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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT IN REPLY

Contrary to the "Question Presented" framed by the Government and the structure of the Government's brief, there are two independent questions presented for this Court. Can 8 U.S.C. § 1231(a)(6) be interpreted to authorize indefinite detention of one class of aliens, but not another? If so, would the indefinite detention of an alien in Mr. Benitez's position raise a serious constitutional question? If this Court answers either question in the negative, then Mr. Benitez is entitled to prevail. Thus, the issues must be examined independently.

I. THE GOVERNMENT HAS FAILED TO MEET MR. BENITEZ'S STATUTORY ARGUMENTS.

The Government fails to meet and overcome Mr. Benitez's statutory arguments in two separate ways. First, as developed in Part A below, the Government misconstrues this Court's precedent. Second, as developed in Parts B, C, and D, it loses sight of the statutory language at issue.

A. The Meaning of § 1231(a)(6) Does Not Depend on the Class of Persons to Which It Is Applied.

The Government does not contest the basic proposition in this case that the language of § 1231(a)(6) does not suggest that it might mean one thing for one class of aliens (*e.g.*, aliens who had originally been admitted for permanent residence like those at issue in *Zadvydas v. Davis*, 533 U.S. 678 (2001)), but an entirely different thing for another class (*e.g.*, aliens who had been admitted under immigration parole, like Mr. Benitez). Instead, it suggests that case law authorizes a court employing the doctrine of constitutional avoidance to interpret the same language one way for one class of persons and a different way for another class. (Resp. Br. at 28-29.) The Government relies first on this Court's decisions interpreting the Due Process

Clause and then on three decisions interpreting statutes. Neither line of cases supports the Government's assertion. Finally, one of this Court's recent opinions regarding detention in Guantanamo Bay provides further support for Mr. Benitez.

1. The Due Process Clause Is in No Way Analogous to § 1231(a)(6).

First, the Government attempts to compare § 1231(a)(6) to the Due Process Clause of the Fifth Amendment. (Resp. Br. at 28.) This is a false comparison. As an initial matter, the Due Process Clause is, of course, not a statute that has been interpreted by the courts under the constitutional avoidance doctrine. It therefore has no application to the first question presented in this case.

Moreover, that constitutional provision provides a general guarantee against governmental intrusion on individual rights. By its very nature, it has to be interpreted in any given case based on all of the surrounding circumstances, including the specific private interests unique to the individual or class of persons at issue. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[This Court's due process] decisions underscore the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." (citations, internal quote marks, and alterations omitted)). On the other hand, § 1231(a)(6) is a statute that applies to specifically delineated groups of aliens. By identifying the various classes of aliens to which it applies without distinguishing among them in its application, the statute itself suggests uniform treatment.

2. No Case Has Ever Held That a Statute Can Be Interpreted One Way When Necessary to Avoid a Constitutional Problem and Another Way When the Constitutional Problem Is Not Present.

Next, the Government asserts that this Court's decisions in *Reno v. Flores*, 507 U.S. 292 (1993), *Crowell v. Benson*, 285 U.S. 22 (1932), and *Lane v. Pena*, 518 U.S. 187 (1996), "construed the same words of a statute one way for constitutional reasons and another way when those same constitutional constraints do not apply." (Resp. Br. at 28-29 & n.16.) The Government is mistaken on all three counts.

While *Flores* did involve an immigration statute providing for discretionary detention, specifically 8 U.S.C. § 1252(a)(1) (1988), its similarity to this case ends there. Nowhere in that opinion did the Court purport to interpret § 1252(a)(1) at all, much less interpret it differently for juvenile aliens than for adult aliens, as the Government implies. Instead, *Flores* involved a facial constitutional challenge by a juvenile alien of an INS regulation, 53 Fed. Reg. 17,449, 17,450-51 (1988) (codified at 8 C.F.R. § 242.24 (1992)), that provided that juveniles could only be released to the custody of a parent, close relative, or legal guardian. *Flores*, 507 U.S. at 300. The Court simply held that this regulation did not violate substantive due process. *Id.* at 300-15. In short, *Flores* has no bearing on the issue of statutory interpretation presented in this case.[1]

[1] Mr. Benitez does not "agree that Section 1231(a)(6)'s presumptive cap on the detention of resident aliens would tolerate the lengthier detention of a juvenile if there were no appropriate sponsor." (Resp. Br. at 29.) Other justifications, however, might prevent the Government from releasing a child. *See Flores*, 507 U.S. at 302 ("[W]here the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.").

