

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TONY H. PHAM, SENIOR OFFICIAL)
4 PERFORMING THE DUTIES OF THE)
5 DIRECTOR OF U.S. IMMIGRATION AND)
6 CUSTOMS ENFORCEMENT, ET AL.,)
7 Petitioners,)
8 v.) No. 19-897
9 MARIA ANGELICA GUZMAN CHAVEZ,)
10 ET AL.,)
11 Respondents.)
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Washington, D.C.
Monday, January 11, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-897, Pham
5 versus Guzman Chavez.

6 Mr. Suri.

7 ORAL ARGUMENT OF VIVEK SURI

8 ON BEHALF OF THE PETITIONERS

9 MR. SURI: Mr. Chief Justice, and may
10 it please the Court:

11 Respondents are detained under
12 Section 1231, not under Section 1226. In the
13 first place, the text of Section 1231 refers
14 repeatedly to an order of removal or to the
15 aliens who have been ordered removed. That is
16 clear from the caption, from the operative
17 provision, and from the definition of the
18 removal period. There is no dispute here that
19 these aliens have been ordered removed. Indeed,
20 that is the definition of reinstating a removal
21 order.

22 In the second place, Section 1226
23 supports that conclusion. The best way to see
24 that is to lay Section 1226 alongside the
25 reinstatement clause. Section 1226 says that it

1 applies pending a decision on whether the alien
2 is to be removed, and the reinstatement clause
3 says that these aliens shall be removed.
4 Putting those two provisions together, it's
5 clear that in the eyes of the law, the decision
6 that has to be made -- that has to be pending
7 for Section 1226 to apply has been made in this
8 case.

9 And if the Court finds all of that
10 unconvincing, it should turn to the structure of
11 the statute. Congress put the provisions
12 governing reinstatement, withholding, and the
13 selection of the country of removal all in
14 Section 1231, not in Section 1226. That's a
15 structural indication that it's Section 1231
16 that applies.

17 I welcome the Court's questions.

18 CHIEF JUSTICE ROBERTS: Now, Mr. Suri,
19 if an alien is in withholding-only proceedings
20 and there's no country other than the one, you
21 know, as to which he claims statutory
22 withholding or CAT relief, can you remove him?

23 MR. SURI: No, we cannot, Your Honor.

24 CHIEF JUSTICE ROBERTS: Well, then so
25 your -- your emphasis that the distinction is

1 between whether and where really doesn't hold up
2 across the board, does it?

3 MR. SURI: I appreciate, Your Honor,
4 that the distinction between whether and where
5 can seem artificial in a context where there's
6 only one option and that option potentially has
7 been ruled out.

8 Nevertheless, that is the distinction
9 the statute requires us to draw, and we can see
10 that in a few ways.

11 First of all, in Section 1231(a)(7),
12 Congress talks about a situation where the alien
13 has been ordered removed, but removal to any
14 country is impracticable or impossible because
15 all of those countries have refused permission.
16 Even in that context, it's 1231 that applies.
17 That suggests that Congress did view whether and
18 where as distinct.

19 Second, that's the distinction that
20 underlies the difference between withholding of
21 removal on the one hand and asylum on the other
22 hand. The Court hasn't said in its precedents
23 about withholding and asylum that the two are
24 functionally the same simply because, as a
25 practical matter, whether and where can collapse

1 into a single inquiry. And --

2 CHIEF JUSTICE ROBERTS: Well, when you
3 say --

4 MR. SURI: -- the final --

5 CHIEF JUSTICE ROBERTS: -- "can
6 collapse," that seems to me to suggest that the
7 distinction you draw is -- is -- is not a valid
8 one. You -- you call it -- you call it
9 artificial, but it seems to me that it might be
10 wrong at -- at least in the category of cases
11 where there's no third country available. And I
12 gather that's in the vast majority, right?

13 MR. SURI: That is correct, Your
14 Honor. But one last point I'd make to defend
15 the distinction is that the very availability of
16 withholding of removal in the first place
17 depends on the Court's accepting that
18 distinction.

19 Recall that the reinstatement clause
20 says that the removal order can't be reopened,
21 can't be reviewed under any circumstances. The
22 only way to square that with withholding is to
23 say that withholding doesn't affect the removal
24 order itself; it just affects the question
25 where.

1 CHIEF JUSTICE ROBERTS: Well, but
2 isn't --

3 MR. SURI: And one --

4 CHIEF JUSTICE ROBERTS: -- why
5 isn't -- since it depends upon -- whether you
6 can actually remove the alien depends upon the
7 particular circumstances of each case, whether
8 there's a third country available.

9 Why isn't that the touchstone that
10 should be applied for -- whether it's persons in
11 1226 or 1231, the particular circumstances?

12 MR. SURI: Because, in Section 1231,
13 the words are "ordered removed." It doesn't
14 refer to the practicalities of removal. And
15 even in 1226, although the court of appeals read
16 "whether the alien is to be removed" to refer to
17 that practical question, Respondents themselves
18 have abandoned that argument they had --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Thank you, Mr. Chief
23 Justice.

24 Counsel, just briefly, I know this
25 wasn't briefed, but could you just explain to me

1 briefly how the district court had jurisdiction
2 under 1252 in this case?

3 MR. SURI: In this case, Your Honor,
4 this was a habeas corpus petition, and the Court
5 in Zadvydas said that such a habeas corpus
6 petition could be heard where the question is
7 whether the government had the authority to
8 detain the alien in the first place.

9 The claim here is that the government
10 doesn't have the authority to detain the alien
11 unless it has provided bond hearings under
12 Section 1226.

13 JUSTICE THOMAS: So that basically
14 trumps 1252?

15 MR. SURI: That is how the Court read
16 these provisions in Zadvydas, and that's the
17 precedent we've stuck with here.

18 JUSTICE THOMAS: Okay. Just, again,
19 could you explain to me what we -- exactly we're
20 reviewing here?

21 MR. SURI: The Court is reviewing a
22 determination that these aliens are entitled to
23 bond hearings, but that determination depends on
24 the contention that these aliens are detained
25 under Section 1226 rather than Section 1231. So

1 that's the issue before the Court.

2 JUSTICE THOMAS: The -- if -- could
3 you tell me what the difference is between
4 "administratively final" and -- an
5 "administratively final order" and a "final
6 order of removal," if there is one?

7 MR. SURI: Yes. The term "final order
8 of removal" is ambiguous. It could refer to a
9 situation where the agency has completed its
10 review, but the courts haven't completed their
11 review, or it could refer to a situation where
12 both the courts and the agency have completed
13 their review.

14 The use of "administratively final"
15 clarifies that ambiguity, makes clear that all
16 we need to establish is that the agencies have
17 completed their review. We don't need to ask
18 about whether the courts are involved.

19 JUSTICE THOMAS: So does that mean --
20 so why doesn't it mean capable of being executed
21 then if the agencies are done?

22 MR. SURI: The definition of
23 "finality" in 1101(a)(47) ties finality to
24 whether the agency's review has been completed.
25 And, here, the agency's review of the removal

1 order itself has certainly been completed.

2 The only question left to decide is
3 the particular country, but that's a distinct
4 question, as this Court emphasized just last
5 term in *Nasrallah*.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: Thank you. Good
10 morning.

11 What percentage, if you know, of the
12 individuals of whom it is -- you know, there's a
13 preliminary thing, does this person have a
14 reasonable fear that he will be persecuted or
15 tortured or whatever if he's removed to country
16 X?

