No. 03-7434

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BENITEZ, *Petitioner*,

v.

JOHN MATA, Interim Field Office Director, Miami, Bureau of Immigration and Customs Enforcement, *Respondent*.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted the phrase "may be detained beyond the removal period" in 8 U.S.C. § 1231(a)(6) to authorize the detention of an alien only as long as necessary to determine whether the alien's removal is reasonably foreseeable. The Court noted that the statute could also be construed to authorize indefinite and perhaps permanent detention, but it rejected this interpretation to avoid the significant constitutional question of whether the petitioners in that case, who had been formally admitted to live in the United States, could be subject to indefinite detention. The questions presented in this case are:

I. Whether the same language in 8 U.S.C. § 1231(a)(6) may be interpreted to have a different meaning for aliens who have been allowed to enter the United States on immigration parole than for aliens otherwise present, even though the statute does not distinguish between the two; and if so,

II. Whether interpreting 8 U.S.C. § 1231(a)(6) to authorize the indefinite detention of a paroled alien in Mr. Benitez's position would raise a sufficiently significant constitutional question to warrant interpreting the statute to avoid the question.

LIST OF PARTIES

Daniel Benitez is the Petitioner in this Court. The original respondent below (and the respondent listed in the caption of Mr. Benitez's petition for a writ of certiorari) was Robert A. Wallis, in his capacity as District Director, Immigration and Naturalization Service ("INS").

Effective March 1, 2003, however, the INS was replaced by the Bureau of Immigration and Customs Enforcement ("ICE") within the newly created Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (codified at 6 U.S.C. § 251(2)). According to the Response to the Petition for a Writ of Certiorari, John Mata, in his capacity as Interim Field Office Director, Miami for ICE, has succeeded Mr. Wallis. Thus, by operation of this Court's Rule 35.3, Mr. Mata is the proper Respondent.

For the sake of simplicity, this brief uses the term "Government" to refer to, as the context requires, Mr. Wallis, Mr. Mata, the INS, or the ICE. The distinction is not relevant to the issues in this proceeding.

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The decision of the court of appeals (J.A. 127-52) is reported at 337 F.3d 1289. Neither the opinion of the district court (J.A. 110-14) nor the report and recommendation of the magistrate judge (J.A. 104-09) is reported.

JURISDICTION

By order dated January 16, 2004, this Court granted Mr. Benitez's Petition for a Writ of Certiorari and took jurisdiction under 28 U.S.C. § 1254 to resolve a circuit split.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law."

Section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (2001), provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF THE CASE

A. Historical Context: The Mariel Boatlift

On April 1, 1980, six Cubans in a bus crashed through the gates of the Peruvian embassy in Havana, Cuba under heavy fire from Cuban security forces. Alex Antón & Roger E. Hernández, *Cubans in America: A Vibrant History of a People in Exile* 201

(2002). They sought and received political asylum from the Peruvian government. *Id.* In response, Fidel Castro announced that anyone desiring to leave Cuba should go to the Peruvian Embassy. *Id*. Within three days, over 10,000 Cuban citizens crowded the embassy grounds and were granted asylum. *Id.* at 201-02; *United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir. 1983). The Cuban government then sealed the area and blocked humanitarian assistance to those inside. Antón & Hernández, *supra*, at 202-03.

The Carter Administration here in the United States determined that these Cubans could be considered refugees even though they were still in Cuba and, citing "grave humanitarian needs" and the "national interest," determined that up to 3500 of them could be admitted to the United States for resettlement under the Refugee Act of 1980. 45 Fed. Reg. 28,079 (Apr. 14, 1980); *see also Frade*, 709 F.2d at 1389; *Pollgreen v. Morris*, 496 F. Supp. 1042, 1047 (S.D. Fla. 1980), vacated, 770 F.2d 1536 (11th Cir. 1985). An airlift of some of these Cubans began shortly thereafter, but was promptly suspended by Castro. *Frade*, 709 F.2d at 1389; Antón & Hernández, *supra*, at 204. Castro then announced that he would allow any Cuban citizens who wanted to leave to depart Cuba from the port city of Mariel. *Frade*, 709 F.2d at 1389; Antón & Hernández, *supra*, at 204.

In what has come to be known as the "Mariel Boatlift" or the "Freedom Flotilla," over 120,000 "Mariel Cubans"[1] made the ninety-mile journey across the Florida Straits to

[1] Mariel Cubans are sometimes referred to by the term "Marielitos," but that term is considered pejorative. *See, e.g.,* Antón & Hernández, *supra*, at 212; Myra Mendible, *Paradise Lost, Paradise Found: Oral Histories and the Formation of Cuban Identities*, 55 Fla. L. Rev. 269, 270 n.7 (2003).

the United States between April and October of 1980. *Frade*, 709 F.2d at 1389; *Pollgreen*, 496 F. Supp. at 1047.

During a famous appearance before the League of Women Voters on May 5, 1980, United States President Jimmy Carter was asked what his administration intended to do about enforcing immigration laws in response to the massive exodus. *Pollgreen*, 496 F. Supp. at 1047; *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 & n.16 (N.D. Ga. 1985). President Carter responded by noting that this crisis stemmed from the "inhumane approach by Fidel Castro" and stated that the United States was "the most generous nation on Earth in receiving refugees, and I feel deeply that this commitment should be maintained." *Fernandez-Roque*, 622 F. Supp. at 897 n.16 President Carter announced:

> [L]iterally tens of thousands of [Cubans] will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. . . .
>
> . . . . [W]e'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

Id.

President Carter's remarks about our country's "open heart and open arms" were "broadly interpreted as governmental approval of the boatlift." *Id.* at 898 (quoting *Frade*, 709 F.2d at 1395). The *New York Times* ran a front-page story the next day with the headline "President Says U.S. Offers 'Open Arms' to Cuban Refugees: Warm Reception

Is Promised." *Id.* His remarks were also publicized in the May 18, 1980, edition of *Granma*, Cuba's official newspaper. *Id.* at 897.

The more than 120,000 Mariel Cubans who came to America during this time can be divided into two groups. The vast majority were ordinary citizens with no criminal past. Antón & Hernández, *supra*, at 206. Unlike many earlier Cubans who had fled after Castro's revolution, the Mariel Cubans were mostly blue-collar, working-class people "with little business or professional experience." *Id.* at 208. At any rate, the large majority of Mariel Cubans were screened by the Government upon their arrival and were immediately paroled into the United States.[2] *Fernandez-Roque*, 622 F. Supp. at 895.

On the other hand, less than two percent (around 2,000 out of more than 120,000) were detained because they either had severe mental problems or serious criminal records in Cuba. *Id.* at 893 & 895 n.11; Antón & Hernández, *supra*, at 206. It is widely believed that the Castro regime had forced these people on board some of the boats leaving Mariel along with the thousands of regular Cuban citizens who fled the country. *Fernandez-Roque*, 622 F. Supp. at 893; Antón & Hernández, *supra*, at 205-06.

This small minority has fostered false perceptions and prejudice against the Mariel Cubans, both by the previously established Cuban exile community and by the general United States population. *See* Antón & Hernández, *supra*, at 206 (explaining how media coverage of this small minority "created the stereotype of the crazed,

[2] For example, although it does not appear in the record developed by Mr. Benitez while he was *pro se*, Mr. Benitez and the others on his boat were welcomed by the Coast Guard as they came into the harbor in Key West and provided food and beds for their first night on American soil. The very next day, they were driven to Miami, and Mr. Benitez was immediately allowed to join his family. He was not put into immigration detention at all until 2001.

homicidal Mariel Cuban"); *see also* Liz Balmaseda, *A Wall Fell Between Cubans on Island, Cubans in Miami*, Miami Herald, Apr. 23, 2000, at 1L ("The very image the Cuban government had put out about those departing via Mariel – that they were 'scum,' delinquents, social misfits – was propagated by some of Castro's most strident opponents in exile. In their haste to save their own image, exiles bought into Castro's labels.").

The exodus from Mariel ended on September 25, 1980, when Castro shut down the harbor. Antón & Hernández, *supra*, at 207.

B. Mr. Benitez's History

Mr. Benitez arrived in Key West on June 26, 1980, and was paroled into the United States, pursuant to 8 U.S.C. § 1182(d)(5) (1976 & Supp. IV 1980), which authorized parole "for emergent reasons or for reasons deemed strictly in the public interest." (J.A. 30, 39-40.)

Three years later in June 1983, Mr. Benitez was charged in state court in Miami for grand theft. (J.A. 45-46.) The police report included in the record indicates that he had purchased stereo speakers that he knew to be stolen. (J.A. 42.) He paid $60 for the speakers, knowing them to be worth more than $400. (J.A. 42.) The state court withheld adjudication of guilt and sentenced Mr. Benitez to probation for three years. (J.A. 46.)

