that arise from an underlying removal order in the reinstatement context." *Id.* at 589. So while "the underlying removal order in most circumstances may *not* be reviewed by the Board of Immigration Appeals," Majority Op. at 30 n.11, there can still be judicial review of certain claims raised upon reinstatement of a removal order, if the petition for judicial review is "filed . . . in accordance with [§ 1252]." *Mejia*, 866 F.3d at 589 (citing § 1252(a)(2)(D)).

Section 1252(b)(1) requires that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal." And we interpreted the phrase, "final order of removal," to refer to the "*original* order of removal," not the reinstated order. *See Mejia*, 866 F.3d at 589 (holding "that the 30-day deadline [for petitioning for judicial review] runs from the date an *original* order of removal becomes final" and rejecting the argument that the deadline refers to the date when the *reinstated* removal order becomes final). Thus, in this Circuit, determining whether we have jurisdiction under § 1252 turns on whether the alien filed his petition for judicial review within thirty days from the date when the "*original* order of removal becomes final." *Id.* The statutory definition of finality applies "equally to the judicial review provision," Majority Op. at 30 n.11, and our jurisdictional inquiry is whether the *original*,

---

re-enter the United States, have the original removal order reinstated by DHS, and petition for review—all within a month's time." *Id.* at 590. Thus, the Court's holding did not abolish "review of all underlying orders in reinstatement." *Id.* (citations and emphasis omitted). There could be judicial review if the alien petitioned for review no more than thirty days from the date the original order of removal became final.

not the reinstated, removal order meets the definition of finality in § 1101(a)(47)(B).

Yet the Majority still argues that a reinstated removal order is not "final" for judicial review until the completion of the proceeding for withholding of removal, relying on decisions from the Second, Fifth, and Ninth Circuits for support. But these cases are improperly based on a pragmatic desire to permit judicial review that we rejected in *Mejia*. As this Court explained, if we were to accept the argument that the period for judicial review of a reinstated removal order depends on when the reinstatement is "final," this "'would defeat the purpose of the statute's time bar by allowing a challenge to an underlying removal order any time a reinstated order is issued.'" *Mejia*, 866 F.3d at 589 (quoting *Verde-Rodriguez v. Att'y Gen. U.S.*, 734 F.3d 198, 203 (3d Cir. 2013)).

In another attempt to avoid the finality of the order of removal, the Majority focuses on purported practicalities, arguing that the "finality" required under § 1231(a)(1)(B) is the final "authority" to physically remove the alien. Majority Op. at 20, 24. But nowhere does the statute refer to "actual legal authority" to remove an alien.[3] Section 1231(a)(1)(B) is triggered

---

[3] The Majority purports to derive the "actual legal authority" standard based on the three dates listed in § 1231(a)(1)(B), the latest of which begins the removal period:

> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

by the administrative finality of the "order of removal." Only by this sleight of hand—converting the finality of an "order" to some amorphous final "authority"—can one avoid the conclusion that the reinstated removal order under § 1231(a)(5) is an administratively final order.

Finally, the Majority claims that "the fact the removal period is limited to 90 days strongly suggests that [§ 1231] is intended to apply only when all legal barriers to removal are cleared away." Majority Op. at 21. But § 1231 provides that aliens with orders of removal reinstated under § 1231(a)(5) "may be detained beyond the removal period." § 1231(a)(6). Among other ways, this extended detention applies to any alien "ordered removed who is inadmissible under Section 1182." *Id.*

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Those dates, it reasons, are "potential legal impediments to removal," suggesting that, rather than determine which date applies, the court should determine whether any "legal impediment" exists. Majority Op. at 20, 26. Apparently, that includes impediments that are not listed, such as the withholding proceedings at issue here.

Creating this standard requires a judicial addition to the clear statutory language. Section 1231(a)(1)(B) lists only three events that trigger the beginning of the removal period. And the list is exclusive, not merely illustrative. Section 1231(a)(1)(B) provides that "[t]he removal period begins on the latest of the following." The provision does not wait for "*all* legal barriers to removal [to be] cleared away." Majority Op. at 21 (emphasis added). While the three triggering events listed in § 1231(a)(1)(B) are themselves legal impediments, this does not mean that the list includes *all* other potential barriers to removal. Instead, as the *expressio unius* canon explains, "expressing one item of an associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (citation and alterations omitted).

And aliens with orders of removal reinstated under § 1231(a)(5) are "inadmissible" under § 1182(a)(9). *See Garcia-Villeda v. Mukasey*, 531 F.3d 141, 151 (2d Cir. 2008) (an alien with a reinstated removal order was "permanently inadmissible" under § 1182); *see also Terrazas-Hernandez v. Barr*, 924 F.3d 768, 775 (5th Cir. 2019); *Mendez-Gomez v. Barr*, 928 F.3d 728, 732-33 (8th Cir. 2019). Thus, each Petitioner is subject to extended detention under § 1231(a)(6).

And failing to effectuate removal within ninety days is no dereliction of statutory duties: § 1231(a)(1) directs removal within ninety days, but § 1231(b)(3)(A) bars removal to a country where life or freedom would be threatened on protected grounds. So where an alien seeks withholding from removal to one country under § 1231(b)(3), *see Fernandez-Vargas*, 548 U.S. at 35 n.4, the statutory scheme itself contemplates that the alien may be removed to another country, § 1231(b)(2), and continued in detention under § 1231(a)(6).

In sum, the language of § 1231 governs every step: the order of removal's reinstatement from its original date (§ 1231(a)(5)), the bar on reviewing the order of removal (§ 1231(a)(5)), the direction to promptly remove the alien (§ 1231(a)(1)(A)), the extension of the removal period (§ 1231(a)(1)(C)), the withholding challenge to the execution of the order (§ 1231(b)(3)(A)), and the alien's detention (§§ 1231(a)(2), 1231(a)(6)).

II.

Despite the directives in § 1231, Petitioners argue that they should be treated under § 1226 and not § 1231. But § 1226 applies in a different context: when an alien

is "pending a decision on whether the alien is to be removed from the United States." § 1226(a). For this provision to apply, the decision that must remain undecided is not whether the alien is to be removed to a certain country but, as § 1226 states, "whether the alien is to be removed from the United States" *at all*.

The Petitioners are not awaiting that decision. As explained above, they illegally reentered the United States after being "ordered removed." § 1231(a)(1)(A). Their "prior order of removal [was] reinstated from its original date and is not subject to being reopened or reviewed." § 1231(a)(5). They are barred from applying "for any relief under this chapter," which includes the possibility of release from detention under § 1226.

The statutory structure of the Immigration and Nationality Act confirms that it is § 1231, not § 1226, that applies to the Petitioners. We cannot read the text of these two provisions in a vacuum but must consider the statutory structure as one of the "tools of divining meaning." *Abramski v. United States*, 573 U.S. 169, 179 (2014).

Both § 1226 and § 1231 are in a part of the Act entitled "Inspection, Apprehension, Examination, Exclusion, and Removal." As the title implies, this part provides a timeline of events that spans eleven statutory provisions from § 1221 to § 1232. Sections 1221 to 1224 discuss the arrival of aliens. Those sections are followed by § 1225, which provides instructions for inspecting the aliens, expediting removal of certain "arriving aliens," and referring others for a removal hearing. Next, § 1226 concerns the "[a]pprehension and detention of aliens" who are still "pending a decision on whether the alien is to be removed from the United

States." § 1226(a). It is not until three statutory provisions later, in § 1229, that the Act explains the structure of the alien's removal proceedings. *See* §§ 1229-1229c. If the alien is admitted into the United States, § 1230 explains how to record admission. On the other hand, "when an alien is ordered removed," § 1231 directs how the alien is treated. This series of events reflects that, once the alien has been ordered removed from the United States in a removal proceeding under § 1229a and that order has been reinstated under § 1231(a)(5), the alien cannot go back in time, so to speak, to § 1226. Section 1226 simply does not apply here.

* * *

Section 1231 speaks directly to those, like Petitioners, who illegally return to the United States after having previously been ordered removed. Section 1226 does not. While their detention remains subject to a *Zadvydas* claim that there is no significant likelihood of removal in the foreseeable future, the statutory language and structure dictates that each Petitioner may be detained without a bond hearing as permitted by § 1231.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 1:17-cv-754 (LMB/JFA)

CRISTIAN FLORES ROMERO, ET AL., PETITIONERS

v.

YVONNE EVANS, ET AL., RESPONDENTS

Filed: Nov. 17, 2017

MEMORANDUM OPINION

Before the Court are petitioners' Motion for Summary Judgment [Dkt. No. 24] and respondents' Motion to Dismiss in Part [Dkt. No. 27] and Motion for Summary Judgment [Dkt. No. 28]. The motions have been fully briefed, oral argument has been heard, and for the reasons discussed in this Memorandum Opinion, respondents' Motion to Dismiss in Part will be granted and petitioner Maria Angelica Guzman Chavez will be dismissed from this civil action. In addition, respondents' Motion for Summary Judgment will be denied, petitioners' Motion for Summary Judgment will be granted, and respondents will be directed to provide petitioners with individualized bond hearings.

