No. 03-878

In The
Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In *Zadvydas v. Davis,* 533 U.S. 678 (2001), this Court interpreted the post-removal-period detention statute (8 U.S.C. § 1231(a)(6)) to limit detention to a period reasonably necessary to effectuate removal, generally presumed to be six months. In *Zadvydas*, the aliens in question were former permanent residents whom the government ordered removed on grounds of deportability due to criminal conduct. Mr. Martinez was ordered removed in 2001 on grounds of inadmissibility due to criminal conduct after the government had paroled him into the United States in 1980 during the Mariel Boatlift from Cuba.

The question presented is whether the Ninth Circuit erred in holding that, because section 1231(a)(6) applies uniformly to both inadmissible aliens and deportable aliens, no basis exists for construing the statute differently in this case from its construction in *Zadvydas* and, therefore, the statute does not authorize indefinite detention of an inadmissible alien who is under a final order of removal, but whom the government cannot remove in the reasonably foreseeable future.

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OPINIONS BELOW

The district court granted habeas corpus relief requiring the government to release Mr. Martinez on conditions based on *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), which held that this Court's construction of 8 U.S.C. § 1231(a)(6) (2000) in *Zadvydas v. Davis*, 533 U.S. 678 (2001), applies with equal force to aliens found inadmissible as it does to those found deportable, because the statute's text treats identically all categories of aliens within its scope. (Dist. Ct. Order Granting Pet. (Oct. 30, 2002).) Upon Mr. Martinez's motion for summary affirmance, and the government's request for summary disposition, in which it acknowledged that *Lin Guo Xi* controlled, the Ninth Circuit affirmed the district court's order of conditional release. (Ninth Circuit Order Granting Appellee's Mot. Summ. J. (Aug. 18, 2003).)

CONSTITUTIONAL PROVISIONS AND STATUTES

"No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . . " U.S. CONST. amend. V.

The statute regarding detention, release, and removal of aliens ordered removed states:

> (1) Removal period
>
> (A) In General
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> . . . .
>
> (3) Supervision after 90-day period
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. . . .

. . . .

(6) Inadmissible or criminal aliens

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).

STATEMENT OF THE CASE

The statute at issue involves aliens who have been ordered removed, not aliens seeking entry to this country. Section 1231(a)(6) governs detention of aliens ordered removed after the expiration of the 90-day removal period established in section 1231(a)(1). The statutory text covers broad categories of aliens ordered removed and treats them uniformly. Because the decision to order Mr. Martinez released on conditions depended on the text of the statute, and that text is immutable, its application to Mr. Martinez does not depend upon his particular circumstances or the details of the 1980 Freedom Flotilla from Mariel, Cuba. Nevertheless, this brief addresses both to inform the legal analysis.

A. The Government Obscures the Relevant Statutory Framework by its Use of "Excluded" and "Paroled" Alien to Refer to an Alien Ordered Removed as Inadmissible and Released on Conditions.

In its characterization of the statutory framework and throughout its brief, the government refers to Mr. Martinez and others similarly situated as "excluded" aliens "for ease of reference" (Br. for Pet'rs at 3), phrases the issue as involving "a right to be paroled into the United States,"

(Br. for Pet'rs at 12), and characterizes the relief granted by the district court as "parole" (*id*.). Use of this nomenclature obscures the relevant statutory framework and the relevant facts. Under section 1231(a)(6), Mr. Martinez is an alien "ordered removed who is inadmissible," whose court-ordered relief from indefinite detention was release on supervision under 8 U.S.C. § 1231(a)(3), not parole under 8 U.S.C. § 1182(d)(5) (2000 & Supp. I 2001).

1. As an Alien "Ordered Removed Who Is Inadmissible," Mr. Martinez Is Subject to the Post-Removal-Period Detention Provisions of 8 U.S.C. § 1231(a)(6).

The government's persistent use of the term "excluded" conflicts with the statutory language adopted in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), and reiterated in the USA PATRIOT Act, Pub. L. No. 107-56, Title IV, § 412(a), 115 Stat. 350 (2001). In IIRIRA's amendments to the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*., Congress eliminated the term "excludable" alien and created a new, broader category of aliens termed "inadmissible." 8 U.S.C. § 1182.[1] In 2001, Congress amended the INA again after *Zadvydas v. Davis*, 533 U.S. 678 (2001), to address detention issues and, again, treated aliens ordered removed the same, whether the removal order was based on deportability or inadmissibility. 8 U.S.C. § 1226a(a)(6) and (7) (Supp. I 2001).

In providing for the post-removal-period detention of aliens in section 1231(a)(6), Congress treated aliens ordered removed as inadmissible under 8 U.S.C. § 1182 in the same manner as aliens ordered removed under 8 U.S.C.

[1] The term "excludable" derives from statutory exclusion proceedings. 8 U.S.C. § 1226 (1994), *amended by* Pub. L. No. 104-208, § 303(a), 110 Stat. 3009 (1996). Congress abolished separate proceedings for exclusion and deportation in favor of a single proceeding for both inadmissible and deportable aliens, now called "removal proceedings." 8 U.S.C. § 1229a (2000).

§ 1227 (2000 & Supp. I 2001). The first clause of section 1231(a)(6) groups aliens formerly classified as excludable – arriving aliens or those like Mr. Martinez who were paroled into the United States – with those who gained entry into the United States without having been admitted, such as those who are present without having been inspected at a border. 8 U.S.C. § 1182(a). This class includes aliens deemed inadmissible for health-related grounds, criminal convictions, prostitution, security-related grounds, illegal entrance, unlawful presence, and miscellaneous other grounds. The detention statute makes no distinctions based on entry among the groups covered by section 1182.[2]

The second clause of section 1231(a)(6) isolates subcategories, all of which pertain to aliens removable due to deportability under section 1227: aliens who violated nonimmigrant status, failed to comply with health-related conditions for admission, committed criminal offenses, engaged in security-related misconduct, or otherwise present a risk to the community or of flight. The category of removable due to deportability also treats aliens with criminal convictions uniformly, regardless of whether they had been admitted only temporarily or had received permanent resident status.

Section 1231(a)(6) draws no distinctions among classes of aliens: deportable aliens can have the same type of criminal history as inadmissible aliens. Further, the immigration status of aliens subject to final removal orders bears no relation to their previous legal status. Regardless of their previous status, removable aliens stand on the same legal footing: they no longer have the right to enter or to remain in the United States. 8 U.S.C. § 1229a(e)(2) (defining "removable" as aliens ordered removed on grounds of inadmissibility or deportability).

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[2] By regulation, the government treats inadmissible aliens who entered without inspection as protected under *Zadvydas*. 8 C.F.R. § 241.13 (2004). *See also* 8 C.F.R. § 241.4 (2004) (providing for continued detention of all removable aliens except Mariel Cubans).

The uniform treatment of the two groups of removable aliens also inheres in the statute enacted after *Zadvydas* that specifically authorizes the indefinite detention of an alien presenting a national security risk, without regard to whether the alien is deportable or inadmissible. 8 U.S.C. § 1226a. These provisions apply only to those aliens certified by the Attorney General as: a) inadmissible and involved with sabotage, espionage, or subversion (8 U.S.C. § 1182(a)(3)(A)(i) and (iii)); b) deportable and involved with sabotage, espionage, subversion, or terrorism (8 U.S.C. § 1227(a)(4)(A)(i) and (iii) and 1227(a)(4)(B)); and c) regardless of inadmissibility or deportability, otherwise engaged in activity that endangers national security (8 U.S.C. § 1226a(a)(3)(A) and (B)). The statute includes a number of procedural protections absent from section 1231(a)(6). 8 U.S.C. § 1226a(a)(3), (6), and (7)(b). Regardless of whether the removal is based on inadmissibility or deportability, an alien certified under section 1226a(a) "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." 8 U.S.C. § 1226a(a)(6) ("Limitation on indefinite detention").

The government's persistent use of "excluded" thus fails to respect three legislative decisions of Congress: to treat equally under the detention statute aliens who are removable as inadmissible and those who are removable as deportable; to replace the "excludable" category with the broader category of inadmissible aliens; and to provide explicit procedural rules where, as with national security risks, indefinite detention may result, regardless of whether deportability or inadmissibility forms the basis for removal.

2. The Parole Statute Addresses Entry into the United States and Does Not Provide for Authority That Duplicates Section 1231(a)(6)'s Authorization for Release on Conditions.

The government's claim that the issue involves an asserted right to "parole" refers to the wrong statute. Parole is a device for temporary release of aliens seeking admission for, among other reasons, urgent humanitarian reasons. 8 U.S.C. § 1182(d)(5). Once the purpose of parole has been satisfied or parole has been revoked, the parole statute refers to admission and removal procedures for disposition of the former parolee: "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). Thus, revocation of parole leads to a separate proceeding to determine removal for inadmissibility, although the same grounds may lead to both revocation of parole and removal. 8 U.S.C. § 1229a.

Once the removal order becomes final, the Attorney General is charged with effecting the alien's removal within 90 days. 8 U.S.C. § 1231(a)(1). Failing that, the form of release authorized under sections 1231(a)(3) and (6) is release on supervision. Such release does not change the alien's legal status. The *Zadvydas* Court recognized this distinction in stating that the issue was not one of conferring on aliens ordered removed a right to be admitted but to release on conditions from indefinite detention. 533 U.S. at 695. The government's use of parole confuses the procedures for allowing aliens into the country with the procedures for removing them from the country.

B. The Historical Context of the Freedom Flotilla Does Not Warrant Special Indefinite Detention for Mariel Cubans.

In 1980, the United States witnessed the migration of thousands of Cubans seeking asylum. Contrary to government's assertions, these individuals were not attempting

to enter the United States illegally. (Br. for Pet'rs at 7.) The Cubans were responding to the invitation of the United States to provide safe harbor from a repressive Communist regime following an announcement by Castro that those who wanted to leave could do so from Mariel Harbor.

