

1 **MARK BRNOVICH**
2 **ARIZONA ATTORNEY GENERAL**
(Firm State Bar No. 14000)

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

3 Joseph A. Kanefield (No. 15838)
4 Brunn (Beau) W. Roysden III (No. 28698)
5 Drew C. Ensign (No. 25463)
6 Anthony R. Napolitano (No. 34586)
7 Robert Makar (No. 33579)
2005 N. Central Ave
8 Phoenix, AZ 85004-1592
9 Phone: (602) 542-8958
10 Joe.Kanefield@azag.gov
11 Beau.Roysden@azag.gov
12 Drew.Ensign@azag.gov
13 Anthony.Napolitano@azag.gov
14 Robert.Makar@azag.gov

David M. Dewhirst*
Solicitor General
215 N Sanders St.
Helena, MT 59601
Phone: (406) 444-4145
David.Dewhirst@mt.gov

**pro hac vice granted*

Attorneys for Plaintiff State of Montana

*Attorneys for Plaintiffs State of Arizona
and Mark Brnovich in his official capacity*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

15 State of Arizona; State of Montana; and
16 Mark Brnovich, in his official capacity as
17 Attorney General of Arizona,

18 Plaintiffs,

19 v.

20 United States Department of Homeland
21 Security; United States of America;
22 Alejandro Mayorkas, in his official
23 capacity as Secretary of Homeland
24 Security; Troy Miller, in his official
25 capacity as Acting Commissioner of
26 United States Customs and Border
27 Protection; Tae Johnson, in his official
28 capacity as Acting Director of United
States Immigration and Customs
Enforcement; and Tracy Renaud, in her
official capacity as Acting Director of U.S.
Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

**PLAINTIFFS' EMERGENCY
MOTION FOR INJUNCTION
PENDING APPEAL**

**EXPEDITED CONSIDERATION
REQUESTED**

INTRODUCTION AND REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to Federal Rule of Civil Procedure 62(c) and (d), 5 U.S.C. § 705, and Federal Rule of Appellate Procedure 8(a)(1), Plaintiffs move for an injunction or stay pending appeal that enjoins the February 18, 2018 Interim Guidance as it relates to removals. As shown below, Plaintiffs have met the elements warranting an injunction pending appeal. Significantly, there is a strong showing that Plaintiffs are likely to succeed on the merits of their APA claims. The U.S. Supreme Court's decision in *Johnson v. Guzman Chavez*, 2021 WL 2653264, at *4 (U.S. June 29, 2021) (Ex. A), recognizes that the "shall" in 8 U.S.C. § 1231 means "must." Combining this recent precedent with the decision by the U.S. District Court in *Texas v. United States*, 2021 WL 2096669, at *35 (S.D. Tex. Feb 23, 2021), as well as the Ninth Circuit's statements in *Lema v. I.N.S.*, 341 F.3d 853, 855 (9th Cir. 2003), establishes a strong showing that the Ninth Circuit or U.S. Supreme Court will find Defendants' compliance with §1231(a)(1) both reviewable and the Interim Guidance unlawful under the APA. Moreover, the Court's standing analysis supports the conclusion that Plaintiffs will suffer irreparable harm absent a stay pending appeal. Finally, the other factors support granting the stay.

Plaintiffs also respectfully request expedited consideration and the following briefing schedule, which Defendants do not oppose: Response due July 9 and Reply due by 9:00 a.m. on July 12. Plaintiffs respectfully request a ruling by July 15, so they can promptly pursue, if necessary, further relief with the Ninth Circuit.

ARGUMENT

In evaluating a request for a stay pending appeal, this Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).¹

¹ Although "[t]here is substantial overlap between these and the factors governing

1 **I. Plaintiffs Are Likely To Succeed On The Merits**

2 Plaintiffs are likely to succeed on the merits because this Court agrees that they
3 have Article III standing to bring their claims, Dkt. 91 at 14, the Interim Guidance is
4 reviewable, and another court has granted a preliminary injunction on similar claims
5 regarding the Interim Guidance's direct antecedent policy, the January 20 Memorandum.
6 *Texas v. United States*, 2021 WL 2096669 (S.D. Tex. Feb. 23, 2021). While the Court
7 did not address the specific merits issues, Plaintiffs reassert the claims presented in their
8 prior briefing, which they incorporate here, including that the Interim Guidance is
9 arbitrary and capricious, is a substantive rule issued in violation of the APA's notice-and-
10 comment requirements, and violates §1231(a)(1). *See*, Dkt. 17; Dkt. 38; Dkt. 64; Dkt. 70.

11 **A. Whether to Carry Out Removals After Final Removal Orders Have
12 Been Issued Is Not Committed To Agency Discretion By Law**

13 New Supreme Court precedent clarifies that the subject of the Interim Guidance,
14 removal of aliens with final orders of removal, is not committed to agency discretion and
15 thus the Interim Guidance is a reviewable agency action. Any presumption against
16 reviewability in this regard is rebutted here because both of the independently sufficient
17 exceptions under *Heckler v. Chaney* are met: Congress "has provided guidelines for the
18 agency to follow in exercising its enforcement powers" and "the agency has consciously
19 and expressly adopted a general policy that is so extreme as to amount to an abdication of
20 its statutory responsibilities." 470 U.S. 821, 832-33 and n.4 (1985).

21 **1. The Interim Guidance Violates The Enforcement Guidelines
22 Provided By Congress**

23 The U.S. Supreme Court interprets 8 U.S.C. § 1231(a)(1)(A) to mandate removal
24 of aliens with final orders of removal unless an express statutory exception applies,

25 preliminary injunctions," *id.* at 1203 n.2, several courts have recognized that "[c]ommon
26 sense dictates that the standard cannot ... require that a district court confess to
27 having erred in its ruling" to grant the motion. *Evans v. Buchanan*, 435 F. Supp. 832, 843
28 (D. Del. 1977); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149 (D.
Mass. 1998). An injunction pending appeal is also appropriate if there are serious
questions going to the merits on appeal and the balance of the hardships tips sharply in
their favor. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011).

1 establishing Congressional guidance that eliminates the presumption of agency
2 discretion. This week, in *Johnson v. Guzman Chavez* the Supreme Court interpreted the
3 directive that DHS “shall remove the alien” in § 1231(a)(1)(A) to mean “[o]nce an alien
4 is ordered removed, DHS *must* physically remove him from the United States within a
5 90-day ‘removal period.’” 2021 WL 2653264, at *4 (U.S. June 29, 2021) (emphasis
6 added) (Ex. A). The Supreme Court further held:

7
8 the most natural reading of the “except as otherwise
9 provided” clause is that DHS must remove an alien within 90
10 days *unless* another subsection of §1231 specifically
11 contemplates that the removal period can exceed 90 days.
12 That aligns with the rest of §1231, which contains specific
13 provisions mandating or authorizing DHS to extend detention
14 beyond 90 days.

15 *Id.* The Supreme Court thus established that the statute issues a command to DHS in
16 mandatory language and that any exception to that command may only be found in other
17 parts of the statute’s own language. This confirms the Ninth Circuit’s reading in *Lema v.*
18 *INS* that “shall” in § 1231(a)(1)(A) means “must.” 341 F.3d 853, 855 (9th Cir. 2003).

19 This resolves the split this Court acknowledged between the two district courts to
20 have interpreted § 1231 in this context. The Southern District of Texas found that “the
21 word ‘shall’ in section 1231(a)(1)(A) means *must*—even as against the Government
22 here.” *Texas v. United States*, 2021 WL 2096669, at *35 (S.D. Tex. Feb. 23, 2021). In
23 contrast, this Court “does not read the use of a naked ‘shall’ in § 1231(a)(1)(A) as
24 stripping the Government of its discretion ... and as mandating the removal of all
25 noncitizens with final orders of removal within 90 days.” Dkt. 91 at 17-18. The
26 Supreme Court’s opinion in *Guzman Chavez* confirms the *Texas* court’s interpretation of
27 “shall” as “must,” resolving this discrepancy and supporting Plaintiffs’ arguments here
28 that any presumption against reviewability is rebutted under *Chaney* by the congressional
“guidelines for the agency to follow in exercising its enforcement powers.” 470 U.S. at
833. Plaintiffs are therefore likely to succeed on the merits.

1 **2. DHS Has Adopted A Policy Of Abdication Of Statutory**
2 **Responsibilities**

3 Further, as Plaintiffs presented in their prior briefing and incorporate here, the
4 Interim Guidance is “an abdication of [DHS’s] statutory responsibilities.” *Chaney*, 470
5 U.S. at 833 n.4; Dkt. 38 at 4-6; Dkt. 70 at 11-13. This abdication is borne out through
6 evidence on the record demonstrating a “big drop off in removals” following the Interim
7 Guidance—roughly 325 fewer per month in total with only 7 other-priority removals—
8 for which the Interim Guidance is the “only factor” responsible. Dkt. 79 at 4; 5/27/21 Tr.
9 At 19-20. And this policy’s express and conscious adoption is indicated by Director
10 Johnson’s February 4 email that “only those who meet the [Section B] priorities will be
11 removed.” Dkt. 64 at 3. This provides a second, independent reason why Plaintiffs are
12 likely to succeed on the merits.