Mr. Benitez subsequently applied to the INS to have his status adjusted to lawful permanent resident,[3] but the application was denied in 1985 because of his 1983 grand

[3] The Cuban Refugee Adjustment Act of 1966 authorized the Attorney General to adjust the status of certain Cuban citizens paroled into the United States after 1958. Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255, historical and statutory notes).

theft conviction, which prevented him from being admissible pursuant to § 212(a)(9) of the INA (codified at 8 U.S.C. § 1182(a)(9)). (J.A. 47-49.)

Mr. Benitez was convicted for the second and last time in April 1993. (J.A. 79-80.) He pleaded guilty to a multi-count indictment that alleged that he was involved with three other individuals in the armed robbery of two men in Miami on the same day in November 1991. (J.A. 67-78.) The indictment was returned generally against all four and did not specify who did what. (J.A. 67-78.) The value of the items stolen (cash, a wallet, sunglasses, and a watch) was approximately $600. (J.A. 69, 72.) A concealed firearm with an altered serial number was used. (J.A. 74, 76.) The state court in Miami sentenced Mr. Benitez to twenty years in state prison. (J.A. 82.)

In June 1993, while Mr. Benitez was serving his sentence, the Government revoked his immigration parole because his "continued parole [was] determined to be against the public interest." (J.A. 90.) After a duly noticed hearing, an immigration judge found Mr. Benitez to be excludable and ordered him deported. (J.A. 91-93.) He was excludable under section 212(a)(7)(A)(i)(I) of the INA because, like most of the Mariel Cubans, he had not obtained a visa when he entered the United States in 1980. (J.A. 91-93.) He was also excludable under section 212(a)(2)(B) because he had multiple criminal convictions with an aggregate term of confinement in excess of five years. (J.A. 91-93.) Mr. Benitez waived his right to appeal the order of removal. (J.A. 93.)

Mr. Benitez completed his state sentence on July 27, 2001, and was immediately taken into custody by immigration officials.[4] (J.A. 7.) He again received notice that his

[4] The Eleventh Circuit mistakenly stated that the transfer occurred in October 2001. (J.A. 131.)

parole had been revoked, but he was advised that the Cuban Review Panel would interview him to determine "whether it is in the public interest for [him] to be released from Service Custody." (J.A. 94-101.)

After the interview, the panel issued a Notice of Releasability dated December 12, 2001, which determined that Mr. Benitez was "releasable under the criteria established by the Cuban Review Plan" and that "efforts to find a suitable sponsorship or placement for [him] shall continue." (J.A. 102.)

C. Procedural History

On January 11, 2002, a few days before Mr. Benitez received the Notice of Releasability (J.A. 102), he filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (J.A. 3-29.) He asserted that the Government was detaining him pursuant to 8 U.S.C. § 1231(a)(6), but that in *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court had interpreted that statute to preclude detention once it becomes clear that an alien cannot be removed in the reasonably foreseeable future. (J.A. 13-28.) Mr. Benitez alleged that the Government would be unable to deport him in the reasonably foreseeable future because it had no repatriation agreement with Cuba. (J.A. 7.) He further alleged that the Government's detention violated his constitutional rights. (J.A. 7, 13-28.)

The petition was referred to a magistrate judge who reviewed the petition and ordered the Government to file an answer justifying its detention of Mr. Benitez. (J.A. 1.) In its answer, the Government admitted that it was holding Mr. Benitez pursuant to § 1231(a)(6) and did not dispute Mr. Benitez's contention that he could not be deported in the reasonably foreseeable future. (J.A. 34-35, 134 n.12.) Instead, it contended that

Zadvydas applied only to "aliens admitted to or present in the United States." (J.A. 35-36.) It argued that this decision did not apply to Mr. Benitez because he "never effected entry into the United States." (J.A. 35.) Even though he had been paroled into the country, the Government contended that because he never "adjusted his status to that of a lawful resident," Mr. Benitez "stands in the position of a person seeking admission or parole into the United States." (J.A. 32-33.) The Government also contended that Mr. Benitez had no constitutional right to release. (J.A. 34.)

The magistrate judge ultimately issued a report and recommendation finding that *Zadvydas* did not apply and that the Government did have the authority to detain Mr. Benitez indefinitely. (J.A. 104-09.) The district court adopted the report and recommendation and denied Mr. Benitez's habeas petition on July 11, 2002. (J.A. 110-14.)

Continuing to proceed *pro se*, Mr. Benitez timely appealed to the United States Court of Appeals for the Eleventh Circuit. (Record 14.) That court appointed counsel to represent Mr. Benitez. (Appointment Under Addendum Five Filed March 12, 2003.) While the case was pending in the court of appeals, the INS issued a Notice of Release Withdrawal, which advised Mr. Benitez that he would not be released because he was "cited for planning an escape" from the state prison facility. (J.A. 118.) The Government filed this document with the court of appeals with a status report. (J.A. 116-20.) Mr. Benitez responded to this status report by explaining that he had nothing to do with any planned escape and had never been given an opportunity to respond to this

allegation. (J.A. 121-24, 132.) The only connection between him and a group of inmates who apparently did plan an escape was that they were all of Hispanic origin. (J.A. 122.)

The court of appeals ultimately affirmed the district court's decision on July 17, 2003, in a per curiam decision. (J.A. 127-52.) Mr. Benitez filed a petition for a writ of certiorari on October 14, 2003. In its response to this petition, the Government advised that the Cuban Review Panel had again determined that Mr. Benitez was "a candidate for release" and that he would be placed in a substance abuse treatment facility. (Response at 8-9.)[5] This Court granted certiorari on January 16, 2004, setting the case for expedited briefing and argument.

D. Authority for Detaining an Alien Subject to a Removal Order

Section 1231 governs the detention, release, and removal of aliens who, like Mr. Benitez, have been ordered removed from the country. 8 U.S.C. § 1231. Normally, the Attorney General is required to remove such an alien within ninety days. § 1231(a)(1)(A). In the case of an alien who is incarcerated when the removal order is entered, this ninety-day period begins to run on the date the alien is released. § 1231(a)(1)(B)(iii). Where, as here, the removal order is based on criminal convictions, the Attorney General must detain the alien during this removal period. § 1231(a)(2). Thus, Mr. Benitez's detention was mandated for ninety days following his release from state custody in July 2001.

[5] The Government further advised that Mr. Benitez's "placement is expected to be in a residential program in a federal facility, and that the placement is unlikely to occur before February 2004, or to be completed before July 2004." (Response at 9.)

The central statutory provision in this case is § 1231(a)(6), which authorizes detention beyond the removal period for all aliens who are not eligible for admission and certain other aliens who are also removable:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6) (emphasis added). This provision applies to Mr. Benitez because he has been determined to be inadmissible under 8 U.S.C. § 1182. There has been no determination that he is "a risk to the community or unlikely to comply with the order of removal."

Mr. Benitez has been detained now for over two-and-a-half years, which is well beyond the ninety-day removal period. This proceeding therefore turns on whether the language "may be detained beyond the removal period" authorizes indefinite, perhaps permanent, detention of paroled aliens like Mr. Benitez. The Government contends that it does. Mr. Benitez contends that this language authorizes continued detention only for as long as is necessary to determine whether his removal is reasonably foreseeable.

This issue of statutory interpretation was before this Court in *Zadvydas v. Davis*, 533 U.S. 678 (2002). In that case, the Court held that an interpretation of § 1231(a)(6) that would allow indefinite detention "would raise a serious constitutional problem," at least with regard to aliens who have entered the United States. *Id* at 690. The Court reviewed its prior decisions that held that potentially indefinite detention may only be ordered, consistent with the Due Process Clause of the Fifth Amendment, "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.' " *Id.* (citations omitted).

The Court recognized and rejected two potential "special justifications" offered by the Government in support of indefinite detention of aliens : (1) ensuring that the alien will appear when removal is possible and (2) preventing danger to the community. *Id.* The Court held that the flight risk justification was "weak or nonexistent" in cases where there is no reasonable likelihood that the alien's country will accept him back. *Id.* The Court rejected the second justification because it was not sufficiently narrow. *Id.* at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.").

Although the Court acknowledged that there are administrative proceedings available to allow an alien to be released from detention, it suggested that "greater procedural protections" may be required. *Id.* at 692. The available procedures were suspect because they placed the burden on the alien to prove that he is not dangerous and, at least in the Government's view, the administrative decision was largely immune from judicial review. *Id.* The Court concluded:

> The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

Id.

