No. 19-897

In the Supreme Court of the United States

MATTHEW T. ALBENCE, acting director, U.S. Immigration and Customs Enforcement, et al.,
Petitioners,

v.

MARIA ANGELICA GUZMAN CHAVEZ, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case concerns two provisions of the Immigration and Nationality Act, each of which authorizes the detention of noncitizens under certain circumstances:

- Section 1226(a) governs detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a).
- Section 1231(a) governs detention during the 90-day "removal period," which is the period when "the Attorney General shall remove the alien." 8 U.S.C. § 1231(a)(1)(A), (a)(2).

Those detained pursuant to Section 1226 generally have a right to a bond hearing, in which an immigration judge will make an individualized determination about whether the noncitizen's particular circumstances require detention during the pendency of proceedings—or whether the individual may be released on bond. The government takes the position that Section 1231 detainees are not entitled to bond hearings.

The question presented is which provision governs the detention of noncitizens who are subject to reinstated removal orders, but who are pursuing lengthy proceedings for withholding or deferral of removal—relief that, if successful, would prevent removal to the government's designated countries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes and Regulations

Statutes and Regulations—continued

Other Authorities

BRIEF IN OPPOSITION

STATEMENT

The statutory provisions at issue here form an integrated system governing the detention of noncitizens as they are processed through the phased machinery of removal from this country.

Section 1226 provides detention authority while the decision "whether the alien is to be removed from the United States" remains "pending." 8 U.S.C. § 1226(a). Because immigration proceedings are often quite prolonged, Congress has provided that (absent certain disqualifying criminal convictions not at issue here) immigration judges are to consider release of an individual on bond or parole, as that person's particular circumstances warrant. *Ibid*. That is, if an individual demonstrates that she is neither a danger to her community nor a flight risk, she may post bond and return to her family for the pendency of removal proceedings—a process which frequently takes multiple years. If an individual cannot make that showing, Section 1226 provides for detention authority.

Section 1231 provides mandatory detention authority during the statutorily defined "removal period." This period is 90 days long (unless extended), during which time "the Attorney General shall remove the alien from the United States." 8 U.S.C. § 1231. Detention thus facilitates the physical removal of an individual from the United States.

This case concerns how those statutes apply to a relatively small sub-category of noncitizens: those who are subject to reinstated removal orders, but who credibly invoke bedrock legal protections against de-

portation to countries where they are likely to be persecuted, tortured, or killed. Like removal proceedings more generally, this process often takes years or more.

The government long took the position that noncitizens in such "withholding-only" proceedings were detained subject to Section 1226. Thus, except for those with serious criminal histories, these individuals could request a bond hearing from an immigration judge and—if warranted—remain with their families and communities during lengthy removal proceedings.

Recently, however, the government changed its position. It now takes the view that, if an individual with a reinstated order of removal wishes to assert his rights to avoid persecution or torture upon removal, the result is *mandatory* detention under Section 1231—for periods usually lasting longer than a year, and often for multiple years. The government has never articulated a rationale for its change in position. And it cannot explain how its stance accords with the short-term nature of Section 1231's detention authority.

Ultimately, the Court should deny the petition for review. The court of appeals reached the correct result—and, in any event, review of this issue is currently premature.

A. Legal background.

The Immigration and Nationality Act (INA) provides the governing framework for the removal of noncitizens from the United States, and for the Executive's powers to detain them during that process.

1. As relevant here, when a noncitizen who has previously been removed from the country is found to have reentered unlawfully, that person's "prior order

of removal is reinstated from its original date and is not subject to being reopened or reviewed," and "the alien is not eligible and may not apply for any relief" under the INA. 8 U.S.C. § 1231(a)(5).

Notwithstanding that seemingly unqualified prohibition, the individual may apply for withholding of removal: "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—or tortured." Pet. App. 4a-5a (quoting 8 U.S.C. § 1231(b)(3)(A); and citing Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note)).

