No. 19-897

IN THE

Supreme Court of the United States

TONY H. PHAM, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

—v.—

MARIA ANGELICA GUZMAN CHAVEZ, ET AL.,

Respondents.

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

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project ("IRP") and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

Amicus has a longstanding interest in the issues in this case. The ACLU has significant expertise regarding the legal and constitutional limits on immigration detention, having litigated *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Nielsen v. Preap*, 139 S. Ct. 954 (2019); and *Demore v. Kim*, 538 U.S. 510 (2003) as counsel of record, and as amicus counsel in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005).[1]

SUMMARY OF ARGUMENT

Amicus agrees with the court below that the text, structure, and purpose of the Immigration and Nationality Act ("INA") make clear that 8 U.S.C. § 1226(a), and not 8 U.S.C. § 1231, governs detention during withholding-only proceedings. The plain text of

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for amicus states that all parties have consented to the filing of this brief.

Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Although Respondents are subject to reinstated removal orders, an immigration court is considering their claims for protection, and thus they are detained "pending a decision on whether [they are] to be removed." *Id*. The question of whether Respondents are "to be removed," *id.*, has yet to be decided and will not be decided until there is a final decision on their entitlement to withholding of removal or protection under the Convention Against Torture ("CAT"). Pet. App. 18a-19a.

By contrast, Section 1231 governs detention "[d]uring" and "beyond" the removal period—that is, the 90-day period during which the government "shall" effectuate the noncitizen's removal. *See* 8 U.S.C. §§ 1231(a)(1)(A), (a)(2), & (a)(6). Because the removal period does not begin until the government has legal authority to remove Respondents—*after* withholding-only proceedings are decided against them—Section 1231 by its terms does not apply. Pet. App. 19a. And because Section 1226(a), and not Section 1231, applies, Respondents are entitled to a bond hearing before an immigration judge ("IJ") to determine whether their detention is necessary to ensure their appearance for court proceedings or to protect public safety.

Because Respondents and the court of appeals fully address the textual argument set forth above, this amicus brief addresses an alternative reason this Court should affirm the court of appeals. To the extent this Court finds the statutes ambiguous, constitutional avoidance requires construing Section 1226(a) to apply in order to avoid the serious due

process problems that would be presented by subjecting individuals in withholding-only proceedings to detention without a bond hearing. Constitutional avoidance compels this result, moreover, even if due process concerns are raised only where detention is prolonged.

First, detention without a bond hearing pending withholding-only proceedings raises serious due process questions. With only one narrow exception inapplicable here—*Demore v. Kim*, 538 U.S. 510 (2003)—this Court has held that the due process touchstone for civil detention is an individualized hearing before a neutral decisionmaker. However, under the government's interpretation of the statutory scheme, individuals in withholding-only proceedings are subject to detention for months or even years without any hearing to determine if their imprisonment is justified. Instead, they receive only pro forma paper reviews by the Department of Homeland Security ("DHS")—the jailing authority. And they do not even receive that until they have already been locked up for three months. This Court in *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001), cast doubt on whether such administrative custody reviews are ever adequate to justify such severe deprivations of liberty, and several lower courts have held that they fail to provide the process due for prolonged imprisonment.

Demore does not support the constitutionality of detention without a hearing here. It is distinguishable for two reasons: it approved such detention only for individuals deportable for certain criminal convictions, based on Congress's specific finding that the group posed a categorical bail risk, and it upheld *only brief* periods of detention. *Demore*,

538 U.S. at 513, 518-20, 528-29. Congress has made no determination that people in withholding-only proceedings—whom DHS has found to have a reasonable fear of persecution or torture—categorically present a heightened bail risk like the "criminal aliens" in *Demore*. And the Court in *Demore* did not bless the lengthy detention that people are routinely subjected to during withholding-only proceedings.

Second, where it is "plausible" to do so, the Court is obliged to adopt a construction of the statute that avoids a serious constitutional problem, and must do so even if that problem would arise in some but not all cases, as Justice Scalia, writing for the Court, explained in *Clark v. Martinez,* 543 U.S. 371, 380 (2005). Thus, the Court need not find that *every* detention without a bond hearing of individuals in withholding-only proceedings raises due process concerns. As long as detention without a bond hearing raises serious constitutional problems in some cases, such as where detention is prolonged, the Court must construe the statute to avoid these problems, if such a construction is available. Wherever serious constitutional questions are raised, the Court must first determine if the question can be avoided through statutory construction. If a plausible construction is available to avoid a serious constitutional question, it must be adopted—and must then be applied consistently across all applications.