In *Crowell*, this Court considered the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. §§ 901-950, which governed claims by certain maritime employees injured while working on navigable waters. 285 U.S. at 36-37. As is relevant here, the Court considered two statutory provisions regarding the relative authority of the Deputy Commissioner of the United States Employees' Compensation Commission and the courts to determine claims under the act. The first provision, 33 U.S.C. § 919(a) (1932), gave the deputy commissioner "full authority to hear and determine all questions in respect of such claim." 285 U.S. at 42, 62. The second provision, 33 U.S.C. § 921(b) (1932), authorized the federal courts to set aside a compensation order by the deputy commissioner if the order is "not in accordance with law." *Id.* at 44-45, 62.

Before engaging in its interpretive analysis, the Court concluded that Congress could delegate the authority to make a final determination of certain historical facts – such as "the circumstances, nature, extent, and consequences of the injuries sustained by the employee" to the deputy commissioner. *Id.* at 50-54. On the other hand, the Court noted that "jurisdictional facts" necessary to give rise to the law applied generally must be subject to review by the courts. *Id.* at 54-61. The Court noted that in the context of maritime-worker injuries, the jurisdictional facts were the "locality of the injury and the existence of the relation of master and servant." *Id.* at 62. Thus, if the Court were to interpret § 919(a) to give the deputy commissioner final authority to determine these facts without judicial review, then it would be unconstitutional.

Applying the constitutional avoidance doctrine, the Court concluded that the term "such claim" in § 919(a) referred to the claim for injury and presupposed that the claimant was an employee and the injury occurred on navigable waters. *Id.* It noted that the "fact of employment is an essential condition precedent to the right to make the claim." *Id.* Because nothing in the act specifically provided

that the deputy commissioner's finding of the jurisdictional facts of employment and location was meant to be final, the Court concluded that the judicial authority to set aside a compensation order that is "not in accordance with law" authorized the courts to review the employment and location decisions. *Id.*

Contrary to the Government's argument, nothing in the Court's reasoning or holding suggested that the same words in the statute could be interpreted differently depending on the context. In all contexts, the language giving the deputy commissioner authority to determine "all questions in respect to such claim" did not prevent the courts from reviewing determinations of legal questions and jurisdictional facts in determining whether an award was "in accordance with the law." There is no hint that the statute might mean one thing for one person, and the opposite for another. Thus, *Crowell* has no application to this case.

Lane is similarly inapposite. In that case, this Court was called upon to determine whether the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §§ 791 *et seq.*, waived the federal government's sovereign immunity to authorize a claimant to sue the government for a violation of the act. 518 U.S. at 189. The Court began by noting that Section 504(a) of that act (codified at 29 U.S.C. § 794(a) (1994)) prohibited discrimination on the basis of disability "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." *Id.* Section 505(a)(2) of the act (codified at 29 U.S.C. § 794a(a)(2) (1994)) provided that an action for money damages "shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [section 504]." *Id.*

After emphasizing the well established rule that a waiver of federal sovereign immunity "must be unequivocally expressed in statutory text," *id.* at 192, the Court held that section 505(a)(2) did not clearly waive sovereign

immunity except with regard to a federal agency that discriminated in the course of providing financial assistance. *Id.* at 192-93. In other words, although all federal agencies were prohibited by section 504(a) from discriminating in "any program or activity" that they conducted, they retained their sovereign immunity against monetary damages awards for that violation unless it involved the provision of federal financial assistance. *See id.* at 196 ("It is plain that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards.").

