No. 20-322

# In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

*v.*

ESTEBAN ALEMAN GONZALEZ, ET AL.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
PETITIONERS

*v.*

EDWIN OMAR FLORES TEJADA, ET AL.

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

## REPLY BRIEF FOR PETITIONERS

JEFFREY B. WALL
*Acting Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Constitution, statutes, regulation, and rule:

# In the Supreme Court of the United States

No. 20-322

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., PETITIONERS

*v.*

ESTEBAN ALEMAN GONZALEZ, ET AL.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., PETITIONERS

*v.*

EDWIN OMAR FLORES TEJADA, ET AL.

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

## REPLY BRIEF FOR PETITIONERS

Respondents concede (Br. in Opp. 1) that the question presented—whether an alien detained under 8 U.S.C. 1231(a)(6) is entitled by statute to a bond hearing before an immigration judge (IJ) after six months of detention—is the subject of a circuit conflict. Respondents nonetheless argue (Br. in Opp. 16-36) that this Court should deny review. The arguments for denying the petition for a writ of certiorari lack merit.

### A. The Decisions Below Are Incorrect

Respondents argue (Br. in Opp. 23-34) that the decisions below are correct. Even if that were so, the court

of appeals' decisions still would warrant review, for as respondents concede (*id.* at 17-20), the question presented is the subject of a circuit conflict. In any event, respondents' arguments on the merits are wrong.

Respondents focus (Br. in Opp. 24-29) on the argument that detaining them for more than six months without bond hearings violates the Constitution. But that is not the issue at this stage. The court of appeals held that *the statute* requires a bond hearing before an IJ after six months of detention, not that the Constitution does so. See Pet. App. 1a-66a. The interpretation of the statute, in turn, should begin with its text. The canon of constitutional avoidance "comes into play only when, *after* the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (emphasis added; citation omitted).

Respondents offer no plausible textual argument for reading Section 1231(a)(6) to require bond hearings before an IJ. They argue that the statute specifies that the government "may" detain the aliens at issue here, not that it must do so. Br. in Opp. 29 (citing 8 U.S.C. 1231(a)(6)). They do not explain, however, how the word "may," a word that grants discretion, supports imposing a legal *requirement* that the government hold a bond hearing. In *Rodriguez*, this Court held that another provision that uses the word "may"—specifically, one that provides that "an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. 1226(a) (emphasis added)—did not support the judicial imposition of a requirement found nowhere in the text that an alien receive a bond hearing every six months. See 138 S. Ct. at 847. If the word "may" did not allow courts to read

in an unstated bond-hearing requirement in *Rodriguez*, it does not do so here either.

Respondents also argue (Br. in Opp. 30-31) that this Court found Section 1231(a)(6) to be ambiguous in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). In *Zadvydas*, however, the Court found Section 1231(a)(6) ambiguous only on one issue—namely, whether the statute granted the government "the power to hold indefinitely * * * an alien ordered removed" even after "removal is no longer reasonably foreseeable." *Id.* at 697, 699. The Court did not declare the statute to be an inkblot, so that courts may read into it whatever limitations or requirements they deem appropriate. As the Court explained in *Rodriguez*, it is a mistake to read *Zadvydas* "as essentially granting a license to graft [unstated procedural rules] onto the text" of federal immigration statutes. 138 S. Ct. at 843.

Finally, respondents assert (Br. in Opp. 32) that a federal regulation, 8 C.F.R. 241.5(b), already empowers the Department of Homeland Security (DHS) to release an alien detained under Section 1231(a)(6) on bond. But the regulation says only that DHS has the *discretion* to release aliens on bond. It does not say, or interpret the statute to say, that the Department of Justice has an *obligation* to hold bond hearings before an IJ. Respondents err in attempting to convert the discretionary authority of one Department into a legal obligation of another.

**B. The Question Presented Warrants Review**

Respondents concede (Br. in Opp. 17-20) that the question presented is the subject of a circuit conflict, with the Third and Ninth Circuits holding that Section 1231(a)(6) requires bond hearings before an IJ after six months of detention, and the Sixth Circuit holding that

the statute contains no such requirement. Respondents attempt to minimize the importance of that conflict in a series of ways, but their arguments all lack merit.

Respondents argue (Br. in Opp. 18-19) that the Sixth Circuit's decision should be disregarded because it decided the question presented in a case in which the alien conceded that Section 1231(a)(6) does not require a bond hearing after six months of detention. But the Sixth Circuit did more than just rely on a concession. The court analyzed the statutory text for itself and then held that the statute imposes no six-month bond-hearing requirement. See *Martinez* v. *LaRose*, 968 F.3d 555, 565-566 (2020). Respondents assert (Br. in Opp. 18) that the Sixth Circuit analyzed the issue "in a single conclusory paragraph," but the court in fact considered the statute's language, cited this Court's decision in *Jennings*, and responded to the Third and Ninth Circuits' contrary decisions. That the Sixth Circuit took a single paragraph shows only that it found the statutory issue to be straightforward and readily resolved, not that its analysis was flawed. In any event, respondents do not dispute that the Sixth Circuit squarely held in a published opinion that Section 1231(a)(6) does not require bond hearings after six months of detention. That holding establishes a circuit conflict, whatever respondents' views about the thoroughness of the court's opinion.