Because it is "the policy of the United States not to * * * effect the involuntary return of *any* person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture" (FARRA § 2242(a) (emphasis added)), these forms of relief—known collectively as withholding of removal—may be pursued even by noncitizens with reinstated removal orders. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 35 n.4 (2006).[1]

Noncitizens with reinstated removal orders are therefore placed in so-called withholding-only admin-

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[1] The court of appeals used the umbrella term "'withholding of removal' to encompass three distinct forms of relief: persecution-based withholding of removal under the INA" (see 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b)); "torture-based withholding of removal under the Convention Against Torture" (CAT) (8 C.F.R. § 1208.16(c)); and torture-based deferral of removal under the [CAT]" (see *id.* § 1208.17). See Pet. App. 6a n.1.

istrative proceedings if they "express[] a fear of returning to the country" designated for removal (8 C.F.R. § 241.8(e)), and an asylum officer determines, after an interview, that the individual has "a reasonable fear of persecution or torture" (*id.* § 208.31(c)). In that event, the case is referred to an immigration judge (IJ) "for full consideration of the request for withholding of removal only." *Id.* § 208.31(e); see also *id.* § 1208.16 (procedure before IJ). An appeal of the IJ's withholding determination may be taken to the Board of Immigration Appeals (BIA), whose decision is in turn judicially reviewable through a petition to the court of appeals. *Id.* § 1208.31(e), 8 U.S.C. § 1252(a)(1), (4); FARRA § 2242(d).

2. Meanwhile, the INA contains two detention provisions relevant here.

First, under 8 U.S.C. § 1226, "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). That statute authorizes the Executive to release a detained noncitizen on bond, and the immigration agencies have issued regulations providing that "a noncitizen detained under [Section] 1226 is entitled to an individualized hearing before an immigration judge to determine whether continued detention is necessary while immigration proceedings continue." Pet. App. 13a (citing 8 C.F.R. § 236.1(d)(1)); see 8 U.S.C. § 1226(a)(1)-(2). Section 1226(c) requires mandatory detention for noncitizens previously convicted of certain criminal offenses. See 8 U.S.C. § 1226(c).

Second, a separate section of the INA provides for detention for the duration of a 90-day "removal period" during which "the Attorney General shall remove the alien from the United States." 8 U.S.C.

§ 1231(a)(1)(A). The removal period begins "on the latest of" three dates:

> (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.

Id. § 1231(a)(1)(B). Detention is mandatory during the 90-day removal period. *Id.* § 1231(a)(2). If the noncitizen is not removed within the 90 days, he or she "normally is subject to supervised release" (Pet. App. 15a (citing 8 U.S.C. § 1231(a)(3)), although the government is empowered to continue the detention of certain categories of noncitizens beyond the 90-day period (see 8 U.S.C. § 1231(a)(6)). No bond hearing is provided by the statute or regulations for noncitizens detained under Section 1231.

B. Factual and procedural background.

1. Respondents are noncitizens who were removed from the United States and then either persecuted, tortured, or threatened with such conduct in the countries to which they had been removed. Pet. App. 6a-7a. "Fearing for their safety, [they] returned to the United States, reentering without authorization and despite their prior removal orders." *Id*. at 7a.

The government reinstated each respondent's prior order of removal under Section 1231(a)(5), but each expressed a reasonable fear of persecution or tor-

ture, and each passed a reasonable fear interview before an asylum officer or an IJ on review. Pet. App. 7a. Each respondent was therefore placed in withholding-only proceedings. *Ibid*. The government detained all of the respondents during those proceedings without providing bond hearings. *Ibid.*

2. Two sets of respondents filed habeas actions in district court in the Eastern District of Virginia, seeking declarations that they were detained under Section 1226, as well as injunctive relief ordering individualized bond hearings. Pet. App. 8a. In one of the two actions, the district court certified a statewide class of similarly situated detainees, and "that decision is unchallenged on appeal." *Ibid.*

Judge Brinkema entered summary judgment for respondents in both cases, holding that "the text, structure, and intent of the INA compel the conclusion that [respondents were] detained under" Section 1226(a). Pet. App. 66a; see *id.* at 45a-72a, 73a-91a. Judge Brinkema observed that Section 1226—which applies "pending a decision on whether the alien is to be removed" (8 U.S.C. § 1226(a))—must control, "because until withholding-only proceedings are complete, a decision has not been made on whether [respondents] will in fact be removed from the United States." Pet. App. 66a.