Not only did *Lane* not involve application of the constitutional avoidance doctrine, it also does not suggest that any statutory language might mean one thing in one context and the opposite in another context. In short, it has no application to this case.

3. This Court's Opinion in *Rasul v. Bush* Provides Further Support for Mr. Benitez's Position.

After the Government filed its brief, this Court held that the federal habeas statute, 28 U.S.C. § 2241 (2003), authorizes an alien detained in Guantanamo Bay, Cuba, to bring a habeas petition in federal court. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). In that case, the Government conceded that § 2241 would authorize an American citizen held at Guantanamo Bay to seek habeas relief, but contended that the same statute could not be used by an alien. 124 S. Ct. at 2696. Although the Court suggested that the petitioners in *Rasul* (foreign nationals alleged to be enemy combatants seized on the battlefield in Afghanistan) may have lacked any constitutional right to habeas relief, *see id.* at 2693-94 (analyzing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)), it rejected the Government's suggestion that § 2241 therefore should be interpreted not to authorize habeas relief:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Id. at 2696.

The Government makes the same argument in this case, and this Court should again reject it. Just as 28 U.S.C. § 2241 draws no distinction between citizens and aliens, 8 U.S.C. § 1231(a)(6) draws no distinction in its application between classes of aliens.

B. The Question in This Case Is Not Whether § 1231(a)(6) Grants a Right to Release; the Question Is Whether It Justifies Mr. Benitez's Detention.

Throughout its brief, the Government repeatedly characterizes Mr. Benitez's position as an argument that § 1231(a)(6) grants him a right to be released from detention. (*E.g.,* Resp. Br. at 12 ("Petitioner claims a statutory and constitutional right to be paroled. . . ."), 13 ("[H]e insists he has a right to release. . . ."), 32 (arguing that the Court should not interpret § 1231(a)(6) to create a "right to parole").) Mr. Benitez argues no such thing, and the Government's insistence on rephrasing the issue demonstrates a misunderstanding of the nature of habeas proceedings.

A habeas petition initiates a "proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated *if no sufficient reason is shown to the contrary*." *Wales v. Whitney*, 114 U.S. 564, 574 (1885) (emphasis added), *quoted with approval in Rumsfeld v. Padilla*, 124 S. Ct. 2711,

2717 (2004). In other words, once the petitioner shows that he is being detained, the detaining official bears the burden of explaining to the court the legal justification for the detention. Thus, Mr. Benitez has never sought to enforce any purported right under § 1231(a)(6). He simply filed a petition for a writ of habeas corpus claiming that the Government was holding him without legal authority. (J.A. 3-26.) After the district court determined that Mr. Benitez's petition was sufficient on its face, it ordered the Government to answer. (J.A. 1.) In its answer, the Government attempted to satisfy its burden to justify Mr. Benitez's continued detention by relying solely on § 1231(a):

> The relevant detention provision governing the petitioner's detention is section 241(a) of the INA, 8 U.S.C. § 1231(a), which covers detention following entry of a final order of removal.

(J.A. 31.)

Thus, it is the Government that is arguing that § 1231(a)(6) gives *it* a substantive right – the right to indefinitely detain Mr. Benitez. The overarching question, therefore, is whether § 1231(a)(6) authorizes Mr. Benitez's continued detention, not whether it gives him any right to release.

C. The Government's Parole Authority Under 8 U.S.C. § 1182(d)(5)(A) Does Not Justify Its Detention of Mr. Benitez.

In its brief, the Government announces a new justification for its detention of Mr. Benitez apart from § 1231(a)(6). Specifically, the Government points to 8 U.S.C. § 1182(d)(5)(A) (2003), which authorizes the Attorney General, under limited circumstances, to parole an alien seeking initial admission to the United States and to later revoke that parole when those circumstances no

longer apply.[2] (Resp. Br. at 25-26.) The Government suggests that it has simply revoked Mr. Benitez's parole and that it is detaining him pursuant to this provision. This argument is both procedurally waived and wrong on the merits.