I. BACKGROUND

Petitioners Maria Angelica Guzman Chavez ("Guzman Chavez"), Jose Alfonso Serrano Colocho ("Serrano Colocho"), Danis Faustino Castro Castro ("Castro Castro"), and Cristian Flores Romero ("Flores Romero") (collectively, "petitioners")[1] are currently detained under the authority of respondents Mary Yvonne Evans ("Evans"), the Field Office Director of the Washington Field Office of Enforcement and Removal Operations, United States Immigration and Customs Enforcement ("ICE"); Thomas D. Homan ("Homan"), the Acting Director of ICE; Brenda Cook ("Cook"), the Court Administrator of the Executive Office for Immigration Review ("EOIR"), Baltimore Immigration Court; and Jefferson B. Sessions III ("Sessions"), the Attorney General of the United States (collectively, "respondents").[2] In this action, petitioners seek a writ of habeas corpus (Count 1) and a declaratory judgment (Count 2) stating that petitioners are detained under 8 U.S.C. § 1226(a), not 8 U.S.C. § 1231, and ordering respondents to either release petitioners or grant them bond hearings, along with miscellaneous associated relief.[3]

The material facts in this action are clear and uncontroverted. All four petitioners are natives and citizens

---

[1] When this habeas petition was filed, there was an additional petitioner, Wilber Rodriguez Zometa. On September 21, 2017, he voluntarily dismissed his claims. See Dkt. No. 33. In addition, the amended habeas petition contained three counts. On August 25, 2017, petitioners dismissed Count 3. See Dkt. No. 26.

[2] All respondents are sued in their official capacities.

[3] Petitioners purport to represent a class of detained individuals but have not yet filed for class certification. As such, their claims will be discussed as individual claims.

of either Guatemala or El Salvador. See Resp. Mem. [Dkt. No. 29] Ex. 1, at 2; id. Ex. 3, at 2; id. Ex. 4, at 2; id. Ex. 5, at 1, 4. At various times between 1999 and 2013, all four entered or attempted to enter the United States without being admitted by an immigration officer. Id. Ex. 1, at 2; id. Ex. 3, at 2; id. Ex. 4, at 2; id. Ex. 5, at 3, 6. All were arrested and placed in removal proceedings, ordered removed, and removed to their native countries. Id. Ex. 1, at 2; id. Ex. 3, at 2; id. Ex. 4, at 2; id. Ex. 5, at 5, 6. After removal, all four reentered the United States without receiving permission from the appropriate authorities, and their removal orders were reinstated. Id. Ex. 1, at 2-3; id. Ex. 3, at 3; id. Ex. 4, at 2-3; id. Ex. 5, at 7.[4] Each petitioner expressed a fear of removal back to his or her home country and was referred to a United States Citizenship and Immigration Services ("USCIS") officer for a reasonable fear interview. Id. Ex. 1, at 3; id. Ex. 3, at 3; id. Ex. 4, at 2-3; id. Ex. 5, at 7. In each case, the USCIS asylum officer determined that the petitioner expressed a reasonable fear of persecution or torture and referred the matter to the Immigration Court, which is conducting withholding-only proceedings. Id. Ex. 1, at 3-4; id. Ex. 3, at 3; id. Ex. 4, at 2-3; id. Ex. 5, at 7, 9-10. Each petitioner remains detained pending resolution of

[4] Alone among petitioners, Guzman Chavez has reentered the United States without authorization twice. In 2012, after her initial removal, she reentered the country, her removal order was reinstated, she pled guilty to a criminal charge of illegal reentry, and she was removed. See Resp. Mem. Ex. 5, at 5, 13. This additional reentry is not relevant to the legal arguments in this action.

those proceedings. Id. Ex. 1, at 3-4; id. Ex. 3, at 3; id. Ex. 4, at 2-3; id. Ex. 5, at 7.[5]

Flores Romero originally brought a petition for a writ of habeas corpus under 28 U.S.C. § 2241, naming Evans and the EOIR as respondents. [Dkt. No. 1], but later filed an amended petition adding the other petitioners and new respondents, dropping the EOIR as a respondent, and including class action claims [Dkt. No. 5]. The core argument in the habeas petition is that petitioners are detained under 28 U.S.C. § 1226(a) and, as such, are entitled to bond hearings.

II. DISCUSSION

A. Standard of Review

A party is entitled to summary judgment if the party can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In general, bare allegations or assertions by the nonmoving party are not sufficient to generate a genuine dispute; instead, the nonmoving party must produce "significantly probative" evidence to avoid summary judgment. Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 929-30 (4th Cir. 1990) (quoting Anderson, 477 U.S. at 242). That being said, in ruling on a motion

---

[5] Flores Romero, Serrano Colocho, Castro Castro, and Guzman Chavez have been detained by ICE respectively since October 5, 2016, Resp. Mem. Ex. 1, at 3; July 5, 2017, id. Ex. 3, at 3; May 19, 2017, id. Ex. 4, at 3; and July 24, 2017, id. Ex. 5, at 8, 11.

for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in her favor. Anderson, 477 U.S. at 255,.

B. Motion to Dismiss in Part for Lack of Jurisdiction

Respondents first argue that Guzman Chavez's claims should be dismissed for lack of jurisdiction. Resp. Mem. 13-14. According to respondents, in general the "proper respondent for a writ of habeas corpus" is the "immediate custodian" of the petitioner—the "warden of the facility where the petitioner is confined." Id. at 13 (citing Rumsfeld v. Padilla, 542 U.S. 426 (2004)). Unlike the other petitioners, Guzman Chavez was detained in Florida, not in Virginia, when this action was filed; as such, respondents argue that her claims should be dismissed because the Court lacks jurisdiction over the warden of the Florida detention facility, who is the only proper respondent. Id. at 14.

In response, Guzman Chavez argues that the rule from Padilla should not be applied in the immigration context because "the individuals who can provide relief in a habeas petition to an immigrant detainee . . . [are] the Attorney General and the Director of ICE," not the warden of the detention facility where the petitioner is held. Guzman Chavez Opp. [Dkt. No. 34] 2. Guzman Chavez supports this argument by pointing to a circuit split on this question, which the Fourth Circuit has not addressed, and by emphasizing that, as a matter of law, the warden of a detention facility cannot order a

bond hearing. See id. at 3-7.[6] In addition, Guzman Chavez appears to argue that any concerns that a rule allowing immigrant detainees to sue the Attorney General rather than the warden would incentivize forum shopping can be limited by a set of venue rules,[7] such as requiring that the action be filed in the district where the immigration proceedings are ongoing. See id. at 7-9.

As both parties recognize, the seminal case addressing who constitutes a proper habeas respondent is Padilla, which involved an American citizen detained pursuant to President Bush's determination that he was an "enemy combatant." Padilla brought a habeas petition naming as respondents President Bush, Secretary of Defense Donald Rumsfeld, and Melanie Marr ("Marr"), the Commander of the Naval Brig where Padilla was being held. See Padilla, 542 U.S. at 432. Padilla had originally been arrested in Chicago by federal agents executing a material witness warrant issued by the

---

[6] Guzman Chavez also argues in a footnote, and without further elaboration, that she is "also asking for injunctive relief, which is relief for which [r]espondents are clearly proper parties and that could be provided in Virginia." Guzman Chavez Opp. 2 n.1. As respondents correctly argue, to obtain injunctive relief, Guzman Chavez first needs to identify a cause of action that gives the Court jurisdiction over her claims; if respondents are correct that her habeas petition must be brought against her immediate custodian, over whom this Court apparently does not have personal jurisdiction, there is no viable cause of action that allows her to seek injunctive relief from this Court. See Resp. Reply [Dkt. No. 36] 5 n.2.

[7] Guzman Chavez in fact uses the term "venue" repeatedly in her brief, but she does not appear to be making an argument about the actual venue statute. In Justice Kennedy's concurrence in Padilla, he conceptualized proper-respondent rules as something akin to "venue," rather than "personal jurisdiction," rules, and the Court interprets Guzman Chavez's argument as invoking this discussion.

United States District Court for the Southern District of New York. See id. at 430-31. He was transferred to New York, where he was held on federal criminal charges for approximately one month before he was designated an enemy combatant, transferred to Department of Defense custody, and moved to a brig in Charleston, South Carolina. See id. at 431-32. After he was moved to South Carolina, Padilla filed his habeas petition in the Southern District of New York. Id. at 432. The government moved to dismiss, arguing that the court did not have jurisdiction over Marr, the immediate custodian and only proper respondent. See id. On that preliminary question, the district court held that Rumsfeld's "personal involvement" in Padilla's custody rendered him a proper respondent; the Second Circuit agreed, finding in addition that on the "unique" facts of the case, Rumsfeld's exercise of the "legal reality of control" over Padilla made him an appropriate respondent. Id. at 432-33.

The Supreme Court reversed the Second Circuit after finding that Marr was the only proper respondent. According to the Court, the "question whether the Southern District has jurisdiction over Padilla's habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the Southern District have jurisdiction over him or her?" Id. at 434. The Court addressed each question in turn.

Beginning with the first question—the proper respondent—the Court started its analysis with the text of the habeas statute, which "straightforwardly provides that the proper respondent" is "the person who has custody over" the petitioner. Id. at 434 (quoting 28 U.S.C.