17 So think of the group of -- of --
18 where that is held by the ALJ or the
19 administrative -- the immigration judge. That
20 is held to be a reason. He has a reasonable
21 fear.

22 Then they go on to decide whether that
23 fear is, in fact, correct, to make a finding on
24 that.

25 What percentage of those who fall into

1 the reasonable fear category, so the -- the
2 immigration service will look into it, what
3 percentage is it found that they are, that they
4 do -- that they -- that they can't be sent to
5 that country? Do you know?

6 MR. SURI: Yes, I do. Our best
7 estimate is around 11 percent.

8 JUSTICE BREYER: Okay. So -- and, of
9 those 11 percent, 98 percent never are sent
10 anywhere, is that right? That's what we're told
11 in one of the briefs.

12 MR. SURI: Yes, that's right.

13 JUSTICE BREYER: So it's about
14 10 percent of those who are sent in that will
15 never leave the United States?

16 MR. SURI: That's about right, yes.

17 JUSTICE BREYER: Okay. So -- so
18 given -- that's a fairly good percentage but not
19 overwhelming percentage.

20 So, with 10 percent who will never
21 leave the United States, can we say that it is
22 administratively final? I mean, with 10 percent
23 of these people, they will not leave the United
24 States. They have a fairly good shot, a fairly
25 good shot. And why is it admin -- it's

1 certainly not administratively final as to those
2 10 percent. They're never going to leave.

3 MR. SURI: The -- the best --

4 JUSTICE BREYER: What do you think
5 about that?

6 MR. SURI: The best answer I have is
7 this Court's decision last term in Nasrallah,
8 where the Court said that a removal order's
9 finality is not affected by CAT protection. And
10 it doesn't matter whether 10 percent or
11 20 percent or some other percentage do or don't
12 ultimately leave the country. The Court was
13 very emphatic that the CAT order is distinct
14 from and doesn't disturb the validity of the
15 final order of removal.

16 JUSTICE BREYER: So -- so, in your
17 view, if, in fact, 98 percent of everyone who
18 reasonably feared -- reasonably feared removal
19 for prejudice and torture -- if 98 percent of
20 them ended up never leaving the United States,
21 do you think that this provision, 1330, 1231,
22 would still require them to be held in custody
23 without hope of bail for a long period of time,
24 maybe several years?

25 MR. SURI: Yes. Our --

1 JUSTICE BREYER: Is that your view?

2 MR. SURI: Yes. Our position turns on
3 what is true in the eyes of the law, not what
4 ends up happening in practice.

5 JUSTICE BREYER: Well, there also
6 are -- I'm not necessarily going to argue. I
7 will point out that there are traditions. There
8 is a constitution. There is a country where, by
9 and large, we don't keep people in prison for
10 years, whoever they are, persons, in -- for
11 years without any chance of even getting bail.

12 Now is that -- is that relevant to
13 this?

14 MR. SURI: Certainly, but the question
15 about detaining people for years doesn't arise
16 in the vast majority of these cases, and, when
17 it does arise, the procedures in Zadvydas will
18 address that problem.

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: Good morning, Mr.
21 Suri. I have a couple of questions about
22 statements that you make in your reply brief.

23 You say that the statute makes
24 detention mandatory during a removal period only
25 for terrorists and criminal aliens.

1 So the two questions are these:
2 First, does that mean that the Department of
3 Homeland Security releases other aliens under
4 supervision? And, second, is there a process
5 for deciding which of these aliens will be
6 detained and which -- which aliens will be
7 released?

8 MR. SURI: Justice Alito, as to the
9 first question, if the alien is released, then,
10 yes, it would be under supervision.

11 As to the second question, the
12 Department tries to detain aliens during the
13 90-day removal period to the maximum extent
14 possible. Releases would occur only if there
15 are operational constraints, such as a lack of
16 detention space in a particular facility.

17 And, no, there's no systematic
18 framework for determining whether that decision
19 is to be made. Rather, it's a case-by-case
20 judgment depending on what's happening at that
21 facility at that time.

22 JUSTICE ALITO: And who makes that
23 decision?

24 MR. SURI: That would be made -- I --
25 I don't know the answer to that question, but I

1 would imagine it's made by the local ICE field
2 office.

3 JUSTICE ALITO: And what type of
4 supervision occurs if there's release?

5 MR. SURI: The supervised release
6 conditions are set out in Section 1231(a)(3).
7 It provides, for example, that the alien must
8 appear before an immigration officer
9 periodically for identification, must submit, if
10 necessary, to a medical examination, and must
11 obey written restrictions on the alien's
12 conduct.

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, I'm not
17 altogether sure I understood Justice Alito's
18 question to you or your response.

19 Can you clarify for me, how many
20 people are held -- are denied supervised release
21 after the 90-day period?

22 MR. SURI: After the 90-day period, I
23 don't have exact statistics on that, but I took
24 Justice Alito to be asking about the initial
25 90-day period, not after the 90-day period.

1 JUSTICE SOTOMAYOR: So I'll ask about
2 after the 90-day period. How many people are
3 granted supervised release after that 90-day
4 period?

5 MR. SURI: I don't have the statistics
6 on that question, but Respondent cites a
7 study -- cite a study that claims that
8 15 percent of the aliens are released at some
9 point before the withholding-only proceedings
10 are completed.

11 JUSTICE SOTOMAYOR: So 85 percent are
12 restrained?

13 MR. SURI: That's correct.

14 JUSTICE SOTOMAYOR: Now 1231(a)
15 commands that the agency release immigrants --
16 remove immigrants within 90 days. You seem to
17 have admitted to Justice Breyer that that, in
18 most cases, is impossible for this class of
19 alien.

20 Now, if that is true, we have to pick
21 between two provisions, 1221 -- 1226 and
22 1231(a), and determine which controls the
23 question of whether these aliens can be released
24 on bond or bail or supervision.

25 Why should we not adhere to the basic

1 interpretive principle that counsels in favor of
2 a harmonious reading and against choosing an
3 interpretation that produces a substantial
4 effect that is inconsistent with the text of
5 another provision?

6 If we accept your reading, basically,
7 we're saying for this class of withholding-only
8 -- withholding applicants, that they're never
9 going to be removed within 90 days of the
10 finality of their removal order. That just
11 doesn't make any sense to me.

12 MR. SURI: I -- I appreciate the force
13 of the argument, but I have two responses to it.

14 The first is that the obligation is
15 subject by its own terms to the phrase "except
16 as otherwise provided in this section."

17 Then, if you go down to 1231(a)(5),
18 the last sentence of that states that aliens
19 with reinstated removal orders can be removed
20 "at any time." We think that "at any time"
21 takes precedence over the 90 days.

22 The second --

23 JUSTICE SOTOMAYOR: Except --

24 MR. SURI: -- point was --

25 JUSTICE SOTOMAYOR: I'm sorry. I -- I

1 -- I -- I'm not quite sure I follow that
2 argument.

3 You already admitted to the Chief
4 Justice that you can't remove these people who
5 are in withholding proceedings because the law
6 doesn't permit you to.

7 MR. SURI: I admitted to the Chief
8 Justice --

9 JUSTICE SOTOMAYOR: So that --

10 MR. SURI: I'm sorry, I didn't mean to
11 interrupt. I admitted to the Chief Justice
12 that, as a practical matter, these aliens can't
13 be removed if there's no country willing to
14 accept them. That was the same situation, by
15 the way, in Zadvydas, where the government was
16 searching for a country to which to remove the
17 alien. That was analyzed under Section 1231.