13 **B. The Injunctive Relief Sought in this Motion Preserves the Status Quo**
14 **and Is Prohibitory Rather than Mandatory in Nature**

15 Relief under Rule of Civil Procedure 62 is also proper because an injunction
16 pending appeal maintains the status quo, which is “normal removal operations.” *See*
17 *Donges v. USAA Federal Savings*, 2019 WL 3208076, at *1 (D. Ariz. July 16, 2019)
18 (Rule 62(d) allows a district court to grant an injunction to preserve the status quo).
19 Specifically, on January 20, 2021, Acting DHS Secretary Pecoske issued a
20 Memorandum. Section C of that Memorandum implemented a 100-day pause on
21 removals outside of narrow categories. Dkt. 91 at 3. Section B of that Memorandum
22 related to other types of enforcement, but there is nothing on the face of it that suggested
23 it was intended to govern removals, particularly since Section C of the document
24 governed removals. *Id.* The Texas District Court enjoined Section C six days later. *Id.* at
25 4; Dkt. 64 at 2. Defendants then “return[ed] to normal removal operations as prior to the
26 issuance of the” Memorandum. *Id.* (citing AR_AZ_0004631). The original complaint in
27 this matter was filed on February 3. Dkt. 1. Unbeknownst to Plaintiffs, on February 4,
28 the Acting ICE Director sent a midnight email that halted normal removal operations for
 aliens who did not meet the Section B priorities. Dkt. 64 at 3. The departure from

1 “normal removal operations” was not publicly known until February 18, 2021 when the
2 Acting ICE Director issued the Interim Guidance. Plaintiffs moved for a preliminary
3 injunction 2.5 weeks later on March 8. Dkt. 13. That Motion sought to enjoin
4 Defendants from “implementing the Removal Moratorium.” *Id.* at 24; *see also id.* at 3
5 (asking Court to enjoin “the Removal Moratorium (including as embodied in the Interim
6 Guidance)”). Therefore, a return to “normal removal operations” is the status quo ante of
7 this litigation and what was in place following the *Texas* court’s TRO, which later
8 matured into a preliminary injunction that Defendants notably did not appeal. Indeed, the
9 *Texas* court persuasively argued that an absence of injunctive relief would cause a pause
10 in removals that would not likely be made up any time soon, were the moratorium were
11 later declared invalid. *Texas*, 2021 WL 2096669, at *19. The same is true as to the
12 interim guidance.

13 Second, the relief sought here is also prohibitory rather than mandatory. This is
14 because Plaintiffs are not seeking any sort of injunction requiring the removal of any
15 particular alien. Instead, the relief sought is merely the return to “normal removal
16 operations,” which are governed by §1231(a)(1) and DHS’s own existing policies and
17 procedure. *Texas*, 2021 WL 2096669, at *19 (injunction would merely require “exercise
18 [of] discretion on an *individualized case by case basis* as required by law.”).

19 **II. The Other Factors Also Support An Injunction Pending Appeal**

20 This Court’s prior order already recognizes that Plaintiffs are harmed by
21 Defendants’ refusal to carry out deportations consistent with §1231(a)(1)(A). Dkt. 91 at
22 10-15. And this type of harm is properly considered irreparable injury because it is
23 monetary injury that will not be recoverable from the federal government. *See E. Bay*
24 *Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (“Irreparable harm is
25 ‘harm for which there is no adequate legal remedy, such as an award for damages.’”
26 (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)); *see*
27 *also id.* (“[W]here parties cannot typically recover monetary damages flowing from their
28 injury—as is often the case in APA cases—economic harm can be considered

1 irreparable.” (citing *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018))). The *Texas*
2 Court reached a similar conclusion. *Texas*, 2021 WL 2096669, at *47.²

3 Moreover, Defendants will not be harmed by an injunction because they will
4 merely return to “normal removal operations.” Also, the balancing of the harms has
5 already been done by Congress when it enacted §1231(a)(1), and Courts cannot second
6 guess that balancing. See *United States v. Oakland Cannabis Buyers’ Coop.*, 532
7 U.S. 483, 497 (2001) (“[A] court sitting in equity cannot ‘ignore the judgment of
8 Congress, deliberately expressed in legislation.’” (citation omitted)). For the same
9 reason public policy favors granting the injunction.

10 **CONCLUSION**

11 For the forgoing reasons, Plaintiffs move for an injunction or stay pending appeal
12 that enjoins the February 18, 2018 Interim Guidance as it relates to removals.

13 RESPECTFULLY SUBMITTED this 1st day of July, 2021.

14
15 **MARK BRNOVICH**
16 **ARIZONA ATTORNEY GENERAL**

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

17 By /s/ Brunn W. Roysden III
18 Joseph A. Kanefield (No. 15838)
19 Brunn W. Roysden III (No. 28698)
20 Drew C. Ensign (No. 25463)
21 Anthony R. Napolitano (No. 34586)
22 Robert J. Makar (No. 33579)
23 *Assistant Attorneys General*

/s/ David M.S. Dewhirst (with permission)
David M.S. Dewhirst*
Solicitor General
**Pro hac vice granted*

Attorneys for Plaintiff State of Montana

24
25
26
27 *Attorneys for Plaintiffs Arizona and*
28 *Arizona Attorney General Mark Brnovich*

² In addition, “a significant portion of criminal aliens and state offenders ‘historically’
recidivate.” *Texas*, 2021 WL 2096669, at *16.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Brunn W. Roysden III

Exhibit A

2021 WL 2653264

Only the Westlaw citation is currently available.
 Supreme Court of the United States.

Tae D. JOHNSON, Acting Director
 of U. S. Immigration and Customs
 Enforcement, et al., Petitioners

v.

Maria Angelica GUZMAN CHAVEZ, et al.

No. 19-897

Argued January 11, 2021

Decided June 29, 2021

Synopsis

Background: Noncitizens filed class action petitions for writs of habeas corpus, challenging their detention pursuant to reinstated removal orders, and seeking declaratory judgment ordering immigration officials to either release them or grant them bond hearings. The United States District Court for the Eastern District of Virginia, Nos. 1:17-cv-00754-LMB-JFA, 1:17-cv-01405-LMB-MSN, [Leonie M. Brinkema](#), J., 280 F. Supp. 3d 835, 297 F. Supp. 3d 618, entered summary judgment in noncitizens' favor, and government appealed. The Court of Appeals for the Fourth Circuit, Harris, Circuit Judge, [940 F.3d 867](#), affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice [Alito](#), held that the section of the Immigration and Nationality Act (INA) that applies “when an alien is ordered removed” and enters the “removal period,” and not the section authorizing detention “pending a decision on whether the alien is to be removed,” governs the detention of noncitizens seeking withholding of removal after reinstatement of removal orders, meaning those noncitizens are not entitled to individualized bond hearings while they pursue withholding of removal, abrogating [Guerra v. Shanahan](#), 831 F.3d 59.

Reversed.

Justice [Thomas](#) filed an opinion concurring in part and concurring in the judgment, in which Justice [Gorsuch](#) joined.

Justice [Breyer](#) filed a dissenting opinion, in which Justice [Sotomayor](#) and Justice [Kagan](#) joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment; Request for Declaratory Judgment; Petition for Writ of Habeas Corpus.

West Headnotes (36)

[1] Aliens, Immigration, and Citizenship  Constitutional and Statutory Provisions

The Immigration and Nationality Act (INA) establishes procedures for removing noncitizens living unlawfully in the United States. Immigration and Nationality Act, § 101 et seq., [8 U.S.C.A. § 1101 et seq.](#)

[2] Aliens, Immigration, and Citizenship  Power to deny admission or remove in general

In addition to the Attorney General, Congress has empowered the Secretary of Homeland Security to enforce the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 101 et seq., [8 U.S.C.A. § 1101 et seq.](#)

[3] Aliens, Immigration, and Citizenship  Notice; order to show cause

In the ordinary course, if the Department of Homeland Security (DHS) discovers that a noncitizen is living in the United States without authorization, it may initiate removal proceedings against the noncitizen by sending him a “notice to appear” which informs him of, among other things, the charges against him and the time and place of the hearing at which an immigration judge (IJ) will determine whether the noncitizen is to be removed. Immigration and Nationality Act § 239, [8 U.S.C.A. §§ 1229\(a\), 1229\(a\)\(1\)\(D\), \(G\)\(i\).](#)

[4] **Aliens, Immigration, and Citizenship** 🔑 Bond or bail

Under the Immigration and Nationality Act (INA), noncitizens who are arrested and detained by the Department of Homeland Security (DHS) pending a removal decision may generally apply for release on bond or conditional parole; to secure release, the noncitizen must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.

Immigration and Nationality Act § 236, 8 U.S.C.A. §§ 1226(a), 1226(a)(2); 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8).