§ 2242). The statute's "consistent use of the definite article" suggested to the Court that "there is generally only one proper respondent" for a given petitioner and that this proper respondent is the person "with the ability to produce the prisoner's body before the habeas court." Id. at 434-35. As the Court explained, this language provides the basis for the general rule that has been "confirm[ed]" by "longstanding practice": "[I]n habeas challenges to present physical confinement—'core challenges'—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Id. at 435.[8]

Padilla relied on three cases—Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); Strait v. Laird, 406 U.S. 341 (1972); and Ex parte Endo, 323 U.S. 283 (1944)—to argue that there should be an exception to this general rule that would enable prisoners who are not detained under criminal charges to sue the individual with legal, rather than physical, control over the prisoner. The Court rejected that reliance by pointing out that the petitioners in Braden and Strait were not challenging

---

[8] At this point, the Court included a footnote acknowledging that it had previously "left open the question whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation." Padilla, 542 U.S. at 435 n.8. The Court recognized that the lower courts had split (with the majority applying the immediate custodian rule) but, because the issue was not squarely presented in Padilla, the Court "again decline[d] to resolve it." Id. Since Padilla was decided, the availability of habeas relief to immigration detainees has been significantly curtailed and it is unclear how the pre-Padilla lower court decisions would apply to the new immigrant habeas landscape. See 8 U.S.C. § 1252;

their immediate physical custody; therefore, "the immediate custodian rule did not apply because there was no immediate physical custodian with respect to the 'custody' being challenged." Padilla, 542 U.S. at 439.[9] Moreover, the Court determined Endo to be inapplicable, as it read that case to stand for "the important but limited proposition" that if the government moves a habeas petitioner after the petition is properly filed, the district court retains jurisdiction over the petition. Id. at 441. The Court held that none of those cases established a broad exception to the general rule governing habeas petitions that, like Padilla's, challenged the petitioner's present physical confinement. Id. at 441-42.

Having determined that Marr was the proper respondent, the Padilla Court moved on to the second question: whether the district court had jurisdiction over Marr. See id. at 442.[10] The Court first observed that the longstanding interpretation of habeas jurisdiction was that jurisdiction was available only in the district of confinement, an interpretation supported by various provisions of the habeas statutes and implicitly confirmed by Congress. See id. at 442-43. Then, the Court

---

[9] In Braden, the petitioner, who was in custody in Alabama, brought a habeas corpus proceeding against a Kentucky court where he had a separate indictment pending, arguing that he had a right to a speedy trial on the Kentucky indictment. 410 U.S. at 485-86. In Strait, the petitioner, who was an Army Reserve officer, brought a habeas corpus proceeding in which he requested a discharge as a conscientious objector against the commanding officer of the Army records center. 406 U.S. at 342.

[10] This requirement comes not from notions of personal jurisdiction but from 28 U.S.C. § 2241(a), which limits district courts to granting habeas relief "within their respective jurisdictions."

rejected Padilla's argument that Braden and Strait stand for the proposition that "jurisdiction will lie in any district in which the respondent is amenable to service of process." Id. at 443. As the Court explained, the Braden petitioner, who was detained in Alabama, was challenging his future confinement in Kentucky and he sued the future custodian in the Western District of Kentucky, where that custodian was located. Id. at 444-45. The Court held that the Western District had jurisdiction because the custodian was properly served "in that district." Id. at 445 (quoting Braden, 410 U.S. at 500). According to the Padilla Court, this decision "does not derogate from the traditional district of confinement rule for core habeas petitions challenging present physical custody" and, in fact, Braden cites favorably to a case "squarely holding that the custodian's absence from the territorial jurisdiction of the district court is fatal to habeas jurisdiction." Id. at 445.

In Strait, the petitioner was an Army reserve officer who was physically located in California. Id. He brought a habeas action against the commanding officer of the Army records center, who was located in Indiana, asking the court to require the Army to process his discharge as a conscientious objector. Id. The respondent objected to the filing of the action in California, as he was not physically present in that state. See id. As the Padilla Court explained, the Strait Court was confined by the then-existing Ahrens rule, which "required that both the petitioner and his custodian be present" in the district of suit. Id. at 446. To fit Strait's habeas petition into the confines of this rule, the Strait Court "invoke[d] concepts of personal jurisdiction to hold that the custodian was 'present' in California through the actions of his agents." Id. Because the

Padilla Court had already held that Marr was the proper respondent and both Marr and Padilla were physically present in South Carolina, the Court found "no occasion" to engage in designation of nominal custodians or other such work-arounds. Id.

Therefore, the Court held that the "proviso that district courts may issue the writ only 'within their respective jurisdictions' forms an important corollary to the immediate custodian rule in challenges to present physical custody under § 2241" and the two rules together "compose a simple rule": "Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." Id. at 447.

Although Padilla has some initial force, ultimately it fails to account for a key difference between this action and Padilla. In Padilla, the petitioner was challenging his physical detention. Although the Secretary of Defense exercised legal control over that detention and would have been able to order Padilla's release, the commander of the brig where Padilla was held also exercised control over his detention and could release him. Therefore, the Padilla Court's holding is more properly viewed as applying to situations where there are multiple officials—some lower-level, such as the warden, and some higher-level, such as the Secretary of Defense—in the chain of custody, all of whom have the capacity to order the requested relief: the release of the prisoner. In such a context, Padilla holds that the petitioner cannot have his pick of officials to sue; instead, he must sue his immediate custodian.

The present action does not fit into this context. Although there are a variety of officials—including the Attorney General and the warden of the Florida facility—who could order Guzman Chavez's release, she is not actually seeking release. Instead, she is seeking an individualized bond hearing, relief which the warden is unable to provide. Therefore, forcing her to sue the warden would be an act of futility. Even if she won a judgment requiring that a bond hearing be held, the warden would not have any ability to provide the relief obtained. Guzman Chavez Opp. 4. The more logical rule is that an immigrant habeas petitioner must sue the warden if and only if the warden can provide the requested relief. If the warden is unable to provide the relief, the immigrant detainee may name as respondent any official who is legally authorized to provide the relief requested.[11]

In addition to conforming to the underlying logic of Padilla, this result accords with the conclusion reached by the one in-circuit district court opinion to have fully considered the question. See Jarpa v. Mumford, 211 F. Supp. 3d 706 (D. Md. 2016) (Xinis, J.), appeal filed, No. 16-7665 (4th Cir. Dec. 2, 2016). In Jarpa, the petitioner named as respondents both the warden of the

---

[11] Respondents appear at times to incorrectly characterize this as a "core" habeas case where Guzman Chavez is challenging her "present physical confinement." Resp. Reply 3-4. So characterized, Guzman Chavez's petition seems bound by the "default rule" announced in Padilla. But in reality, Guzman Chavez is not challenging her present physical confinement; instead, she is challenging the decision to confine her without giving her access to an individualized bond determination. Characterized in this more precise way, Guzman Chavez's petition avoids the default Padilla rule and allows her to name as respondents the officials who can actually provide her a bond hearing.

facility where he was detained as well as various higher-level officials, including the Secretary of Homeland Security and the Attorney General. Id. at 708. The government moved to dismiss all of the respondents except the warden, citing the immediate custodian rule. Id. at 723. The court declined to apply the immediate custodian rule and dismiss the higher-level officials because "the relief sought can only practically be delivered by the head of the agency in charge of interpreting and executing the immigration laws," id. at 724; however, because the petitioner sued the warden along with the higher-level officials, the court did not have to decide whether a petitioner can properly name only higher-level officials and not the appropriate warden.[12]

The second question identified in Padilla—whether the Court has jurisdiction over the appropriate respondent(s)—involves determining whether the court should use traditional "service of process" principles to analyze jurisdiction or whether, as in Padilla, a more limited locational analysis is appropriate. If the former, the Court has jurisdiction over respondents. If the latter, the Court likely does not have jurisdiction over respondents, as neither Guzman Chavez nor any

[12] The briefing in Jarpa has been stayed pending the Supreme Court's resolution of Jennings v. Rodriguez, No. 15-1204, in which detained aliens are arguing that the Constitution requires that aliens subject to mandatory detention under the Immigration and Nationality Act ("INA") receive bond hearings if their detention reaches six months. Unlike petitioners in the present action, the Jarpa petitioner included a due process claim that may be resolved by the Supreme Court's decision in Jennings. See 211 F. Supp. 3d at 710.

proper respondent is apparently located in this district.[13] Based on the principles laid out in Padilla, a locational analysis is appropriate: the Padilla Court explicitly rejected the "service of process" test and all of the cases it cites involved petitions filed in districts with some locational nexus to the petitioner or a respondent. The hard question presented in some of those cases arises when the proper respondent and the petitioner are located in different districts, as in Braden and Strait; however, even in those cases, the courts have limited themselves to finding jurisdiction appropriate either where the petitioner resides (in Strait) or where the respondent is located (in Braden). Given the historical focus on territoriality in habeas cases, as alluded to in Padilla, as well as the fear respondents express that an expansive rule would allow immigrant detainees to engage in forum shopping, this locational limitation is appropriate.