In sum, detention without bond hearings of any individual in withholding-only proceedings raises serious due process concerns. But to affirm here, the Court need only conclude that it would raise a due process problem where detention is prolonged.

ARGUMENT

I. THE INA PROVIDES BOND HEARINGS FOR PEOPLE DETAINED DURING WITHHOLDING-ONLY PROCEEDINGS.

Amicus agree with the court below that the INA requires bond hearings for individuals detained during withholding-only proceedings, because their detention rests on 8 U.S.C. § 1226(a), not 8 U.S.C. § 1231. *See* Pet. App. 17a-22a.

The plain text of Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). As the court of appeals explained, although Respondents are subject to reinstated removal orders, no decision has actually been made as to whether they are "to be removed." "[T]hanks to the exception allowing for withholding-only relief notwithstanding reinstated removal orders, there are now 'pending' immigration proceedings that must be concluded before [Respondents] may be removed." Pet. App. 18a. Section 1226(a)'s reference to detention "pending a decision on whether the alien *is to be removed*," 8 U.S.C. § 1226(a) (emphasis added), addresses the question of whether the government has the legal authority to execute a removal order—a question that is not answered until there is a final decision on the noncitizen's entitlement to withholding or CAT relief. Pet. App. 19a.[2]

[2] Petitioners argue that because withholding and CAT relief bar removal to a specific country, but leave open the possibility of removal to a third country, the decision on whether the individual "is to be removed" already has been made. Pet. Br. 11 (arguing that a decision on these claims affects only "where and

By contrast, 8 U.S.C. § 1231 governs detention "[d]uring" and "beyond" the removal period—that is, the 90-day period during which the government "shall" effectuate the noncitizen's removal. 8 U.S.C. §§ 1231(a)(1)(A), (a)(2), & (a)(6). The removal period does not "begin until the government has the actual legal authority to remove a noncitizen from the country"—that is, when withholding-only proceedings are decided against the noncitizen. Pet. App. 19a. Indeed, were Section 1231(a) to apply during withholding-only proceedings, "agency officials regularly and predictably [would] find themselves unable to meet the 90-day removal deadline." Pet. App. 22a. As the court below explained, "[w]ithholding-only proceedings are lengthy, beginning . . . 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." Pet. App. 21a. The court of appeals properly rejected an interpretation of the statute "that in an

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when" the person will be removed). However, as Respondents explain, identification of the country "where" an individual is to be removed is a necessary predicate to determining "whether" removal will take place. *See* Resp. Br. 28-32. Indeed, in nearly all cases, a grant of withholding or CAT relief is a bar on removal as such. For example, in FY 2017, only *1.6 percent* of people granted withholding that year were deported to third countries (i.e., 21 of 1,274 cases). American Immigration Council & National Immigration Justice Center, *The Difference Between Asylum and Withholding of Removal* 7 (Oct. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf; *see also Kumarasamy v. Attorney Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006) (noting that individuals granted "withholding of removal" "are almost never removed from the U.S.").

entire class of cases [would] put government officials—routinely and completely foreseeably—in dereliction of their statutory duties." Pet. App. 22a.

Respondents' brief develops the above arguments in more detail, *see* Resp. Br. 15-36, so we will not repeat them here. Petitioners' interpretation of Section 1231(a) leads to an illogical result, demonstrating, at a minimum, that the statute is ambiguous. And if there is any ambiguity as to which provision applies, the Court must construe Section 1226(a) to apply, because concluding otherwise would raise serious constitutional concerns, as we demonstrate below.

II. CONSTITUTIONAL AVOIDANCE COMPELS READING SECTION 1226(a) TO GOVERN DETENTION PENDING WITHHOLDING-ONLY PROCEEDINGS.

A. Detention Without a Hearing of Individuals in Withholding-Only Proceedings Raises Serious Due Process Concerns.

This Court has long held that the due process touchstone for any civil detention is an individualized hearing, before a neutral decisionmaker, to determine whether the person's imprisonment is justified. The same principle applies here. To lock up a human being without any opportunity for him or her to rebut the government's case is as basic a violation of due process as they come. But to adopt the statutory construction set forth above, the Court need not find that *every* detention without a hearing of noncitizens in withholding-only proceedings raises serious due process concerns. It need only conclude that *prolonged* detention raises such concerns. The Court has *never*