[5] **Aliens, Immigration, and Citizenship** 🔑 Detention Pending Removal Proceeding

Aliens, Immigration, and Citizenship 🔑 Bond or bail

Under the Immigration and Nationality Act (INA), there is one exception to the general rule that noncitizens who are arrested and detained by the Department of Homeland Security (DHS) pending a removal decision may generally apply for release on bond or conditional parole: for certain criminal noncitizens and noncitizens who have connections to terrorism, detention is mandatory and release is permitted in very limited circumstances. Immigration and Nationality Act § 236, 8 U.S.C.A. §§ 1226(a), 1226(c).

[6] **Aliens, Immigration, and Citizenship** 🔑 Bond or bail

Under the Immigration and Nationality Act (INA), if the Department of Homeland Security (DHS) denies the request for release made by a noncitizen who has been arrested and detained pending a removal decision, the noncitizen may request a bond hearing in front of an immigration judge (IJ) by filing an application for a change in the noncitizen's detention conditions; either the noncitizen or DHS may appeal the IJ's decision to the Board of Immigration Appeals (BIA).

Immigration and Nationality Act § 236, 8 U.S.C.A. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 236.1(d)(3)(i), 1003.19(a), 1003.19(f), 1236.1(d)(1), 1236.1(d)(3)(i).

[7] **Aliens, Immigration, and Citizenship** 🔑 Asylum, Refugees, and Withholding of Removal

Under the Immigration and Nationality Act (INA), a noncitizen who has been arrested and detained pending a removal decision may seek various forms of relief or protection from removal, such as asylum or withholding of removal. Immigration and Nationality Act §§ 236, 240, 8 U.S.C.A. §§ 1226(a), 1229a(c)(4)(A); 8 CFR §§ 1208.4(b)(3)(i), 1240.11(c), 1240.11(e).

[8] **Aliens, Immigration, and Citizenship** 🔑 Determination

Aliens, Immigration, and Citizenship 🔑 Administrative Review

Aliens, Immigration, and Citizenship 🔑 Reopening, Reconsideration, or Remand

Aliens, Immigration, and Citizenship 🔑 Right of review or intervention; standing

Under the Immigration and Nationality Act (INA), if an immigration judge (IJ) decides that a noncitizen who has been arrested and detained pending a removal decision is inadmissible or deportable and that he or she is not entitled to any of the relief or protection requested, the IJ will issue an order of removal, after which the noncitizen may file a motion to reconsider, a motion to reopen, an appeal to the Board of Immigration Appeals (BIA), and a petition for review in federal court. Immigration and Nationality Act §§ 236, 240, 8 U.S.C.A. §§ 1226(a), 1229a(c)(5), 1229a(c)(5)-(7); 8 C.F.R. § 1240.15.

[9] **Aliens, Immigration, and Citizenship** 🔑 Order and Warrant; Enforcement

Under the Immigration and Nationality Act (INA), once a noncitizen is ordered removed, the Department of Homeland Security (DHS) must physically remove him from the United States within a 90-day “removal period.” Immigration and Nationality Act § 241, [8 U.S.C.A. § 1231\(a\)\(1\)\(A\)](#).

[10] **Aliens, Immigration, and Citizenship** 🔑 Order and Warrant; Enforcement

Under the Immigration and Nationality Act (INA), the “removal period” for a noncitizen who has been ordered removed begins on the latest of three dates: (1) the date the order of removal becomes “administratively final,” (2) the date of the final order of any court that entered a stay of removal, or (3) the date on which the alien is released from non-immigration detention or confinement. Immigration and Nationality Act § 241, [8 U.S.C.A. §§ 1231\(a\)\(1\)\(A\)](#), [1231\(a\)\(1\)\(B\)](#).

[11] **Aliens, Immigration, and Citizenship** 🔑 Detention After Order of Removal

Under the Immigration and Nationality Act (INA), during the “removal period” of a noncitizen who has been ordered removed, detention is mandatory. Immigration and Nationality Act § 241, [8 U.S.C.A. § 1231\(a\)\(2\)](#).

[12] **Aliens, Immigration, and Citizenship** 🔑 Order and Warrant; Enforcement

Aliens, Immigration, and Citizenship 🔑 Supervision in general

Aliens, Immigration, and Citizenship 🔑 Time limitations; indefinite detention

Under the Immigration and Nationality Act (INA), the “removal period” for a noncitizen who has been ordered removed may be extended in at least three circumstances, such that the individual remains detained after 90 days have passed: first, the removal period may be extended if the noncitizen fails to make a timely application for travel documents or acts to prevent his removal; second, the Department of Homeland Security (DHS) may stay the immediate removal of certain noncitizens if it decides that such removal is not practicable or proper, or if the noncitizen is needed to testify in a pending prosecution; and finally, a noncitizen may be detained beyond the removal period or released under supervision if he is (1) inadmissible, (2) removable as a result of violations of status requirements, entry conditions, or the criminal law, or for national security or foreign policy reasons, or (3) a risk to the community or unlikely to comply with the removal order. Immigration and Nationality Act § 241, [8 U.S.C.A. §§ 1231](#), [1231\(a\)\(1\)\(C\)](#), [1231\(a\)\(6\)](#), [1231\(c\)\(2\)\(A\)](#); [8 C.F.R. § 241.4](#).

[13] **Aliens, Immigration, and Citizenship** 🔑 Time limitations; indefinite detention

Although the Immigration and Nationality Act (INA) does not specify a time limit on how long the Department of Homeland Security (DHS) may detain a noncitizen in the post-removal period, the Supreme Court has read an implicit limitation into the statute in light of the Constitution's demands, such that a noncitizen may be detained only for a period “reasonably necessary” to bring about the individual's removal from the United States; that period is presumptively six months, and after that point, if the noncitizen provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must either rebut that showing

or release the individual. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231; 8 C.F.R. § 241.13.

[14] Aliens, Immigration, and Citizenship — Supervision in general
Aliens, Immigration, and Citizenship — Time limitations; indefinite detention

Under the Immigration and Nationality Act (INA), if no exception applies, a noncitizen who has been ordered removed but is not removed within the 90-day removal period will be released subject to supervision. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231(a)(3); 8 C.F.R. § 241.5.

[15] Aliens, Immigration, and Citizenship — Expedited removal

In addition to the removal procedures otherwise outlined in the Immigration and Nationality Act (INA), Congress has created an expedited process for noncitizens who reenter the United States without authorization after having already been removed. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231(a)(5).

[16] Aliens, Immigration, and Citizenship — Reinstatement of order

When a noncitizen has reentered the United States without authorization after having already been removed, Department of Homeland Security (DHS) regulations set out the process for reinstating his or her order of removal: in short, the agency obtains the noncitizen's prior order of removal, confirms the noncitizen's identity, determines whether the noncitizen's reentry was unauthorized, provides the noncitizen with written notice of its determination, allows the noncitizen to contest that determination, and then reinstates the order. Immigration and Nationality Act §

241, 8 U.S.C.A. § 1231(a)(5); 8 CFR §§ 241.8(a)-241.8(c), 1241.8(a)-1241.8(c).

[17] Aliens, Immigration, and Citizenship — Discretionary relief in general
Aliens, Immigration, and Citizenship — Expedited removal
Aliens, Immigration, and Citizenship — Right of review or intervention; standing

The Immigration and Nationality Act's (INA) expedited process for noncitizens who reenter the United States without authorization after having already been removed applies to “all illegal reentrants,” and it explicitly insulates the removal orders from review, while also generally foreclosing discretionary relief from the terms of the reinstated order. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231(a)(5).

[18] Aliens, Immigration, and Citizenship — Asylum, Refugees, and Withholding of Removal

Although the Immigration and Nationality Act's (INA) expedited process for noncitizens who reenter the United States without authorization after having already been removed explicitly insulates removal orders from review, while also generally foreclosing discretionary relief from the terms of the reinstated order, it does not preclude a noncitizen from pursuing withholding-only relief to prevent the Department of Homeland Security (DHS) from executing his removal to the particular country designated in his reinstated removal order. Immigration and Nationality Act § 241, 8 U.S.C.A. §§ 1231(a)(5), 1231(b)(3)(A).

[19] Aliens, Immigration, and Citizenship — Constitutional and Statutory Provisions

Aliens, Immigration, and Citizenship  Relief Under Treaties Against Torture

There are two paths for a noncitizen to seek withholding of removal: first, the noncitizen may seek statutory withholding under the Immigration and Nationality Act (INA), and second, the noncitizen may seek withholding under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which prohibits removal of a noncitizen to a country where that individual is likely to be tortured. Immigration and Nationality Act § 241,  8 U.S.C.A. § 1231(b)(3)(A);  8 CFR §§ 208.16-208.17,  1208.16-1208.17.