Therefore, in situations such as Guzman Chavez's, where an immigrant detainee requesting a bond hearing is located in a different district from the officials who have the ability to grant her a hearing, those officials are proper respondents but the detainee must file her petition either where she is located or where the officials are located. Filing a petition in a third district where neither the petitioner nor any proper respondent is located

---

[13] Guzman Chavez, who is currently detained in Florida, identifies the Attorney General and the Director of ICE as the two respondents with authority to order a bond hearing. Guzman Chavez Opp. 5-6 (citing 8 U.S.C. § 1226(a), 6 U.S.C. § 557). Respondents do not contest that position. Although the habeas petition does not identify a location for either the Attorney General or the Director of ICE, the headquarters of both ICE and the Department of Justice are located in the District of Columbia.

does not satisfy the limitation in the habeas statutes, which only allow courts to grant habeas petitions within their respective jurisdictions. As such, respondents' Motion to Dismiss in Part will be granted and petitioner Guzman Chavez's claims will be dismissed without prejudice.

C. Cross-Motions for Summary Judgment

As both parties agree, all relevant facts in this action are undisputed and the resolution of the habeas petition turns on a pure question of law: whether ICE's authority to detain petitioners arises from 8 U.S.C. § 1226, as petitioners contend, or 8 U.S.C. § 1231, as respondents contend. If petitioners are held under § 1226, they are entitled to a bond hearing under § 1226(a). If petitioners are held under § 1231, they are subject to mandatory detention without a bond hearing.[14] Petitioners rely on a Second Circuit opinion holding that aliens in petitioners' position are detained under § 1226(a) and are entitled to bond hearings. Guerra v. Shanahan, 831 F.3d 59 (2d Cir. 2016). Respondents rely on Ninth Circuit and Eastern District of Virginia decisions holding that detainees in petitioners' position are detained under § 1231 and are not entitled to bond hearings. See Padilla-Ramirez v. Bible, 862 F.3d 881 (9th Cir. 2017); Crespin v. Evans, 256 F. Supp. 3d 641,

---

[14] The Supreme Court has recognized a limited due process right to release from mandatory detention in certain narrow circumstances. See Zadvydas v. Davis, 533 U.S. 678 (2001). Petitioners have expressly declined to pursue a Zadvydas-based due process claim, although they have indicated that they may seek leave to amend their petition to add such a claim as the length of their detentions increase. See Pet. Reply [Dkt. No. 35] 16 n.8.

No. 1:17-cv-140, 2017 WL 2385330 (E.D. Va. May 31, 2017), appeal pending, No. 17-6835 (4th Cir.).

The context of petitioners' detention and the legal claims raised by both parties involve the nature of reinstated final removal orders and the effect of withholding-only proceedings on those orders, as well as the statutes governing detention during and after removal proceedings.

1. Reinstated Removal Orders and Withholding-Only Proceedings

When an alien who has been ordered removed from the United States and has either been removed or departed voluntarily under the order of removal illegally reenters the country, the original order of removal "is reinstated from its original date." 8 U.S.C. § 1231(a)(5). Such an order "is not subject to being reopened or reviewed" and the alien "may not apply for any relief" under the INA. See id. In general, this provision "forecloses discretionary relief from the terms of the reinstated order," Fernandez-Vargas v. Gonzales, 548 U.S. 30, 35 (2006); however, there is one exception to this rule. Congress has provided, consistent with the United States's obligations under international law, that the Attorney General may not remove an alien to a country where the alien's life or freedom would be threatened. See 8 U.S.C. § 1231(b)(3).[15] This restriction applies even to aliens with reinstated removal orders. See

[15] In addition to applying for withholding of removal under the statutory provision, aliens may also apply for withholding of removal under the Convention Against Torture. The standards for withholding are slightly different under the two provisions, but the process is the same. See 8 C.F.R. § 208.16.

id. Therefore, although an alien cannot otherwise challenge a reinstated removal order, he can seek protection from having that order executed to a particular country by initiating a withholding-only proceeding.

When an alien subject to a reinstated removal order expresses a fear of removal to the country indicated in his removal order, the Department of Homeland Security ("DHS") refers the alien to an asylum officer for a pre-withholding screening interview. See 8 C.F.R. § 208.31(b). If the asylum officer determines that the alien "has a reasonable fear of persecution or torture," the alien may apply for withholding of removal. See id. § 208.31(e).[16]

If the alien passes this screening process, then the alien is permitted to apply for withholding or deferral[17] of removal and the application goes to an IJ for an initial review to determine whether the alien has met his burden.[18] Should the burden be met, the IJ will grant the

---

[16] Alternatively, if the asylum officer determines that the alien has not established a reasonable fear, the alien can appeal that decision to an immigration judge ("IJ"). Id. § 203.31(f). If the IJ agrees with the asylum officer, the process ends (there is no appeal) and DHS will execute the reinstated removal order. Id. § 203.31(g)(1). If, on the other hand, the IJ finds the alien has established a reasonable fear of persecution or torture, then the alien may apply for withholding of removal. Id. § 203.31(g)(2).

[17] Under § 1231(b)(3), an alien applies for "withholding" of removal. Under the Convention Against Torture, an alien applies for "withholding or deferral" of removal. The difference is not relevant to this action.

[18] Under § 1231(b)(3), the alien bears the burden of establishing that "his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R.

alien's request for deferral or withholding of removal; however, if the IJ determines that the alien has not met his burden, the alien may appeal that determination to the Board of Immigration Appeals ("BIA") and, ultimately, to a federal court of appeals. In these "withholding-only" proceedings, the only issue is whether the alien is entitled to withholding or deferral of removal; the alien may not collaterally attack the underlying removal order. See id. § 208.2(c)(3)(i).

In this litigation, each petitioner has passed the initial screening process, has applied for withholding of removal, and is in the process of applying to an IJ for an initial review of whether withholding or deferral of removal should be granted or, in the case of Flores Romero, is appealing the IJ's adverse initial determination.

2. Statutes Governing Alien Detention

There are two separate provisions in the INA that give the government authority to detain aliens during removal proceedings or while awaiting the execution of an order of removal. When an alien is first arrested, he or she is detained under 8 U.S.C. § 1226(a), which allows DHS to "arrest[ ] and detain[ ]" the person "pending a decision on whether the alien is to be removed from the United States." Under this section, the alien may be released on bond; however, once the "removal period" begins, the authority for detention shifts to

---

§ 208.16(b). To quality for protection under the Convention Against Torture, the alien bears the burden of showing it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." Id. § 208.16(c).

8 U.S.C. § 1231. The "removal period," which is typically a 90-day period[19] in which the alien ought to be removed, begins on the latest of three dates: (1) the "date the order of removal becomes administratively final"; (2) the "date of the court's final order" if "the removal order is judicially reviewed" and "a court orders a stay of the removal of the alien"; or (3) the "date the alien is released from detention or confinement" if "the alien is detained or confined (except under an immigration process)." Id. § 1231(a)(1)(B). During the "removal period," DHS "shall detain the alien." Id. § 1231(a)(2).

3. Regulations Addressing Detention

Respondents argue that DHS regulations, which deserve deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984),[20] provide that aliens in petitioners' position are detained under § 1231. Respondents primarily argue two points here. First, they contend that because under 8 C.F.R.

---

[19] There are some circumstances in which the removal period may be extended beyond 90 days. At a certain point after these 90 days, due process protections may require a bond hearing or the release of the alien. Cf. Zadvydas, 533 U.S. 678. To implement these protections, DHS has instituted regulations governing post-removal-order custody reviews. See 8 C.F.R. § 241.4. These regulations are not at issue in this action.

[20] Respondents also make a brief reference to Auer v. Robbins, 519 U.S. 452 (1997). Resp. Reply 18. To the extent respondents are arguing that their interpretation of these regulations should be given deference under Auer, their argument is rejected. See Guerra, 831 F.3d at 64 ("An agency may not convert an issue of statutory interpretation into one of deference to an agency's interpretation of its own regulations simply by pointing to the existence of regulations whose relevance is tenuous at best.").

§ 241.8(e), a removal order is reinstated before the withholding-only proceedings begin, individuals in petitioners' position are subject to a final removal order. Resp. Mem. 25. Second, they argue that § 241.8(f) states that "[e]xecution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part" and that Part 241 clearly lines up with § 1231. Id. at 25-26.[21]

These regulations do not answer the question raised by petitioners, see Padilla-Ramirez, 862 F.3d at 885; Guerra, 831 F.3d at 63; Crespin, 2017 WL 2385330, at *6 n.17, because it is not clear from the regulations whether § 241.8(f) even applies to individuals who have applied for withholding of removal. The immediately prior subsection, § 241.8(e), provides an "[e]xception" for such individuals by directing that aliens who express a fear of removal should be "immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter." Therefore, to the extent that respondents believe the process of detention

---

[21] Respondents also state, without further elaboration: "[T]he regulation at § 241.4(b)(3) provides that even an alien who is granted withholding of removal is subject to the final-removal-order detention provisions of § 1231(a)(6)." Resp. Mem. 26. Although respondents do not construct a full argument from this provision, it is worth noting that § 241.4(b)(3) only provides that individuals granted withholding of removal "who are otherwise subject to detention are subject to the provisions of this part." Even assuming that being "subject to the provisions of this part" means these individuals may continue to be detained under § 1231, the regulation is inapposite because it only applies to individuals who are "otherwise subject to detention" (for example, criminal aliens).

and removal proceeds sequentially through the chapters, § 241.8(e) provides a detour out of Part 241 for individuals in withholding-only proceedings. Moreover, the only sections in Part 241 that even discuss detention are § 241.3-.4. Section 241.3 provides that "[o]nce the removal period . . . begins, an alien in the United States will be taken into custody pursuant to the warrant of removal," while § 241.4 provides for detention of certain aliens "beyond the removal period." Application of both of these sections would "beg the very question[ ] at issue," Padilla-Ramirez, 862 F.3d at 885: whether aliens in withholding-only proceedings are in the "removal period." Therefore, in the absence of more specific regulations clarifying the meaning of "removal period" and the effect of withholding-only proceedings on the removal period, respondents' position cannot be given deference under Chevron.