President Carter announced on April 14, 1980, that the United States would admit as refugees up to 3,500 of the more than 10,000 Cubans who had taken sanctuary in the Peruvian Embassy in Havana, Cuba. The newly amended provisions of 8 U.S.C. § 1157(b) (Supp. V 1981) provided for admission of refugees in response to an unforseen emergency situation and set aside $4.25 million for resettlement assistance.[3] Flights began to evacuate the refugees to Costa Rica where their requests for admission would be processed.

Two days later, Castro suspended the airlift and announced that Cubans in Florida could send boats to retrieve their relatives from Mariel Harbor. The first boats containing Cuban refugees arrived in Key West on April 21, 1980. ALEX LARZELERE, THE 1980 CUBAN BOATLIFT: CASTRO'S PLOY – AMERICA'S DILEMMA 122-24 (1988). Upon arrival, the Immigration and Naturalization Service allowed the refugees to land and began processing them for resettlement and releasing them to family members and relief agencies. Because they arrived without visas, the refugees were paroled into the United States under section 1182(d)(5).

The number of Cubans who left by boat to seek asylum in the United States far exceeded both President Carter's expectations and the annual immigration quotas. In a memorandum to the Secretary of State on May 1, 1980, the President announced that 9,000 Cubans had been admitted as refugees, and authorized the admission of an additional 10,500 refugees under 8 U.S.C. § 1157(b)

[3] *See* Pres. Determ. No. 80-161; 45 Fed. Reg. 28,079 (April 14, 1980); Cuban Refugees in the Peruvian Embassy in Havana, PUB. PAPERS 689 (April 14, 1980).

during the remainder of the fiscal year. Pres. Determ. No. 80-17; 45 Fed. Reg. 29,785 (May 1, 1980).[4]

The President indicated government approval of the flotilla at a press conference in Miami on May 5, 1980:

> [L]iterally tens of thousands of others 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. . . . But we'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.

President Carter's Speech of May 5, 1980, as quoted in *United States v. Frade*, 709 F.2d 1387, 1395 (11th Cir. 1983). When the number of refugees topped 40,000 on May 14, 1980, the Carter Administration issued a new policy. For the first time, Cubans would have to be screened before departing Cuba. Cuban Refugees, PUB. PAPERS 912-16 (May 14, 1980). Screening procedures broke down, however, and on May 20, 1980, the White House announced that "Cubans arriving in Florida would be treated as applicants for asylum, not as refugees." Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. TIMES, May 21, 1980, at A24. *See* Cuban Asylees, PUB. PAPERS 990 (May 29, 1980) (describing Cubans as asylees).

On June 20, 1980, the Administration declared that "Cubans who have arrived in the United States during the

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[4] Since 1981, the United States has followed an effective if controversial policy of interdiction and offshore screening to avert mass migration into this country. U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 169-170 (1994). In 1994, the United States and Cuba established migration accords to promote legal, orderly migration between the two countries. The United States agreed to provide at least 20,000 visas to Cubans annually in return for Cuba's discouragement of unsafe migration attempts. U.S.-Cuba Joint Communique on Migration, Sept. 9, 1994, DEP'T ST. DISPATCH, Sept. 12, 1994, Vol. 5, No. 7, at 603.

period April 21-June 19, 1980, and who are in I.N.S. Proceedings as of June 19, 1980, and all Haitians . . . will have their parole into the country renewed for a six-month period as 'Cuban/Haitian Entrants (status pending)'." Special to the New York Times, *Text of State Dept. Statement on a Refugee Policy*, N.Y. TIMES, June 21, 1980, at 8. This newly-created status allowed the President to circumvent the annual refugee quotas that Congress had established and to avoid the restrictions on the use of parole to admit refugees imposed by the newly-enacted Refugee Act of 1980. 8 U.S.C. § 1159 (Sipp. V 1981).[5]

Ultimately, more than 125,000 Cubans emigrated to the United States in 1980 during the Freedom Flotilla from Mariel Harbor. Although they were "paroled" rather than "admitted," these individuals enjoyed refugee treatment, if not formal refugee status. They were not detained pending exclusion proceedings, but were immediately processed for resettlement, received government benefits, and were the beneficiaries of special legislation to adjust to lawful permanent resident status. *E.g.,* Refugee Education Assistance Act, Pub. L. No. 96-422, § 501, 94 Stat. 1799, 1809-10 (Oct. 10, 1980) (codified at 8 U.S.C. § 1522 (Supp. V 1981)); Immigration Reform & Control Act, Title II, § 202, Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, 100 Stat. 3359, 3404 (1986). *See generally* Br. of the Florida Immigrant Advocacy Center and Rafael Peñalver as *Amici Curiae*; *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004); Br. of National Refugee Resettlement and Advocacy Organizations as *Amici Curiae* in Support of Respondent Martinez (Refugee Resettlement Agencies' *Amicus* Brief (U.S. filed Aug. 2, 2004)).

In the ensuing years, the United States was faced with the problem of administering a small but growing population of Cuban citizens who had been ordered deported, but whom Cuba would not accept. Except for a minor

[5] For the fiscal year 1980, Congress set the overall immigration quota at 270,000 visas and added to this number an additional 50,000 visas for refugees, which included 5,000 for asylees.

exception in 1984, Cuba has refused to repatriate either the small number of Mariel Cubans who were found excludable upon their seeking entry or those whose parole was later revoked as a result of crimes committed in the United States.[6] After a failed attempt to reinstate the 1984 agreement, the Justice Department created a subcategory for "Mariel Cubans" and the Cuban Review Panel, to consider parole. 8 C.F.R. § 212.12 (1988); 52 Fed. Reg. 48,802 (Dec. 28, 1987).[7] The government's indefinite detention policy affects Mariel Cubans who remain imprisoned although they have long-since completed serving criminal sentences. The policy also affects citizens of other countries with whom the United States does not have repatriation agreements.

Indefinite detention for Mariel Cubans ordered removed is harsh. The government claims the prospect of detention for life is merely a "spectre." (Br. for Pet'rs at 48.) But Hector Peñalver spent the remainder of his life in immigration detention. Shortly after he petitioned for habeas corpus relief in the district of Oregon in 2001, Mr. Peñalver died at the age of 47 in a federal prison cell, having spent the last six years in immigration detention

[6] On December 14, 1984, the United States and Cuba agreed that Cuba would receive 2,746 of these Mariel Cubans at the rate of approximately 100 per month. In exchange, the United States would accept approximately 20,000 Cubans, including 3,000 political prisoners. In the next six months, 201 excluded Mariel Cubans were returned to Cuba, with at least 73 of these Cubans being re-imprisoned upon their arrival. Castro suspended the 1984 agreement when relations between the United States and Cuba broke down. *See Fernandez-Roque v. Smith*, 600 F. Supp. 1500, 1501 n.2 (N.D. Ga. 1985); *see also Rodriguez v. Thornburgh*, 831 F. Supp. 810, 811 (D. Kan. 1993); *Perez v. Neubert*, 611 F. Supp. 830, 832-33 (D.N.J. 1985).

[7] Separate regulations applied to all other aliens ordered removed – whether based on grounds of inadmissibility or deportability – including Cubans who were paroled into the United States before or after 1980. 8 C.F.R. § 241 (2004). These regulations do not apply to aliens apprehended at the border even if paroled into the country. 8 C.F.R. §§ 241.13(b)(3)(I) and 241.3(a).

awaiting removal to Cuba. He had been among those who sought asylum in the Peruvian Embassy in Havana. *Peñalver v. Smith*, CV 3-01-00250-PA (D. Or. 2001). The 25 Mariel Cubans detained in the District of Oregon who sued for release spent a total of more than 134 years in immigration detention awaiting removal. One had been detained for more than 17 years before the district court granted habeas relief. *Céspedes-León v. Smith*, CV 3-01-00371-PA (D. Or. 2003). Several had been detained 10 years or more. *Arano-Alemán v. Smith*, CV 3-01-00370-PA (D. Or. 2003) (10 years); *Vigil-Hernández v. Smith*, CV 3-01-00378-PA (D. Or. 2003) (11 years); *Zayas v. Smith*, CV 3-01-00381-PA (D. Or. 2003) (10 years). The prospect of indefinite, potentially permanent, detention is no mere spectre. *See generally* Brief of American Bar Association as *Amicus Curiae*, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (ABA *Amicus* Brief); Brief of Religious Organizations as *Amici Curiae* in Support of Respondent Martinez (U.S. filed Aug. 2, 2004).

C. Mr. Martinez Was Paroled into the United States in 1980 and Received a Final Removal Order in 2001.

At the age of 25, Mr. Martinez fled Cuba by boat and arrived in the United States on June 8, 1980. (Gov't Mot. for Extension of Time (Gov't Mot. Extension) at 3.) He was paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) and eventually settled in Fresno, California, where his daughter, a United States citizen, still resides. (*Id.*; Certified Administrative Record (CAR) at A-000150.) In 1991, the government denied Mr. Martinez's application to adjust his status to lawful permanent resident because of criminal conduct. (Gov't Mot. Extension at 3.) The order denying Mr. Martinez's application stated: "Applicant will continue in status as an alien paroled into the United States pending resolution of the matters pertinent to his arrival in the United States." (Pet'r Ex. to Pet. for Writ of Habeas Corpus (Pet'r Ex.) at A-000074.)