[20] **Aliens, Immigration, and Citizenship**  Application

Aliens, Immigration, and Citizenship  Time for hearing; continuance
The process for applying for withholding of removal depends on whether the noncitizen is subject to the standard removal proceedings or a reinstated order of removal; a noncitizen subject to the standard removal process typically applies for withholding during the course of his removal proceedings, but because a noncitizen subject to a reinstated order of removal will not have any removal proceedings, the process begins for him only if he expresses a fear to the Department of Homeland Security (DHS) of returning to the country of removal, at which point DHS will refer him to an asylum officer for a reasonable fear determination, which will normally be conducted within 10 days of the referral.  8 CFR §§ 208.31(a), 208.31(b),  1208.31(a), 1208.31(b).

[21] **Aliens, Immigration, and Citizenship**  Hearing or Interview

If an asylum officer concludes that a noncitizen seeking withholding of removal has a reasonable fear of returning to the country of removal, the

officer will refer the matter to an immigration judge (IJ) for initiation of withholding-only proceedings, which are limited to a determination of whether the noncitizen is eligible for withholding or deferral of removal.

 8 CFR §§ 208.2(c)(3)(i),  208.31(e),  1208.2(c)(3)(i),  1208.31(e).

[22] **Aliens, Immigration, and Citizenship**  Administrative Review

An immigration judge's (IJ) final decision as to withholding of removal can be appealed to the Board of Immigration Appeals (BIA).  8 CFR §§ 208.31(e),  1208.31(e).

[23] **Aliens, Immigration, and Citizenship**  Place to Where Removed or Deported

Aliens, Immigration, and Citizenship  Decision or Order
If a noncitizen is granted withholding-only relief, the Department of Homeland Security (DHS) may not remove the noncitizen to the country designated in the removal order unless the order of withholding is terminated, but because withholding of removal is a form of “country specific” relief, nothing prevents DHS from removing the noncitizen to a third country other than the country to which removal has been withheld or deferred.  8 CFR §§ 208.16(f), 208.22,  1208.16(f), 1208.22.

[24] **Aliens, Immigration, and Citizenship**  Detention Pending Removal Proceeding

Aliens, Immigration, and Citizenship  Detention After Order of Removal

Aliens, Immigration, and Citizenship  Bond or bail

The section of the Immigration and Nationality Act (INA) that applies “when an alien is

ordered removed” and enters the “removal period,” and not the section authorizing detention “pending a decision on whether the alien is to be removed,” governs the detention of noncitizens who were removed from the United States but later reentered without authorization, were subject to reinstated orders of removal, and then sought withholding of removal based on fear of persecution in the particular countries designated by their removal orders, meaning those noncitizens are not entitled to individualized bond hearings while they pursue withholding of removal; such noncitizens have been “ordered removed,” and their reinstated removal orders are “administratively final”; abrogating [Guerra v. Shanahan](#), 831 F.3d 59. Immigration and Nationality Act §§ 236, 241, [8 U.S.C.A. §§ 1226](#), [1231](#), [1231\(a\)\(5\)](#).

- [25] [Aliens, Immigration, and Citizenship](#) [Administrative Review](#)
- [Aliens, Immigration, and Citizenship](#) [Order and Warrant; Enforcement](#)

Phrase “administratively final,” as used in the section of the Immigration and Nationality Act (INA) that applies “when an alien is ordered removed” and enters the “removal period,” which begins on the “date the order of removal becomes administratively final,” refers to the agency's review proceedings, separate and apart from any judicial review proceedings that may occur in a court. Immigration and Nationality Act § 241, [8 U.S.C.A. §§ 1231](#), [1231\(a\)\(5\)](#).

- [26] [Aliens, Immigration, and Citizenship](#) [Operation and effect in general](#)
- Under the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) need not wait for a noncitizen to seek, and a court to complete, judicial review of a removal order before executing it; rather, once the Board of Immigration Appeals (BIA) has reviewed the order, or the time for seeking the BIA's review has expired, DHS is free to remove the noncitizen

unless a court issues a stay. Immigration and Nationality Act § 241, [8 U.S.C.A. §§ 1231](#), [1231\(a\)\(1\)\(B\)](#).

- [27] [Aliens, Immigration, and Citizenship](#) [Place to Where Removed or Deported](#)

[Aliens, Immigration, and Citizenship](#) [Decision or Order](#)

Under the Immigration and Nationality Act (INA), when a noncitizen applies for withholding-only relief, he does so as to a particular country, and if an immigration judge (IJ) grants the application for withholding of removal, the IJ prohibits the Department of Homeland Security (DHS) from removing the noncitizen to that particular country, not from the United States; the removal order is not vacated or otherwise set aside, but remains in full force, and DHS retains authority to remove the noncitizen to any other country authorized by statute, including a country designated by the noncitizen, the noncitizen's country of citizenship, the noncitizen's previous country of residence, the noncitizen's country of birth, the country from which the noncitizen departed for the United States, and finally, any country willing to accept the noncitizen. Immigration and Nationality Act § 241, [8 U.S.C.A. §§ 1231](#), [1231\(b\)\(2\)](#); [8 C.F.R. §§ 208.16\(f\)](#), [208.31\(a\)](#), [1208.16\(f\)](#), [1208.31\(a\)](#), [1240.12\(d\)](#).

- [28] [Aliens, Immigration, and Citizenship](#) [Asylum, Refugees, and Withholding of Removal](#)

Under the Immigration and Nationality Act (INA), withholding-only relief is country-specific; it relates to where a noncitizen may be removed, but says nothing about the antecedent question whether a noncitizen is to be removed from the United States. Immigration and Nationality Act § 241, [8 U.S.C.A. §§](#)

1231(b)(2), 1231(b)(3)(A); 8 C.F.R. §§ 208.31(a), 1208.31(a).

[29] **Aliens, Immigration, and Citizenship** — Asylum Distinguished from Withholding of Removal or Deportation
 While a grant of asylum permits a noncitizen to remain in the United States and to apply for permanent residency after one year, withholding-only relief only bars deporting a noncitizen to a particular country or countries. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231.

[30] **Aliens, Immigration, and Citizenship** — Place to Where Removed or Deported
Aliens, Immigration, and Citizenship — Asylum, Refugees, and Withholding of Removal
 A grant of withholding-only relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country; the noncitizen still may be removed at any time to another country. Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231.

[31] **Aliens, Immigration, and Citizenship** — Place to Where Removed or Deported
 The fact that alternative-country removal is rare does not make it statutorily unauthorized under the Immigration and Nationality Act (INA). Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231; 8 C.F.R. §§ 208.31(a), 1208.31(a).

[32] **Aliens, Immigration, and Citizenship** — Order and Warrant; Enforcement
Aliens, Immigration, and Citizenship — Decision or Order
 Under the Immigration and Nationality Act (INA), removal orders and withholding-only proceedings address two distinct questions, namely, “whether” a noncitizen is to be removed and to “where” the noncitizen is to be removed, such that the order of removal is separate from and antecedent to a grant of withholding of removal, and the validity of removal orders is not affected by the grant of withholding-only relief. Immigration and Nationality Act §§ 236, 241, 8 U.S.C.A. §§ 1226, 1231.

[33] **Aliens, Immigration, and Citizenship** — Order and Warrant; Enforcement
 Under the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) must remove a noncitizen within 90 days unless another subsection of the section of the INA governing withholding-only relief specifically contemplates that the removal period can exceed 90 days. Immigration and Nationality Act § 241, 8 U.S.C.A. §§ 1231, 1231(a)(1)(A).

[34] **Aliens, Immigration, and Citizenship** — Detention Pending Removal Proceeding
Aliens, Immigration, and Citizenship — Detention After Order of Removal
 The section of the Immigration and Nationality Act (INA) authorizing detention of a noncitizen “pending a decision on whether the alien is to be removed” and the section of the INA that applies “when an alien is ordered removed” and enters the “removal period” reflect Congress's judgment regarding the detention of different groups of aliens who pose different risks of

flight, that is, that noncitizens who have not been ordered removed are less likely to abscond because they have a chance of being found admissible, but noncitizens who have already been ordered removed are generally inadmissible and so pose a higher flight risk. Immigration and Nationality Act §§ 236, 241, 8 U.S.C.A. §§ 1226, 1231.

[35] Administrative Law and Procedure — Plain, literal, or clear meaning; ambiguity or silence

Chevron deference does not apply where the statute at issue is clear.

[36] Constitutional Law — Avoidance of constitutional questions

Canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, a statute is found to be susceptible of more than one construction.

Syllabus *

*1 Federal immigration law establishes procedures for removing aliens living unlawfully in the United States as well as for determining whether such persons are detained during removal proceedings. The Department of Homeland Security (DHS) may arrest and detain an alien “pending a decision on whether the alien is to be removed from the United States.” 8 U. S. C. § 1226(a). An alien detained under § 1226(a) may generally apply for release on bond or conditional parole. § 1226(a)(2). If an alien is ordered removed and the order becomes “administratively final,” detention becomes mandatory. §§ 1231(a)(1)(A)–(B), (a)(2). If an alien removed under this process reenters the country without authorization, that person faces reinstatement of “the prior order of removal from its original date.” § 1231(a)(5). That order “is not subject to being reopened or reviewed,” and

the alien “shall be removed under the prior order at any time after reentry.” *Ibid*.