4. The Source of Authority to Detain Petitioners

The legal question presented by petitioners boils down to a deceptively simple question: Are petitioners detained under 8 U.S.C. § 1226(a) or under 8 U.S.C. § 1231?[22] Both parties employ a variety of statutory interpretation techniques to answer this question. In the end, although respondents' arguments have some force,

---

[22] Respondents appear to believe that the relevant question in this case is simply whether petitioners' removal orders are "administratively final"; if so, then the "removal period" has begun under § 1231 and petitioners are detained under that section. See Resp. Reply 5; see also Padilla-Ramirez, 862 F.3d at 884 ("The question before us, then, is whether Padilla-Ramirez's reinstated removal order is administratively final."). Although administrative finality is the relevant dividing line in § 1231, the Court must analyze both § 1226 and § 1231 and attempt to harmonize the two statutes rather than unduly focusing on the § 1231 provisions.

the text, structure, and intent of the INA compel the conclusion that petitioners are detained under 8 U.S.C. § 1226(a).

Beginning with the statutory text, § 1226(a) governs detention for an alien "detained pending a decision on whether the alien is to be removed from the United States." As an initial matter, this text governs petitioners' detention because until withholding-only proceedings are complete, a decision has not been made on whether they will in fact be removed from the United States. See Pet. Mem. [Dkt. No. 20] 10-11. As petitioners argue, § 1226(a) focuses not on a determination of removability (which has already been made) but instead on a more concrete determination of whether petitioners will actually be removed—a determination that has not yet been made in petitioners' cases. See id. As such, until the government determines that there is a country to which petitioners can legally be removed, the decision on whether they are "to be removed" remains "pending," and § 1226(a) governs their detention.

This conclusion is reinforced by the statutory structure of the INA and evidence of Congress's intent. Section 1231 provides that the removal period will begin on the latest of three dates: the date the removal order becomes final, the date any judicial stay stopping removal is lifted, or the date the alien is released from non-immigration detention. 8 U.S.C. § 1231(a)(1)(B). As petitioners explain, each of these three preconditions simply relates to a different legal impediment to actual removal: either DHS has not completed its own removal process (the order is not final) or the judicial branch has deprived DHS of authority to execute the removal process (a judicial stay stopping removal is in

place) or the criminal authorities, rather than ICE, have custody of the individual and ICE does not have jurisdiction to remove the noncitizen (the alien is in non-immigration detention). In each situation, DHS may have already determined that the noncitizen is, like petitioners here, removable, but ICE lacks the present and final legal authority to actually execute that order of removal.

Moreover, Congress clearly intended to have § 1231 govern only the final logistical period, in which the government has actual authority to remove the alien and need only schedule and execute the deportation. Congress has specifically limited the normal "removal period" to 90 days, a limitation that makes sense if the removal period is only meant to govern the final logistical steps of physically removing an alien. Based on the length of petitioners' detentions to date, it is obvious that withholding-only proceedings take substantially longer than 90 days. As such, it would be contrary to congressional intent to shoehorn a class of aliens whose proceedings will typically far exceed 90 days into the "removal period" for which Congress has specifically intended a 90-day limit.

Background legal principles of finality also support petitioners' view. The INA limits judicial review to a "final order of removal," 8 U.S.C. § 1252(a)(1), and aliens may appeal adverse decisions in withholding-only proceedings only "as part of the review of a final order of removal," id. § 1231 note (d). Addressing these statutes, many courts have held that a reinstated removal order is not final for purposes of judicial review until after the adjudication of any withholding applications, an

interpretation the government has itself endorsed. See Pet. Mem. 16 (collecting cases).[23] It would be nonsensical to adopt a "bifurcated definition of finality" with respect to removal orders in withholding-only proceedings. Guerra, 831 F.3d at 63. As such, the Court must conclude that reinstated removal orders do not become "administratively final" for purposes of § 1231 until they are final for purposes of appellate review.

Moving beyond the INA context, principles of administrative law support the conclusion that a reinstated removal order is not final until after the conclusion of any withholding-only proceedings. See Pet. Mem. 17. In agency law, finality is generally achieved when an action both "mark[s] the consummation of the agency's decisionmaking process" and also determines legal rights or obligations. Id. at 18 (quoting Bennett v. Spear, 520 U.S. 154, 177 (1997)). In this case, although some legal rights or obligations have already been determined (the petitioners are removable), the decisionmaking process is ongoing—i.e., it has not been consummated—as the agency is still determining whether petitioners will be granted withholding of removal or will be removed. See id. As such, under principles of administrative law, petitioners' removal orders are not "final";

---

[23] Respondents argue that the Fourth Circuit has held that a reinstated removal order's date of finality is the date of the original entry of the order of removal, Resp. Reply 17 (citing Mejia, 866 F.3d 573); however, that case involved the date of finality for determining whether a challenge to the underlying removal order was timely. It is not clear how the Fourth Circuit would analyze finality dates in the context of a challenge to the eventual withholding-only proceedings.

therefore, petitioners are being detained under § 1226(a).

Respondents' arguments to the contrary are unavailing. First, they argue that the text of § 1226(a) supports their position because petitioners' removal orders have already been reinstated; as such, the decision on whether petitioners are "to be removed" is no longer "pending." Resp. Mem. 16-17. In addition, they argue that there is no legal requirement that they amend the final removal order if they wish to remove petitioners to a third country. Id. at 20. Therefore, because respondents may "immediately remove" petitioners "to a third country based on their reinstated orders without" any "additional proceedings, the reinstated removal orders must necessarily be final." Id. This reasoning is incomplete. Although DHS may eventually be able to remove petitioners to some third country even if their application for withholding of removal is granted, third-country removal would require additional proceedings. At the least, DHS would be required to give petitioners notice and the opportunity for a hearing. Pet. Mem. 12.[24] Moreover, the provision allowing for the removal of detainees to additional countries,

---

[24] The parties argue about whether the government can deport an alien to a third country without amending the removal order and whether an IJ who grants withholding of removal has the authority to alter the actual underlying removal order. See Pet. Mem. 12; Resp. Mem. 19-20; Resp. Reply 9-12. Respondents are correct that an IJ in withholding-only proceedings does not have the authority to amend the underlying removal order, see 8 U.S.C. § 1231(a)(5); In re Balbi, 2006 WL 3203536 (BIA Oct. 2, 2006), and that the government has the ability to deport an alien in withholding-only proceedings to a country not specified in the removal order, see 8 C.F.R. § 1240.12(d). At the same time, petitioners are correct that DHS

8 U.S.C. § 1231(b)(2), places "sharp limitations on the countries" that the government may designate for removal—and respondents have not shown that there are any countries that meet those limitations for petitioners. Pet. Reply 5. Finally, as a practical matter, the United States of America generally cannot simply sua sponte deport an alien to a country where he or she does not have citizenship; instead, the government must typically get permission to deport from the third country. Cf. Zadvydas, 533 U.S. at 684 (explaining that the government could not deport the petitioner to Germany, Lithuania, or the Dominican Republic despite his ties to those countries because those countries would not accept him). As such, it is not clear at the present time that petitioners are in fact "to be removed" from the United States. All that is clear is that they are removable.

Turning to the text of § 1231(a)(5), respondents argue that the provision makes clear that the removal period has begun for petitioners. Because a reinstated removal order "is not subject to being reopened or reviewed," respondents argue that petitioners' removal orders are "administratively final" and petitioners are detained under § 1231. Resp. Mem. 14. This argument is unpersuasive. Although the INA indicates that reinstated removal orders are final in the ordinary case, other regulatory provisions that bear more closely on withholding-only proceedings emphasize that aliens in these proceeds are situated differently from the ordi-

---

could not immediately remove petitioners to a third country, as DHS would first need to give petitioners notice and the opportunity to raise any reasonable fear claims. Cf. Kossov v. INS, 132 F.3d 405, 408-09 (7th Cir. 1998).

nary alien subject to a reinstated removal order. For example, as discussed above, 8 C.F.R. § 241.8(e) provides an "[e]xception" to the reinstatement-of-removal regulations when an alien applies for withholding of removal. In addition, the text of § 1231(a)(5) does not squarely answer the question presented. Indeed, § 1231(a)(5) does not even mention withholding-only proceedings, much less does it speak clearly to the source of the authority to detain individuals in those proceedings.

