No. 17-1568

In the Supreme Court of the United States

RAUL PADILLA-RAMIREZ, PETITIONER

v.

ROBERT M. CULLEY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an alien is entitled to a bond hearing before an immigration judge when he is being detained pursuant to a reinstated final order of removal from the United States that "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), but administrative proceedings are ongoing to determine whether he should be granted withholding of removal to one particular country.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 882 F.3d 826. The opinion of the district court (Pet. App. 24-35) is reported at 180 F. Supp. 3d 698. The opinion of the Board of Immigration Appeals (Pet. App. 36-43) is unreported.

JURISDICTION

The court of appeals issued an amended opinion and denied a petition for rehearing on February 15, 2018 (Pet. App. 22-23). The petition for a writ of certiorari was filed on May 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of El Salvador who unlawfully entered the United States in 1999. Pet. App. 25. In 2006, U.S. Immigration and Customs Enforcement (ICE) placed him in removal proceedings,

where he applied for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 25-26. The immigration judge (IJ) found petitioner removable and denied his applications for relief, but granted him voluntary departure. *Id.* at 26. The order required petitioner to leave the United States by a particular date, and provided that it would convert to a removal order if he did not depart on time. *Ibid.* The Board of Immigration Appeals (BIA) affirmed. *Ibid.*

Petitioner did not leave the United States as required. Pet. App. 26. On January 25, 2009, his order of voluntary departure thus converted into a final order of removal. *Ibid.* In February 2010, ICE arrested petitioner and removed him to El Salvador. *Ibid.*

Petitioner thereafter illegally reentered the United States. Pet. App. 26. In December 2015, ICE learned that petitioner had been arrested and was in jail in Idaho pending prosecution on state criminal charges. *Ibid.* ICE reinstated petitioner's prior removal order, pursuant to 8 U.S.C. 1231(a)(5). Pet. App. 26.

2. Section 1231(a)(5) provides that, when the Department of Homeland Security (DHS) determines that an alien has illegally reentered the United States after being removed, the original final order of removal "is reinstated from its original date." 8 U.S.C. 1231(a)(5). That reinstated 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, 8 U.S.C. 1101 *et seq.* 8 U.S.C. 1231(a)(5).

Nevertheless, DHS may not remove 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," 8 U.S.C. 1231(b)(3)(A), or if he is entitled to protection under the CAT, see 8 C.F.R. 208.31, 241.8(e). When an alien is subject to a reinstated final order of removal and expresses a fear of persecution or torture, an asylum officer conducts an interview to determine whether the fear is reasonable. 8 C.F.R. 208.31(b). If the officer finds it is not reasonable, the alien may request review by an IJ. 8 C.F.R. 208.31(f) and (g). If the IJ affirms, no further appeal is available. 8 C.F.R. 208.31(g)(1). If the asylum officer or IJ finds that the fear is reasonable, the case is referred to an IJ for consideration of the request for withholding of removal under Section 1231(b)(3) or the CAT. 8 C.F.R. 208.16, 208.31(e) and (g)(2). This is known as a "withholding-only" proceeding, because withholding of removal and protection under the CAT are the only issues the IJ may consider. See 8 C.F.R. 208.31(g)(2)(i); see also 8 C.F.R. 208.2(c)(3)(i).

If an alien who is subject to a reinstated order of removal is granted withholding of removal or protection under the CAT, that means he cannot be removed to the particular designated country. See 8 U.S.C. 1231(b)(3); 8 C.F.R. 208.16(c), 208.17(a). The alien still remains subject to a final order of removal from the United States, however, that "is not subject to being reopened or reviewed." 8 U.S.C. 1231(a)(5). The alien thus may still be removed to a third country. See 8 U.S.C. 1231(b)(2).

3. In February 2016, ICE took petitioner into custody on his reinstated final order of removal, after his state criminal charges were dismissed. Pet. App. 26. Petitioner expressed a fear of returning to El Salvador, and ICE referred him for an interview to determine

whether he could establish a reasonable fear of persecution or torture in El Salvador. *Ibid.* An asylum officer found that he had a reasonable fear, and referred him to an IJ for withholding-only proceedings to consider whether he could establish eligibility for withholding of removal to El Salvador. *Id.* at 26-27.