Respondents are aliens who were removed from the United States and later reentered without authorization. When DHS reinstated their prior removal orders, each respondent sought withholding-only relief to prevent DHS from executing those orders based on fear of returning to their home country as designated in the removal orders. While respondents’ withholding-only proceedings were pending, DHS detained respondents, and respondents sought release on bond, which was initially denied. The Government opposed their release, maintaining that because respondents were detained under § 1231, not § 1226, they were not entitled to bond hearings. Respondents filed habeas proceedings in District Court, seeking a declaration that § 1226 governs their detention, as well as an injunction ordering the Government to grant them individualized bond hearings consistent with § 1226. The District Court entered summary judgment for respondents, and the Fourth Circuit affirmed.

Held: Section § 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal. Pp. — — —.

(a) Section 1231 authorizes detention “when an alien is ordered removed” and enters the “removal period,” which begins, as relevant here, on “[t]he date the order of removal becomes administratively final.” It is undisputed that each respondent was previously “ordered removed” pursuant to a valid order of removal and that those orders were “reinstated from [their] original date[s]” under § 1231(a)(5). Those reinstated removal orders were also “administratively final.” By inserting the word “administratively,” Congress made clear that DHS need not wait for the alien to seek or exhaust judicial review of that order. Respondents contend that even if § 1231 normally governs in such cases, it ceases to apply when the alien pursues withholding-only relief. Respondents’ arguments cannot overcome the statute’s plain text. Pp. — — —.

(1) Respondents misunderstand the nature of withholding-only proceedings when they argue that because an immigration judge or the Board of Immigration Appeals (BIA) might determine that DHS cannot remove an alien to the specific country designated in the removal order, the question whether the alien is “to be removed” remains

“pending” and is therefore governed by § 1226. If an immigration judge grants an application for withholding of removal, DHS is prohibited from removing the alien *to* that particular country, not *from* the United States. The removal order remains in full force, and DHS retains the authority to remove the alien to any other authorized country. This Court and the BIA have long understood the nature of withholding-only relief this way. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419, 119 S.Ct. 1439, 143 L.Ed.2d 590. Pp. — — —.

*2 (2) Respondents next argue that a removal order does not become “administratively final” until the withholding-only proceedings conclude. A reinstated removal order, they contend, loses its prior finality when the alien initiates withholding-only proceedings. This argument ignores that removal orders and withholding-only proceedings address two distinct questions and end in two separate orders. See *Nasrallah v. Barr*, 590 U.S. — — —, 140 S.Ct. 1683, — — —, 207 L.Ed.2d 111. Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien’s initiation of withholding-only proceedings does not render non-final an otherwise “administratively final” reinstated order of removal. Pp. — — —.

(3) Respondents submit that the “except as otherwise provided in this section” language in the opening clause of § 1231(a)(1)(A)—which sets the default for the length of the removal period at 90 days—places a limit on when the removal period is triggered. The most natural reading of that phrase, however, is that the Government must remove an alien within 90 days *unless* another section of § 1231 specifically contemplates that the removal period can exceed 90 days. The presence of specific statutory provisions in § 1231 that relate to the length of the removal period leads to the conclusion that the opening clause of § 1231(a)(1)(A) refers to them and not the withholding-only provision, which does not mention the length of the removal period and does not stand in the way of removal to a third country. Pp. — — —.

(b) Statutory structure confirms this Court’s textual reading. Every provision applicable to respondents is located in § 1231. It would thus be odd if the provision governing their detention was located in § 1226, rather than § 1231, which contains its own detention provision. Moreover, the inclusion of the statutory withholding provision in § 1231, grouped with other provisions that relate to *where* DHS may remove an alien, illustrates how withholding-only relief fits within

the removal process generally. The order of the applicable Immigration and Nationality Act provisions provides further context for interpreting the proper application of § 1226 and § 1231. Section 1226 applies before an alien proceeds through the removal proceedings and obtains a decision; § 1231 applies after. Pp. 18–19.

(c) Respondents’ contrary reading would also undermine Congress’s judgment regarding the detention of different groups of aliens who posed different flight risks. Aliens who have not been ordered removed are less likely to abscond because they have a chance of being found admissible, while aliens who have already been ordered removed are generally inadmissible, see § 1182(a)(9)(C)(ii), and have already demonstrated a willingness to violate the terms of a removal order, see § 1231(a)(6). Congress had obvious reasons to treat these two groups differently. P. — — —.

(d) Respondents remaining arguments are that withholding-only proceedings are a legal impediment that, like the three triggers to the start of the removal period listed in § 1231(a)(1)(B), must be eliminated before the removal period begins and that Congress could not have intended § 1231 to apply to an alien in withholding-only proceedings because withholding-only proceedings often take longer than 90 days. Neither argument is persuasive. Pp. — — —.

940 F.3d 867, reversed.

ALITO, J., delivered the opinion of the Court, except as to footnote 4. ROBERTS, C. J., and KAVANAUGH and BARRETT, JJ., joined that opinion in full. THOMAS, J., filed an opinion concurring except for footnote 4 and concurring in the judgment, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

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

Attorneys and Law Firms

Vivek Suri, Washington, DC, for Petitioners.

Paul W. Hughes, Washington, DC, for Respondents.

Jeffrey B. Wall, Acting Solicitor General Counsel of Record, Edwin S. Kneedler, Deputy Solicitor General, Scott G. Stewart, Deputy Assistant Attorney General, Vivek Suri, Assistant to the Solicitor General, Lauren E. Fascett, Brian C. Ward, Attorneys Department of Justice, Washington, D.C., for Petitioner

Simon Y. Sandoval-Moshenberg, Rachel C. McFarland, Legal Aid Justice Center, Falls Church, VA, Mark Stevens, Murray Osorio PLLC, Fairfax, VA, Paul W. Hughes, Counsel of Record, Michael B. Kimberly, Andrew A. Lyons-Berg, McDermott Will & Emery LLP, Washington, DC, Eugene R. Fidell, Yale Law School, Supreme Court Clinic, New Haven, CT, for Respondents.

Opinion

Justice ALITO delivered the opinion of the Court, except as to footnote 4.

*3 Federal immigration law contains various provisions authorizing the Government to detain aliens during the removal process. This case concerns two of them: 8 U. S. C. § 1226 and 8 U. S. C. § 1231. We are asked to decide which of those provisions applies to aliens who were removed from the United States but later reentered without authorization, were subject to reinstated orders of removal, and then sought withholding of removal based on fear of persecution in the particular countries designated by their removal orders. If the answer is § 1226, which applies “pending a decision on whether the alien is to be removed from the United States,” then the alien may receive a bond hearing before an immigration judge. If the answer is § 1231, which applies after the alien is “ordered removed,” then the alien is not entitled to a bond hearing. We conclude that § 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal, meaning those aliens are not entitled to a bond hearing while they pursue withholding of removal.

I

A

[1] [2] [3] The Immigration and Nationality Act (INA) establishes procedures for removing aliens living unlawfully

in the United States. In the ordinary course, if the Department of Homeland Security (DHS)¹ discovers that an alien is living in the United States without authorization, it may initiate removal proceedings against the alien by sending him a “notice to appear.” 110 Stat. 3009–587, as added and amended, 8 U. S. C. § 1229(a). That notice informs the alien of, among other things, the charges against him and the time and place of the hearing at which an immigration judge will determine whether the alien is to be removed. §§ 1229(a)(1)(D), (G)(i).

[4] [5] [6] The INA further provides that DHS may arrest and detain the alien “pending a decision on whether the alien is to be removed from the United States.” § 1226(a). Aliens who are arrested and detained may generally apply for release on bond or conditional parole. § 1226(a)(2).² To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings. 8 CFR §§ 236.1(c)(8), 1236.1(c)(8) (2020); *In re Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999). If DHS denies the alien's request, the alien may request a bond hearing in front of an immigration judge by filing an application for a change in the alien's detention conditions. See §§ 236.1(d)(1), 1003.19(a), 1236.1(d)(1). Either the alien or DHS may appeal the immigration judge's decision to the Board of Immigration Appeals (BIA). See §§ 236.1(d)(3)(i), 1003.19(f), 1236.1(d)(3)(i).

[7] [8] At some point, the alien will also have the above-mentioned hearing before an immigration judge to determine whether he is inadmissible or deportable, and therefore subject to removal. 8 U. S. C. § 1229a(a)(1). The alien may seek various forms of relief or protection from removal, such as asylum or withholding of removal. See § 1229a(c)(4)(A); 8 CFR §§ 1208.4(b)(3)(i), 1240.11(c), (e). If the immigration judge decides that the alien is inadmissible or deportable and that the alien is not entitled to any of the relief or protection that he requested, the immigration judge will issue an order of removal. 8 U. S. C. § 1229a(c)(5). If the immigration judge issues an order of removal, the alien may file a motion to reconsider, a motion to reopen, an appeal to the BIA, and a petition for review in federal court. §§ 1229a(c)(5)–(7), 1252(b); 8 CFR § 1240.15.