18 JUSTICE SOTOMAYOR: And your second
19 point, counsel, in response to my question?

20 MR. SURI: My second point was that
21 all that would raise is a structural inference
22 about when the removal period would begin, but
23 the Court shouldn't rely on the structural
24 inference when there's an express text stating
25 when the removal period begins.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Mr. Suri, if I could
4 take you back to your colloquy with the Chief
5 Justice. You were answering his question on the
6 assumption that there was no third country that
7 was available.

8 But I even want to take it a little
9 bit further and ask you, suppose you had a third
10 country that, for whatever reason, was willing
11 to accept an alien. If -- if -- if that alien
12 was currently in withholding proceed --
13 proceedings, you couldn't put him on a plane to
14 that third country, could you?

15 MR. SURI: We could after we provide
16 the alien notice that we were going to do that.

17 JUSTICE KAGAN: Right.

18 MR. SURI: But, without notice --

19 JUSTICE KAGAN: So that's what it
20 would depend on, right? That -- that you would
21 have to provide him notice, and if he had a fear
22 of persecution or torture in that country, he
23 would be given an opportunity to contest his
24 removal to that country, isn't that right?

25 MR. SURI: Yes, that's right.

1 JUSTICE KAGAN: So, in this situation,
2 as to these aliens who are currently in
3 withholding proceedings, you can't put them on a
4 plane to anywhere right now, isn't that right?

5 MR. SURI: Certainly. I agree with
6 that, yes.

7 JUSTICE KAGAN: Okay. And that's not
8 as a practical matter. That really is, as -- as
9 you put it, in the eyes of the law. In the eyes
10 of the law, you cannot put one of these aliens
11 on a plane to any place, either the -- either
12 the country that's referenced in the removal
13 order or any other country, isn't that right?

14 MR. SURI: Yes, that's right. And in
15 order to prevail in this case, I have to
16 convince you that the line between 1231 and 1226
17 is not when the government acquires the legal
18 ability to carry out the order; rather, it's the
19 entry of the order.

20 JUSTICE KAGAN: Okay. So, like, you
21 have to convince me that it doesn't matter that
22 you cannot deport the alien?

23 MR. SURI: Exactly right, yes.

24 JUSTICE KAGAN: Okay. Let me ask
25 you -- you know, suppose there's an alien who

1 just concedes removability and then seeks
2 withholding relief, and the -- the -- the IJ
3 enters the order of removability, of -- of
4 removal, and -- and grants withholding, and then
5 that's appealed by the government.

6 Would -- would that alien be treated
7 as if he were in 1226 or as if he were under
8 1231?

9 MR. SURI: That would never arise in
10 practice, but, if it did, that alien would be
11 treated as under 1226 because, in that context,
12 which I presume is outside the reinstated
13 removal order context, what happens is that the
14 withholding proceedings and the removal
15 proceedings take part together. They're not
16 bifurcated.

17 And so, in practice, the immigration
18 judge wouldn't enter a separate removal order
19 until after the withholding issue also was
20 resolved.

21 JUSTICE KAGAN: I -- I guess the
22 reason I ask is because that seems very similar
23 to me, is that you have a final order of removal
24 and a pending withholding decision, and yet
25 you're going to treat that alien under 1226 but

1 the aliens here under 1231. And I guess I'm
2 wondering what difference that makes and what
3 sense that differential treatment makes.

4 MR. SURI: Yeah. If -- if we had a
5 hypothetical world where the immigration judge
6 were to enter an order of removal that everyone
7 concedes is valid and then conduct separate
8 withholding-only proceedings, then I agree, it
9 would be 1231.

10 All I'm saying is that doesn't happen.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Good morning,
14 Mr. Suri. I wanted to ask about a passage in
15 your reply brief on pages 12 and 13. Your
16 argument, as I understand it, is, under 1231,
17 that there is a final order of removal dating
18 back to the original order of removal. But, for
19 purposes of 1252, the question becomes, is there
20 some chance for judicial review of -- of the
21 withholding-only proceedings?

22 And -- and -- and that -- that statute
23 also grants review only of the final order of
24 removal. Judge Richardson acknowledged this
25 difficulty in his dissent in the Fourth Circuit

1 and said that means that there's effectively
2 going to be no judicial review of
3 withholding-only proceedings. But the
4 government apparently in the Fourth Circuit
5 thought that there could be.

6 And, here, on 12 and 13, I -- I -- I
7 -- I see the government, forgive me, as maybe
8 hedging its bets and -- and -- and -- and not
9 really taking a position on this. And -- and my
10 -- my question for you is, which is it? Is
11 there review or not? And what do we do about
12 the fact that 1252 uses the same -- very similar
13 language as 1231, a final order of removal?

14 Surely, a final order of removal can't
15 mean one thing for -- in one statute and another
16 in another. That would -- that would seem
17 unlikely at least. So perhaps you can help me
18 with that difficulty.

19 MR. SURI: Certainly, Justice Gorsuch.

20 First, since you asked me to take a
21 position, yes, the government's position is that
22 review would be available and that "final" would
23 have to mean something different in 1252.

24 Second, if you think that "final" has
25 to have the same meaning across all contexts,

1 you should rule for us because the general
2 definition of "finality," the reinstatement
3 clause, and Nasrallah all indicate that these
4 orders are final.

5 And so we've offered up the idea that
6 "finality" can have a different meaning in order
7 to preserve the body of precedent in the lower
8 courts about review of withholding-only orders.

9 But --

10 JUSTICE GORSUCH: Explain to me how --
11 how that works, though. How -- I mean, the term
12 isn't "finality." It's a "final order of
13 removal." And it's the exact same phrase in
14 both statutes. How would the government have us
15 interpret that differently here?

16 MR. SURI: We'd have you interpret it
17 differently on the understanding that "final"
18 can mean different things in different contexts.
19 For example, an order can be final for purposes
20 of the court of appeals when the district court
21 decides. It can be final for purposes of this
22 Court when the court of appeals decides. It can
23 be final for purposes of habeas corpus when the
24 entire direct review process is complete.

25 And so it is possible for "final" to

1 have different meanings. And the justification
2 for giving "final" a different meaning in 1252
3 would be the presumption in favor of judicial
4 review.

5 But, as I said, if the Court disagrees
6 with me about all that, then it would follow
7 that these orders are final both in this context
8 and in that context, and the aliens would lose
9 in both cases.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 Good morning, Mr. Suri. In the Fourth
16 Circuit's opinion by Judge Harris, the opinions
17 offered a contextual argument, page 877, "The
18 fact that the removal period is limited to 90
19 days strongly suggests that it is intended to
20 apply only when all legal barriers to removal
21 are cleared away," in other words, using the
22 fact of the 90-day limit to help interpret these
23 two provisions together.

24 What's your response to that argument?

25 MR. SURI: Justice Kavanaugh, the

1 first response is that the purpose of the
2 removal period is to give the government time to
3 identify a country of removal and to clear away
4 the legal, diplomatic, and practical obstacles
5 to removing the alien to that particular
6 country. So it doesn't make sense to say that
7 the removal period begins only when all of the
8 legal barriers are cleared away when the whole
9 point of the period is to give time to clear
10 away some of those barriers.

11 Second, the removal period definition
12 says that the removal period begins upon the
13 completion of three specified events, and those
14 three specific legal barriers are the only ones
15 that need to be cleared away. It's inconsistent
16 with that specification to say, you know,
17 actually, the removal period begins not only
18 when those three barriers are cleared away but
19 when some other unspecified universe of
20 additional barriers also is cleared away.