As for Section 1231, Judge Brinkema concluded that its detention provisions "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." Pet. App. 67a. That much is clear from both the triggering conditions—which center around "legal impediment[s] to actual removal"—and the 90-day duration of the removal pe-

riod itself: "[I]t 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." *Id.* at 66a-67a. For these and other reasons, the court concluded, Section 1226 is the better fit.

3. The Fourth Circuit affirmed. Based on a thorough examination of the text and structure of the two provisions, the court of appeals concluded that—unlike the government's reading—the district court's interpretation "fully effectuates the plain text of the provisions and also ensures that [Section] 1226 and [Section] 1231 fit together to form a workable statutory framework." Pet. App. 18a. That is, "[b]efore the government has the actual authority to remove a noncitizen from the country, [Section] 1226 applies; once the government has that authority, [Section] 1231 governs." *Ibid.* And "[b]ecause the government lacks the authority to actually execute orders of removal while withholding-only proceedings are ongoing, [respondents] are detained under [Section] 1226." *Ibid.* (alterations incorporated; quotation marks omitted).

Dissenting, Judge Richardson agreed with the government's position that Section 1231 governs, and that respondents therefore need not be provided with individualized bond hearings. Pet. App. 33a-44a.

REASONS FOR DENYING THE PETITION

This Court's review is not warranted, for two principal reasons. *First*, the decision of the Fourth Circuit is correct: Section 1226, not Section 1231, governs the detention of noncitizens with reinstated removal orders while their withholding-only proceedings are

pending. *Second*, intervention now would be premature, in light of further proceedings in the courts of appeals.

A. The decision below is correct.

The court of appeals correctly joined the Second Circuit in holding that respondents' detention is governed by Section 1226, entitling them to bond hearings. Pet. App. 1a-32a; see *Guerra* v. *Shanahan*, 831 F.3d 59, 62-64 (2d Cir. 2016).

1. "As in any case of statutory construction, our analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (quotation marks omitted).

a. Section 1226 governs the detention of a noncitizen "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 correctly concluded, the phrase "to be removed" demonstrates that Section 1226(a) is concerned with concrete, practical outcomes. The statute "does not reference legal 'removability,' or use other language that captures whether the alien is *theoretically* removable. Instead, the statute applies 'pending a decision on whether [an] alien is to be removed,' invoking the practical question of whether the government has the authority to execute a removal." Pet. App. 18a-19a (quotation marks and citation omitted) (quoting 8 U.S.C. § 1226(a)). In other words, "[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)).

Congress's decision not to use the language of removability in Section 1226(a)—indicating its intent to focus on practical authority to remove rather than theoretical status—is particularly telling because Congress *did* employ that language elsewhere in the removal provisions of the INA. Section 1229a lays out the procedure for removal proceedings before an immigration judge, and then provides that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien *is removable* from the United States." 8 U.S.C. § 1229a(c)(1)(A) (emphasis added).

Where, as here, "the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A *Sutherland Statutes & Statutory Construction* § 46:06 (6th rev. ed. 2000)); accord, *e.g.*, *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 456 (2012) ("We generally seek to respect Congress' decision to use different terms to describe different categories of people or things."); Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."). "[W]hether an alien is removable" (8 U.S.C. § 1229a(c)(1)(A)) must therefore be a different question than "whether [that] alien is to be removed" (*id.* § 1226(a)).

In other words, "[i]f Congress had wanted to" limit Section 1226(a) detention to those with pending determinations of *theoretical* removability, "it knew exactly how to do so—it could have simply borrowed from the statute next door." *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018).

That conclusion is only strengthened by the fact that both provisions—Section 1226(a) and Section

1229a(c)—were added to the INA as part of the same legislative act, separated by just a few pages of the Statutes at Large. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009, 3009-585, 3009-591; cf. Scalia & Garner, *supra*, at 173 ("[T]he more connection the cited statute has with the statute under consideration, the more plausible the argument becomes.").[2] That Congress chose to use different language in Section 1226(a) indicates strongly that a different meaning—that is, an inquiry into present, practical authority to execute removal—was intended.