Petitioner requested that the IJ provide him a bond hearing. Pet. App. 27. An alien who is arrested in the United States and "detained pending a decision on whether the alien is to be removed from the United States" is ordinarily entitled to a bond hearing. 8 U.S.C. 1226(a); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837-838 (2018); 8 C.F.R. 1236.1(d)(1).

After "an alien is ordered removed" from the United States, however, a different statute governs detention: 8 U.S.C. 1231(a). See *Zadvydas* v. *Davis*, 533 U.S. 678, 682-683 (2001). Section 1231(a) does not provide for bond hearings before an IJ. Rather, it provides that DHS shall detain the alien during an initial 90-day removal period that begins when a removal order becomes "administratively final." 8 U.S.C. 1231(a)(1)(B)(i) and (2). If the alien is not removed during the removal period, the alien "may" continue to be detained or may be released on an order of supervision. 8 U.S.C. 1231(a)(3) and (6). The alien must be released on supervision if, after six months have elapsed, "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701.

DHS's regulations in Part 236 govern detention "prior to order of removal," and Part 241 governs detention of aliens "ordered removed." 8 C.F.R. Pts. 236, 241 (capitalization altered). Part 241 contains regulations on reinstated final orders of removal, which provide that

"[e]xecution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part." 8 C.F.R. 241.8(f). Like Section 1231(a), Part 241 of the DHS regulations does not provide for bond hearings before an IJ. The IJ in this case accordingly determined that she lacked jurisdiction to conduct a bond hearing, because petitioner was subject to a reinstated final order of removal and thus was detained under Section 1231(a). See Pet. App. 27.

4. On March 29, 2016, petitioner filed a petition for writ of habeas corpus, contending that he was entitled to a bond hearing because the proper statutory basis for his detention was Section 1226(a), not Section 1231(a). Pet. App. 25-27. The district court dismissed the habeas petition. Id. at 24-35. The court determined that petitioner was properly detained under Section 1231(a), which does not provide for bond hearings. *Ibid.* The court reasoned that Section 1226(a) did not apply to petitioner because that statute governs detention "pending decision on whether . . . [he] is to be removed from the United States." *Id.* at 32 (quoting 8 U.S.C. 1226(a)) (brackets and ellipsis in original). The court explained that, in this case, "there is no 'pending' decision regarding removal; it has been made, and petitioner is thus logically detained under the post-removal statute," Section 1231(a). *Ibid.*

5. The court of appeals affirmed. Pet. App. 1-21. Like the district court, the court of appeals determined that Section 1231(a) governed petitioner's detention, not Section 1226(a). The court of appeals explained that Section 1226(a) governs detention "only while 'a decision on whether the alien is to be removed from the United States' is 'pending'" and "such a decision is not

pending in [petitioner's] withholding-only proceedings." *Id.* at 11 (quoting 8 U.S.C. 1226(a)). "The decision to be made in those proceedings is not whether he is to be removed from the United States, but merely whether he may be removed to El Salvador." *Ibid.* The court further explained: "This narrow question of *to where* an alien may be removed is distinct from the broader question of *whether* the alien may be removed; indeed, the former inquiry requires that the latter already have been resolved in the affirmative." *Id.* at 11-12. "The fact that the government may still remove [petitioner], albeit to an alternate country, even if he is granted withholding confirms that the decision identified in section 1226(a) has already been made—he is 'to be removed *from the United States*.'" *Id.* at 12 (quoting 8 U.S.C. 1226(a)).

The court of appeals found "readily distinguishable" the Ninth Circuit's prior decision in *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955 (2012), which held that a reinstated final order of removal was not "final" for purposes of obtaining judicial review under 8 U.S.C. 1252(a)(1) until after withholding-only proceedings were completed. Pet. App. 14. The court explained that *Ortiz-Alfaro* rested on the concern that it would otherwise be "impossible for the alien to timely petition for review of any IJ decisions denying him relief or finding that he does not have a reasonable fear." *Ibid.* (quoting *Ortiz-Alfaro*, 694 F.3d at 958) (brackets omitted). The court determined that no such concerns were present here, and that "the text and structure of the Act indicate that Congress intended for section 1231(a) to govern detention of aliens subject to reinstated removal orders." *Id.* at 15.