21 JUSTICE KAVANAUGH: I want to pick up
22 on one of Justice Breyer's questions. I think
23 you acknowledged that some significant number of
24 noncitizens in this circumstance could be
25 detained for several years, and you indicated

1 that Zadvydas would be the answer to that,
2 claims under Zadvydas.

3 Your colleague on the other side says,
4 instead of going through that trouble, why not
5 read the statute here to avoid that potential
6 constitutional problem as a matter of
7 constitutional avoidance. And they say in their
8 brief, "Congress simply did not write a statute
9 that would render constitutional violations
10 routine."

11 Why don't we follow the lead suggested
12 there?

13 MR. SURI: Let me first correct this
14 idea that detention could last for years. In
15 the vast majority of these cases, the detention
16 will last three to four months before the
17 immigration judge issues his decision, and
18 that's no problem, even on Respondents' very
19 unusual case, which will last more than six
20 months.

21 Now, more than six months, we have
22 both Zadvydas procedures, which the Zadvydas
23 court has already told us cures any
24 constitutional problem. And we also have the
25 regulatory procedures for post-order custody

1 review.

2 And, finally, in all these cases, the
3 alien is being detained because we've made a
4 determination that the alien is a flight risk or
5 a risk -- or -- or a danger to the community.
6 That's the trigger we've used to detain the
7 alien under Section 1231(a)(6) for more than
8 three months.

9 Now, if those criteria are satisfied,
10 they should be detainable even on Respondents'
11 view.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: Counsel, I have a
16 question about the post-order custody review.

17 Once the removal period ends once you
18 hit that 90-day mark, do the regulations that
19 govern the post-order custody review
20 automatically kick in so that the detained
21 noncitizen gets some sort of hearing?

22 MR. SURI: Yes, they automatically
23 kick in, and what happens in practice is that
24 the government tries to conduct the review
25 shortly before the removal period has expired.

1 JUSTICE BARRETT: And let me ask you
2 this: In your response to Justice Sotomayor,
3 you said that 85 percent of noncitizens in this
4 category remain restrained after the removal
5 period ends. And I'm wondering why the default
6 isn't set to release with supervision.

7 And -- and here's my reasoning: As I
8 look at the statute, the removal period itself
9 is 90 days. But, if it's the alien's fault that
10 the government is not able to remove the alien
11 during this 90 days -- and I'm looking at the
12 period -- the provision in (a)(1)(C), which
13 says, if the alien fails or refuses to make
14 timely application for travel documents, et
15 cetera, that removal period, as defined in the
16 statute, let's say it might be 200 days.

17 But then I'm looking at (a)(3), which
18 talks about supervision after the 90-day period
19 and says, you know, if the alien does not leave
20 or is not removed within the removal period,
21 defined as 90 days in the statute, it says the
22 alien shall be subject to supervision under the
23 regulations.

24 So why isn't the default that, if it's
25 through the fault of the government or no fault

1 of the noncitizen that removal doesn't take
2 place within the removal period, why isn't the
3 default supervision, rather than, as you
4 suggested to Justice Sotomayor, continued
5 confinement?

6 MR. SURI: Let me make two answers to
7 that, Justice Barrett.

8 The first answer is that (a)(1)(C)
9 isn't about what happens after the removal
10 period; rather, it's a tolling provision. The
11 90 days themselves are extended. It doesn't
12 talk about what happens after the 90 days.

13 And then the second answer is that we
14 agree that for aliens in general, for the whole
15 universe of aliens, not just those with
16 reinstated removal orders, yes, to provide
17 relief is the default, and the findings
18 specified in (a)(6) must be made before the
19 government can continue to detain those aliens
20 for more than 90 days.

21 Our point is simply that because these
22 particular aliens have already been removed from
23 the country, have defied their removal orders,
24 and have come back into the country illegally
25 and been caught, there's a particularly strong

1 basis for concluding that those aliens are a
2 flight risk. And within that subset of aliens,
3 it does make sense that (a)(6) kicks in.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Suri.

7 MR. SURI: Mr. Chief Justice, I think
8 a lot of the questions today have focused on the
9 practicalities and whether the government in
10 practice would have the ability to remove these
11 aliens. But I'd like to just remind the Court
12 quickly that Respondents themselves have
13 abandoned that argument.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Hughes.

18 ORAL ARGUMENT OF PAUL W. HUGHES

19 ON BEHALF OF THE RESPONDENTS

20 MR. HUGHES: Mr. Chief Justice, and
21 may it please the Court:

22 This case addresses narrow
23 circumstances: individuals who, after removal,
24 face persecution, returned here to escape, and
25 have already been found to have a reasonable

1 fear of persecution. 1226, not 1231, governs
2 detention.

3 During withholding proceedings, the
4 INA does not authorize removal. When the
5 government lacks authority to remove, the
6 decision on whether the alien is to be removed
7 from the United States remains pending.

8 This is the language of 1226:
9 "Whether removal will occur cannot be divorced
10 from where. If withholding is granted, the
11 answer to where an individual is removed is
12 virtually always nowhere."

13 1231 is not a fit. It defines the
14 removal period as the time the government shall
15 remove the noncitizen. It is for securing
16 travel documents and effectuating removal.

17 The government's contrary view is not
18 plausible. It would have the removal period
19 begin and end long before it could remove the
20 person anywhere.

21 And 1231(a)(1)(A) is the gateway.
22 First, it defines the removal period. That time
23 cannot begin before the INA authorizes the
24 government to do the one thing required, remove.

25 Second, this conclusion is required by

1 the first clause of (a)(1)(A). It says, "except
2 as otherwise provided in this section."

3 Withholding relief is provided for in 1231.

4 When there is withholding, the government cannot
5 remove, meaning there is no removal period.

6 Third, this makes sense of Congress's
7 determination that the removal period lasts 90
8 days. And all of 1226 provides indefinite
9 detention while proceedings are underway; then,
10 after the INA authorizes removal, the removal
11 period begins and 1231 applies.

12 CHIEF JUSTICE ROBERTS: Counsel --

13 MR. HUGHES: Thank you.

14 CHIEF JUSTICE ROBERTS: -- your --
15 your clients have been ordered removed. And
16 wouldn't -- wouldn't you expect that their
17 detention would be governed by a provision that
18 is entitled "Detention and Removal of Aliens
19 Ordered Removed"? It -- it seems --

20 MR. HUGHES: Two --

21 CHIEF JUSTICE ROBERTS: -- it seems to
22 fit your clients precisely.

23 MR. HUGHES: Two responses, Your
24 Honor. That's overinclusive. As the structure
25 of 1231 makes clear, there are a variety of

1 individuals who can be described as ordered
2 removed that the statute makes plain are not
3 subject to 1231 detention. So that argument the
4 government proffers I -- I don't think can lead
5 to the conclusion.

6 The second point, though, is, what is
7 the order that is -- is critical here? And in
8 this context, you can't separate out the
9 reinstatement order. We agree that when the
10 underlying order of removal is reinstated, that
11 order, of course, has effect, but it only has
12 effect when it's merged with the reinstatement
13 order.

14 And -- and -- and let me explain that.
15 When you have a prior order of removal that's
16 being reinstated, the reinstatement order makes
17 certain critical determinations, for example,
18 that a noncitizen is actually the same person as
19 at issue in that prior order; additionally, that
20 the noncitizen unlawfully entered the United
21 States. Until you have that determination that
22 is in the reinstatement order, the underlying
23 order of removal does not have legal effect
24 under the INA.