Following three criminal convictions for petty theft, burglary, and attempted sex abuse, the government

revoked Mr. Martinez's immigration parole on December 28, 2000. (Gov't Mot. Extension at 3.) The notice of parole revocation invoked 8 U.S.C. § 1182(d)(5) and instructed: "[Y]our parole status is being revoked and . . . you will be placed in Removal Proceedings." (Pet'r Ex. at A-000070.) The government took Mr. Martinez into custody "pursuant to the authority contained in section 236 of the Immigration and Naturalization Act [8 U.S.C. § 1226]." (CAR at A-000100.) The government alleged as grounds for removal the failure to possess a valid visa, permit, entry document, or other suitable travel document, in addition to criminal conduct. (Gov't Supplemental Mot. to Hold in Abeyance, Attach. A at 4.)

The removal proceedings held on January 24, 2001, pursuant to 8 U.S.C. § 1229a, resulted in a final order that Mr. Martinez be removed from the United States to Cuba. Mr. Martinez consented to removal, did not seek protection under the Convention Against Torture, and did not appeal the removal order. Although there was no prospect of removal to Cuba, Mr. Martinez remained in immigration detention. On February 8, 2001, the government made an internal request that travel documents be obtained for Mr. Martinez (Pet'r Ex. at A-000157-164), but no such request was made of Cuba or any other country.

Mr. Martinez was interviewed twice by the Cuban Review Panel while at United States Penitentiary Terre Haute, first on May 1, 2001, and again on March 15, 2002. On both occasions, the Panel denied release based on his prior criminal behavior, although the second Panel acknowledged he was presently non-violent. (CAR at A-000139-43.) Following the March 2002 interview, Mr. Martinez was transferred to a medium security federal prison in Oregon – Federal Correctional Institution Sheridan – to await removal to Cuba.

D. The District Court Granted Mr. Martinez Release Subject to Conditions Based on Section 1231(a)(6)'s Uniform Treatment of Inadmissible and Deportable Aliens.

On July 19, 2002, Mr. Martinez sued for habeas corpus relief under 28 U.S.C. § 2241 (2000), challenging his indefinite detention as a result of the government's inability to remove him to Cuba. (Pet. for Writ of Habeas Corpus.) Mr. Martinez also raised a procedural due process challenge to the Cuban Review Plan. Upon the issuance of *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), on August 1, 2002, the government moved to stay Mr. Martinez's petition while it sought rehearing *en banc*. (Gov't Supp. Mot. to Hold in Abeyance.) In its motion, the government conceded 8 U.S.C. § 1231(a)(6) provided the legal basis for detaining Mr. Martinez. (*Id*. at 4.)

In *Lin Guo Xi*, the Ninth Circuit, employing traditional canons of statutory construction, looked to the language of section 1231(a)(6) and concluded that the statute expressly applies to both inadmissible aliens and aliens removable by deportation. *Lin Guo Xi*, 298 F.3d at 835-36. The court rejected the government's argument that the statute should be construed differently depending upon the category into which the alien fell. The Ninth Circuit found that the plain language of the statute forbids such a "bifurcated construction," and that such an approach would be "untenable." *Lin Guo Xi*, 298 F.3d at 836-37. The court concluded that "the clear text of the statute, coupled with the Supreme Court's categorical interpretation, leaves us with little choice but to conclude that *Zadvydas* applies to inadmissible individuals." *Lin Guo Xi*, 298 F.3d at 836.

On September 18, 2002, over Mr. Martinez's objection, the district court stayed the petition for 30 days. (R. of Hr'g (Sept. 18, 2002).) When the Ninth Circuit denied the government's petition for rehearing in *Lin Guo Xi*, Mr. Martinez, through counsel, immediately moved for an order dissolving the stay and directing the government to release him from indefinite detention because repatriation to Cuba was not foreseeable. (Pet'r Mot. for Order Dissolving Stay

and Directing the INS to Release Him from Indefinite Detention.) After further briefing and a hearing on October 28, 2002, the district court ordered Mr. Martinez released on conditions:

> [Martinez's] motion to dissolve stay and for immediate release is granted. Respondent's motion to hold proceedings in abeyance is denied. The petition for habeas corpus relief is granted. Respondents are ordered to release [Martinez] immediately subject to reasonable conditions.

(Order (Oct. 30, 2002).) Having granted relief on statutory grounds, the court did not reach the constitutional merits of indefinite detention or the procedural due process claim.

Instead of releasing him, the government moved Mr. Martinez to a county jail in rural Oregon, where detainees were forced to sleep on floors without blankets, socks, or underwear. (Pet'r Mot. for Order to Show Cause at 2.) The government then set conditions of release that included a $7,500 bond that Mr. Martinez had no means to meet. The government did not interview Mr. Martinez to assess his ability to post a bond or to determine what conditions of release would be appropriate before setting them. Not until December 23, 2002, did the government interview Mr. Martinez and conclude he was unable to post any amount of bond. (Pet'r Status Report at 2-3.) In April 2003, the government transferred Mr. Martinez to a halfway house, from which he was later released. (Pet'r Notice of Mootness at 1.)

Although the government appealed the conditional release order, it sought and received a stay of the briefing, but not of the release order, pending the disposition of its petition for certiorari regarding the application of section 1231(a)(6) to inadmissible aliens in *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003), *cert. denied sub nom. Snyder v. Rosales-Garcia*, 539 U.S. 941 (2003). Following the denial of that petition, and the government's decision not to petition this Court to review *Lin Guo Xi*, Mr. Martinez moved for summary affirmance. (Mot. Summ. Affirmance.) The government's response again

acknowledged that *Lin Guo Xi* controlled and requested summary disposition as well. (Resp. to Mot. for Summ. Affirmance at 6.) The Ninth Circuit affirmed. (Order (Aug. 18, 2003).) On March 1, 2004, this Court granted certiorari.

SUMMARY OF ARGUMENT

The text of section 1231(a)(6) treats deportable aliens and inadmissible aliens in the same manner. Upon the entry of a final order of removal, both inadmissible and deportable aliens are in the same legal position. *Zadvydas* construes the statutory language to limit the period of detention of aliens removable for deportability, and the same statutory language means the same thing for aliens removable for inadmissibility.

The statutory structure of the immigration laws strongly supports this construction. Mariel Cubans are in the same category of inadmissible aliens that encompasses a broad range of other aliens, including those who entered without permission or who are inadmissible for a myriad of reasons unrelated to criminal convictions. By adopting a single removal proceeding for both inadmissible and deportable aliens, Congress eliminated any reason for distinguishing post-removal-period detention of those removable as inadmissible from that of those removable as deportable. No precedent warrants judicial fragmentation of the post-removal-period detention statute to interpret the statute differently according to the alien's former legal status. That status has been extinguished in the proceedings leading to the removal order.

Section 1231's uniform treatment of aliens who have been ordered removed is especially highlighted by Congress' explicit law on indefinite detention of those presenting national security risks. Unlike section 1231(a)(6), section 1226a explicitly authorizes indefinite detention and sets out procedures for such an extreme measure. In contrast, neither the text of section 1231(a)(6) nor its legislative history reflects an intention to authorize indefinite detention of any class of aliens.

Reliance on the government's parole authority is misplaced. Section 1182(d)(5) is a release – not a detention – statute. When parole is terminated or revoked, the statute explicitly refers to the statute relating to the admission and removal processes. Moreover, the government has mischaracterized Mr. Martinez's claim as one for admission when in fact he requested only release pending removal.

The government basically argues to the Court a policy that Congress has never adopted: that one class of inadmissible aliens should be subjected to different and harsher post-removal-period detention, which could include life imprisonment. This argument finds no support in the text or structure of the statute. Regardless of the many reasons such disparate treatment would be bad policy, the argument is one for Congress, not the Court.

Even if resort to the doctrine of constitutional avoidance were necessary, Mr. Martinez's indefinite detention would raise grave constitutional concerns under substantive and procedural due process. The Sixth Circuit *en banc* found that indefinite detention of inadmissible aliens would violate substantive due process. The government's position that Mr. Martinez is not a person and therefore has no interest in avoiding indefinite detention is contradicted by solid precedent placing human liberty as the highest of values. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The authority upon which the government relies has been superseded by statute. While severe limits on formal admission may apply, even to a man who has sojourned in this country for 24 years, Mr. Martinez cannot be detained indefinitely without the procedural and substantive protections that apply to all persons.

ARGUMENT

I. BECAUSE THE STATUTE TREATS BOTH CATEGORIES OF ALIENS IN THE SAME MANNER, THIS COURT'S CONSTRUCTION OF 8 U.S.C. § 1231(a)(6) IN *ZADVYDAS* TO PRECLUDE INDEFINITE DETENTION OF DEPORTABLE ALIENS REQUIRES THE SAME CONSTRUCTION OF THE STATUTE TO PRECLUDE INDEFINITE DETENTION OF INADMISSIBLE ALIENS.

Mr. Martinez was released from indefinite detention on supervision because the district court and the Ninth Circuit followed the language of section 1231(a)(6) and the precedent of *Zadvydas*. Mr. Martinez is in the statutory class of inadmissible aliens that section 1231(a)(6) treats in the same manner as aliens removable due to deportability such as Messrs. Zadvydas and Ma. Because *Zadvydas* authoritatively construed section 1231(a)(6) to limit detention for purposes of removal when a deportable alien cannot be removed within the reasonably foreseeable future, and because the statute treats inadmissible aliens in the same manner as deportable aliens, *stare decisis* requires the application of the *Zadvydas* construction of section 1231(a)(6) to Mr. Martinez. *Lin Guo Xi v. INS*, 298 F.3d 832, 836 (9th Cir. 2002); *accord Rosales-Garcia v. Holland*, 322 F.3d 386, 403-08 (6th Cir. 2003) (*en banc*); *Borrero v. Aljets*, 325 F.3d 1003, 1009 (8th Cir. 2003) (Heany, J., dissenting).