Finally, the court of appeals recognized that its holding created a circuit conflict with *Guerra* v. *Shanahan*,

831 F.3d 59 (2d Cir. 2016), which held that Section 1226 governs detention of an alien subject to a reinstated final order of removal and who is in withholding-only proceedings. *Id.* at 62-64.

6. In the meantime, an IJ provided petitioner with a bond hearing pursuant to then-binding circuit precedent in *Rodriguez* v. *Robbins*, 804 F.3d 1060 (9th Cir. 2015), rev'd *sub nom. Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), because he had been detained for more than six months.[1] The IJ denied bond. See 12/13/16 Bond Tr. 23. Petitioner appealed and the BIA remanded, concluding that the IJ had put the burden on the alien to show that he is not a flight risk or danger, as in a typical bond hearing, whereas the Ninth Circuit's decision in *Rodriguez* put the burden on the government to establish by clear and convincing evidence that the alien is a flight risk or danger. 5/30/17 BIA Order 1-2; see *Jennings*, 138 S. Ct. at 847-848. On remand, the IJ applied the Ninth Circuit's standard, granted petitioner release on bond, and he was released. See 6/20/17 Order at 1-2.

On September 17, 2018, an IJ denied petitioner's requests for withholding of removal and CAT protection. Petitioner has 30 days from that date to appeal the IJ's decision to the BIA. See 8 C.F.R. 1003.38(b).

ARGUMENT

The court of appeals correctly interpreted Section 1231(a) to govern petitioner's detention during his

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[1] Petitioner should not have been provided a hearing under *Rodriguez*, because the Ninth Circuit's decision in *Rodriguez* itself established that its requirements did not apply to aliens detained under Section 1231(a). See 804 F.3d at 1086. The Ninth Circuit had also held, however, that aliens detained for more than six months under Section 1231(a)(6) were entitled to bond hearings. See *Diouf* v. *Napolitano*, 634 F.3d 1081, 1082 (2011).

withholding-only proceedings, and accordingly to conclude that he was not entitled to a bond hearing before an IJ under Section 1226(a). As petitioner explains (Pet. 12) and as the Ninth Circuit itself recognized (Pet. App. 17-21), however, the Second Circuit has reached a contrary result. See *Guerra* v. *Shanahan*, 831 F.3d 59 (2016). We also agree with petitioner (Pet. 12) that the question presented is a recurring question of substantial importance. This is not an appropriate case for this Court's review, however, because petitioner has been released on bond for independent reasons, and resolution of the question presented would have little if any practical significance for petitioner.

1. The court of appeals correctly determined (Pet. App. 1-21) that petitioner was detained under 8 U.S.C. 1231(a), and accordingly that he was not entitled to a bond hearing before an IJ under 8 U.S.C. 1226(a).

a. An alien is entitled to a bond hearing before an IJ at the outset of his detention if he is detained under Section 1226(a), which applies to certain aliens "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 determined, however, petitioner is no longer awaiting a decision on whether "he is 'to be removed *from the United States*.'" Pet. App. 12 (quoting 8 U.S.C. 1226(a)). Rather, that determination has already been made, when DHS reinstated his prior final order of removal. That order of removal "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), and thus conclusively determines that petitioner is to be removed from the United States.

The court of appeals correctly determined that Section 1231(a) instead governed petitioner's detention.

Section 1231(a) applies after "an alien is ordered removed," 8 U.S.C. 1231(a)(1)(A), as petitioner has been. And Section 1231(a) does not provide for bond hearings. Rather, Section 1231(a) provides for detention during a 90-day removal period, followed by permissive detention subject to release by DHS on an order of supervision. See 8 U.S.C. 1231(a)(2), (3), and (6). The alien must be released by DHS on supervision if, after six months have elapsed, "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas* v. *Davis*, 533 U.S. 678, 701 (2001). But in any event, Section 1231(a) does not provide for an IJ to release an alien on bond.