25 CHIEF JUSTICE ROBERTS: Well, what do

1 you do --

2 MR. HUGHES: You must have both --

3 CHIEF JUSTICE ROBERTS: -- what do you
4 do about 1231(a)(5), which says that a
5 reinstated removal order "is not subject to
6 being reopened or reviewed"? I mean, you're --
7 you're taking the position that the
8 withholding-only proceedings prevent that order
9 from becoming final, and yet that would seem to
10 me to be reopening and reviewing it.

11 MR. HUGHES: Well, Your Honor, I think
12 the Court dealt with this in Fernando Vargas,
13 and the government doesn't disagree that
14 notwithstanding what does look like categorical
15 language in (a)(5), there is still the right to
16 withholding that's provided for by statute in
17 fulfillment of the United States' treaty
18 obligations.

19 And I think the best way to reconcile
20 that (a)(5) language that Fernando Vargas tells
21 us we have to reconcile with the right to
22 withholding is to understand that reinstatement
23 is a process.

24 This is how the regulations describe
25 it, for example, 8 C.F.R. 208.31(a). It talks

1 about the reinstatement process. And we think
2 that that reinstatement process is conclusive
3 and final at the time that the withholding-only
4 proceedings conclude and that order is subject
5 to execution. But --

6 CHIEF JUSTICE ROBERTS: I suppose is
7 -- is -- is your answer the same to what we said
8 in Nasrallah, that a CAT order "does not affect
9 the validity of the final order of removal"? Is
10 that --

11 MR. HUGHES: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: Yeah. I'm
13 sorry. I'm sorry.

14 MR. HUGHES: So there's two responses
15 --

16 CHIEF JUSTICE ROBERTS: I just -- I
17 just want to make sure that your -- you'd have
18 the same answer to the previous question I
19 asked.

20 MR. HUGHES: Yes, Your Honor. Two
21 responses. It's a question of when is it that
22 it becomes final. But, second, stepping back --
23 and -- and I know -- I believe this gets to the
24 administrative finality trigger in (a)(1)(B) --
25 we believe if the Court looks there, for all the

1 reasons I just described, you would not conclude
2 it's administratively final until it -- it --
3 it's executable and that process concludes.

4 But that's --

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MR. HUGHES: -- our second argument.

7 CHIEF JUSTICE ROBERTS: All right.

8 Thank you, counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice.

12 Mr. Hughes, I'm a bit confused. Would
13 you -- so we had a removal order that Respondent
14 was subject to. We agree on that. Respondent
15 returns to the country.

16 Now what happens to that underlying
17 removal order in your assessment?

18 MR. HUGHES: Your Honor, for that
19 underlying removal order to be reinstated, there
20 has to be certain determinations that are made,
21 which includes identifying that the person at
22 issue is the same person that was subject to and
23 deported on the first time pursuant to that
24 removal order; second, that the individual, in
25 fact, unlawfully reentered the country rather

1 than --

2 JUSTICE THOMAS: Let's assume that's
3 -- let's assume those -- that's accurate, that
4 -- that we're not debating the factual part.

5 What's the effect of the process of
6 reinstating removal?

7 MR. HUGHES: Your Honor, when you have
8 that reinstatement order, it does bring back to
9 life the underlying order of removal. And so,
10 with the underlying order of removal and the
11 reinstatement order paired together, that, when
12 that process is final, does authorize the United
13 States to remove an individual when that -- when
14 that process is concluded.

15 JUSTICE THOMAS: So what -- why is
16 that -- how -- how do you reconcile that? And
17 this goes back to the Chief Justice's point.

18 How do you reconcile that with what
19 the Court said about CAT orders in Nasrallah?

20 MR. HUGHES: Two reasons, Your Honor.
21 First is, when do we think that this process
22 reaches conclusion? And we think the process
23 reaches its conclusion, it's administratively
24 final, at the point that it's -- it's
25 executable. And that's important because,

1 otherwise, the categorical language of (a)(5)
2 would seem to allow the government to remove an
3 individual during the pendency of the
4 withholding process.

5 But the government doesn't take that
6 position. My friend on the other side made that
7 quite clear, that they cannot do so. That would
8 be in violation of the statute.

9 But my -- my first point, if I can for
10 a moment, is that we don't think the Court even
11 needs to reach (a)(1)(B) and administrative
12 finality, and that's because (a)(1)(A) is the
13 gateway that defines what the removal period is.

14 And if the removal period -- if the
15 government categorically does not have authority
16 to remove, it makes no sense to conclude that
17 the removal period, the 90 days during which the
18 government shall remove, has begun. It simply
19 doesn't meet the definition without even getting
20 into the -- the -- (a)(1)(B).

21 JUSTICE THOMAS: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer.

24 JUSTICE BREYER: Well, your last
25 point, "except as otherwise provided in this

1 section," what is -- what is -- where does it
2 otherwise provide that -- that -- that you have
3 this, say, the torture as the statute claim and
4 the persecution claim?

5 MR. HUGHES: Yes, Your Honor. It's in
6 (b)(3). 1231(b)(3) is the provision of 1231
7 that says, when you have a withholding claim,
8 the attorney general may not remove an alien.

9 And so Your Honor is precisely right,
10 it's that "except" clause which shows that when
11 the government does not have authority under the
12 INA to remove, the removal period does not
13 begin.

14 And -- and that makes sense of this
15 statute, that the 90 days during which the
16 government has one obligation, to remove, that's
17 why this is the time period Congress wrote in.
18 It's also why, in (a)(1)(C), the noncitizen has
19 certain obligations, for example, to cooperate
20 in obtaining travel documents.

21 That whole structure of the statute
22 makes clear that the removal period is -- as
23 that title says, removal period, it's when the
24 government shall remove. And so --

25 JUSTICE BREYER: Why -- now you -- you

1 -- you mean to -- do you mean to abandon the
2 administratively final? The way I have been
3 reading that is a possibility, though it favors
4 you -- don't tell -- tell me I'm wrong right now
5 if I'm wrong, please, because it won't do any
6 good.

7 (5) -- (a)(5) -- you know, (5) says
8 reinstatement. So you reinstate an order. The
9 order says, Smith, go. Now we cannot question
10 that order that says, Smith, go. That's what it
11 says in (5). You don't question that.

12 But there are some things you could
13 bring up. You could say: By the way, I'm
14 Jones; I'm not Smith. And now you could also
15 say: By the way, I don't want to go to country
16 X because they're going to murder me, et cetera.

17 And what supports that is the date the
18 order of removal "becomes" -- it doesn't say the
19 date it was reinstated. It doesn't say became
20 final. It says "becomes final."

21 And so something must have the
22 possibility of happening between the time you
23 entered the order saying -- an old order -- go,
24 Smith, and the beginning of the removal period.

25 Now is that correct?

1 MR. HUGHES: Yes, Your Honor. We
2 absolutely make and embrace that argument
3 throughout.

4 JUSTICE BREYER: All right. If -- if
5 you make and embrace that argument, I can think
6 of two things that stand between entry order,
7 go, Smith, and the beginning of the removal
8 period, i.e., administratively final: one
9 thing, when you say: Hey, I'm not Smith; I'm
10 Jones. Second thing: I won't -- don't want to
11 go to country X, they're going to murder me.

12 Are there a third, fourth, and fifth
13 thing?

14 MR. HUGHES: I -- I think that's
15 principally it, Your Honor. I'm not aware of
16 other things that would be in the way.