1. The Government Is Bound By Its Answer to Mr. Benitez's Habeas Petition.

As noted in Part I(B), *supra*, the Government responded to Mr. Benitez's habeas petition by stating that it was detaining Mr. Benitez pursuant to 8 U.S.C. § 1231(a)(6). (J.A. 31.) Nowhere did it suggest to the district court that it was actually detaining Mr. Benitez pursuant to its general parole authority under § 1182(d)(5)(A). The Government cannot raise a new issue like this for the first time in this Court where it was not preserved below. *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991). The Government made a similar attempt in the Eleventh Circuit to provide an alternative basis for its detention of Mr. Benitez by arguing that he was being detained pursuant to pre-IIRIRA provisions, but the

[2] The full text of this provision is as follows:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A).

Eleventh Circuit properly held that argument to have been waived. (J.A. 67 n.13.)

Moreover, the questions presented in Mr. Benitez's petition for a writ of certiorari were limited to the authority of the Government to detain Mr. Benitez under § 1231(a)(6).[3] This Court's Rule 14.1(a) clearly states, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." *See also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) (enforcing this rule to preclude a respondent from injecting a new justification for the decision below).

2. The Government's Parole Authority Does Not Justify Detention of an Alien Subject to an Order of Removal.

Even if this Court were inclined to consider an alternative statutory basis for Mr. Benitez's detention that was not raised below, § 1182(d)(5)(A) no longer has any application to Mr. Benitez. By its terms, § 1182(d)(5)(A) applies only to "any alien applying for admission to the United States." By the time the Government took Mr. Benitez into custody, he was subject to a final order of removal that he did not contest. Under no view could he be considered an alien applying for admission. The Government's authority to detain an alien subject to a final removal order is governed by § 1231.[4]

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[3] The Government's response to the petition also couched its version of the questions presented solely in terms of § 1231(a)(6).

[4] As the Government itself explained in its answer to the habeas petition, § 1231(a)(6) is the statute that "covers detention following entry of a final order of removal." (J.A. 31.)

D. Section 1231(a)(6) Is Not Limited to "Criminal Aliens" and Does Not Require Any Determination That an Alien Be Dangerous Before He Can Be Detained.

Throughout its brief, the Government discusses § 1231(a)(6) as if it only applied to "criminal aliens"[5] who have been determined to be dangerous.[6] While dangerous, criminal aliens might make the easiest target for the Government's policy arguments, § 1231(a)(6) applies to a whole host of aliens who are neither criminals nor dangerous. As more fully documented in Mr. Benitez's initial brief, the statute applies to aliens who are inadmissible because they have committed such sins as being poor, seeking certain jobs, allowing their visas to expire, or being physically helpless due to sickness or infancy. (Pet. Br. at 47.) *See also Zadvydas*, 533 U.S. 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.")

Thus, if the Court accepts the Government's arguments, then it necessarily will be interpreting § 1231(a)(6) to authorize the Government to give a life sentence to an alien who is inadmissible because he is poor or sick, but

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[5] *E.g.,* Resp. Br. at (I) (phrasing question presented as only applying to "continued detention of a criminal alien"), 14 (providing heading for entire argument that § 1231(a)(6) permits indefinite detention of "criminal aliens who have not been admitted" and characterizing § 1231(a)(6) as "Congress's express authorization for the Executive Branch to *detain* excluded criminal aliens")).

[6] *E.g.,* Resp. Br. at 13 (asserting that Mr. Benitez "insists he has a right to be released, notwithstanding any express determination by the government that he poses a risk to the public"), 22 (claiming that Mr. Benitez's interpretation of § 1231(a)(6) would "restrict the government's ability to prevent dangerous aliens from circulating through American society").

only hold a violent criminal for six months just because he had once been lawfully admitted for permanent residence. The text of § 1231(a)(6) thankfully does not permit such an absurd result. If Congress wishes to authorize indefinite detention for criminal aliens subject to a removal order who are determined to be dangerous, it is free to do so. Only then will the Court have to reach the constitutionality of this very different principle.