The Court also rejected the Government's argument that "from a constitutional perspective, alien status itself can justify indefinite detention" under the Supreme Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *Zadvydas*, 533 U.S. at 692. The Court noted that the parties had briefed the issue of whether "subsequent developments have undermined *Mezei*'s legal authority," *id.* at 694, but it declined to address this issue because *Mezei* was distinguishable. *Id.* at 693.

Mr. Mezei had previously lived in the United States, but had been out of the country for nearly two years. *Id.* at 692. When he returned to the country by boat at Ellis Island, he was denied admission and not allowed to return to his home in America. *Id.* Because no other country would accept him, he was detained on Ellis Island. *Id.* The *Mezei* court held that this detention did not violate the Constitution because he had not been formally admitted to enter the country. *Id.* The *Zadvydas* Court noted that this was an important distinction:

> We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.

Id. at 682; *see also id.* at 693 (calling this distinction a difference "in a critical respect" between *Zadvydas* and *Mezei*).

The Court noted that Mr. Mezei's "presence on Ellis Island did not count as entry into the United States. Hence, he was 'treated,' for constitutional purposes, 'as if stopped at the border.' " *Id.* The Court also cited two prior cases where aliens were deemed not to have "entered" the country even though they were in fact allowed to enter. *Id.* (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (alien arriving from Russia ordered excluded,

but allowed to stay in the United States because war had broken out in Europe), and *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (alien paroled into country pending determination of admissibility)).

Having distinguished *Mezei*, the Court ultimately concluded that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.* at 696. It therefore turned to the issue of whether Congress had clearly intended for § 1231(a)(6) to authorize indefinite detention. After reviewing the language of the statute, the provisions of similar statutes, and the history of the immigration laws, *id.* at 697-99, the Court was unable to find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 699.

Based on this analysis, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Thus, it held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

Because this Court emphasized in *Zadvydas* that the aliens in that case had been lawfully admitted for entry into the United States, it left open the question of whether § 1231(a)(6) authorizes indefinite detention of inadmissible aliens. Inadmissible aliens can be divided into three separate groups: (1) aliens who have entered the country

without inspection (e.g., by sneaking across the border),[6] (2) arriving aliens stopped at the border, and (3) aliens who were inspected at the border and paroled into the country. Since *Zadvydas*, the Government has interpreted § 1231(a)(6) to authorize the indefinite detention of the latter two categories (arriving aliens and parolees), but not the first (illegal entrants). Determination of Whether There Is a Significant Likelihood of Removing, 8 C.F.R. § 241.13(3)(i) (2003); Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001).

Mr. Benitez challenges the Government's interpretation with regard to paroled aliens. In this case, the Government has not challenged Mr. Benitez's assertion that there is no significant likelihood of removal in the reasonably foreseeable future because the

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[6] These aliens, sometimes referred to by the acronym EWI ("entered without inspection"), have traditionally been treated as having entered the United States and have been grouped with admitted aliens as "deportable" and subject to "deportation" proceedings. 66 Fed. Reg. at 56,969; *see also* 8 U.S.C. § 1251(a) (1996) (providing grounds for deporting "[a]ny alien in the United States"). Aliens stopped at the border (even if subsequently paroled), on the other hand, were referred to as "excludable" and were subject to "exclusion" proceedings. 8 U.S.C. § 1182(a) (1996); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159 (1993) ("Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing . . . ."). *See generally Landon v. Plasencia*, 459 U.S. 21, 25-26 (1982) (explaining difference between deportation and exclusion).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3546 (Sept. 30, 1996), changed this terminology. Deportation and exclusion are now referred to as "removal." *See generally* 8 U.S.C. § 1229a (providing removal proceedings for both deportable and inadmissible aliens). The term "deportable" now applies only to aliens who have been formally admitted. 8 U.S.C. § 1227(a) (2003). The term "excludable" is no longer used, and "inadmissible" is now used to refer both to aliens stopped at the border (including parolees) and aliens who entered without inspection. *See generally* 8 U.S.C. § 1182(a) (setting forth aliens who are inadmissible, including (in subparagraph (6)) aliens who are present without inspection); *see also* 8 U.S.C. § 1225(a)(1) (aliens present in the United States without being formally admitted are treated as applicants for admission).

This brief uses the terms "parolee" and "paroled alien" to refer to aliens like Mr. Benitez who were allowed to physically enter the country, but were never formally admitted. In his certiorari petition and in the Eleventh Circuit, he used the term "non-admitted aliens" to mean the same thing. This term is discarded here to avoid confusing parolees with EWI's, who are "inadmissible" pursuant to 8 U.S.C. § 1182(a)(6), but are covered by the holding in *Zadvydas* pursuant to 8 C.F.R. 241.13. 66 Fed. Reg. at 56,969.

United States has no repatriation agreement with Cuba. Thus, the only issue in this appeal is whether this Court's interpretation of § 1231(a)(6) should apply with respect to the detention of aliens who, like Mr. Benitez, were paroled into the United States.

SUMMARY OF ARGUMENT

When the Government is unable to remove an alien from the United States because no country will take him, the Government contends that it has the authority under 8 U.S.C. § 1231(a)(6) to put that alien in prison for the rest of his life. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), however, this Court rejected that notion and held that § 1231(a)(6) does not authorize indefinite detention. Specifically, it held that the statute's provision that certain aliens "may be detained beyond the removal period" authorized detention only as long as necessary to determine whether the alien's removal is reasonably foreseeable. It reached this interpretation to avoid the serious constitutional question of whether indefinite detention would violate the due process rights of an alien who had been admitted for permanent residence in this country. Even though the Court dealt in *Zadvydas* with admitted aliens, its interpretation of § 1231(a)(6) should apply both directly and indirectly to inadmissible aliens paroled into this country.

This Court's interpretation of § 1231(a)(6) in *Zadvydas* should apply directly to paroled aliens because the statute does not distinguish between admitted and paroled aliens. As an initial matter, even though this Court's reasoning in *Zadvydas* was driven in part by its desire to avoid having to determine whether the statute violates the constitutional rights of admitted aliens, it concluded that the statute does not authorize indefinite detention. While the reasoning was limited to concerns for admitted aliens, the

holding was not. Indeed, the Court expressly noted that the statute also applies to aliens who have not been admitted, and Justice Kennedy specifically pointed out in his dissent that the Court's decision would apply to Mariel Cubans on parole.

Moreover, the Court's construction of § 1231(a)(6) was not the result of blind application of the avoidance doctrine. To the contrary, the Court carefully considered the relevant interpretive factors, such as the statute's plain language, its underlying purposes, language used in other statutes providing for detention, and the history of detention statutes in America. Based on this analysis, the Court concluded that its construction of the statute was reasonable. The Eleventh Circuit therefore erred in overlooking this analysis and substituting its own interpretation of § 1231(a)(6) for that of this Court.

The Eleventh Circuit (and the other lower courts reaching the same result) concluded that the same statutory language may be interpreted differently depending on the pedigree of the person to whom it is applied. Not only is there no precedent for this principle, it offends any sense of fairness or justice.

The Eleventh Circuit's reasoning in reaching this conclusion does not withstand scrutiny. The court seized on language in *Zadvydas* that " 'terrorism or other special circumstances' may justify greater deference to Congress and the Executive," but it took this passage out of context. The quote passage appears in the constitutional analysis in *Zadvydas*, not the interpretive analysis. This Court did not suggest in any way that in reaching its interpretation of § 1231(a)(6) it was somehow defying or thwarting the intent of the political branches. The passage simply signals that if and when the Court is called

to consider the constitutionality of another provision that specifically authorizes indefinite detention in narrow circumstances, the Court might be inclined to uphold it.

The Eleventh Circuit also suggested that *Zadvydas* was an "as-applied" constitutional challenge. A cursory review of this Court's opinion, however, belies the lower court's revisionism. If *Zadvydas* were an as-applied challenge, the Court would have, by necessity, reached the opposite interpretation of the statute. It would have held that the statute does authorize indefinite detention, but that it is unconstitutional as applied to admitted aliens.

Finally, the Eleventh Circuit recast Mr. Benitez's claim as one of entitlement to a right to parole. This Court rejected this very notion in *Zadvydas*. Mr. Benitez does not claim that § 1231(a)(6) gives him any rights, only that it does not extinguish his most basic human liberty interest. Moreover, Mr. Benitez does not contest the authority of the Government to impose the strict conditions of supervision applicable to post-removal release. In no sense is he seeking the right to roam free in this country as a citizen or permanent resident. In short, the Eleventh Circuit could point to no legitimate reason for not directly applying this Court's holding in *Zadvydas* to Mr. Benitez's case.