Respondents emphasize that the INA dictates that an order of deportation "shall become final" once the BIA affirms it or the time for seeking BIA review of the order runs out. 8 U.S.C. § 1101(a)(47)(B); see Resp. Reply 6. They go on to argue that because petitioners cannot seek BIA review of their underlying removal order, the order is administratively final. This argument is not especially persuasive. As even respondents recognize, finality may have different meanings in different contexts. The INA definition respondents point to defines "final," but § 1231(a)(5) speaks of orders that are "administratively final." The addition of the modifier "administratively" indicates that Congress intended for finality in the § 1231(a)(5) context to mean something different from finality in the normal § 1101(a)(47)(B) context. If Congress intended for the meanings of the two provisions to be the same, it presumably would have used the same unqualified word "final."

III. CONCLUSION

All told, this petition presents a difficult question of statutory interpretation. Although respondents' arguments have some merit, petitioners' position, which attempts to harmonize § 1226 and § 1231 by locating the dividing line between the two sections as the moment

when the government has final legal authority to remove the alien, better accords with the text, structure, and intent of the relevant provisions. Accordingly, the Court concludes that petitioners are detained under § 1226(a), not § 1231, and therefore are entitled to individualized bond hearings.

For the reasons stated above, respondents' Motion to Dismiss in Part will be granted, petitioners' Motion for Summary Judgment will be granted, and respondents' Motion for Summary Judgment will be denied by an appropriate Order to be issued with this Memorandum Opinion.

Entered this [17th] day of Nov., 2017.

Alexandria, Virginia

/s/ LMB
LEONIE M. BRINKEMA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 1:17-cv-1405 (LMB/MSN)

ROGELIO AMILCAR CABRERA DIAZ, ET AL.,
ON BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED, PETITIONERS

v.

RUSSELL HOTT, FIELD OFFICE DIRECTOR,
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
ET AL., RESPONDENTS

Filed: Feb. 26, 2018

MEMORANDUM OPINION

Before the Court is petitioners' Motions to Certify Calss [Dkt. No. 11] and Motion for Summary Judgment [Dkt. No. 16] as well as respondents' Motion for Summary Judgment [Dkt. No. 21]. For the reasons that follow, petitioners' motions will be granted and respondents' motions will be denied.

I. BACKGROUND

Petitioners Rogelio Amilcar Cabrera Diaz ("Cabrera Diaz"), Jennry Francisco Moran Barrera ("Moran Barrera"), and Rodolfo Eduardo Rivers Flamenco ("Rivera Flamenco") (collectively, "petitioners") have filed a class

action habeas corpus petition pursuant to 28 U.S.C. § 2241, seeking class action certification and an order directing respondents Russell Hott ("Hott"), the Field Office Director for U.S. Immigration and Customs Enforcement ("ICE"), and Jefferson B. Sesssions, III ("Sessions"), the Attorney General of the United States of America, (collectively, "respondents") to grant the class members bond hearings.

The relevant facts are simple and undisputed. Each individual petitioner has been removed from the United States under an order of removal. Second Am. Pet. For Writ of Habeas Corpus [Dkt. No. 4] ¶¶ 13, 19, 23. When each petitioner returned to his native country (two of the petitioners are from El Salvador and one if from Honduras), he received death threats. Id. ¶¶ 14, 20, 24. As a result, each petitioner returned to the United States without permission from the appropriate authorities. Id. ¶¶ 15, 20, 25. Each petitioner has been issued a Notice of Intent/Decision to Reinstate Prior Order, which reinstated the prior order of removal and rendered him deportable, and each has been detained by ICE at Immigration Centers of America-Farmville (in Farmville, Virginia) since such issuance. Id. ¶¶ 17, 21-22, 25. Each petitioner has expressed a fear of returning to his native country and, after either an asylum officer or an immigration judge ("IJ") determined that he had a reasonable fear of persecution or torture, he was placed in withholding-only proceedings, which remain pending. Id. ¶¶ 18, 22, 26.

Petitioners believe that they, and other detainees who are similarly in withholding-only proceedings, are entitled under the Immigration and Nationality Act ("INA") to bond hearings, because they believe that

8 U.S.C. § 1226, not 8 U.S.C. § 1231, provides the source of authority for their detention. Id. ¶¶ 41-44. This Court has agreed. See Romero v. Evans, __ F. Supp. 3d __, No. 1:17-cv-754, 2017 WL 5560659 (E.D. Va. Nov. 17, 2017). Accordingly, petitioners seek to represent a class of all individuals:

> who are in 'withholding-only proceedings, having established a reasonable fear of persecution or torture, and such proceedings are not administratively final, or if final, a stay of removal has been granted by a U.S. Court of Appeals, and
>
> who, as of the time of filing the initial pleading in this case or at any time thereafter, are detained by, or on the authority of, U.S. Immigration and Customs Enforcement, within the state of Virginia.

Id. ¶ 47. Respondents disagree that class certification is appropriate and that petitioners are being held pursuant to § 1226. Accordingly, petitioners have filed a Motion for Class Certification [Dkt. No. 11] and each party has filed a Motion for Summary Judgment [Dkt. Nos. 16 & 21].

II. DISCUSSION

A. Standard of Review

A party is entitled to summary judgment if the party can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In general, bare allegations or asser-

tions by the nonmoving party are not sufficient to generate a genuine dispute; instead, the nonmoving party must produce "significantly probative" evidence to avoid summary judgment. Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 929-30 (4th Cir. 1990) (quoting Anderson, 477 U.S. at 242). That being said, in ruling on a motion for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in her favor. Anderson, 477 U.S. at 255.

Class certification is appropriate under Fed. R. Civ. P. 23 if petitioners can show that there are sufficiently numerous parties ("numerosity"); there are questions of law or fact common to the class ("commonality"); the claims or defenses of the named petitioners are typical of the claims or defenses of the class ("typicality"); and the named petitioners will fairly and adequately protect the interests of the class ("adequacy"). In addition, a proposed class must qualify under Rule 23(b)(1), (2), or (3). Petitioners seek certification under Rule 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

B. Summary Judgment

As both parties agree, all relevant facts in this action are undisputed and the resolution of the habeas petition turns on a pure question of law: whether ICE's authority to detain petitioners arises from 8 U.S.C. § 1226, as petitioners contend, or 8 U.S.C. § 1231, as respondents contend. If petitioners are held under § 1226, they are entitled to a bond hearing under § 1226(a) unless the government determines that they are criminal aliens

subject to mandatory detention under § 1226(c).[1] If petitioners are held under § 1231, they are subject to mandatory detention without a bond hearing.[2] Petitioners rely on an opinion from this Court, as well as a Second Circuit opinion, holding that aliens in petitioners' position are detained under § 1226 and are entitled to bond hearings. See Romero, F. Supp. 3d, 2017 WL 5560659, appeal pending, No. 18-6086 (4th Cir.); see also Guerra v. Shanahan, 831 F.3d 59 (2d Cir. 2016). Respondents rely on Ninth Circuit and Eastern District of Virginia decisions holding that detainees in petitioners' position are detained under § 1231 and are not entitled to bond hearings. See Padilla-Ramirez v. Bible, 862 F.3d 881 (9th Cir. 2017); Crespin v. Evans, 256 F. Supp. 3d 641, No. 1:17-cv-140, 2017 WL 2385330 (E.D. Va. May 31, 2017), appeal dismissed as moot, No. 17-6835 (4th Cir. Feb. 23, 2018).[3]

---

[1] A petitioner classified as a criminal alien under 8 U.S.C. § 1226(c) would have the opportunity to challenge his classification in a hearing conducted under In re Joseph, 22 I. & N. Dec. 799 (BIA 1999), which gives an alien allegedly subject to mandatory detention the ability to seek a "bond ruling as to whether the alien is properly included in a mandatory detention category" from an IJ, id. at 800 (internal quotation marks omitted).

[2] The Supreme Court has recognized a limited due process right to release from mandatory detention in certain narrow circumstances. See Zadvydas v. Davis, 533 U.S. 678 (2001). Petitioners have declined to pursue a Zadvydas-based due process claim.

[3] At oral argument, counsel explained to the Court that the petitioner in Crespin was granted withholding of removal and was released from custody, which mooted Crespin before the Fourth Circuit could decide the appeal. Similarly, counsel explained that each of the three original petitioners in Romero has concluded withholding-only proceedings and that the appeal in that action will be moot once

The context of petitioners' detention and the legal claims raised by both parties involve the nature of reinstates final removal orders and the effect of withholding-only proceeding on those orders, as well as the statutes governing detention during and after removal proceedings.

1. Reinstated Removal Orders and Withholding-Only Proceedings

When an alien who has been ordered removed from the United States and has either been removed or departed voluntarily under the order of removal illegally reenters the country, the original order of removal "as reinstated from its original date." 8 U.S.C. § 1231(a)(5). Such an order "is not subject to being reopened or reviewed" and the alien "may not apply for any relief" from that order under the INA. See id. In general, this provision "forecloses discretionary relief from the terms of the reinstated order," Fernandez-Vargas v. Gonzales, 548 U.S. 30, 35 (2006); however, there is one exception to this rule. Congress has provided, consistent with the United States's obligations under international law, that the Attorney General may not remove an alien to a country where the alien's life or freedom would be threatened. See 8 U.S.C. § 1231(b)(3).[4] This restriction applies even to aliens with reinstated removal orders. See id. Therefore, although an alien cannot

---

the IJ in the remaining petitioner's withholding-only proceedings formally enters an Order granting him relief.