The fact that petitioner is in ongoing withholding-only proceedings does not change the fact that he was detained under Section 1231(a): He is still "an alien [who has been] ordered removed," 8 U.S.C. 1231(a)(1)(A), and thus is no longer awaiting a decision on whether he "is to be removed from the United States." 8 U.S.C. 1226(a). That is because "[t]he decision to be made in those proceedings is not whether he is to be removed from the United States, but merely whether he may be removed to El Salvador." Pet. App. 11. "This narrow question of *to where* an alien may be removed is distinct from the broader question of *whether* the alien may be removed; indeed, the former inquiry requires that the latter already have been resolved in the affirmative." *Id.* at 11-12. "The fact that the government may still remove [petitioner], albeit to an alternate country, even if he is granted withholding confirms that the decision identified in section 1226(a) has already been made—he is 'to be removed *from the United States*.'" *Id.* at 12 (quoting 8 U.S.C. 1226(a)). The court of appeals thus

correctly determined that the statutory basis for petitioner's detention is Section 1231(a), which does not provide for IJ bond hearings.

b. Contrary to petitioner's contention (Pet. 20), the court of appeals' decision is consistent with its own prior circuit precedent in *Ortiz-Alfaro* v. *Holder*, 694 F.3d 955 (9th Cir. 2012). Indeed, the court of appeals itself determined that *Ortiz-Alfaro* was "readily distinguishable." Pet. App. 14. *Ortiz-Alfaro* did not address any question of immigration detention, which detention statute applies during withholding-only proceedings before an IJ, or the possibility of release on bond by an IJ. Instead, *Ortiz-Alfaro* addressed a question of subject matter jurisdiction over a petition for review, under 8 U.S.C. 1252(a)(1).

Specifically, Section 1252(a)(1) grants the courts of appeals jurisdiction over petitions for review of a "final order of removal." 8 U.S.C. 1252(a)(1). Such a petition "must be filed no later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The question in *Ortiz-Alfaro* was whether a reinstated final order of removal was "final," within the meaning of Section 1252(a)(1), notwithstanding that withholding-only proceedings were ongoing. See 694 F.3d at 956-958. Consistent with the decisions of other courts of appeals that have addressed that question, the Ninth Circuit concluded that the answer was no. *Id.* at 958; see *Ponce-Osorio* v. *Johnson*, 824 F.3d 502, 506-507 (5th Cir. 2016) (per curiam); *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1186 (10th Cir. 2015). Otherwise, it would be "impossible" to file a timely petition for review of an IJ decision denying withholding of removal in any case in which it took more than 30 days to make the decision to deny withholding of removal. *Ortiz-Alfaro*, 694 F.3d at 958.

Nothing in the court of appeals' decision in this case is to the contrary, because the decision here interpreted different statutory language for a different purpose. In *Ortiz-Alfaro*, the court interpreted the word "final" in Section 1252(a)(1). See 694 F.3d at 958 ("The parties dispute whether Ortiz's reinstated removal order is final."). The court's decision here, by contrast, hinges on the meaning of Section 1226(a)'s language providing that it governs detention "pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. 1226(a), and Section 1231(a)'s language stating that it picks up "when an alien is ordered removed," 8 U.S.C. 1231(a). And although "an alien is ordered removed" under Section 1231(a) when an "order of removal becomes *administratively* final," 8 U.S.C. 1231(a)(1)(A) and (B)(i) (emphasis added), Congress did not require that an order never becomes "administratively final" for purposes of detention under Section 1231(a) until it becomes "final" following completion of withholding-only proceedings, for purposes of judicial review under Section 1252(a).

In any event, Section 1226(a) ceases to apply once a decision is made to remove an alien from the United States, and here that decision has already been made. The only question is to *where* petitioner can be removed, and in particular whether he can be removed to El Salvador. Indeed, "[e]ven if the cumulative effect of the government's removal efforts is that [petitioner] cannot be removed from the country—which is entirely speculative at this point—he would be no different than the alien in *Zadvydas*," Pet. App. 17, who could not be removed to his native country and who no other country would accept. See *Zadvydas*, 533 U.S. at 684-685. The court of appeals' decision is accordingly correct.