By attempting to frame the issue before the Court as one of admission rather than detention, the government skips much of the decisive statutory construction question concerning detention of inadmissible and deportable aliens for the purpose of removal. As in *Zadvydas*, this case does not involve whether to confer upon aliens a right to admission to the United States but only "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." 533 U.S. at 695. Because the plain meaning of the clause forming the grammatical subject of

section 1231(a)(6) resolves the case, the Court need not address the constitutional issues surrounding the application of the grammatical predicate to inadmissible aliens. *Zadvydas*, 533 U.S. at 689 ("this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (citations omitted)).

A. In 8 U.S.C. § 1231(a)(6), Congress Expressed in Plain Terms That Inadmissible Aliens Are to Receive the Same Treatment as Deportable Aliens.

Because this case calls upon the Court to construe section 1231(a)(6), the language of the statute itself provides the starting point. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). The statutory text of section 1231(a)(6) requires that an inadmissible alien be treated in the same manner as a deportable alien after the expiration of the removal period.

1. The Plain Language of the Statute Requires Equal Treatment of Both Inadmissible and Deportable Aliens.

In the plain words of the text, Congress has unequivocally answered the question whether deportable and inadmissible aliens should be treated in the same manner: the parallel structure of section 1231(a)(6) allows no distinction among classes of aliens. The grammatical subject of the sentence sets out two adjectival clauses that describe groups who are subject to the same predicate:

> An alien ordered removed who is [1] inadmissible under section 1182 of this title, [2] [or] removable

> under section 1227(a)(1)(c), 1227(a)(2), or 1227(a)(4) of this title or. . . .

8 U.S.C. § 1231(a)(6) (bracketed inserts from *Zadvydas*, 533 U.S. at 682). Section 1182 describes inadmissible aliens, and section 1227 describes deportable aliens. The plain meaning of the statute is that the designated groups are subject to the same predicate – the detention provision this Court construed in *Zadvydas*. *See Ron Pair Enterprises*, 489 U.S. at 241 (statute's meaning was also "mandated by the grammatical structure of the statute").

Because no ambiguity appears in the statute's uniform treatment of the designated groups – aliens who are removable due to inadmissibility and those who are removable due to deportability – "judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). In the absence of an exception in the language of the statute, "the courts can make none." *French's Lessee v. Spencer*, 62 U.S. (21 How.) 228, 238 (1858). Because no extraordinary circumstances warrant deviation from the statute's plain meaning, "the sole function of the courts is to enforce it according to its terms." *Ron Pair Enterprises*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

2. *Zadvydas* Construed the Statute.

Even if the indefinite detention of inadmissible aliens presented no constitutional issue (and it does, *infra* at Point II), the holding of *Zadvydas* was limited to statutory interpretation: "[W]e construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal court review." 533 U.S. at 682. This ruling followed logically from the discussion of the doctrine of constitutional avoidance as an aid in the construction of statutes. *Zadvydas*, 533 U.S. at 689. The Court recognized that the broad scope of the statute encompassed "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. The holding interpreted the words of the statute:

> [W]e read an implicit limitation [on the length of detention] into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.

Zadvydas, 533 U.S. at 689. This holding, coupled with the uniform treatment the removal statute accords deportable and inadmissible aliens, means that the statute does not permit indefinite detention of inadmissible aliens.

The plain text of the statute as interpreted by this Court compels this conclusion even though the Court in *Zadvydas* did not reach the question of the statute's application to aliens who had not yet gained initial entry. 533 U.S. at 682. The Court exercised the jurisprudential restraint that limits decisions to the issues raised in the petition for certiorari. SUP. CT. RULE 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Lopez v. Davis*, 531 U.S. 230, 241 n.6 (2001). Nonetheless, the inexorable application of *Zadvydas* to inadmissible aliens not only inhered in the majority's opinion, Justice Kennedy explicitly recognized it in dissent: "[I]t 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. Now with the question squarely before the Court, the statute permits a single construction: both classes of aliens are subject to the same grammatical predicate this Court construed in *Zadvydas*.

3. Statutory Construction Does Not Permit Varying Interpretations Depending on the Canon of Construction Applied.

The avoidance of constitutional doubt is a well-established rule to assist in the construction of statutory language. *See, e.g., Zadvydas*, 533 U.S. at 689 (citing cases); *Jones v. United States*, 526 U.S. 227, 239-40 (1999) (citing cases). "Out of respect for Congress," the Court "assume[s] legislation is written in light of constitutional limitations." *Jones*, 526 U.S. at 240 (quoting *Rust v. Sullivan,* 500 U.S. 173, 191 (1991)).

The government has offered no precedent that permits courts to vary the construction of the same statutory language depending on the applicable canon of statutory construction, nor is there precedent that allows the doctrine of constitutional avoidance to fragment a statute by judicial construction.[8] The suggestion that the term construed in *Zadvydas* has a different meaning for different classes in the statute runs counter to the rule requiring intra-statutory consistency. *See* Br. of American Civil Liberties Union as *Amicus Curiae*, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (ACLU *Amicus* Brief) (demonstrating that government's approach will embroil the courts in continual and unnecessary constitutional adjudication).

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[8] The only cases the government offers do not involve ascribing different meanings for the same words in a statute. (Br. for Pet'rs at 29.) In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court qualified by construction the words "full power to hear and determine all questions" in maritime employment compensation claims to cover the determination of only non-jurisdictional facts by the administrative agency. 285 U.S. at 62. The statute meant the same thing for all claimants, with the same qualification that the courts would ultimately decide whether the claim was within the agency's jurisdiction to determine. Further, the Petitioner's reliance on *Lane v. Pena*, 518 U.S. 187 (1996), is misplaced because that case did not involve constitutional avoidance, the statutory language was contained in two separate statutes, not the same language in the same sentence, and the case involved the requirement of express waiver of sovereign immunity, which was lacking.

Because "identical words used in different parts of the same act are intended to have the same meaning," *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986)), the identical words in the same sentence of a statute must also be given the same meaning. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (the rule of intra-statutory consistency is "at its most vigorous when a term is repeated within a given sentence"); *see Rasul v. Bush*, 124 S.Ct. 2686, 2696 (2004) ("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."). The government admitted as much in its briefing in *Zadvydas* and its companion case, when it recognized "the unambiguous intent of Congress that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6)." Brief for Petitioner, at 46, *Ashcroft v. Ma*, No. 00-38 (U.S. filed June 28, 2001).[9] This case requires only the logical application of controlling precedent to a parallel group listed in the same statute.

[9] This recognition of the uniform statutory treatment of removable aliens under the post-removal-period detention statute was not an isolated admission: "[W]here Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category"; "Congress made no distinction between aliens who have resided in this country, regardless of how long, and aliens who have never resided here, when it authorized the Attorney General to detain beyond the removal period"; and "in IIRIRA, Congress took a significant step toward eliminating distinctions between the treatment of resident aliens and aliens applying for admission when it created one new proceeding, termed a 'removal' proceeding, in which to determine both expulsion and exclusion cases, replacing the formerly distinct deportation and exclusion proceedings." *See* Brief for Petitioner, *Ashcroft v. Ma*, No. 00-38, at 17 and 47; Brief for Respondent, *Zadvydas v. Davis*, No. 99-7791, at 14 (U.S. filed Jan. 5, 2001).

4. Under the Doctrine of *Stare Decisis*, *Zadvydas* Controls the Meaning of the Predicate Clause of the Statute.

The doctrine of *stare decisis* controls this case. In *Zadvydas*, the Court interpreted a particular phrase in the relevant statute: "may be detained beyond the removal period." 533 U.S. at 688-89, 699. Therefore, the meaning of that phrase construed in *Zadvydas* should be construed identically in the present case. *United States v. Wells*, 519 U.S. 482, 495 (1997) (there is a presumption "that Congress expects its statutes to be read in conformity with this Court's precedents."). This is especially true where Congress, subsequent to *Zadvydas*'s interpretation, explicitly authorized indefinite detention in national security cases. 8 U.S.C. § 1226a.

B. The Statutory Context Supports the Plain Terms of the Statute and Contradicts the Government's Arguments.

Context also provides statutory meaning. *Hibbs v. Winn*, 124 S.Ct. 2276, 2285 (2004); *Bailey v. United States*, 516 U.S. 137, 145 (1995). Here, the statutory context bolsters the conclusion that the detention statute treats inadmissible and deportable aliens identically. IIRIRA eliminated the category of "excludable" aliens and instead moved that class of aliens into the same category of inadmissible aliens as those who entered without inspection, among others. 8 U.S.C. § 1182(a). The post-removal-period detention of this broad class of inadmissible aliens does not trigger the concerns raised by the government's policy arguments any more than does the post-removal-period detention of the class of aliens removable by deportation. Further, subsequent legislation specifically provided for indefinite detention of aliens who present security risks in explicit terms entirely absent from section 1231(a)(6). The statutory context supports equal treatment for inadmissible and deportable aliens and undercuts disparate treatment for aliens formerly termed excludable.

1. The Statutory Context Provides No Basis for Disparate Treatment of Deportable and Inadmissible Aliens under the Detention Statute.

The statutory context demonstrates that, under section 1231(a)(6), Congress intended uniform treatment of removable aliens, whether the alien is deportable or inadmissible. Once they are subject to a final removal order, all aliens, regardless of their prior status, have had their right to remain in the United States extinguished. The government's statutory analysis is flawed by its reliance on four categories of aliens that are irrelevant under section 1231(a)(6): permanent residents, non-immigrants, those who enter without inspection, and those stopped at the border seeking admission. (Br. for Pet'rs at 2.) Aliens formerly admitted as permanent residents and non-immigrants, who, for whatever reason – including criminal conduct – are subject to removal orders, have been categorized by Congress without such distinctions under the second prong of section 1231(a)(6). 8 U.S.C. §§ 1227 and 1229a. Aliens who have been stopped at the border and those who entered without inspection, once ordered removed, are also categorized without distinction under the first prong of section 1231(a)(6). Both groups are subject to the same detention provisions after the expiration of the removal period.