Respondents also argue (Br. in Opp. 17-20) that this Court should allow the question presented to percolate further in the courts of appeals. But these cases present a straightforward issue of statutory interpretation, and judges in the courts of appeals have already reviewed that issue. Respondents themselves say (*id.* at

18) that the Third and Ninth Circuits have both provided "detailed" analyses of the arguments in favor of reading Section 1231(a)(6) to require bond hearings after six months of detention. On the other side of the ledger, the dissent in *Aleman* provided a similarly detailed analysis of the arguments against that reading. See Pet. App. 56a-66a.

Finally, respondents deny (Br. in Opp. 34-36) the importance of the question presented. For example, they contend (*id.* at 36) that the decisions below raise no concerns about the separation of powers. But this Court has explained that responsibility for making immigration policy belongs to Congress and the Executive Branch, not to the courts. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). The court of appeals violated that principle by imposing a bond-hearing requirement found neither in the text of any statute nor in the text of any applicable regulation. Respondents also contend (Br. in Opp. 35) that the decisions below impose only "modest" burdens on the government. The Executive Branch has determined, however, 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). This Court has likewise recognized that those burdens are now "overwhelming our immigration system." *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1966 (2020) (citation omitted). The decisions below add to those burdens.

### C. These Cases Are Suitable Vehicles For Deciding The Question Presented

Respondents argue last of all (Br. in Opp. 20-23) that these cases are poor vehicles for deciding the questions presented. That contention, too, is mistaken.

1. Respondents principally argue that these cases may become moot after this Court's decision in *Pham* v. *Guzman Chavez*, No. 19-897 (oral argument scheduled for Jan. 11, 2021). *Guzman Chavez* presents the question whether an alien who is subject to a reinstated removal order and who has been placed in withholding-only proceedings is subject to detention under 8 U.S.C. 1231(a)(6) (the statute at issue in this case) or instead under 8 U.S.C. 1226. See Pet. 25. Respondents are correct that the class action in *Barr* v. *Flores Tejada* may become moot after *Guzman Chavez*. The class in that case was limited to aliens who have been placed in withholding-only proceedings, and if the Court holds in *Guzman Chavez* that such aliens are subject to detention under Section 1226, they presumably could obtain bond hearings to the extent provided in the regulations implementing that Section, and thus would no longer present a live controversy about whether they are entitled to bond hearings under Section 1231(a)(6). See Pet. 12; Br. in Opp. 20. Respondents are wrong, however, to suggest that the other class action, *Barr* v. *Aleman Gonzalez*, may become moot. As respondents acknowledge (Br. in Opp. 20), "the certified class [in that case] is not limited to people in withholding-only proceedings." And if at least one plaintiff has a live controversy,

the Court may proceed to decide the question presented. See, *e.g.*, *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2565 (2019).*

Respondents argue (Br. in Opp. 20-21) that even *Aleman* could become moot because the class representatives are in withholding-only proceedings. But the government has cited (Pet. 27) many decisions from this Court holding that, once a district court properly certifies a class, the class members' claims remain live even if the representatives' claims become moot. See, *e.g.*, *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1538-1539 (2018); *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 74-75 (2013); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 753 (1976); *Sosna* v. *Iowa*, 419 U.S. 393, 399-403 (1975). Respondents fail to address those decisions.

Respondents suggest (Br. in Opp. 21) that if the Court were to hold in *Guzman Chavez* that aliens in withholding-only proceedings are subject to detention under Section 1226(a) rather than Section 1231(a)(6), Federal Rule of Civil Procedure 23 would require a remand so that the district court may reconsider the propriety of class certification and substitute a class representative with a live claim. On several previous occasions when class representatives' claims have become

---

* In the certiorari petition, the government correctly explained (Pet. 8-9, 12) that the *Aleman* class includes aliens who are not in withholding-only proceedings, while the *Flores* class is limited to aliens in such proceedings. But in later describing the possible effect of a decision in *Guzman Chavez*, the government stated (Pet. 27) that "[t]he certified classes in these cases" include aliens who are not in withholding-only proceedings. We regret the error in the latter statement's description of the *Flores* class and the possible effect of *Guzman Chavez* on it as a result.

moot after certification, however, the Court has proceeded to decide the case without a remand and without substitution of class representatives, where it is "unlikely that [the existing class representative] would have interests conflicting with those [of the remaining class members]" and where "the interests of that class have been competently urged" by counsel. *Sosna*, 419 U.S. at 403; see, *e.g.*, *Franks*, 424 U.S. at 752-757; *Sosna*, 419 U.S. at 397-403.