upheld prolonged detention without an individualized hearing at which the detainee has a meaningful opportunity to participate.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. Immigration detention, like all civil detention, is warranted only where "a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id*. (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Thus, any detention incidental to removal must "bear[ ] [a] reasonable relation" to valid government purposes, and be accompanied by adequate procedural protections to ensure that the government's asserted justification outweighs the individual's constitutionally protected liberty interest. *Id*. The sole purposes of immigration detention are to effectuate removal should an individual ultimately lose her immigration case, and to protect against danger and flight risk during that process. *Id*. at 690-91. Where there is no evidence that an individual would flee or pose any danger to the community while she awaits her immigration hearing, detention is by definition arbitrary and violates due process.

With the exception of *Demore*, this Court has never upheld *any* civil detention as constitutional without an individualized hearing before a neutral decisionmaker to ensure the person's imprisonment is actually serving the government's goals. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention where Congress provided "a full-blown adversary hearing" on

dangerousness, where the government bears the burden of proof by clear and convincing evidence); *Hendricks*, 521 U.S. at 357-58 (upholding civil commitment when there are "proper procedures and evidentiary standards," including an individualized hearing on dangerousness); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement"); *Schall v. Martin*, 467 U.S. 253, 277, 279-81 (1984) (upholding detention pending a juvenile delinquency determination where the government proves dangerousness in a fair adversarial hearing with notice and counsel).

The Court has also required individualized hearings before deprivation of liberty interests in analogous circumstances, including for sentencing on revocation of parole (despite the individual having already been sentenced to the full term of his or her confinement), *see Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972), and even for property deprivations, *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano v. Yamasaki*, 442 U.S. 682, 696-97 (1979) (in-person hearing required for recovery of excess Social Security payments); *see also Zadvydas*, 533 U.S. at 692 (criticizing the administrative custody reviews in that case and noting that "[t]he Constitution demands greater procedural protection even for property"). If a hearing is required before such deprivations of property, it certainly must be required to lock up a person seeking humanitarian protection from removal.

The requirement of an individualized hearing is all the more critical where detention is *prolonged*. *See id.* at 701 ("for detention to remain reasonable," greater justification is needed "as the period of . . . confinement grows"); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249–50 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited.").

Individuals in withholding-only proceedings are routinely detained for months and even years without a bond hearing. As this Court recognized in *Zadvydas*, "Congress previously doubted the constitutionality of [immigration] detention for more than six months." *Zadvydas*, 533 U.S. at 701. But individuals are routinely detained pending withholding-only proceedings for longer than six months. *See, e.g.*, Resp. Br. 5 (explaining that "withholding-only proceedings frequently last longer than a year; some take three years or more to reach a final decision"); *see also*, *e.g.*, *Martinez v. LaRose*, 968 F.3d 555, 557-58 (6th Cir. 2020) (pending withholding-only case that has lasted nearly three years to date); *Baños v. Asher*, 2:16-cv-01454-JLR-BAT, at *18-19, 23 (W.D. Wa. Oct. 17, 2017) (R&R) (ECF No. 67); *Baños v. Asher*, 2:16-cv-01454-JLR-BAT (W.D. Wa. Dec. 11, 2017) (order adopting R&R) (certifying class of individuals detained six months or longer pending withholding-only proceedings); *Gonzalez v. Sessions*, 325 F.R.D. 616, 622, 626 (N.D. Cal. 2018) (same).

Under Petitioners' view that 8 U.S.C. § 1231 governs, the only process such individuals receive are unilateral custody reviews by DHS—the jailing authority—and not a hearing before a neutral

decision-maker to determine if their detention is justified. *See* Pet. Br. 34-36. Petitioners maintain this is so regardless of how long the detention lasts, or the reasons for such prolonged detention, including government delay. But the Court has never previously upheld prolonged detention on the basis of a single, one-sided paper assessment by the detaining authority. As explained in Point II.B, *infra*, these custody reviews are no substitute for an individualized bond hearing.

The only instance in which the Court has found any civil detention without a hearing to be constitutional is plainly distinguishable. In *Demore,* this Court upheld short-term mandatory detention, under 8 U.S.C. § 1226(c), of a narrowly defined category of noncitizens who are deportable based on certain criminal convictions. *Demore* does not apply here for two reasons.