Congress did not authorize indefinite detention except in the context of national security. Nor did it authorize different detention practices for different categories of aliens ordered removed. The government's claim that deference to the "political Branches" requires indefinite detention for Mr. Martinez and thousands of others finds no textual support. By seeking to carve out an exception for those aliens removable due to "excludability" where none exists in the statute, the Executive Branch is failing to carry out the statute enacted by the Legislative Branch, as it has been interpreted by the Judicial Branch. *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. . . . "); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means. . . . A judicial construction of a statute is an authoritative statement of what the statute mean[s]. . . . "). The structure of the statute does not permit disparate treatment of inadmissible and deportable aliens who have been ordered removed.

2. The Subsequent Amendment of the Immigration and Nationality Act to Authorize Detention of Aliens Who Present Risks to National Security Supports Application of *Zadvydas* to Both Deportable and Inadmissible Aliens.

After September 11th, Congress amended the INA to provide expressly for prolonged detention of aliens who constitute national security risks. 8 U.S.C. § 1226a(a)(6). Viewed in the context of this subsequent legislation, Congress harbored no intention of treating inadmissible aliens differently from deportable aliens under section 1231(a)(6).

In section 1226a, Congress continued to treat removable aliens – whether inadmissible or deportable – as the relevant category, with no indication that aliens formerly termed "excludable" are subject to different treatment. Congress carefully elided subsection (ii) from the reference to section 1182(a)(3)(A), which excluded inadmissible aliens in the category of aliens who sought to enter to engage in "any other unlawful activity," so common criminals do not generally fall subject to indefinite detention.[10] The procedural protections – as scant as they may be – show that Congress, when contemplating the radical and harsh possibility of indefinite detention, provides some

[10] Subsection (ii) on "other unlawful activity" is sandwiched between subsection (i), which relates to espionage and sabotage, and (iii), which relates to sedition.

standards and review. 8 U.S.C. § 1226a(a)(7), (b). Section 1231(a)(6) contains no such protections.

Congress could not have intended that, of all removable aliens, only Mariel Cubans would have fewer protections than terrorists and security risks. If inadmissible aliens were already statutorily subject to indefinite detention, Congress would have fashioned section 1226a in a manner that recognized that a broader class of inadmissible aliens was already facing such a fate without the statute. When a statute is amended, as with section 1226a, this Court presumes Congress intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 397 (1995); *see Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (the Court avoids a statutory construction that would render another part of the same statute superfluous). The explicit reference in section 1226a to indefinite detention – with language reflecting awareness of *Zadvydas* – and the absence of any comparable language in section 1231(a)(6), demonstrates Congress' awareness and intention that only section 1226a authorized indefinite detention of a discrete group of which Mr. Martinez is not a member. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*"); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).[11]

[11] Indefinite detention, without express authorization, would be especially anomalous given the definite sentencing guidelines and statutory maxima for aliens who willfully violate conditions of release imposed under section 1231(a)(3) and (6) (maximum one-year sentence) and willfully prevent their departure (maximum 10-year sentence). 8 U.S.C. § 1253(a) & (b) (2000); U.S. SENTENCING GUIDELINES MANUAL App. A (2004); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2004).

Congressional concerns regarding foreign or internal dangers short of war may lead to expulsion or detention, regardless of the status the alien formerly held. 8 U.S.C. § 1226a; *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952). Congress has expressly authorized – and provided procedural mechanisms for – indefinite detention for national security purposes in 8 U.S.C. § 1226a when removal is not immediately possible. Regardless of the circumstances of the alien's presence, the government must follow specific procedures before continuing post-removal-period detention beyond six months on the basis of national security concerns. 8 U.S.C. § 1226a(a)(7). *See Zadvydas*, 533 U.S. at 696 (declining to consider "terrorism or other special circumstances where special arguments might be made for forms of preventive detention").[12] The national security concerns reflected in past Court rulings on indefinite detention of aliens are now addressed by statute. *See also* Brief of Eizenstat and Pickering as *Amici Curiae* in Support of Respondent Martinez (U.S. filed Aug. 2, 2004) (Eizenstat *Amici* Brief).

3. The Government's Reliance on the Parole Statute Is Misplaced.

Although the government initially recognized that section 1231(a)(6) was the relevant statute, the government now asserts the parole statute also authorizes indefinite detention. (Br. for Pet'rs at 26-27.) The structure of the statutes demonstrates that parole is distinct from release on supervision under sections 1231(a)(3) and (6). The parole statute provides that, once the purposes of parole have been satisfied, "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

[12] *See also* 8 U.S.C. § 1537(c) (2000) (providing for post-removal-period detention of terrorist aliens whose repatriation is not possible, setting reviews every six months, and instructing agency to make efforts for removal to third countries).

admission to the United States." 8 U.S.C. § 1182(d)(5)(A). Thus, return to custody under section 1182(d)(5)(A) triggers 8 U.S.C. § 1225 (2000) and 8 U.S.C. § 1226 (2000), which provide for the inspection, apprehension, and detention of applicants for admission.[13] Such applicants are then subject to a removal hearing under section 1229a and, if ordered removed for inadmissibility, subject to post-removal-period detention and release under section 1231.

Because the parole statute explicitly directs that further detention is controlled by section 1226, which provides for the apprehension and detention of applicants for admission, and not section 1182(d)(5), further detention upon entry of a removal order is authorized only by section 1231. Post-removal-period detention under section 1182(d)(5) would render meaningless the statutory language "thereafter . . . shall continue to be dealt with in same manner as any other applicant."[14]

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[13] This Court in *DeMore v. Kim*, 538 U.S. 510 (2003), considered 8 U.S.C. § 1226(c), which provides for detention without bond of certain categories of aliens during the pendency of removal proceedings against them. The Court noted the statute does not allow for indefinite detention of aliens because removal proceedings have a finite duration, in contrast to the post-removal-period detention considered in *Zadvydas*. *Kim*, 538 U.S. at 529 (citing *Zadvydas*, 533 U.S. at 697 ("post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point")). *Kim* reinforces that, after the removal order, the relevant detention statute is not the parole statute but the post-removal-period statute.

[14] The government similarly misplaces reliance on section 1231(h) (Br. for Pet'rs at 25), which this Court has previously noted is a limitation on private rights of action that "does not deprive an alien of the right to rely on 28 U.S.C. § 2241 to challenge detention that is without statutory authority." *Zadvydas*, 533 U.S. at 688.

C. Although the Statute Does Not Suffer from Any Ambiguity, the Legislative History Betrays No Intention Contrary to the Uniform Treatment Compelled by the Face of the Statute.

In the absence of ambiguity, there need be no resort to legislative history. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 132-33 (2002). The detention statute unambiguously treats removable aliens, whether inadmissible or removable by deportation, in exactly the same manner. The legislative history does not support different treatment for formerly "excludable" aliens from the protections afforded aliens removable for deportability. Further, the government's reliance on a generalized hostility to Mariel Cubans and those similarly situated is misplaced.

This Court's previous exploration of the legislative history of section 1231(a)(6) found there was "nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Zadvydas*, 533 U.S. at 699. Likewise, no legislative history illuminates the indefinite detention of inadmissible aliens.

The government's legislative history argument, contradicted as it is by its position in *Zadvydas* that the statute unambiguously treated inadmissible and deportable aliens the same (*see supra* at Part I.A.2), demonstrates the pitfalls of venturing beyond the statutory language. The government argues that the purpose behind IIRIRA was "to combat the growing problem of criminal recidivism by aliens and to diminish the rights of aliens who have illegally entered the country." (Br. for Pet'rs at 30.) The government cites no direct legislative history to support this characterization, but invokes the spirit of the legislative history to support its position. In fact, the legislative history is silent on the issue before the

Court, but Congress' general intention is less helpful to the government's view than it claims.[15]

The House version of IIRIRA included a statement of goals aimed at reform and illegal entry to the United States: "to improve deterrence of illegal immigration to the United States [by various measures], to reform the legal immigration system and facilitate legal entries into the United States, and for other purposes." *E.g.*, H.R. CONF. REP. NO. 104-828, at 1 (1996); H.R. REP. NO. 104-469, at 1 (2d Sess. 1996). Similarly, the Senate version of IIRIRA purported to "increase control over immigration to the United States by [various measures]; reduce the use of welfare by aliens; and [serve] other purposes." S. REP. NO. 104-249, at 1 (1996). IIRIRA's changes to the criminal penalties and the class subject to such penalties reflect congressional concern with illegal entry, not with problems with repatriation.[16]

The legislation, beyond the post-removal-period statute, does not otherwise address the detention period, the duration of detention after the removal period, the entry fiction, or the detention of inadmissible rather than deportable aliens. Nothing supports the government's

[15] Although the government claims a passage from a House Report supports general increased detention (Br. for Pet'rs at 31), reinsertion of the material elided from the sentence demonstrates that only detention in the 90-day removal period was addressed, the purpose of which was to assure removal: "The reforms thus required increased detention of aliens who are ordered removed, *and for removal to be completed within 90 days of a final order of removal*." H.R. REP. No. 879 at 108, 104th Cong. 2d Sess. 105 (1997) (previously elided phrase italicized). No reference is made to the situation here, where removal is not reasonably foreseeable and the detention is no longer for the purpose of ensuring removal.