17 JUSTICE BREYER: Okay. Thank you.

18 MR. HUGHES: And -- thank you, Your
19 Honor.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Mr. Hughes, I want to
22 follow up on the question that Justice Kagan
23 posed to Mr. Suri.

24 Do you agree that while an alien is in
25 withholding-only proceedings, DHS has the

1 authority, the legal authority, to remove the
2 alien to a third country so long as it provides
3 the alien with notice of that third country
4 removal and the alien does not express a fear of
5 persecution or torture with respect to the third
6 country?

7 In -- in those circumstances, do the
8 statute and regulations authorize DHS to put the
9 alien on a plane leaving the country?

10 MR. HUGHES: Yes, Your Honor, if those
11 conditions have been satisfied. And what that
12 would typically result in would be a warrant of
13 removal to that particular country, a 205
14 warrant of removal. And that would authorize,
15 under the INA, removal to that -- to that
16 country. And we would agree, when that occurs,
17 that 1231 applies.

18 But that requires, as you indicated,
19 several legal steps between where Respondent is
20 in our circumstances to the INA authorizing
21 that.

22 JUSTICE ALITO: In Nasrallah versus
23 Barr, you were successful. And I wonder how you
24 can reconcile the argument that the Court
25 accepted there about administrative finality

1 with the position that you are -- you are taking
2 here.

3 MR. HUGHES: Well, Your Honor, I think
4 there's -- there's multiple reasons, but our
5 first argument to start is the gateway provision
6 of (a)(1)(A), which is to say it defines and
7 limits the removal period as the time that the
8 government can actually execute on the removal
9 order. And that is explained by the first
10 clause, "except as otherwise provided in this
11 section." And withholding is within this
12 section and alleviates or precludes the
13 government from executing on the removal order.

14 So I don't think the Court even has to
15 get to (a)(1)(B) in order to resolve this case.
16 And that makes 1226, which this case fits
17 perfectly within that language, harmonious with
18 1231 by understanding what the very definition
19 of "removal period" is.

20 And that obviates the Court from even
21 having to address questions of finality. But,
22 if the Court does get to questions of finality,
23 and for all the reasons Justice Breyer
24 explained, the process becomes -- becomes
25 administratively final when this process

1 concludes at the time of withholding.

2 And -- and my friend on the other side
3 has --

4 JUSTICE ALITO: Let me ask you -- let
5 me squeeze in one more question. To what degree
6 is your argument dependent on the statistics
7 that were discussed earlier about the
8 feasibility of removal to a third country?

9 Suppose that there was a third country
10 or third countries that -- that were willing to
11 accept these aliens.

12 Would you have an argument then?

13 MR. HUGHES: Well, Your Honor, if
14 there was that for a third country, I don't
15 think we would even have those proceedings
16 because, presumably, instead of spending all
17 this time and effort litigating these cases, the
18 government would just remove individuals to
19 those third countries. And so I think we'd be
20 in a very different scenario.

21 If the government did have that
22 country to identify, I agree we'd be in -- in
23 very different circumstances. It -- it -- it
24 just doesn't, and that's -- that's why we're
25 here.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor.

3 JUSTICE ALITO: But do you think --

4 JUSTICE SOTOMAYOR: Counsel, how much
5 of your argument depends on your due process
6 concern?

7 As I understood, one of your arguments
8 in your brief is, if we read it the government's
9 way, we're inviting the potential of due process
10 violations. Is that correct?

11 MR. HUGHES: Yes, Your Honor. The
12 government's point that Zadvydas, they think, is
13 the back-end protection here, I think, is
14 revealing on that end because that --

15 JUSTICE SOTOMAYOR: All right. So
16 that -- that's my question to you. If the
17 process provided by the government's regulations
18 are not satisfactory, can't the noncitizen do
19 what you did here, just get habeas review, and
20 why wouldn't that be enough?

21 MR. HUGHES: Your Honor, I think that
22 this goes to the very purpose of constitutional
23 avoidance, as Justice Scalia explained to the
24 Court in Clark v. Martinez, which is to say,
25 rather than set up a structure where the court

1 has -- courts have to do individualized
2 determinations as to whether or not detention is
3 constitutionally excessive in individual cases,
4 if there's a plausible alternative reading --
5 and we think our reading is absolutely plausible
6 -- it makes the most sense to infer that
7 Congress chose a statutory structure that was
8 not going to lead to routine and predictable
9 constitutional violations in at least some case.

10 Now my friend on the other side says
11 it might not be in most of the cases, but
12 Justice Scalia addressed that in Clark v.
13 Martinez and said, if there's any predictable
14 range of cases that leads to unconstitutional
15 outcomes, that's pretty good evidence that's not
16 the proper construction of the statute if
17 there's a plausible alternative.

18 JUSTICE SOTOMAYOR: One of the amici
19 here set out why they thought the administrative
20 review process under 1231 is not adequate.

21 Are you accepting the arguments of
22 that amici?

23 MR. HUGHES: Yes, Your Honor. I think
24 you may be referring to the ACLU. And --

25 JUSTICE SOTOMAYOR: Yes.

1 MR. HUGHES: -- it's exactly the
2 arguments that this Court in Zadvydas adopted,
3 which is to say there's no neutral arbitrator.
4 One of the de minimis requirements of due
5 process is before prolonged deprivation of
6 liberty having a neutral arbiter.

7 And what the Court in Zadvydas said is
8 it wouldn't be enough for a deprivation of
9 property if there was a non-reviewable
10 administrative agency that makes a -- a property
11 deprivation, and the same rules should govern in
12 fundamental liberty interests.

13 JUSTICE SOTOMAYOR: But answer Justice
14 Thomas's question. Why wouldn't the habeas
15 proceeding be enough to give you that review?

16 MR. HUGHES: Well, again, it goes back
17 to the constitutional avoidance principle. Even
18 if there is an option to vindicate the
19 constitutional rights, here, we're addressing
20 what's the proper construction and interplay of
21 1226 and 1231.

22 And given that we believe that this is
23 very plausibly read as being in 1226, the
24 constitutional avoidance doctrine in -- informs
25 us that we shouldn't select the construction of

1 the statute that is going to lead to grave
2 constitutional concerns and the need to bring
3 individualized habeas actions.

4 JUSTICE SOTOMAYOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Mr. Hughes, just on
7 the constitutional point again, is -- is your
8 understanding -- I guess I'm a little bit
9 confused as to what the government is -- is
10 saying about Zadvydas and -- and -- and how it
11 serves as a backdrop.

12 Is -- is your understanding that, once
13 six months passes, all of the people in your
14 clients' position will be able to get hearings
15 under Zadvydas?

16 MR. HUGHES: No, Your Honor, it's not
17 my understanding, and it's actually quite the
18 contrary. When these individualized claims are
19 brought, the government resists them. So it's
20 not the case that they get individualized
21 hearings under -- under Zadvydas, no.

22 JUSTICE KAGAN: Well, why is that?
23 What -- what grounds does the government resist
24 them on? On -- on -- on the view that removal
25 is -- is -- that they haven't satisfied the

1 standard of -- of reasonable foreseeability of
2 removal? Is that the idea?

3 MR. HUGHES: That is the argument that
4 the government advances and then the lower --
5 the courts have to address that argument on an
6 as-applied basis, yes, Your Honor.

7 JUSTICE KAGAN: I mean, could you give
8 me a little bit more on that? Like, what does
9 the government say and what have courts been
10 holding with respect to this?

11 MR. HUGHES: Your Honor, there's mixed
12 results in the lower courts, that they -- they
13 are a bit all over the map as to what they think
14 the standard for Zadvydas would be in this
15 context.