The government attempts to disregard this straightforward construction, repeatedly asserting that, by its "plain terms," Section 1226(a) "governs the detention of aliens who are awaiting a decision on whether they will be ordered removed." Pet. 8. But that is not what the statute says: Section 1226 governs "pending a decision on whether the alien is to *be* removed" (8 U.S.C. § 1226(a) (emphasis added)), not "whether he will be *ordered* removed" (Pet. 8 (emphasis added)). Those are not the same thing.

b. That Section 1226(a) applies until, as a practical matter, "the government has the authority to execute a removal" (Pet. App. 19a) is confirmed by the complementary text and structure of Section 1231.

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[2] What is more, it was IIRIRA that first introduced the concept of "removal" and "removability" to the INA, replacing the legacy nomenclature of "inadmissibility" and "deportability." See *Calcano-Martinez* v. *INS*, 533 U.S. 348, 350 & n.1 (2001) (describing this "statute-wide change in terminology"); *Jama* v. *ICE*, 543 U.S. 335, 345 (2005). Given this context, it would be especially inappropriate to assume that Congress failed to use its newly minted terminology with precision.

That section provides for mandatory detention "[d]uring the removal period," defined as the "period of 90 days" during which "the Attorney General *shall* remove the alien from the United States." 8 U.S.C. § 1231(a)(1)(A), (a)(2) (emphasis added). The purpose of this "90-day period is to afford the government a reasonable amount of time within which to make the travel, consular, and various other administrative arrangements that are necessary to secure removal." *Diouf* v. *Mukasey*, 542 F.3d 1222, 1231 (9th Cir. 2008); see also *Leslie* v. *Attorney Gen. of U.S.*, 678 F.3d 265, 270 (3d Cir. 2012) ("[T]he purpose of [Section] 1231 detention is to secure an alien pending the alien's certain removal[.]").

Consistent with this purpose, Congress expressly contemplated that the "removal period"—and thus the length of Section 1231 detention—would last 90 days or less. And "the 90-day limitation makes sense if the removal period is only meant to govern the final logistical steps of physically removing an alien. But it is obvious that withholding-only proceedings take substantially longer than 90 days." Pet. App. 21a (quotation marks and citation omitted). Confronted with this potential inconsistency, the court of appeals rightly was "most reluctant to adopt a construction of [Section] 1231 that in an entire class of cases will put government officials—routinely and completely foreseeably—in dereliction of their statutory duties." *Id*. at 22a; see also *Guerra*, 831 F.3d at 62-63 (since Section 1231 "is concerned mainly with defining the 90-day removal period during which the Attorney General 'shall remove the alien[,]'" Section 1226 "is the more

logical source of authorization for the detention of aliens currently in withholding-only proceedings.").[3]

The statutory triggers for the beginning of the Section 1231(a) removal period are further clues to its intended operation:

> 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.

Pet. App. 19a-20a (citing 8 U.S.C. § 1231(a)(1)(B)(i)-(iii)).

As the court of appeals explained, these "preconditions are concerned with legal impediments to actual removal rather than initial determinations of removability." Pet. App. 20a (alteration incorporated; quotation marks omitted).[4] "A noncitizen in criminal

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[3] True, "Section 1231 also contemplates delays to removal" beyond the 90-day period, "but the contemplated delays are of a logistical nature, not a [substantive legal] one." *Hechavarria* v. *Sessions*, 891 F.3d 49, 55 n.4 (2d Cir. 2018).

[4] The government focuses on Section 1231(a)'s heading and prefatory language, which references "aliens ordered removed" (8 U.S.C. § 1231(a), (a)(1)(A)), contending that a noncitizen with a reinstated removal order has indeed been ordered removed. Pet. 9, 11. But that prefatory language is not operative with respect to the boundaries of the statutory "removal period" when the three-pronged definition in Section 1231(a)(1)(B) explicitly controls that topic. See, *e.g.*, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (discussing the "commonplace of statutory construction that the specific governs the

custody, for instance, may already have been determined (and finally so) to be 'removable.' Nevertheless, the 90-day removal period will not begin, and [Section] 1231's detention provisions will not apply, until that noncitizen is released from nonimmigration custody so that immigration authorities will have jurisdiction to execute the removal order." *Ibid*.