[4] In addition to applying for withholding of removal under the statutory provision, aliens may also apply for withholding of removal under the Convention Against Torture. The standards for withholding are slightly different under the two provisions, but the process is the same. See 8 C.F.R. § 208.16.

otherwise challenge a reinstated removal order, he can seek protection from having that order executed to a particular country by initiating a withholding-only proceeding.

When an alien subject to a reinstates removal order expresses a fear of removal to the country indicated in his removal order, the Department of Homeland Security ("DHS") refers the alien to an asylum officer for a pre-withholding screening interview. See 8 C.F.R. § 208.31(b). If the asylum officer determines that the alien "has a reasonable fear of persecution or torture," the alien may apply for withholding of removal. See id. § 208.31(e).[5]

If the alien passes this screening process, then the alien is permitted to apply for withholding or deferral[6] of removal and the application goes to an IJ for an initial review to determine whether the alien has met his burden.[7] Should the burden be met, the IJ will grant

---

[5] Alternatively, if the asylum officer determines that the alien has not established a reasonable fear, the alien can appeal that decision to an IJ. Id. § 203.31(f). If the IJ agrees with the asylum officer, the process ends (there is no appeal) and DHS will execute the reinstated removal order. Id. § 203.31(g)(1). If, on the other hand, the IJ finds the alien has established a reasonable fear of persecution or torture, then the alien may apply for withholding of removal. Id. § 203.31(g)(2).

[6] Under § 1231(b)(3), an alien applies for "withholding" of removal. Under the Convention Against Torture, an alien applies for "withholding or deferral" of removal. The difference is not relevant to this action.

[7] Under § 1231(b)(3), the alien bears the burden of establishing that "his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R.

the alien's request for deferral or withholding of removal; however, if the IJ determines that the alien has not met his burden, the alien may appeal that determination to the Board of Immigration Appeals ("BIA") and, ultimately, to a federal court of appeals. In these "withholding-only" proceedings, the only issue is whether the alien is entitled to withholding or deferral of removal; the alien may not collaterally attack the underlying removal order. See id. § 208.2(c)(3)(i).

In this litigation, each petitioner has passed the initial screening process, has applied for withholding of removal, and is in the process of applying to an IJ for an initial review of whether withholding or deferral of removal should be granted.

2. Statutes Governing Alien Detention

There are two separate provisions in the INA that give the government authority to detain aliens during removal proceedings or while awaiting the execution of an order or removal. When an alien is first arrested, he or she is detained under 8 U.S.C. § 1226(a), which allows DHS to "arrest[] and detain[]" the person "pending a decision on whether the alien is to be removed from the United States." Under this section, the alien may be released on bond;[8] however, once the removal period" begins, the authority for detention shifts to 8 U.S.C.

---

§ 208.16(b). To qualify for protection under the Convention Against Torture, the alien bears the burden of showing it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." Id. § 208.16(c).

[8] As discussed above, Congress has provided for mandatory detention for some aliens with certain criminal convictions who would otherwise be detained under § 1226(a) and entitled to a bond hearing. See 8 U.S.C. § 1226(c).

§ 1231. The "removal period," which is typically a 90-day period[9] in which the alien ought to be removed, begins on the latest of three dates: (1) the "date the order of removal becomes administratively final"; (2) the "dated of the court's final order" if "the removal order is judicially reviewed" and "a court orders a stay of the removal of the alien'" or (3) the "date the alien is released from detention or confinement" if "the alien is detained or confined (except under an immigration process)." Id. § 1231(a)(1)(B). During the "removal period," DHS "shall detain the alien." Id. § 1231(a)(2).

3. The Source of Authority to Detain Petitioners

The legal question presented by petitioners boils down to a deceptively simple question: Are petitioners detained under 8 U.S.C. § 1231?[10] Both parties employ a variety of statutory interpretation techniques to answer this question. In the end, although respondents'

---

[9] There are some circumstances in which the removal period may be extended beyond 90 days. At a certain point after these 90 days, due process protections may require a bond hearing or the release of the alien. Cf. Zadvydas, 533 U.S. 678. To implement these protections, DHS has instituted regulations governing post-removal-order custody reviews. See 8 C.F.R. § 241.4. These regulations are not at issue in this action.

[10] Respondents appear to believe that the relevant question in this case is simply whether petitioners' removal orders are "administratively final"; if so, then the removal period has begun under § 1231 and petitioners are detained under that section. See Resp. Mem. [Dkt. No. 22] 12; see also Padilla–Ramirez, 862 F.3d at 884 ("The question before us, then, is whether Padilla–Ramirez's reinstated removal order is administratively final."). Although administrative finality is the relevant dividing line in § 1231, the Court must analyze both § 1226 and § 1231 and attempt to harmonize the two statutes rather than unduly focusing on the § 1231 provisions.

arguments have some force, the text, structure, and intent of the INA compel the conclusion that petitioners are detained under 8 U.S.C. § 1226.

Beginning with the statutory text, § 1226(a) governs detention for an alien "detained pending a decision on whether the alien is to be removed from the United States." As an initial matter, this text governs petitioners' detention because until withholding-only proceedings are complete, a decision has not been made on whether petitioners will in fact be removed from the United States. See Pet. Mem. [Dkt. No. 17] 6. As petitioners argue, § 1226(a) focuses not on a determination of removability (which has already been made) but instead on a more concrete determination of whether petitioners will actually be removed—a determination that has not yet been made in petitioners' cases. See id. As such, until the government determines that there is a country to which petitioners can legally be removed, the decision on whether they are "to be removed" remains "pending," and § 1226(a) governs their detention.

This conclusion is reinforced by the statutory structure of the INA and evidence of Congress's intent. Section 1231 provides that the removal period will begin on the latest of three dates: the date the removal order becomes final, the date any judicial stay stopping removal is lifted, or the date the alien is released from non-immigration detention. 8 U.S.C. § 1231(a)(1)(B). As petitioners explain, each of these three preconditions simply relates to a different legal impediment to actual removal: either DHS has not completed its own removal process (the order is not final) or the judicial branch has deprived DHS of authority to execute the removal process (a judicial stay stopping removal is in place) or the

criminal authorities, rather than ICE, have custody of the individual and ICE does not have jurisdiction to remove the noncitizen (the alien is in non-immigration detention). In each situation, DHS may have already determined that the noncitizen is, like petitioners here, removable, but ICE lacks the present and final legal authority to actually execute that order of removal.

Moreover, Congress clearly intended to have § 1231 govern only the final logistical period, in which the government has actual authority to remove the alien and need only schedule and execute the deportation. Congress has specifically limited the normal "removal period" to 90 days, a limitation that makes sense if the removal period is only meant to govern the final logistical steps of physically removing an alien. Based on the length of petitioners' detentions to date, see Second Am. Pet. ¶¶ 17, 21, 25, it is obvious that withholding-only proceedings take substantially longer than 90 days. As such, it would be contrary to congressional intent to shoehorn a class of aliens whose proceedings will typically far exceed 90 days into the "removal period" for which Congress has specifically intended a 90-day limit.

Background legal principles of finality also support petitioners' view. The INA limits judicial review to a "final order of removal," 8 U.S.C. § 1252(a)(1), and aliens may appeal adverse decisions in withholding-only proceedings only "as part of the review of a final order of removal," id. § 1231 note (d). Addressing these statutes, many courts have held that a reinstated removal order is not final for purposes of judicial review until after the adjudication of any withholding applications, and interpretation the government has itself endorsed.

See Pet. Mem. 7.[11] It would be nonsensical to adopt a "bifurcated definition of finality" with respect to removal orders in withholding-only proceedings. Guerra, 831 F.3d at 63. As such, the Court concludes that reinstated removal orders do not become "administratively final" for purposes of § 1231 until they are final for purposes of appellate review.

Moving beyond the INA context, principles of administrative law support the conclusion that a reinstated removal order is not final until after the conclusion of any withholding-only proceedings. See Pet. Mem. 7. In agency law, finality is generally achieved when an action both "mark[s] the consummation of the agency's decisionmaking process" and also determines legal rights or obligations. Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). In this case, although some legal rights or obligations have already been determined (the petitioners are removable), the decisionmaking process is ongoing—i.e., it has not been consummated—as the agency is still determining whether petitioners will be granted withholding of removal or will be removed. As such, under principles of administrative law, petitioners' removal orders are not "final"; therefore, petitioners are being detained under § 1226(a).

---

[11] Respondents argue that the Fourth Circuit has held that a reinstated removal order's date of finality is the date of the original entry of the order of removal, Resp. Mem. 25-26 (citing Mejia v. Sessions, 866 F.3d 573 (4th Cir. 2017)); however, that case involved the date of finality for determining whether a challenge to the underlying removal order was timely. It is not clear how the Fourth Circuit would analyze finality dates in the context of a challenge to the eventual withholding-only proceedings.