16 The government makes the argument that
17 if there are proceedings ongoing, the whole --
18 there is not reasonable foreseeability that is
19 satisfied for that due process test.

20 The -- the -- the noncitizens
21 routinely make the argument that, because of the
22 prolonged nature, regardless of that
23 foreseeability, there still needs to be an
24 individualized detention.

25 My understanding is that the district

1 courts are -- are somewhat mixed on this
2 question. And many courts have found,
3 notwithstanding the government's contrary
4 argument, that there's very serious due process
5 concerns that require a -- a hearing, an
6 individualized hearing, in those circumstances
7 over the government's objection to that
8 principle.

9 JUSTICE KAGAN: But the government's
10 argument, as it goes through these cases one by
11 one by one, is that -- is that aliens who are in
12 withholding proceedings even after six months do
13 not get Zadvydas hearings because, in that case,
14 detention -- in that case, removal is still
15 foreseeable?

16 MR. HUGHES: Yes, Your Honor, that's
17 correct.

18 JUSTICE KAGAN: Okay. That's all.
19 Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

22 JUSTICE GORSUCH: Good morning, Mr.
23 Hughes. One of the government's main structural
24 arguments in response to your 1226 submission is
25 that Congress placed both the provisions

1 governing restatement of removal orders and
2 provisions governing withholding orders in 1231,
3 not 1226.

4 What -- what do you say to that?

5 MR. HUGHES: Thank you, Your Honor.

6 So, to begin with the reinstatement
7 provision, that's (a)(5), I think it's
8 understandable that it's in Section 1231
9 because, as we've explained, in more than
10 98 percent of cases, the individual does go
11 immediately to Section 1231 detention and is
12 promptly removed from the United States.

13 This case is about the very rare
14 exception when individuals have satisfied a
15 reasonable fear interview, which is -- which is
16 a very high threshold under the standard.

17 JUSTICE GORSUCH: I understand that.
18 But, again, both the withholding as well as the
19 reinstatement are in 1231. So you're -- you're
20 just saying, well, I'm -- I want to talk about
21 withholding. But that's in 1231 too.

22 So what -- what -- what do we do about
23 that?

24 MR. HUGHES: Your Honor, I think one
25 way to think about withholding -- and this goes

1 to the hypothetical that I believe Justice Kagan
2 posed earlier -- is it's very normal for
3 individuals in removal proceedings to concede
4 their removability, and -- and not in
5 reinstatement cases, but just in normal removal
6 proceedings, to concede everything about
7 removability and that the removal -- to only
8 advance a withholding claim. That happens day
9 in and day out in the immigration courts, and
10 that's non-controversially subject to 1226
11 detention.

12 These cases look exactly like that,
13 and they fit well within the category of 1226,
14 of protracted proceedings that make the
15 determination as to whether the INA --

16 JUSTICE GORSUCH: I -- I -- I
17 understand all of that, and I'm sorry to
18 interrupt, but what -- what rational explanation
19 is there for Congress to have placed that in
20 1231 then?

21 MR. HUGHES: Well, in -- because
22 Congress was placing where individuals are sent
23 in the -- the 1231(b). With (b)(2), you have
24 the list of countries and in (b)(3) the -- the
25 -- the list of countries for withholding where

1 the individual could not be sent.

2 I think that's the rational basis on
3 which this was structurally placed in 1231. But
4 I don't think that bears on the detention
5 question when we know that individuals in
6 outside reinstatement proceedings who only have
7 withholding claims are uncontroversially subject
8 to 1226 detention, as -- as I think my colleague
9 earlier agreed.

10 JUSTICE GORSUCH: What do we do about
11 the fact that we don't normally think of agency
12 action becoming final just because a party
13 doesn't press a request for additional agency
14 action?

15 This administrative finality argument
16 all depends on the absence of any request for
17 further agency action from an individual. That
18 seems an unusual way to define "agency
19 finality."

20 Can you help me with that?

21 MR. HUGHES: Yes, Your Honor. And,
22 again, to start with, and I hate to keep
23 repeating, but I -- we don't think you get to
24 finality.

25 But -- but, if you do get to finality,

1 you know, the key way to think of it is the
2 reinstatement process, when does that conclude,
3 and we think that when it's actually executable
4 is a natural way to think of administrative
5 finality.

6 And -- and, again, the government's
7 position, I think, has real problems here
8 because, as they articulated earlier, they think
9 that "finality" means two different things in
10 this same particular statutory scheme. They
11 agree that there's --

12 JUSTICE GORSUCH: Right. Yeah, I got
13 that argument. Thank you, Mr. Hughes. My
14 time's expired. I'm sorry.

15 MR. HUGHES: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you.

19 And good morning, Mr. Hughes. Looking
20 at the language of 1226, it, of course, says
21 "pending a decision on whether the alien is to
22 be removed." And then, when you go to 1231, it
23 makes clear that that decision on whether the
24 alien is to be removed has really already been
25 made automatically in the case of someone who

1 reenters the country illegally because the prior
2 order of removal is reinstated.

3 So I know we're -- I'm covering ground
4 that's been covered, but just trying to make
5 sense of the precise text of these two
6 provisions. It gets difficult to say that
7 there's a decision pending on whether the alien
8 is to be removed when the statute itself says
9 they are to be removed. "Shall be removed" is
10 the language of 1231.

11 Can you help me on that?

12 MR. HUGHES: Yes, Your Honor. Two
13 responses. First, this -- that argument rests
14 on the government separating out the whether and
15 the where. And I think, for reasons the Court
16 well understands, we don't think it's anywhere
17 near plausible to say you can decide the whether
18 question under 1226. It's the where question,
19 and 98 percent of the time it's going to be
20 nowhere. That just is not actually deciding the
21 whether question under 1226.

22 But the second point, to -- to address
23 the reinstatement provision in (a)(5), this goes
24 back to the point I was earlier making. We
25 appreciate that that language reads absolute in

1 its terms, and that's why it has to be
2 reconciled with withholding, because, if the
3 Court read that to its absolute terms, that
4 would mean it -- it would nullify withholding
5 proceedings for individuals in this category.
6 It would mean that individuals could immediately
7 be removed.

8 The government agrees that that's not
9 a plausible reading of the -- the statutory text
10 given the -- the -- the U.S. obligations here.
11 And so the way that it gets reconciled is to
12 appreciate the process of reinstatement and when
13 that reinstatement can be deemed final, thus
14 triggering the obligations or the rights under
15 the -- the (a)(5) reinstatement process.

16 That, we think, is most naturally
17 understood to be when these withholding
18 proceedings conclude, resulting in an order that
19 is executable and administratively final.

20 JUSTICE KAVANAUGH: And these
21 provisions, are they part of the '96 Act?

22 MR. HUGHES: Yes, Your Honor, I
23 believe -- I believe they are. The withholding
24 provisions predate that, but -- but the
25 provisions you're referencing, yes, Your Honor.

1 JUSTICE KAVANAUGH: Yeah. And the '96
2 Act, as -- as we discuss often, was, of course,
3 meant to be very stringent, so it's not
4 surprising that the language of (a)(5)'s worded
5 that way.

6 One of your main responses -- and you
7 were talking about this with Justice Kagan -- is
8 going past the -- the six-month Zadvydas period.

9 I guess my question is, why don't --
10 there are -- there are cases pending in this
11 Court on that question, the constitutional
12 Zadvydas due process point. Isn't that the
13 better way to analyze this, rather than
14 reconfiguring the statute to get to that result?