In other words, "Section 1231 assumes that the immigrant's removal is both imminent and certain. The definition of the removal period is dependent upon the assumption that no substantive impediments remain to the immigrant's removal." *Hechavarria*, 891 F.3d at 55. With withholding proceedings ongoing, a noncitizen's removal is neither imminent nor certain, and legal impediments indeed remain.

The two detention provisions thus fit together seamlessly: "Before the government has the actual authority to remove a noncitizen from the country, [Section] 1226 applies; once the government has that authority, [Section] 1231 governs." Pet. App. 18a. That is, "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, [Section] 1231's 90-day removal period begins." *Id.* at 20a. "The result is that until withholding-only proceedings conclude, the removal period has not begun and [Section] 1231's detention provisions do not apply. Instead, the decision regarding whether [respondents] are 'to be

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general") (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); cf. *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 776 (2018) ("When a statute includes an explicit definition, we must follow that definition[.]") (quotation marks omitted)).

removed' remains 'pending,' and [Section] 1226 governs." Pet. App. 22a.

2. The government's objections to the Fourth Circuit's analysis do not withstand scrutiny.

a. The government first suggests that the text of Section 1226 excludes those with reinstated removal orders: Because withholding only provides "protection from being removed to a particular country * * * the government remains free to remove the alien to any country apart from the country of risk." Pet. 10-11. Thus, the argument goes, for those in withholding-only proceedings, "[t]he 'decision on *whether* the alien is to be removed'" has been made; withholding only determines to *where*. *Id.* at 11 (quoting 8 U.S.C. § 1226(a)); see also Pet. App. 42a-43a (Richardson, J., dissenting).

As the court of appeals rightly noted, though, "the 'whether' and 'where' questions [cannot] be separated so cleanly." Pet. App. 23a. Rather, "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 [respondents] are in fact "to be removed" from the United States.'" Pet App. 24a (quoting Pet. App. 70a).

In other words, the argument about "whether" versus "where" overlooks that the government cannot deport someone without deporting him or her *to somewhere*. And if the government's first-choice removal destination is off the table due to pending withholding proceedings, the INA "places sharp limitations" on removal to alternative countries. Pet. App. 60a-70a; see

8 U.S.C. § 1231(b).[5] That is, "the government generally cannot simply *sua sponte* deport an alien to a country where he or she does not have citizenship." Pet. App. 24a (quotation marks omitted).

Moreover, even if a third country is available within the statutory structures, the government must first notify the noncitizen of the country to which it intends to effectuate removal, allowing "an opportunity to request withholding of removal to *that* particular country." Pet. App. 25a (citing *Kossov* v. *INS*, 132 F.3d 405, 409 (7th Cir. 1998)). For this reason, "'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." *Ibid*.

The result is that, "in practice * * * non-citizens who are granted restrictions on removal are almost never removed from the U.S." *Kumarasamy* v. *Attorney Gen. of U.S.*, 453 F.3d 169, 171 n.1 (3d Cir. 2006)

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[5] Section 1231(b)(2) sets out an ordered list of countries to which the government is empowered to remove a noncitizen; except in the case of an unusually multinational individual, most of the putative options are likely either to be the same country for which withholding is being sought, or to not exist at all. See, *e.g.*, 8 U.S.C. § 1231(b)(2)(D) ("a country of which the alien is a subject, national, or citizen"), (E)(iii) ("[a] country in which the alien resided before the alien entered the country from which the alien entered the United States"), (E)(iv) ("[t]he country in which the alien was born"). And while there is a residual clause authorizing removal to "another country whose government will accept the alien into that country" (*Id.* § 1231(b)(2)(E)(vii)), the Court has made clear that the government lacks the power to deport a noncitizen to such an unaffiliated third country without that country's consent. See *Jama*, 543 U.S. at 347.