First, *Demore* approved only the mandatory detention of individuals who are deportable for certain criminal convictions based on Congress's specific finding that the group posed a categorical bail risk. *See Demore*, 538 U.S. at 518-21 (citing studies and congressional findings regarding the "wholesale failure by the INS to deal with increasing rates of criminal activity by [noncitizens]"). *Demore* emphasized that the "narrow detention policy" at issue was reasonably related to the government's purpose of effectuating removal and protecting public safety. *Id*. at 526-28. *Demore* did not address any detention beyond the particular category of "criminal aliens" covered by Section 1226(c).

Unlike the detainees Congress found to pose a categorical bail risk in *Demore*, Congress has made no judgment about the flight risk and dangerousness of individuals in withholding-only proceedings as a class. These individuals have re-entered the country because they faced persecution or torture after their removal from the United States. A DHS official has concluded that they have a reasonable fear of persecution or torture, and are entitled not to be returned to the country where they face severe harm until there is a final resolution of their claims. Many of them have no criminal records whatsoever. (Those who do have criminal convictions covered by Section 1226(c) will be automatically detained pursuant to that statute.) Congress has made no categorical judgment that this group of individuals poses a flight risk, much less danger to the community. Indeed, although Petitioners interpret the statute to bar bond hearings for such individuals, they agree that, unlike the mandatory detention statute in *Demore*, nothing in the statutory scheme *prohibits* their release from custody. *See* 8 U.S.C. § 1231(a)(6) (providing for release at DHS's discretion). It is one thing to defer to Congress when it has actually made a categorical determination; it would be another thing entirely to allow people to be detained without hearings where no such judgment has been made.

Second, *Demore* upheld *only brief* periods of detention without a bond hearing. The Court stressed what it understood to be the brief period of time that mandatory detention typically lasts. *See* 538 U.S. at 529-30 (noting mandatory detention lasts an average of 47 days in 85% of cases and an average of four months for those 15% of cases where individuals

appeals to Board of Immigration Appeals).[3] Justice Kennedy noted in his concurring opinion that "[w]ere there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id*. at 532–33 (Kennedy, J., concurring).

In essence, *Demore* held that Congress could reasonably conclude, for purposes of brief detentions, that the category of noncitizens at issue posed sufficient risks to justify detention without individualized hearings. *Demore* did not address the constitutionality of prolonged detention without bond hearings. The government has subsequently conceded that prolonged mandatory detention may raise serious constitutional problems and require greater judicial scrutiny. *See* Pet. Br. at 47, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Aug. 26, 2016) (arguing that "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely").[4]

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[3] The government later admitted that the data in *Demore* was wrong and that the average detention length under Section 1226(c) was 382 days in cases involving an appeal. *Jennings*, 138 S. Ct at 869 (Breyer, J., dissenting); Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Scott S. Harris, Clerk, Supreme Court of the U.S. 3 (Aug. 26, 2016), *available at* https://on.wsj.com/2sUWIGk.

[4] The government in *Jennings* maintained that Section 1226(c) was not ambiguous, and could not be interpreted to require a bond hearing after six months, arguing therefore that challenges

B. DHS's Custody Reviews Do Not Comport with Due Process Requirements.

Petitioners suggest there are no constitutional problems presented in this case because there is a process for review of their custody: the DHS custody reviews provided by regulation. *See* Pet. Br. 34-36 (citing 8 C.F.R. §§ 241.4, 241.13). However, these unilateral custody reviews, conducted solely through review of a paper file by a DHS officer, do not remotely provide adequate process. In contrast to bond hearings, these custody reviews provide

- no in-person, adversarial hearing;
- no neutral decision-maker;
- no opportunity to call witnesses;
- no ability to challenge the government's evidence of flight risk and danger; and
- no administrative appeal.

Moreover, the individual bears the burden of proving a negative "to the satisfaction of" DHS: namely, that their release would not pose a danger to the community or significant flight risk. 8 C.F.R. § 241.4(d)(1).

In many cases, DHS custody reviews have rubber-stamped the prolonged detention of noncitizens, without an individualized determination of whether their incarceration is necessary to address flight risk or danger. *See, e.g.*, *Casas-Castrillon v.*

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to prolonged detention should be brought as as-applied constitutional challenges through individual habeas corpus petitions. *Id.* at 46-47.