The Government insists that "this case and the others pending before the Court are not about paroled aliens who established stable and law-abiding lives in the United States." (Resp. Br. at 24.) Again, the Government misses the point. This case *is* about the proper interpretation of a statute that applies equally to "dangerous, criminal aliens" and "stable and law-abiding" aliens. Mr. Benitez does not contend that § 1231(a)(6) is unconstitutional either on its face or as applied to him. He merely contends that it must not be interpreted to permit indefinite detention.

The premise of the Government's distinction between criminal and law-abiding aliens appears to be that § 1231(a)(6) would not permit the indefinite detention of other inadmissible aliens subject to a removal order, so long as they are law-abiding. What is the basis for this presumption? The Government appears to be suggesting either that those inadmissible aliens have a constitutional right that criminal aliens do not have or that § 1231(a)(6) provides different detention authority for criminal and law-abiding aliens. Neither contention has any basis in law or in the language of § 1231(a)(6).

Congress does not appear to have had the same difficulty as the Government in understanding the scope of *Zadvydas* or the fact that § 1231(a)(6) does not authorize the indefinite detention of even the most dangerous aliens. In section 412(a) of Title IV of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 305 (2001), Congress enacted 8 U.S.C. § 1226a, which provides that the Attorney General shall take custody of any alien he certifies as a terrorist and "shall maintain custody of such an alien until the alien is

removed from the United States." 8 U.S.C. § 1226a(a)(1) (2004). Congress specifically addressed the possibility of indefinite detention for aliens who cannot be removed:

> **Limitation on indefinite detention.** An alien detained solely under paragraph (1) who has not been removed under section 1231(a)(1)(A) of this title, and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

§ 1226a(a)(6).

Importantly, § 1226a applies by its own terms both to inadmissible and deportable aliens. *See* § 1226a(a)(3)(A) (including, among aliens eligible for certification as terrorists, inadmissible aliens that are described in §§ 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), and 1182(a)(3)(B)). This statute illustrates Congress' understanding that § 1231(a)(6) does not authorize indefinite detention; otherwise, there would be no reason to include inadmissible aliens within the scope of § 1226a. In contrast to the silence in § 1231(a)(6), Congress' explicit handling and limitations on indefinite detention in § 1226a further confirms that it understands this Court's holding in *Zadvydas* to control § 1231(a)(6) regardless of the class of alien being detained.[7]

In short, the Government has failed to meet or overcome Mr. Benitez's argument that § 1231(a)(6) must mean the same thing when applied to him as when applied to Mr. Zadvydas.

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[7] Indeed, this Court concluded in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that one indicator that Congress did not intend § 1231(a)(6) to authorize indefinite detention was that, in contrast to the silence in § 1231(a)(6), another statute, 8 U.S.C. § 1537(b)(2)(C) (2001), provided for "continued detention" of an alien engaged in terrorist activities with a requirement that the Attorney General continue efforts to remove the alien and review the case every six months. 535 U.S. at 697.

II. THE GOVERNMENT HAS ALSO FAILED TO MEET MR. BENITEZ'S CONSTITUTIONAL ARGUMENTS.

The Government's arguments also fail to overcome Mr. Benitez's alternative argument that indefinite detention of inadmissible aliens ordered removed would raise a sufficiently serious constitutional question to warrant applying the same reasoning as in *Zadvydas*. The Government's arguments in response suffer from two different fatal flaws: (A) they depend on facts not present in this case, and (B) they create more separation of powers problems than they resolve.

A. The Government's Arguments Depend on Circumstances Not Present in Mr. Benitez's Case.

The Government's policy and constitutional arguments in favor of its asserted authority to detain Mr. Benitez depend on its assertion that Mr. Benitez and other aliens like him are dangerous and that Mariel Cubans who were allowed to enter and reside in the United States are no different from other aliens paroled pursuant to § 1182(d)(5)(A). The Government does not acknowledge, much less attempt to rebut, the detailed arguments in Mr. Benitez's initial brief that belie the foundation for the Government's position. (*See* Initial Br. at 38-46.)