*4 [9] [10] [11] Once an alien is ordered removed, DHS must physically remove him from the United States within a 90-day “removal period.” 8 U. S. C. § 1231(a)(1)(A). The removal period begins on the latest of three dates: (1) the date the order of removal becomes “administratively final,” (2) the date of the final order of any court that entered a stay of removal, or (3) the date on which the alien is released from non-immigration detention or confinement. § 1231(a)(1)(B). During the removal period, detention is mandatory. § 1231(a)(2).

[12] Under § 1231, the removal period may be extended in at least three circumstances, such that an alien remains detained after 90 days have passed. First, the removal period may be extended if the alien fails to make a timely application for travel documents or acts to prevent his removal. § 1231(a)(1)(C). Second, DHS may stay the immediate removal of certain aliens if it decides that such removal is not practicable or proper, or if the alien is needed to testify in a pending prosecution. § 1231(c)(2)(A). And finally, the statute provides that an alien may be detained beyond the removal period or released under supervision if he is (1) inadmissible, (2) removable as a result of violations of status requirements, entry conditions, or the criminal law, or for national security or foreign policy reasons, or (3) a risk to the community or unlikely to comply with the removal order. § 1231(a)(6); see also 8 CFR § 241.4 (setting out procedures DHS must follow to impose continued detention). Continued detention under this provision creates the “post-removal-period.”

[13] Although the statute does not specify a time limit on how long DHS may detain an alien in the post-removal period, this Court has “read an implicit limitation” into the statute “in light of the Constitution's demands,” and has held that an alien may be detained only for “a period reasonably necessary to bring about that alien's removal from the United States.” *Zadvydas v. Davis*, 533 U.S. 678, 689, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). And according to the Court, a period reasonably necessary to bring about the alien's removal from the United States is presumptively six months. *Id.*, at 701, 121 S.Ct. 2491. After that point, if the alien “provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,”

the Government must either rebut that showing or release the alien. *Ibid.*; see also 8 CFR § 241.13 (setting out the *Zadvydas* procedures).

[14] If no exception applies, an alien who is not removed within the 90-day removal period will be released subject to supervision. See 8 U. S. C. § 1231(a)(3); see also 8 CFR § 241.5.

B

[15] [16] In addition to the removal procedures outlined above, Congress has created an expedited process for aliens who reenter the United States without authorization after having already been removed. The relevant statutory provision states:

“If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.” § 1231(a)(5).

DHS's regulations set out the process for reinstating an order of removal. In short, the agency obtains the alien's prior order of removal, confirms the alien's identity, determines whether the alien's reentry was unauthorized, provides the alien with written notice of its determination, allows the alien to contest that determination, and then reinstates the order. See 8 CFR §§ 241.8(a)–(c), 1241.8(a)–(c).

*5 [17] [18] Title 8 U. S. C. § 1231(a)(5) applies to “all illegal reentrants,” and it “explicitly insulates the removal orders from review,” while also “generally foreclos[ing] discretionary relief from the terms of the reinstated order.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006). It does not, however, preclude an alien from pursuing withholding-only relief to prevent DHS from executing his removal to the particular country designated in his reinstated removal order. *Ibid.*, n. 4; see also § 1231(b)(3)(A).

C

[19] Much of this case turns on the nature of withholding-only proceedings. There are two paths for seeking withholding of removal. First, the alien may seek statutory withholding under § 1231(b)(3)(A), which provides that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.” Second, the alien may seek withholding under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 113, which prohibits removal of an alien to a country where the alien is likely to be tortured. See 8 CFR §§ 208.16–208.17, 1208.16–1208.17.

[20] [21] [22] The process for applying for withholding of removal depends on whether the alien is subject to the standard removal proceedings or a reinstated order of removal. As mentioned above, an alien subject to the standard removal process typically applies for withholding during the course of his removal proceedings. See *supra*, at —. But because an alien subject to a reinstated order of removal will not have any removal proceedings, the process begins for him only if he expresses a fear to DHS of returning to the country of removal. See §§ 208.31(a), 1208.31(a). At that point, DHS will refer him to an asylum officer for a reasonable fear determination, which will normally be conducted within 10 days of the referral. §§ 208.31(b), 1208.31(b). If the asylum officer concludes that the alien has a reasonable fear, he will refer the matter to an immigration judge for initiation of withholding-only proceedings. §§ 208.31(e), 1208.31(e). Those proceedings are “limited to a determination of whether the alien is eligible for withholding or deferral of removal,” and as such, “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” §§ 208.2(c)(3)(i), 1208.2(c)(3)(i). The immigration judge's final decision as to withholding can be appealed to the BIA. §§ 208.31(e), 1208.31(e).

[23] If an alien is granted withholding-only relief, DHS may not remove the alien to the country designated in the removal

order unless the order of withholding is terminated. §§ 208.22, 1208.22. But because withholding of removal is a form of “‘country specific’ ” relief, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428, n. 6, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), nothing prevents DHS “from removing [the] alien to a third country other than the country to which removal has been withheld or deferred,” §§ 208.16(f), 1208.16(f); see also §§ 208.17(b)(2), 1208.17(b)(2).

D

Respondents are aliens who were removed from the United States and later reentered without authorization. *Guzman Chavez v. Hott*, 940 F.3d 867, 870 (C.A.4 2019). When DHS discovered their presence, it reinstated their prior removal orders. *Id.*, at 870–871. Each respondent expressed a fear of returning to his or her home country and was referred to an asylum officer for a reasonable fear interview. *Id.*, at 871. In each case, the asylum officer determined that the respondent had a reasonable fear of persecution or torture and referred the respondent to an immigration judge for withholding-only proceedings. *Ibid.* Although some of the respondents were initially granted supervised release, all were ultimately detained by DHS. *Ibid.* They then sought release on bond while their withholding-only proceedings were pending. The Government opposed release, maintaining that because respondents were detained under 8 U. S. C. § 1231, not § 1226, they were not entitled to bond hearings.

*6 Respondents filed two habeas proceedings in the Eastern District of Virginia seeking a declaration that § 1226 rather than § 1231 governs their detention, as well as an injunction ordering the Government to grant them individualized bond hearings consistent with § 1226.³ In both cases, the District Court entered summary judgment in favor of respondents, concluding that § 1226 governs their detention. See *Romero v. Evans*, 280 F.Supp.3d 835, 849 (2017); *Diaz v. Hott*, 297 F.Supp.3d 618, 623, 628 (2018). The Government appealed both decisions, and the Fourth Circuit affirmed, over a dissent by Judge Richardson. See 940 F.3d at 882. In doing so, the Fourth Circuit

joined the Second Circuit but departed from the Third, Sixth, and Ninth Circuits. Compare [Guerra v. Shanahan](#), 831 F.3d 59, 64 (C.A.2 2016), with [Martinez v. Larose](#), 968 F.3d 555, 559 (C.A.6 2020); [Guerrero-Sanchez v. Warden York County Prison](#), 905 F.3d 208, 213 (C.A.3 2018); [Padilla-Ramirez v. Bible](#), 882 F.3d 826, 832 (C.A.9 2017). We granted certiorari to resolve the split. [Albence v. Guzman Chavez](#), 590 U. S. —, 141 S.Ct. 107, 207 L.Ed.2d 1050 (2020). We conclude that [§ 1231](#), not [§ 1226](#), governs respondents’ detention and now reverse the judgment of the Fourth Circuit.⁴

II

A

[24] We turn first to the statutory text. [Section 1226](#) provides that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” [§ 1226\(a\)](#). [Section 1231](#), by contrast, authorizes detention “when an alien is ordered removed” and enters the “removal period,” which begins on “[t]he date the order of removal becomes administratively final.” [§§ 1231\(a\)\(1\)\(A\)–\(B\), \(2\)](#).⁵ It further provides that when an alien reenters the country after having already been removed, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.” [§ 1231\(a\)\(5\)](#). In that scenario, “the alien is not eligible and may not apply for any relief under this chapter” and “shall be removed under the prior order at any time after the reentry.” *Ibid.*

The parties agree that [§ 1226](#) governs the detention of aliens until [§ 1231](#)’s “removal period” begins. As relevant here, the removal period begins when an alien is “ordered removed,” and the removal order becomes “administratively final.” To resolve this case, we therefore must decide two questions: whether respondents were “ordered removed” and whether their reinstated removal orders were “administratively final.” The answer to both questions is yes.

First, respondents have been “ordered removed.” It is undisputed that each respondent was previously removed pursuant to a valid order of removal. And after respondents later reentered the United States without authorization, those prior orders were “reinstated from [their] original date[s]” under [§ 1231\(a\)\(5\)](#). Those reinstated orders are not subject to reopening or review, nor are respondents eligible for discretionary relief under the INA. Instead, they “shall be removed under the prior order at any time after the reentry.” *Ibid.* Accordingly, respondents’ prior orders, reinstated under [§ 1231\(a\)\(5\)](#), show that respondents were ordered removed.