Respondents' arguments to the contrary are unavailing. First, they argue that the text of § 1226(a) supports their position because petitioners' removal orders have already been reinstated; as such, the decision on whether petitioners are "to be removed" is no longer "pending." Resp. Mem. 4. In addition, they argue that withholding-only proceedings only address the possibility of executing a removal order to a particular country but do not prohibit immediate removal of petitioners to a different country based on the reinstated orders. Id. at 14-15. This reasoning is incomplete. Although DHS may eventually be able to remove petitioners to some third country even if their application for withholding of removal is granted, third-country removal would require additional proceedings. At the least, DHS would be required to give petitioners notice and the opportunity for a hearing. Cf. Kossov v. INS, 132 F.3d 405, 408-09 (7th Cir. 1998). Moreover, the provision allowing for the removal of detainees to additional countries, 8 U.S.C. § 1231(b)(2), places sharp limitations on the countries that the government may designate for removal—and respondents have not shown that there are any countries that meet those limitations for petitioners. Finally, as a practical matter, the United States of America generally cannot simply sua sponte depart an alien to a country where he or she does not have citizenship; instead, the government must typically get permission to deport from the third country. Cf. Zadvydas, 533 U.S. at 684 (explaining that the government could not deport the petitioner to Germany, Lithuania, or the Dominican Republic despite his ties to those countries because those countries would not accept him). As such, it is not clear at the present time that petitioners

are in fact "to be removed" from the United States. All that is clear is that they are removable.

Turning to the text of § 1231(a)(5), respondents argue that the provision makes clear that the removal period has begun for petitioners. Because a reinstated removal order "is not subject to being reopened or reviewed," respondents argue that petitioners' removal orders are "administratively final" and petitioners are detained under § 1231. Resp. Mem. 15-17 (internal quotation marks omitted). This argument is unpersuasive. Although the INA indicates that reinstated removal orders are final in the ordinary case, other regulatory provisions that bear more closely on withholding-only proceedings emphasize that aliens in these proceedings are situated differently from the ordinary alien subject to a reinstated removed order. For example, 8 C.F.R. § 241.8(e) provides an "[e]xception" to the reinstatement-of-removal regulations when an alien applies for withholding of removal. In addition, the text of § 1231(a)(5) does not squarely answer the question presented. Indeed, § 1231(a)(5) does not even mention withholding-only proceedings, much less does it speak clearly to the source of the authority to detain individuals in those proceedings.

Therefore, petitioners are detained pursuant to 8 U.S.C. § 1226, not 8 U.S.C. § 1231, and summary judgment will be granted in their favor.

C. Class Certification

Respondents do not challenge petitioners' ability to satisfy the numerosity and adequacy requirements, see Resp. Opp. [Dkt. No. 24] 7 n.2, but do argue that peti-

tioners fail to satisfy the commonality and typicality requirements. They also argue that 8 U.S.C. § 1252(f)(1) precludes class certification under Rule 23(b)(2).

Commonality is satisfied if petitioners can identify a "common contention capable of being proven or disproven in 'one stroke.'" Brown v. Nucor Corp., 785 F.3d 895, 909 (4th Cir. 2015) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)); however, the "determination of [the common contention's] truth or falsity" must "resolve an issue that is central to the validity of each one of the claims," Wal-Mart Stores, 564 U.S. at 350. Petitioners argue that the central legal question presented by their habeas petition—whether individuals in withholding-only proceedings are detained pursuant to § 1226 or § 1231—is exactly such a question capable of common resolution in "one stroke." Respondents argue that because Judge Ellis and this Court have disagreed about the appropriate resolution of that question "and no Fourth Circuit decision has resolved the issue there can be no commonality to the cases and no common injury as Petitioners allege." Resp. Opp. 10. This argument is nonsensical. That courts might disagree on the appropriate resolution of this admittedly complex question of statutory interpretation does not change the fundamental nature of the question as one that is common to all individuals in the proposed class and that can be resolved in "one stroke."

In addition, respondents argue that petitioners have not met the commonality requirement because the proposed class "includes [criminal] aliens who would be subject to detention under both 8 U.S.C. § 1226(a) and 8 U.S.C. § 1226(c)." Id. at 11. As discussed above, the fundamental question is whether individuals in withholding-

only proceedings are detained under § 1226 or § 1231. Resolving that question is not dependent on whether a particular alien is subject to § 1226(c) and is therefore ineligible for bond. Accordingly, the core legal question raised by the petition is common among all members of the proposed class, regardless of whether any individual member is subject to § 1226(c).

With respect to the criminal aliens subject to mandatory detention under 8 U.S.C. § 1226(c), respondents also argue that aliens detained under § 1226(c) are generally permitted a Joseph hearing to challenge the basis of their mandatory detention and that the issues presented in a Joseph hearing will often implicate the core question of removability because the grounds for mandatory detention and for removability often overlap. Id. at 11-12. Because individuals in withholding-only proceedings may not challenge their underlying order of removal, respondents appear to argue that it would be inappropriate to allow them to access Joseph hearings. See id. This argument is unavailing. It is clear that individuals in withholding-only proceedings may not legally challenge the reinstated order of removal; however, if the government determines that any particular covered individual is subject to mandatory detention under § 1226(c), there is no reason that the individual could not challenge that determination in a Joseph hearing as long as doing so does not require him to challenge the underlying removal order.[12] In addition, the potential Jo-

[12] To the extent that the classification decision is based on the underlying removal order, the individual alien may not have a substantive opportunity to challenge the determination; however, if the government seeks to detain individuals under § 1226(c) for reasons that

seph wrinkle does not change the fundamentally common nature of petitioners' core contention: that they are detained under § 1226, not § 1231. Because a single common question is sufficient to satisfy the commonality requirement, it is clear that petitioners have met that requirement.

Respondents' argument that petitioners also fail to satisfy the typicality requirement is unavailing for the same reasons. As respondents concede, the "commonality and typically requirements occasionally merge" because both relate to the question whether the claims of class members and, particularly the claims of the named class members vis-à-vis the claims of the rest of the class, are so interrelated that class certification is economical and fair. Resp. Opp. 13. Respondents argue that petitioners are not typical because none of them is subject to mandatory detention under § 1226(c) and, therefore, petitioners seek only bond hearings and not Joseph hearings in their individual cases; however, as discussed above, the core legal question raised by the petition is the same across all class members.[13] As such, the named petitioners are typical of the class in the

---

are not based on the underlying removal order, then the individual has the opportunity to contest that determination just like any other alien detained pursuant to § 1226(c).

[13] Petitioners also note that a "Joseph hearing" is "simply shorthand for a bond hearing which involves the threshold question of whether the noncitizen is subject to mandatory detention," which suggests that a bond hearing and a Joseph hearing are substantially similar. Pl. Reply [Dkt. No. 27] 6-7.

relevant ways, even if there may be some differences between their situations and some of the situations of other class members.[14]

Finally, respondents argue that 8 U.S.C. § 1252(f)(1) precludes class certification because it prohibits classwide injunctive relief. Section 1252(f)(1) states, in full: "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter,[15] as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Although this provision does prohibit classwide injunctive relief in some circumstances, the prohibition is limited to injunction "against the operation of" the relevant INA provisions. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 481 (1999). Petitioners are not seeking an injunction "against the operation of" the INA but are instead seeking an injunction requiring respondents to comply with the terms of the INA, as interpreted by this Court. Accordingly, § 1252(f)(1), by its terms, does not act as a bar to classwide relief in this civil action. See also Abdi v. Duke,

---

[14] In addition, as discussed at oral argument, class certification in petitioners' circumstance is both economical, as there are apparently nearly 50 potential class members at any one time who could file individual habeas petitioners, and necessary to allow the Fourth Circuit to decide the important legal question presented in this petition, because experience demonstrates that individual claims are often rendered moot during the appellate process.

[15] Part IV includes both § 1226 and § 1231.

F. Supp. 3d ___, 2017 WL 5599521, at *26 (W.D.N.Y. Nov. 17, 2017); R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 184 (D.D.C. 2015); Preap v. Johnson, 303 F.R.D. 566, 584 (N.D. Cal. 2014), aff'd, 831 F.3d 1193 (9th Cir. 2016).

Therefore, petitioners meet each of the necessary requirements for class certification and their motion will be granted.

III. CONCLUSION

For the reasons stated above, petitioners' Motion to Certify Class [Dkt. No. 11] and Motion for Summary Judgment [Dkt. No. 16] will be granted and respondents' Motion for Summary Judgment [Dkt. No. 21] will be denied by an appropriate Order to be issued with this Memorandum Opinion.

Entered this [26th] day of Feb. 2018.

Alexandria, Virginia

/s/ LMB
LEONIE M. BRINKEMA
United States District Judge

APPENDIX D

1. 8 U.S.C. 1226 provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person

---

[1] So in original. Probably should be "sentenced".

cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

2. 8 U.S.C. 1231(a) provides:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United

States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under

section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment

---

[1] See References in text note below.

[2] So in original. Probably should be "subparagraph (B),".

until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of

---

[3] So in original. Probably should be followed by a closing parenthesis.

the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If 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 of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title 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).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.