Respondents rely (Br. in Opp. 21) on *Kremens* v. *Bartley*, 431 U.S. 119 (1977). In *Kremens*, a putative class challenged the constitutionality of state procedures for the commitment of children to mental-health institutions. *Id.* at 121-122. "After the commencement of th[e] action, but *before* class certification or decision on the merits by the District Court, the [State] promulgated regulations which substantially increased the procedural safeguards afforded" to certain groups of children. *Id.* at 125. Then, after certification and the district court's decision, the state legislature "enacted a new statute substantially altering its * * * admission procedures" for certain groups of children. *Id.* at 126. Because "the promulgation of the regulations materially changed, prior to class certification, the controverted issues," and the passage of the statute changed those issues again after certification, the Court found it prudent to remand the case to the district court so that it could start afresh. *Id.* at 130. These cases, by contrast, raise the possibility of changes in the composition of the class only after class certification, not before it. In addition, any change in the composition of the class as a result of *Guzman Chavez* would not "materially" affect "the controverted issues." *Ibid.* If this Court were to hold in *Guzman Chavez* that aliens in withholding-

only proceedings are subject to detention under Section 1226, that would mean that some members (those in such proceedings) would "ha[ve] simply 'left' the class." *Id.* at 132. But for the remaining members, the controverted issue would remain just what it has been throughout this litigation: whether Section 1231(a) requires a bond hearing before an IJ after six months of detention.

In sum, regardless of the outcome of *Guzman Chavez*, there will be remaining class members in *Aleman* with live claims, and neither Article III nor Federal Rule of Civil Procedure 23 would preclude this Court from deciding the question presented. It thus would be appropriate for the Court to grant the petition now and resolve the circuit conflict. But if the Court were to disagree, it could hold this petition pending its decision in *Guzman Chavez*. Then, if the Court were to conclude in *Guzman Chavez* that Section 1231 governs the detention of aliens in withholding-only proceedings, it could grant plenary review in these cases. Conversely, if the Court were to hold in *Guzman Chavez* that Section 1226 governs the detention of such aliens, it could grant the petition, vacate the judgment of the Ninth Circuit, and remand the cases so that the lower courts could consider the propriety of the class certification and class representatives as well as the propriety of deciding the merits in light of the rulings on the class issues. See Br. in Opp. 20-21 (seemingly conceding that such a decision in *Guzman Chavez* could undermine the propriety of respondents' own class action in *Aleman*).

Respondents err, however, in contending (Br. in Opp. 2-3) that this Court should deny the petition and allow the government to "raise *Guzman Chavez* on re-

mand if it is relevant." When a case otherwise deserving of review becomes moot through no fault of the parties, the Court's "established practice" has been to grant the petition and vacate the judgment below. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Similarly, respondents themselves argue that, if a certified class action becomes improper as a case makes its way to this Court, "the case must be remanded * * * for reconsideration of the class definition." Br. in Opp. 21 (citation and emphasis omitted). As a result, even if respondents were correct that *Guzman Chavez* might moot *Flores* and render the class improper in *Aleman*, the proper course, if the Court does not grant plenary review, would be to grant the petition and vacate the judgments, not to deny the petition.

2. Respondents separately argue (Br. in Opp. 21-23) that these cases are poor vehicles for resolving the question presented because they arise in a preliminary-injunction posture. That contention lacks merit. These cases present a pure question of law about the meaning of Section 1231(a). The court of appeals definitively resolved that question in a published opinion with full precedential effect. See Pet. App. 11a-53a. The court and respondents have not suggested that additional proceedings in the district court might change the answer to that question. Accordingly, this Court should grant the petition and resolve the circuit conflict now.

Respondents argue (Br. in Opp. 21-22) that, although further proceedings on remand will not affect the court of appeals' holding that respondents are entitled by statute to a bond hearing, those proceedings may enable the parties and the lower courts to litigate and resolve respondents' constitutional claims. But given that the court of appeals has already held that the statute

entitles respondents to bond hearings after six months of detention, respondents fail to explain why, on remand, the parties and the lower courts would address whether the Constitution *also* entitles them to such hearings. After all, when a court rules for a plaintiff under the statute, it ordinarily does not go on to consider whether the Constitution also independently requires the same relief. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). To be sure, the lower courts might address respondents' claims that the Due Process Clause requires certain procedures at such bond hearings. See Pet. 25 n.3. But the statutory issue presented here is a pure question of law, and respondents offer no sound reason to believe that any factual development with respect to any constitutional claim would affect that question of interpretation.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JEFFREY B. WALL
*Acting Solicitor General*

DECEMBER 2020