*7 [25] [26] Second, respondents’ reinstated removal orders are “administratively final.” Although that phrase is not defined in the statute, its meaning is clear. By using the word “administratively,” Congress focused our attention on the *agency’s* review proceedings, separate and apart from any judicial review proceedings that may occur in a court. Context confirms this interpretation. Recall that under [§ 1231\(a\)\(1\)\(B\)](#), the removal period begins “on the latest of” three events: (1) “[t]he date the order of removal becomes administratively final”; (2) “[i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order”; and (3) “[i]f the alien is detained or confined” outside the immigration process, the date of the alien’s release. Reading the first two provisions together, it is clear that DHS need not wait for the alien to seek, and a court to complete, judicial review of the removal order before executing it. Rather, once the BIA has reviewed the order (or the time for seeking the BIA’s review has expired), DHS is free to remove the alien *unless* a court issues a stay. That reinforces why Congress included “administratively” before the word “final” in the first provision.

Respondents do not contest that their prior removal orders have long been “administratively final,” as we understand the term. See Brief for Respondents 8, 20–21, 24–26.⁶ Each had the opportunity to seek review in the BIA after the initial removal order was entered, and [§ 1231\(a\)\(5\)](#) explicitly prohibits them from seeking review or relief from the order after it is reinstated following unlawful reentry. In other words, there is nothing left for the BIA to do with respect to the removal order other than to execute it. Thus, respondents’ orders are administratively final.

For these reasons, § 1231's detention provisions are a natural fit for aliens subject to reinstated orders of removal. Respondents and the dissent appear to accept this much but nevertheless contend that even if § 1231 normally governs aliens in this posture, it ceases to apply when such an alien pursues withholding-only relief. See *post*, at ——— – ——— (opinion of BREYER, J.). Each of the arguments on this score fails.

1

[27] [28] Respondents first argue that because an immigration judge or the BIA might determine that DHS cannot remove an alien to the specific country designated in the removal order, the question whether the alien is “to be removed” remains “pending” and is therefore governed by § 1226. Respondents misunderstand the nature of withholding-only proceedings. When an alien applies for withholding-only relief, he does so as to a particular country. See 8 CFR §§ 208.31(a), 1208.31(a). The proceedings that result from such an application are “limited to a determination of whether the alien is eligible for withholding or deferral of removal,” and “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” §§ 208.2(c)(3)(i), 1208.2(c)(3)(i). If an immigration judge grants an application for withholding of removal, he prohibits DHS from removing the alien *to* that particular country, not *from* the United States. The removal order is not vacated or otherwise set aside. It remains in full force, and DHS retains the authority to remove the alien to any other country authorized by the statute. See §§ 208.16(f), 1208.16(f), 1240.12(d). And the statute provides numerous options: a country designated by the alien; the alien's country of citizenship; the alien's previous country of residence; the alien's country of birth; the country from which the alien departed for the United States; and finally, any country willing to accept the alien. Brief for Petitioners 3 (citing 8 U. S. C. § 1231(b)(2)). In short, withholding-only relief is country-specific. It relates to *where* an alien may be removed. It says nothing, however, about the antecedent question *whether* an alien is to be removed from the United States.

*8 [29] [30] This Court and the BIA have long understood the nature of withholding-only relief this way. In *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999), we distinguished withholding-only relief from asylum, noting that “a grant of asylum permits an alien to *remain in the United States* and to apply for permanent residency after one year,” while “withholding only bars deporting an alien *to a particular country or countries.*” (Emphasis added.) And in *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008), the BIA made clear that withholding-only relief “does not afford [an alien] any permanent right to remain in the United States.” Rather, as the “regulations make clear,” a grant of withholding “does not prevent the DHS from removing an alien to a country other than the one to which removal has been withheld.” *Ibid.* Indeed, just last Term, we affirmed that a grant of withholding-only relief “means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country,” and that “the noncitizen still may be removed at any time to another country.” *Nasrallah v. Barr*, 590 U. S. —, —, 140 S.Ct. 1683, 1691, 207 L.Ed.2d 111 (2020) (internal quotation marks omitted).

[31] Respondents counter that, as a practical matter, the questions “whether” an alien may be removed and “where” he may be removed to are indistinguishable because DHS often does not remove an alien to an alternative country if withholding relief is granted. They point to one source claiming that in 2017, only 1.6% of aliens who were granted withholding of removal were actually removed to an alternative country. See Brief for Respondents 6, 30–31 (citing American Immigration Council & National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 7 (Oct. 2020), www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf). But the fact that alternative-country removal is rare does not make it statutorily unauthorized. Here, the statute makes clear that removability and withholding relief are distinct, and we decline to ignore the plain import of the statutory text in favor of on-the-ground statistics about the feasibility of removal to a third country.

Indeed, respondents’ argument—that the decision about whether an alien “is to be removed” remains “pending” for

purposes of § 1226 until DHS is certain that it will be able to carry out that removal—is at odds with the statutory text of § 1231 and our decision in *Zadvydas*. To begin, it is not plausible that an alien is detained under § 1226 instead of § 1231 while DHS resolves any practical problems associated with the execution of a removal order because § 1231, not § 1226, is the part of the INA that anticipates and addresses those problems. For example, § 1231(a)(1)(C) extends the removal period if the alien fails to timely apply for travel documents and therefore cannot be removed to the relevant country. Section 1231(c)(2)(A) authorizes DHS to stay the immediate removal of certain aliens if it decides that immediate removal “is not practicable or proper.” And § 1231(a)(3) allows for supervised release after the 90-day removal period expires “[i]f the alien does not leave or is not removed” during that time period. Those provisions would be unnecessary if questions of how and where an alien is to be removed were bound up in whether the alien was removable at all under § 1226.

Our decision in *Zadvydas* confirms this distinction between whether an alien is to be removed and where an alien is to be sent. In that case, we addressed claims raised by two aliens who, due to the Government's inability to locate a country of removal, had been detained for prolonged periods of time under § 1231. See 533 U.S., at 684–686, 121 S.Ct. 2491. But rather than holding that these aliens should not have been detained under § 1231 at all because the decision about whether they were to be removed remained “pending,” the Court set out certain procedural mechanisms to allow aliens to seek release from § 1231 detention if there was no significant likelihood of removal in the reasonably foreseeable future. *Id.*, at 701, 121 S.Ct. 2491. That holding would make little sense if DHS had to conclusively resolve the question of “where” an alien was to be removed *before* resolving “whether” the alien was to be removed under § 1226.⁷

*9 Respondents next argue that a removal order does not become “administratively final” until the withholding-only proceedings conclude. That is so, they say, even if a reinstated order of removal is “administratively final” at the time of its reinstatement; according to their submission, when the alien initiates withholding-only proceedings, the reinstated order loses its prior finality. See Brief for Respondents 24–25. In a similar vein, the dissent contends that respondents’ removal orders are not “administratively final” because, by seeking withholding-only relief, respondents are “in effect” seeking “a modification of, a change in, or a withholding of, the ‘prior order of removal.’” *Post*, at —.

[32] These related arguments suffer from the same flaw as the one just discussed: They ignore that removal orders and withholding-only proceedings address two distinct questions. As a result, they end in two separate orders, and the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings.

Case law makes this clear. In *Matter of I-S- & C-S-*, two aliens asserted that they were entitled to withholding of removal during their initial removal proceedings. The Immigration Judge concluded that they were removable but agreed that they were entitled to withholding relief. As a result, the Immigration Judge did not issue an order of removal but instead simply granted the aliens’ withholding applications. 24 I. & N. Dec., at 432–433. DHS appealed, arguing that it was error for the Immigration Judge not to issue the order of removal. *Id.*, at 433. The BIA agreed. It stated that “[a]lthough entering an order of removal prior to granting withholding may appear to be a technicality,” it is “axiomatic that in order to withhold removal there must *first* be an order of removal that can be withheld.” *Ibid.* (emphasis added). In other words, the order of removal is separate from and antecedent to a grant of withholding of removal. Every Member of this Court approved that reading just last Term. In *Nasrallah v. Barr*, the majority explained that the grant of withholding relief under CAT “does not disturb the final order of removal,” “affect the validity of the final order of removal,” or otherwise “merge into the final order of removal.” 590 U. S., at —, 140 S.Ct., at 1691. The dissent acknowledged the same. See *id.*, at —, 140 S.Ct., at 1696 (opinion of THOMAS, J.) (“The majority correctly notes that a CAT order does not fall within” the statute's definition of an order of removal); *id.*, at —

—, 140 S.Ct., at 1697 (“[S]tatutory withholding seeks to prevent removability and is considered after the alien has been deemed removable. Thus, statutory withholding claims also do not affect the validity of the underlying removal order” (citation omitted)). Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien’s initiation of withholding-only proceedings does not render non-final an otherwise “administratively final” reinstated order of removal.