(quoting David Weissbrodt & Laura Danielson, *Immigration Law & Procedure* 303 (5th ed. 2005)) (alteration incorporated); cf. Pet. App. 24a ("government has not shown" that any alternative removal countries exist for respondents). That is, withholding proceedings almost always *do* determine "whether the alien is to be removed," not just to where. 8 U.S.C. § 1226(a).

b. The government also asserts that the Fourth Circuit's construction of Section 1231—that it is concerned with "legal impediments to actual removal" (Pet. App. 20a (alteration incorporated))—"lacks a sound basis in the statutory text." Pet. 11. Not so.

The "removal period" of Section 1231 cannot begin until a noncitizen's removal order is "administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). Under the settled meaning of that concept in administrative law, agency action is not "final" unless it "mark[s] the consummation of the agency's decisionmaking process." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997)). And when withholding-only proceedings are ongoing, the agency's removal decision can hardly be said to be "consummated"; rather, "[i]n 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.'" Pet. App. 26a-27a (quoting *Luna-Garcia* v. *Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015)). It is hard to imagine another administrative context in which an agency order would be considered "final"—and thus subject to immediate challenge in court—while further proceedings about the legality of executing that order were pending before the same agency.

To be sure, in *most* cases, a reinstated removal order will be administratively final. This fact "explain[s]

why Congress located [Section] 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 * * * will 'mark the consummation of the agency's decisionmaking process,' leaving for the 90-day window only administrative execution of the removal order." Pet. App. 26a (quoting *Bennett*, 520 U.S. at 177-178); cf. Pet. 9-10 (relying on the placement of Section 1231(a)(5)).

As the court of appeals explained, though, "the question here is about the exceptional case, not the ordinary case: The small percentage of cases in which—notwithstanding [Section] 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." Pet. App. 26a. Because the government's decisionmaking process with respect to respondents' removal remains ongoing, their removal orders are not "administratively final," and Section 1231's removal period has not yet begun. 8 U.S.C. § 1231(a)(1)(B)(i). That is the "sound basis in the statutory text" the government claims is missing. Pet. 11.

3. Ultimately, the proper functioning of this statutory framework is non-controversial in the vast majority of normal, non-reinstatement removal cases: Section 1226(a) applies, thereby permitting the government the flexibility to make a bond determination and respecting the noncitizen's liberty interests, during the often-lengthy proceedings leading up to a "decision on whether the alien is to be removed." 8 U.S.C. § 1226(a).

Once that decision is made and finalized, detention authority shifts to Section 1231, which *requires*

the government to detain the noncitizen during a relatively short period while it "make[s] the travel, consular, and various other administrative arrangements that are necessary to secure removal." *Diouf*, 542 F.3d at 1231. In that context, mandatory detention makes sense: The government has an interest in maintaining physical control over someone while that person's "removal is both imminent and certain." *Hechavarria*, 891 F.3d at 55.

The question here is simply where in that statutory structure to locate the sub-class of noncitizens whose removal orders have been reinstated, but who are pursuing often years-long proceedings that, if successful, will almost certainly preclude their deportation. In light of the undisputed statutory context, the Fourth Circuit resolved that issue in commonsense fashion: "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, [Section] 1231's 90-day removal period begins." Pet. App. 20a; see, e.*g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1626 (2016) ("[W]e must, as usual, interpret the relevant words not in a vacuum, but with reference to the statutory context.") (quotation marks omitted).

The Fourth Circuit's decision is true to both the text and the context of the INA. Further review of that decision is thus unwarranted.

B. Review is presently premature.

Regardless of the merits of the Fourth Circuit's holding, it would be premature at this juncture for the Court to review the question presented.

1. To start, the government fails to directly acknowledge that the Court denied certiorari on this

exact question just last Term. See *Padilla-Ramirez* v. *Culley*, 139 S. Ct. 411 (2018).

2. Additional percolation on this "difficult question" (Pet. App. 71a), would be beneficial. See *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsberg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Indeed, the Fourth Circuit's decision below provides robust explanation for why Section 1226 governs in these circumstances. Compare Pet. App. 1a-32a with *Guerra*, 831 F.3d at 62-64 (treating the question in significantly less depth). The lower courts should be allowed the benefit of the Fourth Circuit's analysis, giving "the issue * * * further study before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari); cf., *e.g.*, *Box* v. *Planned Parenthood of Ind. & Kent., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring) ("[B]ecause further percolation may assist our review * * * I join the Court in declining to take up the issue now.").