[16] *See, e.g.*, 8 U.S.C. § 1326(b)(4) (2000) (imposing fines and/or imprisonment of up to ten years for reentry of nonviolent offenders removed prior to completion of their sentence); 8 U.S.C. § 1324(a)(1)(A)(v) (2000) (broadening the class subject to criminal sanction under section 1324 to include those who engage in conspiracy to smuggle aliens or aid or abet alien smuggling); 8 U.S.C. § 1324c(e) (2000) (imposing criminal penalties for failure to disclose role as preparer of false application or document).

claim of generalized hostility to aliens' rights in this legislation. Moreover, even if supported, this claim cannot serve as an appropriate guide to the construction of the statute. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

D. If Section 1231(a)(6) Were Ambiguous as to the Detention of Deportable and Inadmissible Aliens, the Statute Would Be Construed in Favor of the Alien.

If there were ambiguity regarding the uniform treatment of inadmissible and deportable aliens (which there is not), several related rules of construction would require the interpretation of the statute in favor of the alien. First, because the case concerns indefinite detention, the rule of lenity applies, rooted as it is in the "'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 209 (1967))). Second, in the immigration context, including in cases of removal proceedings, the Court has construed ambiguities in favor of the alien. *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[W]e will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). Third, when a particular interpretation of a statute invokes the outer limits of congressional power, the Court expects a clear indication that Congress intended that result. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). If there were ambiguity in the statute's requirement that, under the detention statute, all aliens removable due to inadmissibility be treated

the same as all aliens removable due to deportability, each of these rules of construction would require interpretation of the statute in favor of Mr. Martinez and against indefinite detention.

E. Equal Treatment for All Aliens Identified in the Detention Statute Avoids Conflict with Congressional Condemnation of Arbitrary Detention.

Finally, the Court should construe the statute in a manner that avoids unnecessary conflict with the international treaty obligations of the United States. The Congress that promulgated section 1231(a)(6) did so in the context of its previous condemnation of arbitrary detention. In 1992, the Senate ratified the International Covenant on Civil and Political Rights (ICCPR). 138 CONG. REC. S4781-84 (April 2, 1992). Article 9 of the ICCPR provides that "[n]o one shall be subjected to arbitrary arrest or detention." G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966).

After there has been a determination that removal is not likely to occur in the reasonably foreseeable future, further detention serves no purpose and constitutes arbitrary detention. *See Zadvydas*, 533 U.S. at 691. A construction of section 1231(a)(6) that allows for the indefinite detention of Mr. Martinez, in the absence of express authority such as provided in section 1226a, would run directly counter to congressional commitments to avoid arbitrary detention. "[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).[17]

[17] This concern is heightened in light of the United Nations Working Group on Arbitrary Detention's definition of arbitrary detention as including continued incarceration beyond service of a criminal

(Continued on following page)

Congress' commitment to the law of nations, as manifested by its ratification of the ICCPR, strongly supports construction of the statute to treat removable aliens equally, whether inadmissible or deportable, because a different construction of the statute would subject removable aliens to indefinite detention. *See generally* Br. for the Lawyers Committee for Human Rights, Human Rights Watch, and Amnesty International USA as *Amici Curiae* at 10, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004).

II. IN THE ALTERNATIVE, THE CONSTITUTIONAL DOCTRINE OF AVOIDANCE WOULD REQUIRE THE *ZADVYDAS* CONSTRUCTION OF SECTION 1231(a)(6) BECAUSE INDEFINITE DETENTION OF INADMISSIBLE ALIENS WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

The doctrine of constitutional avoidance, which was applied to an alien removable as deportable in *Zadvydas*, requires the same construction of section 1231(a)(6) when the statute is applied to an alien removable as inadmissible. Indefinite detention implicates the Due Process Clause because aliens, regardless of their legal status within the United States, are "persons" within the meaning of the Due Process Clause. By blurring the distinction between the right to formal entry and core rights shared by all persons within the territorial jurisdiction of the United States, the government adopts the extreme and untenable position that aliens formerly denominated excluded – unlike any other category of aliens – lack any substantive due process right to be free from indefinite detention. The grave doubt as to the constitutionality of the statute, if construed to permit indefinite detention of inadmissible aliens, subsumes the merits of constitutional questions.

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sentence. Report of the U.N. Working Group on Arbitrary Detention, U.N. Doc. E/CN.4./1998/44 (1997).

A. The Government's Claim That Mr. Martinez Lacks Any Protected Liberty Interest Conflicts with Precedent.

The government asserts that "[a]liens stopped at the border and denied admission lack any protected liberty interest in release into the United States." (Br. for Pet'rs at 15.) The government's use of "release into" suggests something more than Mr. Martinez sought. The constitutional question does not hinge on whether Mr. Martinez has a right to admission or parole into the United States, because his request for release on supervision pending removal was not a request for admission or parole into the United States, nor does such release alter his immigration status. Mr. Martinez sought only release on supervision from indefinite, potentially permanent, incarceration. As the Court noted in *Zadvydas*, the question is not whether the alien has a right to admission, but whether aliens are subject to indefinite imprisonment where removal cannot be accomplished. 533 U.S. at 695.

While aliens subject to removal orders do not, and need not, share equal rights to statutory benefits enjoyed by citizens or even permanent resident aliens, all "persons" enjoy an array of certain core rights protected by the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."). The basic set of rights thus protected include Fifth and Sixth Amendment trial rights (*Wong Wing v. United States*, 163 U.S. 228 (1896)); access to the writ of habeas corpus (*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)); equal economic opportunity (*Yick Wo*, 118 U.S. at 369); and protection under the just compensation clause (*Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"); *Landon v.*

Plasencia, 459 U.S. 21, 32 (1982) ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly").

To the extent the government is claiming Mr. Martinez lacks "any protected liberty interest," this Court's precedent forecloses such a position. In a case involving Cuban refugees who, like Mr. Martinez, were paroled into the United States, this Court flatly rejected the claim that excludable aliens were not "persons" under the Due Process Clause: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). This Court then recognized and affirmed its long history of according constitutional rights to aliens regardless of their method of entry into the United States. "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments. . . . [W]e have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." *Plyler*, 457 U.S. at 210 (citations omitted); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien within the territorial jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); *see also Rasul,* 124 S.Ct. at 2696 n.8 (recognizing alleged alien enemies as "persons" under 28 U.S.C. § 2241).

Because aliens are persons, they are protected by the Due Process Clause. The Sixth Circuit *en banc* not only found the government's contrary position constitutionally doubtful, the court found it unconstitutional: "[I]t [is] not only unpalatable but also untenable to conclude that under the Due Process Clause of the Fifth Amendment persons living in the United States – whether by our

choice or not – could be subjected to life in prison simply because their country of origin will not have them back." *Rosales-Garcia*, 322 F.3d at 412-13. The court noted the extreme implications of the government's position: "A life sentence in prison, in fact, seems to us no less impermissible than the government's torture or summary execution of these aliens." *Id*. at 413.[18] At best, constitutional doubt is implicated by the indefinite detention of Mr. Martinez for what effectively constitutes a life sentence.

The government's claim that Mr. Martinez can be placed in indefinite detention at the Executive's will, based on the circumstances of his arrival more than 24 years ago, runs contrary to his overwhelming interest in individual liberty and freedom from arbitrary detention: "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2661 (2004) (Scalia, J., dissenting).

In the absence of criminal proceedings, or their functional equivalent in the context of dangerous mental illness, the norm is freedom from imprisonment. *United States v. Salerno*, 481 U.S. 739, 749 (1987); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). "[G]overnment detention violates [the Due Process Clause] unless the

[18] The radical nature of the government's claim is reflected in footnote 8 of its brief, where the government claims an "excluded alien does not enjoy First Amendment protections." (Br. for Pet'rs at 18 n.8 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (exclusion of alien anarchists does not violate the First Amendment)).) Once more the government blurs the distinction between formal entry, where an alien's beliefs can be burdened, and core rights of persons within the territory of the United States. Some interests "of transcending value" cannot be compromised. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80) (emphsis in original); *see also Salerno*, 481 U.S. at 746; *Hendricks*, 521 U.S. at 356. Detention does not bear the necessary reasonable relation to the purpose of confinement if the goals of detention are not attainable. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)); *see also Hamdi*, 124 S. Ct. at 2461 (prisoners of war must be released upon cessation of active hostilities).

Twenty-four years ago, Mr. Martinez presented himself at the border. Consistent with the government's policy objective of permanent resettlement, he was paroled into the United States where he has lived ever since. He has spent over half his life in the United States, developing the inevitable personal attachments that accompany long-term presence. The decision denying him legal status to remain in the United States occurred in 2001 – after 21 years of lawful presence. The government's characterization of "stopped at the border and denied admission" does not accurately reflect the experience of the individual to whom constitutional principles will be applied. *See* ACLU *Amicus* Brief; Refugee Resettlement Agencies' *Amicus* Brief (arguing that refugee parolees like Respondent have special claim for constitutional protection).

B. Mr. Martinez's Interest Is in Release from Indefinite Detention on Supervision Pending Removal.

Even if indefinite detention were statutorily authorized (which it is not), prolonged and indefinite detention when removal cannot be effectuated violates the Constitution. While the government can detain aliens to remove them, when removal is no longer possible, the impact of such detention exceeds the government's legitimate

interests and constitutes impermissible punishment in violation of the Due Process Clause.