Alternatively, even if *Zadvydas* does not directly control, it indirectly requires the same result for Mr. Benitez. If *Zadvydas* stands for anything, it is that when indefinite detention would raise a serious constitutional question, it must be interpreted to only authorize detention for as long as necessary to determine whether removal is reasonably foreseeable. *Zadvydas* also re-affirmed this Court's long-held view that the Due Process

Clause generally applies to aliens. The only question is whether Mr. Benitez's status as an inadmissible, paroled alien vitiates his right to due process. It does not.

The Eleventh Circuit relied on the "entry fiction," a long-held legal fiction that an arriving alien who has been allowed to disembark and land on our shores is not deemed to have "entered" the country while his application for entry is being considered. This fiction should not apply in this case for no less than four reasons.

First, the fiction originated as a creature of statutory, not constitutional law. This Court has never applied it to deny constitutional protection to an alien that has been paroled into this country. When the Court has applied the doctrine to paroled aliens, it has been with regard to statutory rights and benefits. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court held that a paroled Cuban was not statutorily entitled to a benefit provided for admitted aliens. The Court went on, however, to analyze whether this statute violated the paroled alien's due process rights. While it concluded that there was no violation in that case, its analysis demonstrates that, despite the entry fiction, the alien was protected by the Constitution.

Second, to the extent the entry fiction might apply as a constitutional concept, it should be limited to admission and removal decisions. This Court has held that aliens whom immigration officials allow to land on our soil at an immigration checkpoint do not acquire any constitutional rights with regard to whether they are admitted for entry or ordered removed. It has never held, however, that they have no rights regarding their treatment while in our country. To the contrary, the Court long ago held in *Wong Wing v.*

United States, 1634 U.S. 228 (1896), that the treatment of an alien awaiting his removal is subject to the Due Process Clause.

The third and fourth reasons for not applying the entry fiction in this case result from Mr. Benitez's particular situation as a Mariel Cuban who was been paroled into this country. Unlike the applicants against whom the entry fiction has heretofore been applied, the Mariel Cubans came to this country at the invitation of our President. Moreover, in the case of Mariel Cubans, parole was used as a means of entry, not as a temporary measure while their applications were being considered. Thus, the entry fiction makes no sense in this case.

In applying the entry fiction, the Eleventh Circuit relied entirely on this Court's Cold War decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which approved of the indefinite detention of an arriving alien. *Mezei* does not control. First, unlike Mr. Mezei, Mr. Benitez lived continuously in the United States for over twenty years before he was detained. Second, Mr. Mezei was detained at his port of entry, while Mr. Benitez was allowed to enter the country and assimilate immediately after his arrival. Third, the Government specifically determined that Mr. Mezei, who had just spent nearly two years behind the Iron Curtain, posed a national security risk, while it has determined that Mr. Benitez poses no risks. Finally, even if *Mezei* were on all fours, this Court's intervening due process jurisprudence has eroded the continuing viability of that decision.

Once the entry fiction is discarded in this case, then the reasoning in *Zadvydas* demonstrates that § 1231(a)(6) would raise serious constitutional questions if it were

interpreted to authorize indefinite detention of paroled aliens like Mr. Benitez. In evaluating the constitutionality of indefinite detention under the statute in *Zadvydas*, this Court focused on the breadth of application of the statute, noting that it applied to many admitted aliens that did not pose any risks, such an alien who has simply overstayed his visa. The over-breadth concern is heightened in this case because the statute applies to a much broader range of inadmissible aliens, including those who are helpless, seeking a job, or are poor. Again, in the case of Mr. Benitez, the Government has specifically determined that he does not pose any risk to public safety. This finding provides further support for this Court's concerns in *Zadvydas* that § 1231(a)(6) provides inadequate procedural safeguards to support indefinite detention.

The Eleventh Circuit's constitutional reasoning was guided by concerns of national security in the event a rogue nation decided to unleash its most undesirable aliens on our shore. Inhumane treatment of human beings, however, is neither an appropriate response, nor the only alternative. The political branches have many tools to deal with attacks on our sovereignty: diplomatic responses including trade sanctions, as well as military options.

More importantly, however, Mr. Benitez does not contend that the United States lacks authority to detain arriving aliens. His challenge is limited to aliens for whom the Government made the conscious choice to allow to come into our country and live among us. The Mariel Boatlift demonstrates this dichotomy. The Government immediately detained the small minority of Mariel Cubans who it determined to be violent criminals.

The authority to detain arriving aliens is not at issue. Thus, vindicating the human rights of Mr. Benitez and other paroled aliens will pose no risk to our national security.

Finally, even if the indefinite detention of Mr. Benitez does not violate his right to substantive due process, it is clear by now that his detention violates his right to procedural due process. Every procedure that he has been afforded has resulted in the determination that there is no good reason to detain him, yet he remains detained. It is time for this nightmare to end.

ARGUMENT

Mr. Benitez and about 125,000 other Cuban citizens were not legally eligible to come to the United States in 1980 because they did not have visas. They came anyway, and instead of turning them back, the United States welcomed them with an open heart and open arms. Even though these Mariel Cubans were not technically eligible to enter the United States, the Government decided to let them in anyway on immigration parole.

Like any other large population, a number of these Mariel Cubans committed crimes after their arrival. The Government elected to revoke their parole and ordered them to be returned to Cuba. The Government detained them by putting them in prison while it attempted to send them back. The Government contends that because Fidel Castro will not take them, it has the statutory authority to keep these people imprisoned for the rest of their lives.

Daniel Benitez is one of these people. In support of its contention that it can imprison Mr. Benitez until he is dead, the Government relies on 8 U.S.C. § 1231(a)(6),

which provides that any inadmissible alien and certain admitted aliens "may be detained beyond the [ninety-day] removal period."

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted this language to authorize detention for as long as necessary to determine whether the alien's removal is reasonably foreseeable. While *Zadvydas* dealt with aliens who had been legally admitted to the United States, this interpretation should also apply to aliens like Mr. Benitez who have not been legally admitted, but have been paroled into the country. As argued in Part I of this brief, the interpretation should apply directly because § 1231(a)(6) does not distinguish between different classes of aliens. Alternatively, as argued in Part II, it should apply indirectly because, as in *Zadvydas*, that interpretation is necessary to avoid a substantial constitutional question.

I. BECAUSE § 1231(A)(6) DOES NOT DISTINGUISH BETWEEN DIFFERENT CLASSES OF ALIENS, THIS COURT'S INTERPRETATION OF THE STATUTE IN *ZADVYDAS* SHOULD APPLY EQUALLY TO ALL ALIENS.

The Court should not reach any of the complex and important constitutional issues raised in Part II of this brief or in the various amicus briefs. This proceeding may be resolved by simply applying the interpretation of § 1231(a)(6) that this Court reached just a few years ago in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Because the key language in § 1231(a)(6) – "may be detained beyond the removal period" – does not suggest the length of the additional authorized detention, additional language must be read into the statute. Should that language be "as long as the Government sees fit" (as the Government argued in *Zadvydas*), "as long as would be constitutional depending on the specific kind of alien being detained" (as the Government argues now), or "as long as

necessary to determine whether removal is reasonably foreseeable" (as Mr. Benitez argues)?

In *Zadvydas*, this Court selected the latter interpretation. The Eleventh Circuit should have followed this Court's dictate. The meaning of these same words should not and cannot change depending on the pedigree of the alien to whom they are applied. The Eleventh Circuit's justifications for rejecting *Zadvydas* when considering the detention of paroled aliens do not withstand scrutiny.

A. This Court's interpretation of § 1231(a)(6) in *Zadvydas* should be the final word.

The Eleventh Circuit failed to appreciate the nature of both the holding and the reasoning in *Zadvydas*.

(1) In Zadvydas*, this Court held that the language "may be detained beyond the removal period" authorizes detention only as long as necessary to determine whether removal is reasonably foreseeable.*

Because this Court made clear in *Zadvydas* that the constitutionality of the indefinite detention of a parolee would "present a very different question," the Eleventh Circuit distinguished *Zadvydas* and selected an entirely different interpretation of § 1231(a)(6). In so doing, it simply misunderstood the holding in *Zadvydas*. The holding was a matter of statutory construction, not constitutional law.

Even if the "serious constitutional threat" that led this Court to interpret § 1231(a)(6) is not present in cases involving paroled aliens, the fact remains that this Court has given its interpretation of this statute. Lower courts may not interpret the statute differently. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)

("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction . . . .").