2. The court of appeals' decision in this case conflicts with the Second Circuit's decision in *Guerra*. In *Guerra*, the Second Circuit addressed the same question presented here: whether Section 1226 or Section 1231(a) governs detention of an alien who is subject to a reinstated final order of removal and is in withholding-only proceedings. See 831 F.3d at 62-64. Whereas the Ninth Circuit concluded here that Section 1231(a) governs detention during that time, the Second Circuit in *Guerra* held that Section 1226 does. *Ibid.* The court of appeals here expressly recognized that it was opening a circuit conflict. See Pet. App. 21.[2]

The question presented recurs with some frequency. The basic question in this case—whether Section 1226 or Section 1231(a) applies—arises whenever an alien is arrested after unlawfully reentering the United States, has the prior removal order reinstated, and, after having been ordered removed from the United States, is found to have a reasonable fear of persecution or torture and thus is placed into withholding-only proceedings. That situation is fairly common. See Executive Office for Immigration Review, United States Dep't of Justice, *FY 2016 Statistics Yearbook* B1 (Mar. 2017) (reporting that immigration judges received approximately 3,000 new withholding-only cases in each fiscal year from 2014 through 2016).

The resolution of the question also has several legal and practical consequences. Under Section 1231(a), for example, an alien is subject to detention during the 90-day removal period, followed by a period of permissive detention subject to release by DHS on an order of supervision. If the alien were detained under Section 1226(a),

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[2] This issue is pending in the Third Circuit, in *Guerrero-Sanchez* v. *Warden York Cnty. Prison*, No. 16-4134 (argued Apr. 18, 2018).

by contrast, he would be entitled to a bond hearing before an IJ at the outset of his detention, where he would be released if he established that he is not a flight risk or a danger. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847-848 (2018). For certain criminal aliens, however, release on bond would be prohibited if Section 1226 applied. See 8 U.S.C. 1226(c)(2). If such criminal aliens are detained under Section 1231(a), however, then release on an order of supervision would be available after the 90-day removal period. 8 U.S.C. 1231(a)(3) and (6).

For these reasons, although only two courts of appeals have thus far considered the issue, review by this Court may be warranted in an appropriate case.

3. This, however, is not an appropriate case. The question of which statute governs detention during withholding-only proceedings has little if any remaining practical significance for petitioner because he has been released on bond (and thus is no longer detained) for independent reasons. In particular, an IJ provided petitioner a bond hearing under Ninth Circuit precedent in *Rodriguez* on the ground that he had been detained for more than six months, and determined that he should be released under the standards imposed by the Ninth Circuit in such circumstances. See p. 7, *supra*. His release on bond eliminates the immediate practical importance of this question to petitioner.

Furthermore, the issue could not have any practical significance for petitioner unless DHS first took him back into custody while his withholding-only proceedings remained pending. The government could potentially seek to take petitioner back into custody on the ground that he should not have been given the bond hearing in the first place: The Ninth Circuit's decision

in *Rodriguez* did not apply to aliens detained under Section 1231(a), and this Court's decision in *Jennings* in any event overruled *Rodriguez* as a circuit precedent and thus eliminated the predicate for the hearing. But if the government sought to rearrest petitioner, he apparently would become a member of the circuit-wide certified class in *Aleman Gonzalez* v. *Sessions*, 325 F.R.D. 616 (N.D. Cal. June 5, 2018), appeal pending, No. 18-16465 (9th Cir. filed Aug. 3, 2018).[3] In that case, the district court followed the Ninth Circuit's prior decision in *Diouf* v. *Napolitano*, 634 F.3d 1081 (2011), and construed 8 U.S.C. 1231(a)(6) to guarantee an IJ bond hearing after six months of detention for aliens who are subject to a reinstated removal order and in withholding-only proceedings, notwithstanding this Court's decision in *Jennings*, and entered a preliminary injunction requiring such hearings. See *Aleman Gonzalez*, 325 F.R.D. at 619. Unless the Ninth Circuit were to vacate that injunction before this Court were to render a decision on the merits, if it granted certiorari in this case, then even if petitioner were rearrested he apparently would be entitled to a bond hearing regardless of how this Court decided the question presented. It is thus far from clear that the Court's resolution of the question presented here would have any legal or practical significance for petitioner.[4]

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[3] The government filed a protective notice of appeal but the Solicitor General has not yet determined whether to appeal.

[4] The case also would become moot if petitioner's withholding-only proceedings were completed before this Court could render any decision. On September 17, 2018, the IJ denied petitioner's request for withholding of removal or protection under the CAT on the merits. See p. 7, *supra*. But his withholding-only proceedings remain ongoing, as he has 30 days from that date to appeal to the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2018

BIA. See 8 C.F.R. 1003.38(b). So long as petitioner remains at large, any appeal to the BIA would be put on the non-detained docket, which is not expedited.