In *Zadvydas*, the Court recognized that the right to freedom from imprisonment is separate and distinct from any right to reside in this country:

> The question before us is not one of 'conferring on those admitted the right to remain against the national will' or 'sufferance of aliens' who should be removed . . . [but] 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 (rejecting government's argument that because aliens with final orders of deportation have no right to "liv[e] at large in this country," they likewise have no liberty interest that is implicated by detention). As in *Zadvydas,* the issue here is not Congress' authority to determine whom it may expel or exclude, but rather the means it has chosen to implement those goals. *See Zadvydas,* 533 U.S. at 695 (emphasizing that "[Congress'] power [to regulate immigration] is subject to important constitutional limitations" and citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983), for the proposition that "Congress must choose 'a constitutionally permissible means of implementing' that power."). Mr. Martinez sought only release from indefinite detention pending removal.

Consistent with this Court's constitutional analysis in *Zadvydas*, an alien's detention must be evaluated in light of the government's regulatory goals. 533 U.S. at 690-91. Mr. Martinez's removal was and continues to be "a remote possibility at best." *Zadvydas*, 533 U.S. at 690. Thus, the government's interest in preventing flight "is weak or nonexistent." *Id*. Furthermore, this Court has consistently held that when "preventive detention is of potentially *indefinite* duration . . . the dangerousness rationale [must] be accompanied by some other special circumstance . . . that helps to create the danger." *Id*. at 691 (citing *Hendricks*, 521 U.S. at 368). In *Zadvydas*, the government

argued that this "special circumstance" was supplied by the detainees' status as aliens who had been ordered removed. *Id*. The Court rejected this argument, emphasizing that "the alien's removable status . . . bears no relation to a detainee's dangerousness." 533 U.S. at 692. Because danger alone is insufficient to justify potentially permanent detention, and because removable status provides no additional basis for such detention, indefinite detention is unconstitutionally excessive.

As this Court recognized in *Zadvydas*, the existence of periodic review procedures does not save detention from being indefinite. 533 U.S. at 691 (characterizing detention as "indefinite" and "potentially permanent," notwithstanding the availability of review procedures). The constitutional deficiency of the Cuban Review Plan is set out *infra* at Point II.D.

C. The Supreme Court's Decision in *Mezei* Does Not Control the Outcome of this Case.

The government broadly interprets *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), to hold that it may detain indefinitely aliens who have not affected an entry, reasoning that aliens standing at the border have no rights. (Br. for Pet'rs at 16-20.) While the Court in *Zadvydas* did not consider the effect of *Mezei* because it found the case distinguishable, *Zadvydas*, 533 U.S. at 693, the government argues that *Mezei* compels indefinite detention for "excludable," as opposed to deportable, aliens who have been ordered removed. (Br. for Pet'rs at 15-20.) *Mezei* is irrelevant to analysis of the post-removal-period detention statute because the factual and statutory contexts are distinct and because the constitutional underpinnings of the ruling no longer exist.

1. *Mezei* Involved National Security, While Mr. Martinez's Indefinite Detention Does Not.

Although Mr. Mezei had previously resided in the United States, the Court treated his landing on Ellis

Island as an attempted initial entry that resulted in permanent exclusion on security grounds. *Mezei*, 345 U.S. at 207. *Mezei* must be viewed in light of the particular national security concerns and the statutory scheme present in that case, both of which are absent here. Mr. Mezei was ordered excluded and detained as a security threat during a presidentially-declared state of emergency under the President's war powers. The holding was narrow: "exclusion without hearing in certain *security cases*" does not violate the Fifth Amendment. *Mezei,* 345 U.S. at 214 (emphasis added).

In *Mezei*, the government's interest in national security was at its apex while Mezei's interest was at its nadir. The Court decided that, given "the times being what they are," it would defer to the executive's authority to "impose additional restrictions on aliens entering or leaving the United States *during periods of international tension and strife*." *Mezei*, 345 U.S. at 216 (emphasis added). The *Mezei* majority accepted at face value the government's classification of Mr. Mezei as a security threat. Courts have generally allowed the Executive an extraordinary amount of leniency during wartime or when national security is truly at stake. *But see Hamdi,* 124 S. Ct. at 2648 (detainee entitled to challenge enemy combatant classification despite detention during wartime). As in *Zadvydas* and in contrast to *Mezei*, no exigencies present themselves here. And where national security is at issue, Congress has now superseded *Mezei* by enacting a statute, complete with procedural protections if the detention exceeds six months. 8 U.S.C. § 1226a.

The government's broad application of *Mezei* to non-national security cases cannot be reconciled with the Court's narrow ruling and its place in history. *Mezei* is a procedural due process case, and as such, there inheres some individual interest at stake, which the *Mezei* Court neither identified nor addressed. Prior decisions clearly established that aliens within the territorial jurisdiction had certain rights that could not be arbitrarily denied. *See, e.g., Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (alien seeking admission entitled to notice and hearing before

she could be removed); *Chin Yow v. United States*, 208 U.S. 8, 12 (1908) (alien entitled to a "hearing in good faith" in exclusion proceedings); *see* ABA *Amicus* Brief at 8-11. Other than *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the only other case on which *Mezei* relied, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), recognized an alien's interest in not being removed arbitrarily by providing for judicial review of removal decisions. *See* Eizenstat *Amici* Brief (explaining why government's national security arguments are without merit).

2. *Mezei* Involved an Arriving Alien's Rights in Admission to the United States, While Mr. Martinez Sought Neither Entry Nor Admission, but Release on Conditions from Indefinite Detention.

Although Mr. Mezei asserted "unlawful confinement", the Court in *Mezei* characterized the claim as a request for admission, focusing its analysis on only the procedural due process rights attendant with admission rather than the substantive due process right to freedom from arbitrary and indefinite detention. 345 U.S. at 210. The government incorrectly identifies the right controlled by *Mezei* as a "right to be paroled into the United States, rather than detained." (Br. for Pet'rs at 12.) To the contrary, Mr. Martinez does not claim a statutory or constitutional right to enter the United States. As the Court recognized in *Zadvydas,* the interest asserted is not admission, but freedom from an indefinite term of imprisonment. *Zadvydas*, 533 U.S. at 695. Moreover, Mr. Martinez did not ask to be permanently released "at large" in the United States. Instead, the district court ordered Mr. Martinez's release properly conditioned on compliance with terms of supervision. (Order (Oct. 30, 2002).)

3. Because Mr. Martinez Is Not an Arriving Alien, but Subject to a Final Order of Removal, He Is Not in Ongoing Exclusion Proceedings, Rendering the Entry Fiction Moot.

Mezei justified detention as a necessary component of the continued exclusion process that included application of the entry-fiction. 345 U.S. at 215 (describing detention as "continued exclusion on Ellis Island" but not an entry). Because there was no post-removal-detention statute when *Mezei* was decided, the statutory authority to detain necessarily derived from the authority to detain pending exclusion proceedings. *Mezei*, 345 U.S. at 210-11 (detention during exclusion authorized by the now-repealed Passport Act of 1918). This Court recently distinguished between detention "*pending their removal proceedings*" and post-removal-period detention. *Kim,* 538 U.S. at 527-28. The ongoing nature of the removal proceedings, coupled with their finite duration, made the detention in *Kim* materially different from the indefinite detention at issue in *Zadvydas* and here. *Kim*, 538 U.S. at 527-28. Resort to the "ongoing exclusion proceedings" fiction is no longer necessary because IIRIRA expressly authorizes post-removal-order detention in sections 1231(a)(2) and (6).

Moreover, because *Mezei* involved an arriving rather than a departing alien, the entry-fiction had greater applicability. The entry-fiction is pertinent with respect to the circumstance of an arriving alien who is applying for admission and the rights available in the admission process. The entry-fiction makes sense only with regard to the procedures necessary to prevent entry, as opposed to the procedures necessary to remove a person already in the United States.

4. This Case Does Not Implicate the Political Branches' Plenary Powers over Expulsion or Exclusion.

Mezei reaffirmed the political Branches' primacy over matters pertaining to admission and foreign policy.

Because Mr. Martinez is not requesting admission or challenging the removal order, his conditional release from imprisonment does not imperil the "fundamental sovereign attribute of political Branches to expel or exclude." (Br. for Pet'rs at 16 (citing *Mezei*, 345 U.S. at 210).) The temporal limit on post-removal-period detention of inadmissible aliens awaiting removal neither infringes on the political Branches' power to control immigration nor involves foreign policy considerations. *Zadvydas*, 533 U.S. at 695.

Moreover, release under supervision pending removal is not "compelling those entries in the first place over the express determination of the Executive Branch and Congress that an alien should not be admitted." (Br. for Pet'rs at 38.) The government made the decision to allow Mr. Martinez to resettle in the United States 24 years ago. That decision is not at issue. Nor is the order that he be removed from the United States. Mr. Martinez's release from indefinite detention does not alter the requirement that he return to Cuba, does not constitute an admission or entry, does not change his legal status, and does not allow him to "live at large." *Zadvydas*, 533 U.S. at 696.[19] His conditional release relates only to the means of effectuating the removal order. In rejecting a similar argument, this Court stated that the plenary power to regulate immigration is still subject to constitutional limitations. *Zadvydas*, 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose a constitutionally permissible means of implementing that power)). Despite these limitations, "we nowhere deny the right of Congress to remove aliens, to subject them to conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Zadvydas*, 533 U.S. at 695; *see* Eizenstat *Amici* Brief.

[19] Similarly, the government's choice to release Mr. Martinez under its parole procedures, in the context of post-removal-period supervision, confers no entry rights. The lower court order did not require re-parole, but only release on supervision from detention.