Although this Court indicated that the *constitutional analysis* would be "a very different question" in a case involving aliens who "have not yet gained admission to this country," *Zadvydas*, 533 U.S. at 682, nowhere in the opinion did the Court suggest that the statutory analysis would be different or that its ultimate interpretation of § 1231(a)(6) would not apply to those aliens. To the contrary, in contrast to the constitutional analysis, the Court's entire discussion on statutory interpretation (Part III(B) of the opinion) referred to aliens generally, not just to aliens who have effected an entry. *See id.* at 696-99; *see also Lin Guo Xi*, 298 F.3d at 836 ("Concluding that the statute 'does not permit indefinite detention,' the Court pointedly used the term 'aliens' as opposed to 'deportable aliens.' ").

The Court was clearly aware that the language it was interpreting also applied to aliens who had not effected an entry. The Court noted that § 1231(a)(6) "applies to certain categories of aliens who have been ordered removed, namely *inadmissible* aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons." *Zadvydas*, 533 U.S. at 688 (emphasis added); *see also Lin Guo Xi v. INS*, 298 F.3d 832, 835-36 (9th Cir. 2002) (emphasizing this language).

Moreover, Justice Kennedy's dissent (in which Chief Justice Rehnquist joined) emphasized both the fact that the statute applied to inadmissible aliens and the clear indication that the majority was interpreting the statute in general, not just as applied to admitted aliens:

> Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens . . . . On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. *Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.*

Zadvydas, 533 U.S. at 710 (Kennedy, J., dissenting) (emphasis added). More to the point, Justice Kennedy expressly noted that the release of Mariel Cuban parolees like Mr. Benitez "would seem a necessary consequence of the majority's construction of the statute." *Id.* at 717. All four dissenting justices joined this portion of Justice Kennedy's dissent, and the majority did not dispute Justice Kennedy's point. *See id.* at 702 (Scalia, J., dissenting, joined by Thomas, J.) (joining Part I of Justice Kennedy's dissent). Thus, while the Court was closely split as to the length of detention authorized by § 1231(a)(6), there appears to have been no disagreement that once interpreted, the same interpretation should apply to all who are covered by the statute.

(2) This Court's interpretation of § 1231(a)(6) in Zadvydas *was the result of thorough interpretive analysis.*

In addition to misapprehending the holding in *Zadvydas*, the Eleventh Circuit also failed to appreciate this Court's underlying reasoning. In rejecting this Court's interpretation of § 1231(a)(6) with regard to paroled aliens, the Eleventh Circuit

overlooked this Court's invocation of various interpretative aids aside from the avoidance doctrine. While the avoidance doctrine may have been the final consideration that led this Court to interpret § 1231(a)(6) as it did, the Court conducted a thorough and searching interpretative analysis that supported its construction.

Starting as always with the plain language of the statute, the Court rejected the Government's argument that the statute's use of the term "may" put the length of detention in the unfettered discretion of the Attorney General:

> The Government points to the statute's word "may." But while "may" suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word "may" is ambiguous.

Zadvydas, 533 U.S. at 697. Thus, the Court held that it could not determine the length of detention authorized based on the language of the statute alone. *Id.* at 696-97.

The Court then examined the purpose of § 1231 itself – "effectuating an alien's removal." *Id.* at 697; *see also United States v. Witkovich*, 353 U.S. 194, 202 (1957) (holding that clause in immigration statute regarding supervision of aliens subject to deportation order "must be placed in the context" of the "legislative scheme designed to govern and to expedite the deportation of undesirable aliens"). Because this purpose is no longer served when it becomes clear that the alien cannot be removed, the Court invoked the long-held legal principle "*Cessante ratione legis cessat ipse lex*," which means "the rationale of a legal rule no longer being applicable, that rule itself no longer applies." *Zadvydas*, 533 U.S. at 699 (quoting 1 E. Coke, *Institutes* 70b).

The Court also noted that in three other detention provisions, Congress spoke in "clearer terms." *Id.* at 697. First, while § 1231(a)(6) makes no mention of the possibility

that removal may never be possible, 8 U.S.C. § 1537(b)(2)(C) (1994 ed. Supp. V) specifically authorized continued detention of a terrorist alien "if no country is willing to receive" the alien. *Zadvydas*, 533 U.S. at 697. Lest there be any doubt that this provision contemplates continuing detention, it provides for review of the detention determination every six months. *Id.*

Second, while § 1231(a)(6) provides that the Attorney General "may" detain an alien beyond the removal period, 8 U.S.C. § 1226(c) affirmatively provides that the Attorney General "shall" detain certain criminal aliens during the removal proceedings and "may" release such an alien only under certain conditions. *Zadvydas*, 533 U.S. at 697.

Third, 8 U.S.C. § 1231(a)(2) mandates that "under no circumstances" shall the Attorney General release certain criminal or terrorist aliens during the ninety-day removal period. Section 1231(a)(6), of course, does not have similar language; indeed, it places no limitation on the circumstances under which the Government may release the broad ranges of aliens covered by the provision. *Zadvydas*, 533 U.S. at 697.

This Court further contrasted these provisions with § 1231(a)(6) to demonstrate why indefinite detention under those provisions would be less suspect than under § 1231(a)(6). The Court first noted that "post-removal-period detention, unlike detention pending a determination of removability [under § 1226(c)] or during the subsequent 90-day removal period [under § 1231(a)(2)], has no obvious termination point." *Zadvydas*,

533 U.S. at 697.[7] Second and "[m]ore importantly," the Court noted that unlike the other statutes, § 1231(a)(6) "applies not only to terrorists and criminals, but also to ordinary visa violators." *Zadvydas*, 533 U.S. at 697. Thus, a comparison of both the purposes and the text of these three provisions with § 1231(a)(6) further supported this Court's interpretation.

The Court then reviewed the history of § 1231(a)(6) and predecessor statutes governing post-removal detention, *id.* at 698, and "found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.* at 699. Indeed, consistent with the Court's interpretation of § 1231(a)(6) in *Zadvydas*, the earlier statutes and cases generally limited post-removal detention to six months or "a reasonable time." *Id.* at 698.

Finally, in selecting which of the competing interpretations to adopt, the Court chose the more narrow interpretation to "avoid a serious constitutional threat." *Id.* at 699. While much of the opinion was devoted to analyzing the seriousness of this threat, the Court's thorough consideration of the other interpretative factors – language, statutory purposes, comparative analysis, and statutory history – was equally critical to the Court's ultimate interpretation.

After all, this Court has repeatedly emphasized that the avoidance doctrine is applicable only when there is more than one permissible interpretation. *See, e.g., United States v. Salinas*, 522 U.S. 52, 60 (1997) (holding that constitutional avoidance doctrine

[7] Indeed, this Court has subsequently upheld the constitutionality of § 1226(c), even as applied to aliens who have been formally admitted, in large part because "while the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' the detention here is of a much shorter duration." *Demore v. Hyung Joon Kim*, 538 U.S. 510, __, 123 S. Ct. 1708, 1720 (2003).

cannot be invoked where statute is "unambiguous"); *Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Of course, the fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction 'to the point of disingenuous evasion' to avoid a constitutional question."). While the dissent in *Zadvydas* contended that the Court's interpretation was "not plausible," *Zadvydas*, 533 U.S. at 707, that view simply did not carry the day.

For all these reasons, the Eleventh Circuit erred in substituting its own interpretation of § 1231(a)(6) for that of this Court.[8]

B. The meaning of statutory language should not change depending on the person to whom it is applied.

Even if *Zadvydas* did not directly establish the proper interpretation of § 1231(a)(6) as applied to all aliens, Justice Kennedy was entirely correct in noting that "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility." *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting). The language of the statute does not in any way distinguish in its application between paroled aliens and other aliens present in the United States. To the contrary, "[t]he statute itself clearly indicates, on its face, that it is equally applicable to both inadmissible/excludable aliens and to otherwise removable aliens." *Borrero v.*

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[8] Even if a minority of this Court continues to disagree with the interpretation reached in *Zadvydas*, principles of *stare decisis* should lead that minority to agree that the Eleventh Circuit's ruling must be reversed. *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring); *Orozco v. Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., concurring).

Indeed, because Congress can always enact a statute explicitly authorizing indefinite detention (at which point the constitutional question will be called), the principles of *stare decisis* have particularly strong application in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Aljets, 178 F. Supp. 2d 1034, 1041 (D. Minn. 2001) ("*Borrero I*"), *rev'd*, 325 F.3d 1003 (8th Cir. 2003) ("*Borrero II*").

The failure of this statute to suggest in any way that the length of detention or the authority to detain depends on the nature of the alien's presence in the country is dispositive. As the en banc Sixth Circuit reasoned:

> Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret "detained beyond the removal period" differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (discussing presumption that a statutory term retains the same meaning throughout a statute and in particular throughout a provision).