For example, the Government's position that Mr. Benitez and similarly situated aliens are dangerous is belied by the facts that (1) nothing in § 1231(a)(6) requires a determination that a detained alien is dangerous to anyone, (2) the Cuban Review Panel has never determined that Mr. Benitez is dangerous, and (3) the panel has twice found that he had sufficiently proven that he was not dangerous to qualify him for release under the immigration regulations. (Answer Exh. J; Resp. to Cert. Pet. at 8-9.)

B. The Government's Position Does Not Recognize the Proper Role of the Judiciary Under the Facts of This Case.

The Government suggests that this Court would overstep its judicial role by enforcing any limits on the Government's ability to imprison aliens who were once paroled, but subsequently ordered removed. These arguments again overlook the facts of this case.

1. The Courts' Proper Role Is To Determine the Constitutional Consequences of the Political Branches' Decision to Invite and Welcome the Mariels Into Our Society.

In perhaps the most eloquent passage of its brief, the Government contrasts the roles of the political branches (largely the executive) with the role of the judiciary with regard to aliens seeking to enter our country:

> When an individual is formally admitted to the United States, a court's recognition and protection of a liberty interest does not *cause* the entry. The court's role (*e.g.,* in *Zadvydas*) simply delineates the *consequences*, statutory and constitutional, of an entry that has already been authorized by the political Branches and has been accomplished without judicial intervention. By contrast, when the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations.

(Resp. Br. at 20.)

This argument may have substantial appeal, but it provides no support for the Government in this case. If and when this Court orders the Government to release Mr. Benitez (subject to whatever supervision the political branches deem appropriate, *see* 8 U.S.C. § 1231(a)(3) (2003)), it will not *cause* an entry that the political branches have refused. The political branches acted in 1980. They did not, contrary to the tenor of the Government's argument, make the "quintessentially political determination that [Mr. Benitez] should not be admitted or released into the United States." To the contrary, the Carter Administration made the political judgment not only to allow Mr. Benitez and his compatriots to enter the United States and live among us, but to invite them to leave Cuba to be received here with an "open heart and open arms." (*See generally* Pet. Br. at 2-5; Amicus Br. of Fla. Immigrant Advocacy Center et al. at 16-30.)

Thus, in all except the most artificial sense of an asserted legal fiction, it was the political branches that *caused* Mr. Benitez's entry into the United States. Now it is up to the judicial branch to delineate the statutory and constitutional *consequences* of the Carter Administration's political decision.

2. The Government's "Just Trust Us" Procedural Due Process Arguments Ignore the Role of the Judiciary.

The Government asserts that its parole regulations satisfy any procedural due process rights that Mr. Benitez may have. (Resp. Br. at 43-49.) This argument boils down to a plea to "just trust us." The Court should reject this argument for at least two reasons: (1) the Government's procedures do not provide a neutral factfinder, and (2) Mr. Benitez's own circumstances demonstrate that the procedures are illusory.

First, while the Government explains its internal procedures in some detail (Resp. Br. at 45-47), it neglects

to mention who makes the ultimate determination whether to release a detained alien. The authority to release a detained Mariel Cuban rests in the discretion of the Associate Commissioner for *Enforcement*. 8 C.F.R. § 212.12(b) (2003). This officer is charged with "the planning, oversight, and advancement of *enforcement* programs engaged in interpretation of the immigration and nationality laws, and the development of Service policies to assist *enforcement* activities." 8 C.F.R. § 100.2(c)(2) (2003) (emphasis added). In other words, the adjudicator is also in charge of enforcing the laws against the claimant.

As it has in other recent contexts, this Court should reject this kind of "fox watching the hen house" procedure as a means of providing procedural due process. For example, in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Court rejected the Government's argument that due to the Executive's war powers and the "limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict," the courts should defer to the Executive's determination of whether a citizen captured on the battlefield was fighting United States forces, without any review by a neutral factfinder. *Id.* at 2645-48 (O'Connor, J., plurality op.)[8]; *see also Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance'. . . .") (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)).