5. Subsequent Developments Have Undermined *Mezei*'s Legal Authority.

Even if *Meze*i were not distinguishable, the decision should not be reaffirmed beyond its narrow facts because subsequent developments in due process jurisprudence render *Mezei* an historic anachronism. Br. of Law Professors as *Amicus Curiae* at 2-3, 17-18, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (Professors' *Amicus* Brief); ABA *Amicus* Brief at 24-25; *see* Eizenstat *Amici* Brief (noting that government's national security and border control arguments are particularly weak with respect to parolees like Respondent); ACLU *Amicus* Brief (same). The proposition that the government may detain "completely at the mercy of the unreviewable discretion of the Attorney General," *Mezei*, 345 U.S. at 217 (Black, J. dissenting), has not survived the years. *Rasul*, 124 S. Ct. at 2696 (describing the purpose of the writ of habeas corpus as to review "the legality of Executive detention"); *Hamdi*, 124 S. Ct. at 2648 (due process requires that U.S. citizen who is alleged enemy combatant receive "a fair opportunity to rebut the Government's assertions before a neutral decisionmaker").

Mezei departed significantly from prior caselaw recognizing due process rights for arriving aliens. Prior to *Mezei*, the Court had not held that inadmissible aliens were denied the basic protections of due process. *See, e.g., Chin Yow v. United States,* 208 U.S. 8 (1908) (recognizing right to review of exclusion decision); *Nishimura Ekiu*, 142 U.S. at 660 (determining whether exclusion was in conformity with law). *See generally* Professors' *Amicus* Brief at 9-10; ABA *Amicus* Brief at 8-13.

Mezei itself does not support the sweeping proposition the government asserts – that inadmissible aliens are necessarily beyond all substantive due process protections. *Mezei* was a procedural due process case considering the narrow question of whether someone the government had

identified as a security threat could be excluded without a hearing.[20]

Developments in this Court's due process jurisprudence since *Mezei* have eroded much of the rationale underlying *Mezei*. The dissent in *Mezei* sharply criticized arbitrary incarceration. 345 U.S. at 217-18 (Jackson, J., dissenting). *Mezei* was decided before the development of the due process "punishment doctrine" which forbids arbitrary incarceration. *Zadvydas*, 533 U.S. at 690; *Hendricks*, 521 U.S. at 356; *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 755; *Jackson*, 406 U.S. at 738, and before the changes in due process jurisprudence established by *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The plenary power doctrine in the context of indefinite detention has been significantly curtailed since its zenith in *Mezei*. *Zadvydas,* 533 U.S. at 695. Just this term, this Court quoted from Justice Jackson's dissent in *Mezei* affirming the limits on the government's authority to detain even when national security is at stake:

> Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

Rasul, 124 S. Ct. at 2692 (quoting *Mezei,* 345 U.S. at 218-19 (Jackson, J., dissenting)). *See also Kim*, 538 U.S. at 510 (recognizing limitations on indefinite detention of aliens). Thus, even when the government interests are highest, the Executive still does not enjoy unfettered discretion.

The Court has recognized the significant interest of aliens in a number of contexts. *See, e.g., Kwong Hai Chew*

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[20] In the end, after granting him an exclusion hearing, the government paroled Mr. Mezei anyway. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 984 n. 265 (1995).

v. Colding, 344 U.S. 590, 596 (1953) (recognizing liberty interest of lawful permanent resident alien); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Landon v. Plasencia,* 459 U.S. 21, 38 (1982) (noting lawful permanent resident aliens are entitled to advance notice of exclusion proceeding); *Plyler*, 457 U.S. at 210 (aliens are persons and therefore covered by Fifth and Fourteenth Amendments); *Zadvydas*, 533 U.S. at 721 (Kennedy, J. dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"). Most recently, the Court considered whether traditional notions of territory define the perimeters of habeas jurisdiction and concluded that the "reach of the writ depend[s] not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact. . . . " *Rasul,* 124 S. Ct. at 2697 (internal quotation marks omitted). To the extent that it relied on a territorial fiction, *Mezei* has been rejected or eroded to such an extent that the case is no longer relevant.

D. Indefinite Detention under Section 1231(a)(6) Also Raises Constitutional Doubt Based on the Absence of Procedural Due Process Protections.

Mr. Martinez asserted before the district court that his indefinite detention violated procedural as well as substantive due process rights. Because the case was resolved on purely statutory grounds in the lower courts, neither the procedural due process claims nor the facts personal to Mr. Martinez were fully developed. However, the constitutional shortcomings of the proceedings are readily apparent.

The detention statute, because it does not contemplate indefinite detention, makes no provisions for hearings, neutral fact-finders, or review. *Compare* 8 U.S.C. § 1226a (providing review procedures for indefinite detention of security risks) *with* 8 U.S.C. § 1231(a)(6). The only review for Mariel Cubans is regulatory and fails to provide detainees with minimal mechanisms to protect the integrity of the

process, such as impartial decision-makers, appropriate notice to detainees in advance of their interviews, disclosure of materials upon which the panel will rely, clear standards, creation of a record, and meaningful review. 8 C.F.R. § 212.12. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58, 563-67 (1974) (setting out procedural due process minima); *Goldberg v. Kelly*, 397 U.S. 254, 264-71 (1970) (same); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1971). These minimal standards apply to persons with even less of a liberty interest than Mr. Martinez: they are serving criminal sentences imposed after receiving the full panoply of protections required in criminal cases. Especially given the significant risk of erroneous deprivation of liberty due to Cuban Review Panel decisions, the Cuban Review Plan regulations are constitutionally deficient.

The only factors that the government considers in making its discretionary release determinations are whether an alien poses a danger or flight risk. *See* 8 C.F.R. § 212.12(d)(2) and (3) (2004). In order to be meaningful, the decision to detain must consider both length of detention and foreseeability of removal. *Zadvydas*, 533 U.S. at 701 ("And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."). Because the Cuban Review Panel's review procedures do not require consideration of either of these factors, they offer no protection against the fundamental due process problem – indefinite, potentially life-long, incarceration of an alien whose removal cannot be effectuated.

Once a year, a Mariel detainee receives a file and/or personal interview, not before impartial reviewers, but before a panel composed of two or three people, all of whom are government employees charged with the detainee's detention and removal. 8 C.F.R. § 212.12(d)(1) (2004). Such "interrogation by one's captor . . . hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." *Hamdi*, 124 S. Ct. at 2651. Because the interviews are not recorded and the detainee does not have access to either his immigration file or the material upon

which the decision is made, there is no record with which to address the partiality of the reviewer or to rebut the information upon which the detention decision is made. Without sufficient advance notice to prepare, the detainee has the burden of demonstrating all of the factors in § 212.12(d)(2), including proving that he or she is non-violent and will continue to be non-violent.

The Cuban Review Panel is not instructed to take into consideration crucial factors of a detainee's circumstances because they are not mentioned in the regulation. The Panel need not consider the length of the individual's detention, the probable length of future detention, or the access to (or lack of access to) rehabilitative programs. Nor do the regulations consider that prolonged detention in a medium security correctional institution or even a federal penitentiary at a remote location might have an adverse affect on the detainee's ability to maintain close family ties, to develop community support, and to obtain vocational training or remedial education – all explicit criteria for release. 8 C.F.R. § 212.12(d)(3).

Because there is no review of the Panel's decision, the detainee has no administrative recourse to challenge the Panel's decision.[21] The government's decision to detain an individual is based on the detaining officer's unguided judgment regarding the individual's file, or selected portions thereof, without considered input from the individual detainee. An adverse decision is based on the conclusion that the person has not met the (unspecified) burden of proving a lengthy list of factors, most of which involve inherently impossible predictions of future behavior. This does not comport with minimal due process.

[21] In 2000, the government repealed 8 C.F.R. § 212.13 which provided a single departmental review of the Panel's determination. 65 Fed. Reg. 80281, 80293 (Dec. 21, 2000). The agency explained that by December 21, 2000, the department had completed its review of the detention of all Mariel Cubans denied parole and that, therefore, the provisions for review were no longer necessary. *Id*. The government has made no review provisions for Mariel Cubans, such as Mr. Martinez, whose parole was subsequently revoked.

Before *Zadvydas*, the Third Circuit found that the government violated the detainee's due process rights by denying parole based solely on the detainee's criminal history:

> [T]he petitioner in this case was repeatedly denied parole by INS officials based on no more than a reading of his file that listed years-old convictions for firearm, attempted robbery, and bail jumping offenses. No inquiry was made to ascertain, for example, whether the bail jumping offense was the result of a lack of notice, misunderstanding, or an affirmative effort to avoid apprehension. The INS made no effort to determine if such conduct was presently likely to be repeated or whether it could be discouraged by requiring appropriate surety. Through at least four denials of parole, the INS continued to cite to the petitioner's now nearly ten-year old convictions as justification to confine him.

Ngo v. INS, 192 F.3d 390, 398 (3rd Cir. 1999); *accord Phan v. Reno*, 56 F. Supp. 2d 1149, 1157-58 (W.D. Wash. 1999) (finding procedural due process violation in the context of pre-*Zadvydas* indefinite detention of deportable aliens).

Finally, the regulations place the burden of proof on the detainee, when the interest in release from indefinite detention, if not requiring proof beyond a reasonable doubt, at least dictates that the burden rest on the government. *See Sandstrom v. Montana*, 442 U.S. 510, 514-27 (1979) (jury instruction unconstitutionally shifted burden of proof of element of offense from state to defendant); *Addington v. Texas*, 441 U.S. 418, 427 (1979) ("[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."); *In re Winship*, 397 U.S. 358 (1970) (the burden is always upon the prosecution to establish every element of crime charged by proof beyond a reasonable doubt). *See Zadvydas*, 533 U.S. at 702 (requiring detainee to prove that there is absolutely no prospect of removal in order to

secure release "demands more than our reading of the statute can bear"). These procedures are facially inadequate to protect a detainee's procedural due process rights.

CONCLUSION

For the foregoing reasons, the grant of relief by the District Court and the Court of Appeals should be affirmed.

Respectfully submitted,

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