Rosales-Garcia v. Holland, 322 F.3d 386, 404-05 (6th Cir.) (en banc), *cert denied, _U.S._,123 S. Ct. 2607 (2003)*; *accord Lin Guo Xi*, 298 F.3d at 836 ("The statute, on its face, makes no exceptions for inadmissible aliens. The Supreme Court's unqualified holding provides that the statute 'does not permit indefinite detention.' "); *Borrero I*, 178 F. Supp. 2d at 1042 ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others.").

Similarly, this Court has emphasized that "where the Legislature makes a plain provision, without making any exception, the courts can make none." *French's Lessee v. Spencer*, 62 U.S. (21 How.) 228, 238 (1858), *quoted in Rosales-Garcia*, 322 F.3d at 405 n.25, *and Lin Guo Xi*, 298 F.3d at 836. Because the Legislature did not distinguish between admitted and paroled aliens in § 1231(a)(6), neither should the courts. Indeed, the notion that the same words in the same sentence can mean something very different as applied to different people belies any sense of fairness or justice. *Cf. Chmakov v.*

Blackman, 266 F.3d 210, 215 (3d Cir. 2001) (noting that if the meaning of a statute could "change depending on the background or pedigree of the petitioner," then "the meaning of any statute [would be rendered] as changeable as the currents of the sea, and potentially as cruel and capricious").

An exhaustive search of all of this Court's decisions regarding the constitutional avoidance doctrine has yet to reveal a single decision in which this Court suggested that the same words of a statute may be interpreted one way with regard to situations in which a serious constitutional question would be raised, but an entirely different way to situations that do not pose the same constitutional problem. Indeed, aside from the lower courts that have refused to apply this Court's interpretation in *Zadvydas* to paroled aliens, there does not appear to be any such precedent in any American court. *See Lin Guo Xi*, 298 F.3d at 839 ("The government has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation.").

C. The grounds relied upon by the courts that have interpreted § 1231(a)(6) differently for parolees do not withstand scrutiny.

(1) This Court's statements that more deference to Congress and the Executive might be justified in other circumstances had no bearing on the Court's interpretive analysis.

The Eleventh Circuit adopted the Eighth Circuit's reasoning that *Zadvydas* does not apply to paroled aliens because "*Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens." (J.A. 147 (quoting *Borrero II*, 325 F.3d at 1007).) The two courts reached this conclusion based on this Court's "notation that

'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." (J.A. 147 (quoting *Borrero II*, 325 F.3d at 1007 (in turn quoting *Zadvydas*, 533 U.S. at 696)).) Their reasoning is flawed because they have taken the Court's language out of context.

The referenced passage appears not in the Court's analysis of how the statute can be interpreted, which appears in Part III(B) of the opinion, but in Part III(A), which contains the Court's analysis of whether the indefinite detention of admitted aliens poses a serious constitutional question. *Zadvydas*, 533 U.S. at 695-96. This constitutional analysis presupposed an interpretation of § 1231(a)(6) that authorized indefinite detention. The Court, however, adopted the other plausible interpretation – that the provision only authorizes detention for as long as necessary to determine whether removal is reasonably foreseeable.

Moreover, in making the referenced comment, the Court was addressing the specific question of whether scrutinizing the indefinite detention of aliens ordered removed unduly interferes with the authority of Congress and the Executive over immigration law. *Id.* The Court emphasized that the scope of its analysis was limited to the context of evaluating "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.* at 695. The Court did so by noting the issues that were not before it. The Court was not, for example, examining "the right of Congress to remove aliens, to subject them to supervision or to incarcerate them where appropriate for violations of those conditions." *Id.* The Court went on to note:

> Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.

Id. at 696. Thus, this reference to heightened deference with regard to "terrorism or other special circumstances" was made to demonstrate that § 1231(a)(6) is *not* directed at such cases. Again, § 1231(a)(6) only deals with the general issue of what to do with "aliens that the Government finds itself unable to remove." *Id.* at 695.

For these reasons, the Court's suggestion that a different level of constitutional analysis would apply if § 1231(a)(6) were limited to terrorists and other special circumstances in no way implies that the statute should be interpreted differently in those situations. At most, the referenced language in *Zadvydas* signals that the Court may be more inclined to tip the scales in favor of the Government if and when it considers the constitutionality of a statute that authorizes indefinite detention of a more narrowly defined group of aliens, like terrorists. *See, e.g.,* 8 U.S.C. § 1537(b)(2)(C) (authorizing continuing detention of terrorist aliens the Government is unable to remove), *cited in Zadvydas*, 533 U.S. at 697.

(2) Zadvydas was not an "as-applied constitutional challenge."

The Eleventh Circuit further justified its limitation of *Zadvydas* by contending that this Court's opinion "reads like an as-applied constitutional challenge." (J.A. 148.) This observation is simply incorrect.

If this Court had decided in *Zadvydas* that § 1231(a)(6) was unconstitutional as applied to admitted aliens, it would have written a very different opinion. First, instead of concluding that § 1231(a)(6) authorizes detention only for as long as necessary to

determine whether removal is reasonably foreseeable, the Court would have begun the opinion with the conclusion that the statute must be interpreted to authorize indefinite detention. Second, the Court never would have invoked the avoidance doctrine. The whole purpose of the doctrine is to allow federal courts to avoid having to review and possibly reject the will of the elected legislature where possible. Finally, the Court would have been forced to do what it chose not to do – answer the serious constitutional question of whether the Constitution permits the indefinite detention of admitted aliens.

Similarly, the Eleventh Circuit suggested that this Court radically altered the established meaning of § 1231(a)(6). The court stated, for example, that in *Zadvydas*, this Court "left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States." (J.A. 148; *see also* J.A. at 149 (characterizing *Zadvydas* as "a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally *but otherwise leaves it alone*." (emphasis added)) (quoting *Lin Guo Xi*, 298 F.3d at 841 (Rymer, J., dissenting).)

Nowhere in its opinion, however, did this Court state, much less suggest, that it was altering the meaning of the statute. The Court recognized that the statute could be interpreted to authorize indefinite detention, but could also be interpreted to authorize detention only for as long as necessary to determine whether removal is reasonably foreseeable. *Zadvydas*, 533 U.S. at 689, 697. Of these two permissible interpretations, the Court picked the latter. In short, the holding in *Zadvydas* was a matter of statutory interpretation, not constitutional law.

(3) Mr. Benitez does not argue that § 1231(a)(6) gives him any right to parole, only that it does not authorize the permanent deprivation of his general right to be free from detention.

Finally, the last ground on which the Eleventh Circuit limited *Zadvydas* was its conclusion that "reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens." (J.A. 151.) The court relied on a provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") – the act creating current § 1231(a)(6) – that provides that the act should not be construed to "create any substantive or procedural right or benefit that is legally enforceable." (J.A. 151 (citing 8 U.S.C. § 1231(h)).)

As this Court made clear in *Zadvydas*, however, the issue is not whether the statute creates a right, it is whether the statute authorizes the Government to extinguish a basic human liberty:

> The question before us is not one of "confer[ring] on those admitted the right to remain against the national will" or "sufferance of aliens" who should be removed. Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Zadvydas, 533 U.S. at 695. Mr. Benitez is not trying to enforce a right created under § 1231(a)(6); he is simply asking the Court to determine whether the statute authorizes his continued detention.

As this Court noted in *Zadvydas*, the stringent conditions of the release Mr. Benitez seeks and the criminal penalties applicable for violating those conditions further belie any notion that Mr. Benitez seeks the rights of an alien admitted for permanent

residence. *See id.* at 695 ("[W]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions."); 8 U.S.C. § 1231(a)(3) (2001) (granting authority to promulgate regulations governing supervision and conditions of release of aliens not removed within 90 days); 8 U.S.C. § 1253(b) (2001) (imposing criminal penalties for failure to comply with release conditions); Conditions of Release After Removal Period, 8 C.F.R. § 241.5 (2003) (requiring alien to periodically report to immigration officer and answer questions under oath, continue to try to obtain travel documents to effectuate removal, report for physical or mental evaluations as directed, obtain advance permission for any significant travel, and update immigration officer with current address).

For all these reasons, this Court's decision in *Zadvydas* answered the question posed in this case. Section 1231(a)(6) does not authorize indefinite detention, regardless of whether indefinite detention of an alien in Mr. Benitez's circumstances would raise a serious constitutional question.

II. INTERPRETING § 1231(A)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF A PAROLED ALIEN WOULD RAISE A SUFFICIENTLY SIGNIFICANT CONSTITUTIONAL QUESTION TO WARRANT INTERPRETING THE STATUTE TO AVOID THE QUESTION.