Moreover, valuable additional perspectives will not be long in coming. A decision on the question presented by the Sixth Circuit, for example, is likely imminent. See *Melara Martinez* v. *Barr*, No. 19-3908 (6th Cir.) (argued Jan. 30, 2020). If the Court wishes to take up this issue, it may do so in that case—with the benefit of an additional opinion from an as-yet uncommitted court of appeals.

In fact, the Sixth Circuit case presents a more attractive vehicle, because it also cleanly presents the

next logical question that flows from the government's position: If the government is right that the statutory scheme does not provide for bond hearings, whether the resulting mandatory detention—for the frequently years-long duration of prolonged administrative proceedings—is consistent with due process.

For example, the habeas petitioner in the Sixth Circuit case has been in government custody for *twenty-seven months* without an individualized determination of his flight risk or danger to the community. See, *e.g.*, Pet'r Br. 1, No. 19-3908 (6th Cir. Nov. 7, 2019), Dkt. 28. That is flatly inconsistent with a "society [in which] liberty is the norm, and detention * * * without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987); see also *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.") (quotation marks and citations omitted).

If the government is right about the statute, the Court will likely have to answer the constitutional question one way or another. Cf. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 852 (2018) (remanding to the court of appeals to consider the due process issue). Unlike this case, the pending Sixth Circuit case provides

an opportunity to address both issues in one integrated proceeding.[6]

3. Nor is the need for immediate review as pressing as the government contends. The government objects to "providing a new mechanism for aliens in withholding-only proceedings to obtain release over DHS's objection," when people in that category have supposedly "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." Pet. 15-16.

Even assuming that flight from "a reasonable fear of persecution or torture" (8 C.F.R. § 208.31) may fairly be described as "disregard for * * * removal orders" (Pet. 16), the government's argument disregards that the *purpose* of a bond hearing is to determine precisely whether an individual person is likely to abscond. See *Guerrero-Sanchez* v. *Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (explaining that "the government's interest" in preventing flight "is served by the bond hearing process itself.") (quoting *Diouf* v. *Napolitano*, 634 F.3d 1081, 1088 (9th Cir. 2011)). That is, "[i]f the alien poses a flight risk, continued detention is permitted." *Ibid.* (alteration incorporated). All the Fourth Circuit's decision provides to respondents is process—something the government has no legitimate reason to fear.

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[6] The pending petition in *Albence* v. *Arteaga-Martinez*, No. 19-896, provides no opportunity for consideration of this issue, as the decision in that case construes statutory text in light of constitutional avoidance. By contrast, *Melara Martinez* presents the constitutional question directly.

The government's policy concerns, moreover, are belied by the fact that, for many years, the government *itself* took the position that noncitizens in respondents' circumstances are subject to Section 1226 detention, not Section 1231. See, *e.g.*, *Lopez* v. *Napolitano*, 2014 WL 1091336, at *3 (E.D. Cal. 2014) ("Respondent asserts that Petitioner is being detained pursuant to 8 U.S.C. § 1226(a)."); *Castillo* v. *ICE Field Office Dir.*, 907 F. Supp. 2d 1235, 1241 (W.D. Wash. 2012) ("Respondent agrees * * * that because Petitioner's application for withholding of removal is pending, he is currently not subject to a final reinstated order of removal."). Treating individuals like respondents as subject to Section 1226 cannot have baleful consequences for the government, since the government previously took this very position.

Moreover, the district court's statewide injunction—mandating bond hearings for all noncitizens in respondents' position detained in Virginia—was entered in February 2018, over two years ago. See Order, *Diaz* v. *Hott*, No. 17-cv-1405 (Feb. 26, 2018), Dkt. 32. If the government's concerns about widespread "fail[ure] to comply with an order of removal" (Pet. 16) by noncitizens released on bond were well-founded, those concerns would have materialized by now—and we would have heard about them in the government's petition.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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