[8] Although only three justices (the Chief Justice and Justices Kennedy and Breyer) joined Justice O'Connor's opinion, four others concurred that due process requires a hearing before a neutral factfinder to justify continued detention. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part) (joined by Ginsburg, J.) (contending that the stated reason for detention was invalid, but noting that if it were sufficient, the plurality's procedures would be required); *id.* at 2671 (Scalia, J., dissenting) (joined by Stevens, J.) (contending that detention could only be continued in conjunction with a criminal prosecution in court).

Second, contrary to the Government's contention that these procedures "are meaningful, as [Mr. Benitez's] own impending release demonstrates," (Resp. Br. at 47), Mr. Benitez's circumstances demonstrate beyond any doubt that the current procedures are illusory.

On December 12, 2001, less than six months after the Government first detained Mr. Benitez, the Cuban Review Panel first determined that Mr. Benitez was due to be released. (*See generally* Initial Br. at 7.) Nearly three years later, Mr. Benitez is still waiting to be released.[9] Mr. Benitez no longer has any reason to believe the Government's repeated assurances of his "impending release," and neither should this Court. *Cf. Ngo v. INS*, 192 F.3d 390, 398-99 (3d Cir. 1999) (finding INS violated procedural due process of detainee where it denied release multiple times based on nothing more than cursory reference to ten-year-old convictions); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1157-58 (W.D. Wash. 1999) (finding procedural due process violations in parole determinations because, among other things, there was no neutral decision maker); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (same).

3. The Government Fails to Appreciate the Difference Between a Hostile Nation and a Human Being Born in a Hostile Nation.

Finally, the Government raises the specters of national security and foreign relations in an effort to shield its treatment of Mr. Benitez and other detainees from judicial scrutiny. First, it suggests that the responsibility for the humane treatment of these people "more appropriately rests with the alien's country of origin" because Mr.

[9] His release was temporarily revoked due to a wholly unsupported charge that he participated in a planned escape, a charge he was never given the opportunity to refute. (J.A. 52-53, 55-58, 64 n.9.)

Benitez "is no more ours than theirs." (Resp. Br. at 47.) Then, the Government complains that Mr. Benitez's position in this case "will force the government to resort to new international diplomacy, 'trade sanctions,' and military force" to deal with countries that send their citizens here against our will.[10] (Resp. Br. at 48-49 n.27.) These arguments have an alarming flaw.

Our nation was founded on the principles that "all men are created equal" and that people are born with "unalienable rights." Since the Civil War and the enactment of the Fourteenth Amendment and, more recently, the enactment of laws prohibiting discrimination on the basis of ethnicity and national origin, we have fostered the belief that a person has the right to be treated humanely and with respect, even if he or she had the misfortune of being born in a nation that opposes the United States. Even if there were some logical foundation to the suggestion that our administration is teaching Fidel Castro a lesson by imprisoning people who fled his country, that suggestion has no place in our American society.

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[10] Not only does this argument ignore the fact that Mr. Benitez and the Mariels did not come to the United States against our will, it overlooks the fact that illegal aliens (*i.e.*, aliens who have gotten into the country without applying for admission at an immigration checkpoint) are fully protected against indefinite detention. *See* 8 C.F.R. § 241.13(3)(i) (2003); 66 Fed. Reg. 56,967, 56,969 (2001); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) (noting long recognition that illegal aliens have the additional constitutional rights possessed by those lawfully admitted).

This principle shatters the Government's argument that recognizing constitutional rights for paroled aliens will make our country vulnerable to rogue nations who want to dump their worst citizens on our shores. (Resp. Br. at 39-40.) If anything, the bizarre dichotomy that the Government cannot indefinitely detain illegal aliens, but can indefinitely detain aliens who applied for admission and were paroled, would only encourage the feared rogue nations to smuggle their violent criminals into our country.

If the political branches determine that we must retaliate against Castro or any other dictator or nation that tries to infringe on our sovereignty through mass emigration, our American ideals and, more importantly, our Constitution require that we take action against that dictator or nation itself, not the innocent victims. "[I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny." *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

CONCLUSION

For the foregoing reasons, the Court should reverse and 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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