Alternatively, even if this Court were to determine that the same language in § 1231(a)(6) could mean something different for Mr. Benitez than for Mr. Zadvydas, the same interpretation should still apply. If *Zadvydas* means anything, it is that if indefinite detention of a class of aliens raises a serious constitutional question, then § 1231(a)(6)

should be interpreted to authorize detention for only as long as removal is reasonably foreseeable. This holding should apply here because the indefinite detention of a paroled alien like Mr. Benitez would also raise a serious constitutional question.

A. The Fifth Amendment's Due Process Clause applies to the detention of paroled aliens.

The starting point of the constitutional analysis is the Due Process Clause of the Fifth Amendment, which provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law." The threshold question is whether Mr. Benitez is a "person" for purposes of the Due Process Clause. This Court has already made clear in *Zadvydas* that indefinite detention pursuant to § 1231(a)(6) implicates the "liberty" interest protected by the clause. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.").

This Court has long made clear that any alien physically present in this country, even if his or her presence is illegal, is protected by the Due Process Clause, which by its plain language applies to "all persons."

> [O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id. at 693 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982), *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953), and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). Indeed, this Court has specifically held that Cuban aliens paroled pursuant to § 1182(d)(5) are entitled to constitutional protection. *Mathews*,

426 U.S. at 77. Mr. Benitez therefore generally enjoys the protections of the Due Process Clause.

The question thus becomes whether there is something about Mr. Benitez's continued detention in this case that removes this general protection.

(1) The "entry fiction" has no application to Mr. Benitez's detention.

The Eleventh Circuit held that Mr. Benitez has no due process right with regard to indefinite detention because he is in this country on immigration parole. (J.A. 143-45.) Pursuant to the "entry fiction," an alien who is allowed to land on our shores while his application for admission is pending is treated for immigration purposes as if he were stopped at the border. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). The Eleventh Circuit relied on this Court's observation in *Zadvydas* that, in light of the entry fiction, the constitutionality of detaining aliens who "have not yet gained initial admission to this country would present a very different question" from the constitutionality of detaining admitted aliens. *Zadvydas*, 533 U.S. at 682. Although the question may be different, the answer is the same for at least four different reasons.

First, the entry fiction does not limit the constitutional rights of aliens who have been paroled into the country. Specifically, the fiction is largely a statutory concept, as opposed to a rule of constitutional law. It derives from specific statutes that provide that instead of being forced to remain on board the boat in which he arrived pending the review of his application for admittance, an applicant may temporarily land on our shores:

> Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by

> sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore 'shall not be considered a landing' nor relieve the vessel of the duty to transport back the alien if ultimately excluded. And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.

Mezei, 345 U.S. at 215 (citations and footnote omitted).

This "legislative grace" has been extended to allow the temporary parole of the alien into the population while his application is being processed. *See* 8 U.S.C. § 1182(d)(5). As with the statutory scheme allowing a temporary landing described in *Mezei*, § 1182(d)(5) specifically provides that a paroled alien is not to be treated as having been admitted. Even though he is in reality present in the United States, the immigration statutes treat him as if he were not. Hence, the concept truly is a "fiction."

While this Court has endorsed this fiction in determining that an alien on parole does not enjoy certain *statutory* rights accorded to admitted aliens, *see Leng May Ma*, 357 U.S. at 188; *Kaplan*, 267 U.S. at 230-31, it has never held that they do not enjoy the *constitutional* protections of "persons" within our territory. *See Jean*, 472 U.S. at 869 (Marshall, J., dissenting) (arguing that extension of entry fiction to deprive aliens present in the United States of constitutional protections "can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence"); *see also* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact Of Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365, 378 (2002) ("The only possible basis for putting parolees into the 'initial entrant/*Mezei'*

category is because Congress – at one time – made 'entry' a gatekeeping concept and determined that parole shall not constitute an 'entry.' To hold now that parolees are not within the protection of the ruling in *Zadvydas* would be to permit statutory policies to dictate constitutional results.").

Thus, for example, in *Mathews*, this Court held that Cuban citizens paroled into the country under 8 U.S.C. § 1182(d)(5) are not "lawfully admitted for permanent residence" for purposes of a Medicare statute, 425 U.S. at 74 n.7, but are still "persons" protected by the Due Process Clause. *Id.* at 77. In determining after considerable constitutional analysis that the regulation in that case did not violate the aliens' due process rights, the Court clearly was not of the opinion that the entry fiction deprived paroled aliens of those rights. *Id.* at 77-88.

Moreover, it would be perverse if an alien who properly reported to an immigration checkpoint to apply for admission to this country was not protected by the Due Process Clause while legally paroled into the country, but another alien who snuck through the border without inspection did receive this protection. This Court has made clear, however, that even illegal aliens are in fact protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 693 (citing *Plyler*, 457 U.S. at 210, *Mathews*, 426 U.S. at 77, *Kwong Hai Chew*, 344 U.S. at 596-98, and *Yick Wo*, 118 U.S. at 369). And the Government has clearly (and correctly) read *Zadvydas*'s limiting interpretation on § 1231(a)(6) to apply to illegal aliens who entered without inspection. 8 C.F.R. § 241.13(3)(i) (2003); 66 Fed. Reg. at 56,969. Thus, the entry fiction should not be applied to evaluate the constitutional rights of paroled aliens.

A second reason why the fiction should not apply here is that to the extent the fiction is a valid constitutional concept, it should be limited to admission and removal decisions. It should not apply to the treatment of aliens paroled into the country. Because of the nature of sovereignty, the entry fiction may make some sense, even in constitutional terms, with regard to proceedings to determine whether an alien may be lawfully admitted into the country or forcibly removed. Thus, for example, this Court has suggested that an arriving alien who is allowed to disembark from a ship and come onto dry land at the port has few if any constitutional rights with regard to his application for admission. *See Mezei*, 345 U.S. at 213, 215; *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Nishimura Ekiu v. United States*, 142 U.S. 651, 661-62 (1892). It may even be assumed, for the sake of argument, that a paroled alien may face a real obstacle in challenging the Government's decision to deny him admission or to remove him.

Mr. Benitez, however, does not challenge the authority of the Government to deny him initial passage into the country or to deny his application to adjust his status to that of a lawful permanent resident. He only challenges his treatment now that he has been allowed into the country (and to stay here for more than twenty years). Nor does he challenge the right of the Government to send him back to Cuba. He challenges only the way the Government treats him until it does so.

Indeed, this Court has long held that the Fifth Amendment governs the treatment of an alien awaiting his removal. *See Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896). In that case, this Court struck down a federal law providing for imprisonment at

hard labor while Chinese aliens awaited deportation. In reasoning directly applicable to this case, the Court stated:

> No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. *But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.* It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.

Id. at 237 (emphasis added). Section 1231(a)(6), of course, does not provide for a judicial trial before the deprivation of an alien's liberty.

Third, unlike most other paroled aliens, Mariel Cubans like Mr. Benitez came here at the invitation and encouragement of the United States. Even if the entry fiction might rationally subject other paroled aliens to an indefinite deprivation of liberty, it would be cruel and capricious to apply the doctrine to Mariel Cubans like Mr. Benitez. These people are essentially refugees whom the United States, through President Carter, invited with "open heart and open arms" to come to our country.

Fourth and finally, the parole of Mariel Cubans was not a temporary solution while their admissibility was determined. The genesis of the entry fiction was the practical and humanitarian need to allow arriving aliens to disembark from their vessel and, in limited situations, to join the population while immigration officials determined whether they are admissible. *Mezei*, 345 U.S. at 215. The decision to parole the Mariel Cubans, however, did not contemplate a temporary release while immigration officials

determined admissibility. The Government cannot credibly contend that it needs over twenty years to determine whether Mariel Cubans are admissible.

At least in the case of the Mariel Cubans, parole was used to allow aliens who were technically inadmissible to enter the United States anyway. Nearly all of the Mariel Cubans were inadmissible (or "excludable" in pre-IIRIRA parlance) because they did not obtain visas. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). Moreover, despite the Mariel Cubans' inadmissible/excludable status, after being physically present for at least one year, they were allowed to apply to adjust their status to lawful permanent residents if they were eligible to receive an immigrant visa and were otherwise admissible for permanent residence. Pub. L. No. 89-732, 80 Stat. 1161; Pub. L. No. 96-212 at § 203(i), 94 Stat. at 108. (codified as amended at 8 U.S.C. § 1255, historical and statutory notes). Thus, in no way was the parole of Mariel Cubans intended to be a temporary solution while the Government reviewed their applications for admission. Indeed, in Mr. Benitez's case, he was fully eligible for adjustment until his 1983 conviction for purchasing stolen speakers.

In short, the justification for the entry doctrine is not present in the case of the Mariels. The same legal principle on which this Court relied in *Zadvydas* should apply here to establish the inapplicability of the entry fiction: " '*Cessante ratione legis cessat ipse lex*' (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)." *Zadvydas*, 533 U.S. at 699 (quoting 1 E. Coke, *Institutes* 70b).