15 MR. HUGHES: Well, Your Honor, we
16 don't think this requires any reconfiguration of
17 the statute at all. We think we're naturally
18 within 1226.

19 And as for 1231, we think the
20 government has a substantial problem with
21 explaining how the removal period, which is the
22 time during which the government shall remove,
23 can begin and end long before the government has
24 authority to remove anyone anywhere.

25 So we certainly don't ask for any

1 reconfiguration of the statutes. We just want
2 1226(a) and 1231 applied by their terms.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Counsel, when you
7 were answering Justice Kagan's questions and
8 then again when you were answering Justice
9 Gorsuch, you pointed out that you thought it
10 would be anomalous for those noncitizens who
11 concede removability and litigate only
12 withholding claims to remain within 1226,
13 whereas those who have reinstated orders and
14 litigate withholding-only claims would be
15 treated under 1231.

16 And I just want to make sure that I'm
17 tracking that because the government says the
18 guide -- the dividing line here is once a final
19 order of removal has been entered. And in the
20 normal case, you know, the mine run of cases in
21 which withholding claims are litigated, as you
22 point out, those are in the removal proceedings
23 themselves.

24 So, under the government's view, it
25 would make sense that those were under 1226,

1 rather than 1231, because, in that situation,
2 there is no final order of removal.

3 So explain to me what the anomaly is.

4 MR. HUGHES: Well, Your Honor, the --
5 the -- the explanation was why (b)(3) reasonably
6 exists in 1231 and why we would draw that
7 inference, because, if we were, then that
8 category of cases, I think, would -- would come
9 out differently.

10 I appreciate that that is the
11 government's rule, and -- and that's a rule that
12 -- that does not fare well for us. Our rule, of
13 course, is quite different. It turns on whether
14 or not the INA authorized removal of the
15 individual, and that tracks directly from the
16 text of 1226 and 1231. We think that's the rule
17 the Court should adopt in construing these
18 statutes.

19 JUSTICE BARRETT: Okay. And let me
20 ask you this. So we're comparing here two
21 statutes, 1226 and 1231, and -- and I'm trying
22 to figure out how much of the scheme in 1226
23 that's advantageous in terms of offering a bond
24 hearing to the noncitizen is regulatory and how
25 much is statutory, because, in your brief on

1 page 7, you say, "After an initial custody
2 determination by DHS, Congress determined that a
3 noncitizen is entitled to a bond hearing before
4 an IJ."

5 But, as support for that, you cite a
6 regulation, not a statutory provision. And as
7 far as I can tell, in 1226 itself, the bond
8 hearing looks discretionary because it says that
9 the alien may be released on bond.

10 So why is a bond hearing an
11 entitlement under the statute as opposed to the
12 regulations? And why would it have to be before
13 an IJ, rather than an official from ICE, as a
14 matter of the statute?

15 MR. HUGHES: Well, thank you, Your
16 Honor. 1226(a)(2), of course, the statute
17 directly requires a -- a bond hearing where
18 there is not the -- the bond carrying
19 requirements in 1231. So it's a direct
20 distinction between the detention provisions.

21 Your Honor, of course, is correct that
22 -- that it being squarely assigned to an IJ has
23 been done by matter of regulation, 8 C.F.R.
24 236.1(b). That's certainly the way that this
25 has been implemented. I think there may be a

1 reasonable argument that the bond requirement
2 carries with it the requirement of a neutral
3 arbitrator. But, regardless, that is how DHS
4 for decades has implemented this.

5 So the legal structure that comes to
6 the Court is a statute that requires the bond
7 and the -- the implementing regulations that put
8 that before a neutral immigration judge.

9 JUSTICE BARRETT: Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, Mr. Hughes.

12 MR. HUGHES: Thank you, Your Honor.

13 We believe that the language of 1226
14 here fits perfectly. This is absolutely
15 individuals who are in detention pending a
16 decision on whether the alien is to be removed
17 from the United States.

18 Again, we think the government's
19 position has a very critical flaw, that they
20 take the position the removal period begins and
21 almost always ends before they can remove the
22 individual anywhere.

23 And we believe that (a)(1)(A) is -- is
24 the critical provision here because it defines
25 the removal period as the time during which the

1 government must have this authority. And it
2 also excepts from the removal period other
3 provisions in -- in 1231 when the government
4 doesn't have authority to remove, which includes
5 the withholding provision. That's squarely the
6 case here.

7 Finally, we've certainly not retracted
8 in any -- our argument has been consistent
9 throughout this case. The government's
10 incorrect in saying we've somehow backed away
11 from our argument. It has always been whether
12 or not the INA authorizes removal of the
13 individual. It's what we've said in the court
14 of appeals, in the district court, and
15 consistently throughout.

16 Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Suri, you have three minutes for
20 rebuttal.

21 REBUTTAL ARGUMENT OF VIVEK SURI

22 ON BEHALF OF THE PETITIONERS

23 MR. SURI: Mr. Chief Justice, if we
24 take a fair view of this case, we've got some
25 strong arguments under the text of Section 1231,

1 particularly the title, "Detention and Removal
2 of Aliens Who Have Been Ordered Removed."

3 They've got some reasonable arguments
4 under Section 1226. How can you say that
5 someone -- that there's been a decision about
6 whether to remove someone when it's not clear
7 that there's any country available?

8 So I'd like to talk in this rebuttal
9 about a few tiebreakers you might use to side
10 with 1231 over 1226. The first is that even
11 with respect to their arguments in 1226, all
12 they've been able to show is that those
13 provisions are ambiguous.

14 You can read those provisions to refer
15 to practicalities of removal, or you can read it
16 to refer to the legal decision, i.e., the order
17 of removal itself.

18 The phrases in Section 1231, by
19 contrast, are fairly clear. "Ordered removed"
20 means ordered removed. And these aliens have
21 certainly been ordered removed.

22 So, in those circumstances, what the
23 Court should do is use the clarity of
24 Section 1231 to resolve the ambiguity in 1226.
25 It shouldn't use the alleged ambiguity in 1226

1 to override the clarity of 1231.

2 The second tiebreaker is the structure
3 of the statute. Congress put the removal --
4 reinstatement of removal provision in
5 Section 1231. It also put the withholding
6 provision in Section 1231.

7 So, if you find yourself thinking that
8 the text of 1226 and 1231 pull in opposite
9 directions, the structure of the statute tells
10 you that Section 1231 should win out here.

11 The third is -- the third tiebreaker
12 is this Court's precedent. In order for
13 Respondents to prevail, they have to adopt a
14 definition of "administrative finality" that's
15 directly contrary to this Court's decision just
16 last term in *Nasrallah*. They have to say that a
17 CAT or withholding order does reset the finality
18 of a removal order, indeed, that a mere request
19 for such protection resets the finality.

20 We don't -- that's directly contrary
21 to what the Court said, which is that a CAT
22 order does not disturb the validity of a final
23 order of removal.

24 The other relevant precedent is this
25 Court's decision in *Zadvydas*. The aliens in

1 Zadvydas find themselves in precisely the same
2 circumstance that Respondents are talking about
3 here. The government's looking around for some
4 country to which it can remove them, and there
5 may be no such country available.

6 The Court didn't say in those
7 circumstances, oh, the decision about whether to
8 remove these aliens hasn't been made, so we're
9 under 1226. It said those aliens were under
10 1231, and it provided certain procedural
11 protections while they remained there.

12 That's exactly what we ask the Court
13 to do here. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:05 a.m., the case
17 was submitted.)

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