Dep't of Homeland Sec., 535 F.3d 942, 950-52 (9th Cir. 2008) (describing individual detained seven years who received a single DHS file review deeming him a flight risk, with no notice of the review, no interview or opportunity to contest the government's findings, and no appeal); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) (describing individual detained nearly two years based on DHS custody reviews, only to be released by an immigration judge after a bond hearing where he was found to pose no flight risk or danger to the community); *Hamama v. Adducci*, 285 F. Supp. 3d 997, 1018 n.12 (E.D. Mich. 2018), *rev'd on other grounds*, 912 F.3d 869 (6th Cir. 2018), *cert. denied*, No. No. 19-294, 2020 WL 3578681 (U.S. July 2, 2020) (noting, in class action challenging prolonged detention, the "strong evidence" that custody reviews for class members "were not undertaken in a good faith effort to detain only those who were flight and safety risks" and that "[v]irtually every detainee who had a . . . review was denied release, and given a terse written statement that the Government was still interested in removing the detainee; there is no indication that any legitimate bond issue was even considered").

Under the regulations, DHS is required to conduct an initial file review before the 90–day removal period expires if the individual's removal cannot be accomplished during this time ("the 90–day review"). *See* 8 C.F.R. § 241.4(k)(1)(i). The individual should receive written notice of the review and have the opportunity to submit information to support release and to be assisted by an individual of his or her choosing in submitting information. *See id.* § 241.4(h)(2). If the individual is not released or removed, he or she should receive a second file review

three months later ("the 180–day review"). *See id.* § 241.4(k)(2)(ii). If the noncitizen is not released, a subsequent review will be commenced within one year. *See id.* § 241.4(k)(2)(iii). At no point does the individual receive an in-person hearing, although an interview may be conducted at DHS's discretion at the 90-day review, *id.* § 241.4(h)(1), and should take place at the 180-day review before continued detention is approved, *id.* § 241.4(i)(3)(i). As a practical matter, interviews are rarely provided. There is no appeal from DHS's decision. *Id.* §§ 241.4(d), 241.13(g)(2).

These custody reviews do not provide anything remotely close to the process due for detention of this length. *Zadvydas* itself cast doubt on this custody review process, finding serious due process concerns where "[t]he sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review." 533 U.S. at 692; *see also id.* (noting that "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'" (quoting *Superintendent, Mass. Corr. Instit. at Walpole v. Hill*, 472 U.S. 445, 450 (1985)).

Lower courts have held that the regulations raise serious due process concerns "because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge." *Diouf*, 634 F.3d at 1091; *see also Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 227 (3d Cir. 2018) (finding serious constitutional concerns because the custody

reviews are done by "DHS employees who are not ostensibly neutral decision makers such as immigration judges" and "place the burden on the alien, rather than the Government, to prove that he or she is not a flight risk or a danger to the society," and because there is no appeal) (emphasis omitted).

The process the government has made available under Section 1231 affords none of the procedural protections necessary for such a severe deprivation of physical liberty. The process available under Section 1226 provides a hearing before an independent adjudicator, and the opportunity to present witnesses and challenge the government's evidence. Accordingly, by interpreting Section 1226 to apply, the Court avoids the manifest constitutional problems that Respondents' detention under Section 1231 presents.[5]

III. CONSTITUTIONAL AVOIDANCE APPLIES EVEN IF THE COURT CONCLUDES THAT SERIOUS CONSTITUTIONAL CONCERNS ARE RAISED ONLY BY PROLONED DETENTION.

As we have shown, detention of individuals in withholding-only proceedings for any period without a bond hearing raises serious due process concerns, and therefore supports construing such detentions to be governed by Section 1226 rather than Secion 1231.

[5] To prefer Section 1226 over Section 1231, the Court need not determine that every aspect of Section 1226 is constitutional in all applications. It need only conclude that detention without a bond hearing in these circumstances would raise due process problems. As Section 1226 provides a bond hearing, and Section 1231 as implemented does not, that is sufficient to support the statutory construction advanced by Respondents.

But even if the Court were to conclude that only prolonged detention raises such concerns, the result would be the same. The Court would be obliged to interpret Section 1226 to govern, and that construction would apply to all individuals in such proceedings.

"'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The canon is "a means of giving effect to congressional intent," "resting on the reasonable presumption that Congress did not intend [the statutory interpretation] which raises serious constitutional doubts." *Clark*, 543 U.S. at 381 (Scalia, J.).