(2) **Mezei *does not control in this case.***

The Eleventh Circuit relied entirely on this Court's Cold War decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which upheld a

constitutional challenge to the indefinite detention of an arriving alien. Mr. Benitez's circumstances, however, differ in at least four material respects.

First, unlike Mr. Mezei, Mr. Benitez lived continuously in the United States prior to his detention. While Mr. Mezei had lived in the United States for several years, he had been absent behind the Iron Curtain for nineteen months before his attempted re-entry at Ellis Island. *Id.* at 208. The Court held that this significant break in time was controlling and that Mr. Mezei had been "assimilated" to the status of an arriving alien. *Id.* at 214. The Court contrasted Mr. Mezei with the petitioner in another case that year who had only been absent for four months with permission from the Government. *Id*. (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953)). In *Kwong Hai Chew*, the Court held that the alien retained the constitutional protections of a person in the United States. 344 U.S. at 601. Because Mr. Benitez has remained continuously in the United States since 1980, he has more constitutional protection than did Mr. Mezei.

Second, unlike Mr. Mezei, Mr. Benitez was not detained at the border. Mr. Mezei arrived at the entry port on Ellis Island and, although he was allowed to get off the boat, he was not allowed to enter any further into the United States. *Mezei*, 345 U.S. at 208-09. Mr. Benitez, on the other hand, spent a single night at a refugee camp in Key West before he was driven to Miami and promptly picked up by his aunt and uncle as a free man. As Professor Aleinikoff has observed:

> Whatever logic might distinguish the case of non-citizens who have proceeded no further into the United States than an inspection post at the border from those who have been admitted, it is hard to see how a parolee who has lived freely in the United States for years would not come within the category of persons that the Court says the due process clause of the Constitution protects.

Aleinikoff, *supra*, 16 Geo. Immigr. L.J. at 378.

Third, unlike Mr. Mezei, Mr. Benitez has not been found to pose any risk to national security. The key fact in *Mezei* was that the Government had determined that Mr. Mezei's release into the United States "would be prejudicial to the public interest for security reasons." *Mezei*, 345 U.S. at 208. This determination was "made on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.' " *Id.* The Court noted that Mr. Mezei had just returned from nearly two years "behind the Iron Curtain" and the case arose at the height of the Cold War. *Id.* at 214. Indeed, the Court emphasized the President's additional authority in immigration matters "during periods of international tension and strife," which included "the present emergency." *Id.* at 210.

Finally, to the extent *Mezei* stands for the proposition that a paroled alien has no right to be free from unjustified detention, it is inconsistent with this Court's subsequent civil detention cases and should be overruled or limited to its facts. As explained in detail in Part II of the *amicus curiae* brief of the American Bar Association, this Court's view and interpretation of the Due Process Clause – both its substantive and procedural components – have undergone substantial development and clarification since *Mezei* was decided.

B. The indefinite detention of paroled aliens like Mr. Benitez violates their right to substantive due process.

In *Zadvydas* this Court engaged in the full due process analysis of the indefinite detention of an admitted alien. 533 U.S. at 690-96. Accordingly, Mr. Benitez will limit his argument here to a few additional points that further support this analysis.

(1) The governmental objectives sought to be accomplished by § 1231(a)(6) do not support indefinite detention.

As this Court found in *Zadvydas*, flight risk and danger to the community are insufficient to support indefinite detention under § 1231(a)(6). *Id.* at 690-92. Inadmissible paroled aliens present no greater risks of flight or danger than do the aliens considered in *Zadvydas*. Indeed, a review of the reasons that a particular alien might be inadmissible demonstrates that there is no rational basis for tying alien status to either of these risks.

Among the grounds that would render an alien inadmissible, and thus subject to detention under § 1231(a)(6), are: (1) being sufficiently poor as to be "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A); (2) seeking to "perform[ ] skilled or unskilled labor" unless a specific need is certified by the Secretary of Labor, § 1182(a)(5)(A)(i); (3) having an expired visa or passport, § 1182(a)(7)(A), (B); (4) having left or remained out of the United States to avoid the draft, § 1182(a)(8)(B); (5) being a practicing polygamist, § 1182(a)(10)(A); (6) being "helpless from sickness, mental or physical disability or infancy" or accompanying such a person, § 1182(a)(10)(B); (7) having voted illegally in the United States, § 1182(a)(10)(D); or (8) having previously renounced United States citizenship to avoid paying taxes, § 1182(a)(10)(E). This is hardly a murderer's row of aliens who would be likely to flee or present a danger to the community.

The facts of this case demonstrate beyond doubt that § 1231(a)(6) is not tied to the policy goals that indefinite detention would serve. On the only two occasions that the Cuban Review Panel has considered Mr. Benitez's detention, it determined that he was

eligible for release. This necessarily means that the panel concluded that Mr. Benitez is presently non-violent, is likely to remain non-violent, and is not otherwise likely to violate any conditions of his supervised release. *See* 8 C.F.R. § 212.12(d)(2) (requiring these findings before the panel may recommend that a parolee be released). In other words, Mr. Benitez is still being detained despite affirmative findings by the Government that neither policy underlying his detention is present. Thus, indefinite detention under § 1231(a)(6) would fail even the most minimal level of constitutional scrutiny.

(2) Section 1231(a)(6) does not provide adequate procedural safeguards to support indefinite detention.

In determining that indefinite detention would raise a constitutional problem, this Court also focused on the scant procedural protections provided. "[T]he sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant judicial review." *Zadvydas*, 533 U.S. at 692. Additional procedural deficiencies include the lack of a neutral decision maker. *See* 8 C.F.R. § 212.12(b)(1) (Mariel detainees); 8 C.F.R. § 241.4(d)(1) (non-Mariel detainees). The facts in this case demonstrate an even more insidious problem with the procedures provided: they are illusory. The fact that the Cuban Review Panel has consistently determined Mr. Benitez to be releasable demonstrates that the administrative procedures are no process at all. After nearly three years, he remains in detention.

(3) The right of paroled aliens like Mr. Benitez to be free from unjustified, indefinite detention does not leave our nation defenseless against hostile nations attempting to force dangerous foreign nationals on our shores.

Inhumane treatment of human beings is neither the proper nor the only method of protecting our nation. If a rogue nation attempts an assault on our sovereignty by sending its most violent prisoners to our shores, we have many options. Our government can deal with this situation like it would any other infringement on our sovereignty: diplomatically through negotiations, trade sanctions, and the like, or militarily through force.

Moreover, Mr. Benitez does not contend that the United States lacks the power to deny entry to an arriving alien. This would be an entirely different case if the United States had determined that the Mariel Cubans were a threat to our sovereignty and detained them immediately upon their arrival. While indefinite detention might not be the most humane thing to do, it could more logically be defended as necessary to protect our sovereignty. That argument falls apart with the Mariels, however, because the Carter Administration made the political judgment that any risks to our sovereignty were outweighed by our moral obligation to welcome these refugees with an open heart and open arms. The resulting inconvenience of our inability to remove the very small percentage of these refugees whom we no longer want is the price of that political judgment. More importantly, the small minority of Mariel Cubans who had serious mental problems or violent criminal records *were* detained from the outset. *Fernandez-Roque*, 622 F. Supp. at 893 & 895 n.11; Antón & Hernández, *supra*, at 205.

Finally, § 1231(a)(6) is not tailored in any fashion to serve the purpose of protecting our sovereignty. As noted *supra*, it applies broadly to many aliens posing no risks to our citizens, much less to the nation's sovereignty. If Congress believes it appropriate, it can always enact a statute authorizing the indefinite post-removal detention in special circumstances where, for example, a hostile nation has attacked us by dumping its violent criminals on our shores.

C. The indefinite detention of paroled aliens like Mr. Benitez violates their right to procedural due process.

Even if the indefinite detention of a paroled alien did not violate substantive due process, it is now apparent that Mr. Benitez has been denied procedural due process. As noted *supra*, the procedures put in place by the Cuban Review Panel have established that there is no justification for his continued detention and that he has been eligible for release for more than two years. His continued detention demonstrates that these procedures are illusory.

The events demonstrating this denial of procedural due process occurred largely after Mr. Benitez filed his initial petition. Moreover, he did not have the benefit of legal representation in developing the record below. Therefore, to the extent it is not clear from the record that he has been denied procedural due process, Mr. Benitez asks for a remand to develop the record on this issue.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Eleventh Circuit and remand with instructions that the

Eleventh Circuit vacate the district court's judgment and direct the district court to grant Mr. Benitez's habeas petition.

Respectfully submitted,

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