Constitutional avoidance sometimes results in a statutory interpretation that provides greater process than would the Constitution itself. *See* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997) (citing cases where the Court construed a statute narrowly to avoid a constitutional question, only to later reject the underlying constitutional claim in a case involving a different statute); *Clark*, 543 U.S. at 381 (citing Vermeule).

Similarly, when some but not necessarily all of a statute's applications present constitutional problems, constitutional avoidance requires construing that statute consistently across all its applications. As Justice Scalia explained in *Clark*:

> It is not at all unusual to give a statute's ambiguous language a limiting

> construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.

Id. at 380.

In *Clark*, for example, the Court construed 8 U.S.C. § 1231(a)(6) to prohibit the indefinite detention of inadmissible noncitizens where their removal is not reasonably foreseeable. *Clark*, 543 U.S. at 378. The Court applied the limiting construction of the statute it had adopted in *Zadvydas* for noncitizens ordered deported after entering the country, even though the Court recognized that the indefinite detention of inadmissible noncitizens may not present the same constitutional concerns. *See Zadvydas*, 533 U.S. at 682. Nevertheless, because the statute's "operative language . . . applie[d] without differentiation" to inadmissible noncitizens, the limiting construction adopted in *Zadvydas* necessarily applied to them as well. *Clark*, 543 U.S. at 378.

As *Clark* illustrates, when a statutory provision is given a limiting construction to avoid a serious constitutional question arising from some of its applications, that interpretation necessarily governs all applications, including those applications that would not themselves raise the same constitutional concerns. *Id.* at 380-81. A statute cannot mean one thing in one set of applications but something different in another set. The absence of constitutional concerns in some cases "cannot justify giving the *same* . . . provision a different meaning" in different factual circumstances. *Id.* at 380. Once a statute is construed

in one case, that interpretation must be applied uniformly in all cases to which the statute applies. *See also*, *e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (plurality opinion) (explaining that although the categorical approach for interpreting criminal statutes was adopted to avoid Sixth Amendment problems that are not presented in immigration cases, the Court "'must interpret [a criminal statute] consistently, whether we encounter its application in a criminal or noncriminal context.'") (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004)).

Thus, to adopt the statutory construction advanced here, the Court need not agree with us that *all* detention without bond hearings of persons in withholding-only proceedings violates due process. If *prolonged* detention of such individuals without a bond hearing would raise a serious constitutional problem, and there is a "plausible" interpretation that would avoid that problem, the Court must adopt it. *See Clark*, 543 U.S. at 380-81. The government cannot dismiss the constitutional problem by asserting that cases of prolonged detention are outliers and can be resolved on an as-applied or case-by-case basis. Congress is presumed not to adopt unconstitutional statutes, so if a plausible construction avoids the problem, it must be adopted.

Constitutional avoidance is available, of course, only where a statute is ambiguous to begin with. Thus, in *Jennings v. Rodriguez*, this Court reversed an appellate court decision applying constitutional avoidance to interpret statutory detention provisions to require a bond hearing after six months because the Court found the statutes unambiguous. 138 S. Ct. 830, 842-44, 846-47 (2018). Because no plausible alternative construction was available, detained

individuals could only raise as-applied constitutional challenges to the statutory provisions in cases where detention was prolonged.

In contrast, here, to the extent the Court does not agree that the statutory text clearly requires bond hearings for individuals in withholding-only procedures under Section 1226(a), the statutory scheme is at minimum ambiguous, and can be plausibly interpreted to so require. *See* Point I, *supra*. Thus, under the reasoning of *Clark*, constitutional avoidance requires construing the statute in light of the constitutional problems that would be posed by allowing prolonged detention without bond hearings.

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Locking up a human being for months or years—especially one found to have a reasonable fear of persecution or torture—without ever providing a hearing before a neutral tribunal on whether the individual actually needs to be detained violates the most basic principles of due process. DHS's unilateral pro forma custody reviews do not come close to providing the process that is due. Accordingly, interpreting Section 1231 in the manner Petitioners propose to govern the detention of individuals in withholding-only proceedings would violate due process. At a minimum, it would raise serious constitutional concerns. Those concerns require the Court to interpret Section 1226(a) to govern detention of these individuals, and therefore to afford bond hearings. Due process and basic decency require no less.

CONCLUSION

The Court should affirm the Fourth Circuit's ruling.

Respectfully Submitted,

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