3

At oral argument, respondents offered a new textual argument in support of their position that § 1231 does not govern their detention. They point to the opening clause of § 1231(a)(1)(A), which states in full: “*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.” (Emphasis added.) Respondents submit that because withholding-only relief is provided for in § 1231, DHS cannot remove an alien who seeks such relief, and the removal period cannot begin under § 1231(a)(1)(B). Tr. of Oral Arg. 33–34, 45. Stated differently, respondents read the “[e]xcept as” language as another limit on when the removal period is triggered, a reading that the dissent endorses. See *post*, at ———.

*10 [33] Even assuming that respondents did not forfeit this argument by failing to raise it in their brief, it fails on the merits. Section 1231(a)(1)(A) relates to the length of the removal period, and it sets the default for that period at 90 days. It does not, as respondents suggest, serve as the “gateway” for when the removal period begins. Tr. of Oral Arg. 45. Those triggers appear in § 1231(a)(1)(B). Nor does it simply offer “basic operative language” regarding what DHS must do. *Post*, at ———. The provision’s focus is the length of time that DHS has to remove an alien once the alien is ordered removed. And the most natural reading of the “except as otherwise provided” clause is that DHS must remove an alien within 90 days *unless* another subsection of § 1231 specifically contemplates that the removal period can exceed 90 days. That aligns with the rest of § 1231, which contains specific provisions mandating or authorizing DHS to extend detention beyond 90 days. See,

e.g., § 1231(a)(1)(C) (requiring the extension of the 90-day period and permitting continued detention “if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien’s departure or conspires or acts to prevent the alien’s removal subject to an order of removal”); § 1231(c)(2)(A) (permitting DHS to stay immediate removal of certain aliens if such “removal is not practicable or proper” or the alien is needed to testify in a criminal case); § 1231(a)(6) (permitting DHS to detain certain groups of aliens “beyond the removal period”).⁸

Given the presence of specific statutory provisions in § 1231 under which DHS is not required to remove the alien within 90 days, we have little trouble concluding that the opening clause of § 1231(a)(1)(A) refers to them and not the withholding-only provision, which does not mention the length of the removal period and does not stand in the way of removal to a third country.

In short, the statutory text makes clear that § 1231, not § 1226, governs respondents’ detention, and none of respondents’ counterarguments can overcome that plain text.

B

The statutory structure confirms the textual reading. Consider first the structure of § 1231 itself, which is titled “Detention and removal of aliens ordered removed.” Every provision applicable to respondents is located in § 1231. Respondents’ orders of removal are reinstated against them under § 1231(a)(5). The bar on reopening or reviewing those removal orders, as well as the requirement that DHS remove aliens subject to reinstated orders, also appears in § 1231(a)(5). And the provision allowing respondents to seek withholding-only relief comes from § 1231(b)(3)(A). It would thus be odd if the provision governing respondents’ detention was located in § 1226, rather than § 1231, which contains its own detention provision. See 940 F.3d at 887 (Richardson, J., dissenting).

Moreover, the inclusion of the statutory-withholding provision in § 1231, grouped with other provisions

that relate to *where* DHS may remove an alien, illustrates how withholding-only relief fits within the removal process generally. [Section 1231\(b\)](#) is entitled “Countries to which aliens may be removed.” Paragraph (1) lists all of the countries to which an alien “arriving at the United States” may be removed. Paragraph (2) lists all of the countries to which “[o]ther aliens” may be removed. And paragraph (3)(A)—the statutory-withholding provision—states that “[n]otwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” The placement of the statutory-withholding provision in [§ 1231](#) is therefore strong evidence that withholding-only proceedings are relevant to where an alien will be removed (and therefore detention under [§ 1231](#)), not whether the alien will be removed at all (and therefore detention under [§ 1226](#)).

*11 The general structure of the INA provides further support. [Sections 1226](#) and [1231](#) both appear in Part IV of Title 8, chapter 12, of the United States Code, entitled “Inspection, Apprehension, Examination, Exclusion, and Removal.” The sections within that part proceed largely in the sequential steps of the removal process. Sections 1221 to 1224 address the arrival of aliens. Section 1225 provides instructions for inspecting aliens, expediting the removal of some, and referring others for a removal hearing. [Section 1226](#) authorizes the arrest and detention of aliens pending a decision on whether they are to be removed. Section 1227 explains which aliens are deportable. Section 1228 authorizes the expedited removal of some of those deportable aliens. [Sections 1229](#), [1229a](#), and [1229b](#) set out the process for initiating and conducting removal proceedings, and they specify the types of relief that an alien can request during those proceedings, such as cancellation of removal. Section 1229c addresses voluntary departure. Section 1230 explains what to do if an alien is admitted. And [§ 1231](#) explains what to do if the alien is ordered removed.

The order of the sections in Part IV provides helpful context for interpreting the proper application of [§ 1226](#) and [§ 1231](#). See [940 F.3d at 887–888](#) (Richardson, J., dissenting). [Section 1226](#) applies before an alien proceeds

through the removal proceedings and obtains a decision; [§ 1231](#) applies after. Once an alien has been ordered removed from the United States in a removal proceeding under [§ 1229a](#) and that order has been reinstated under [§ 1231\(a\)\(5\)](#), “the alien cannot go back in time, so to speak, to [§ 1226](#).” *Id.*, at 888.

C

[34] Respondents’ contrary reading would undermine Congress’s judgment regarding the detention of different groups of aliens who posed different risks of flight: aliens detained under [§ 1226](#) before having been ordered removed and those held under [§ 1231](#) after already having been ordered removed.

Aliens who have not been ordered removed are less likely to abscond because they have a chance of being found admissible, but aliens who have already been ordered removed are generally inadmissible. See [8 U. S. C. § 1182\(a\)\(9\)\(C\)](#). The only apparent relief they can hope to obtain is a grant of withholding-only relief, and they would seem to still have a chance to get that relief if they absconded and were again apprehended. In addition, aliens who reentered the country illegally after removal have demonstrated a willingness to violate the terms of a removal order, and they therefore may be less likely to comply with the reinstated order. See [§ 1231\(a\)\(6\)](#). Congress had obvious reasons to treat these two groups differently.

III

Respondents’ remaining arguments are unpersuasive. They primarily argue that [§ 1226](#) governs whenever the INA does not “authorize” DHS to remove an alien. Brief for Respondents 16. Respondents rely on [§ 1231\(a\)\(1\)\(B\)](#), which, again, provides that the removal period begins on the latest of three dates: (1) the date the order of removal becomes “administratively final,” (2) the date of the final order of any court that entered a stay of removal, or (3) the date on which the alien is released from non-immigration detention or confinement. Respondents contend that those

triggers constitute various legal impediments to removal, and those legal impediments show that § 1231 detention applies only if DHS has secured full and complete legal authority to remove an alien. In other words, to detain an alien under § 1231, DHS must eliminate all legal impediments to removal. Otherwise, § 1226 applies. Like the three legal impediments listed in § 1231(a)(1)(B), respondents say, withholding-only proceedings are another impediment that deprives DHS of the full legal authority required to remove.

Respondents’ argument fails on multiple levels. First, even if § 1231(a)(1)(b) imposes three “legal impediments” to removal, that does not mean that *all* legal impediments must be eliminated before the removal period begins. Indeed, the text of § 1231(a)(1)(B) suggests the opposite. It enumerates three specific triggers for the removal period but nowhere includes “the completion of withholding-only proceedings.” See *NLRB v. SW General, Inc.*, 580 U.S. —, —, 137 S.Ct. 929, 940, 197 L.Ed.2d 263 (2017) (“[E]xpressing one item of an associated group or series excludes another left unmentioned” (brackets and internal quotation marks omitted)). Nor does it otherwise include a catchall provision that might support respondents’ position, such as “or the date on which DHS obtains final legal authority to remove the alien.” Second, even if we accepted that there is an implicit requirement that DHS have full “legal authority” before the removal period begins, withholding-only proceedings have nothing to do with that authority. As explained above, DHS retains its authority during withholding-only proceedings to remove the alien to any country other than the country that is the subject of those proceedings.

*12 Respondents next turn to the 90-day removal requirement in § 1231(a)(1)(A). They contend that Congress could not have intended § 1231 to apply to an alien in withholding-only proceedings because the removal period contemplated by § 1231(a)(1)(A) is only 90 days, and withholding-only proceedings take much longer than that. Brief for Respondents 22, 26–27. In respondents’ view, the removal period’s short duration proves that it is meant to apply only during the final period during which DHS takes steps to put an alien on an outbound plane. *Id.*, at 22. Even assuming respondents are correct that withholding-only proceedings are not usually completed in 90 days, it

does not follow that § 1231 is inapplicable to aliens who initiate them. In addition to setting out a 90-day removal period, § 1231 expressly authorizes DHS to release under supervision or continue the detention of aliens if removal cannot be effectuated within the 90 days. See §§ 1231(a)(3), (6). There is no reason why DHS cannot detain aliens in withholding-only proceedings under those same post-removal-period provisions. As explained above, DHS routinely holds aliens under these provisions when geopolitical or practical problems prevent it from removing an alien within the 90-day period. See, e.g., *Zadvydas*, 533 U.S., at 684–686, 121 S.Ct. 2491.

[35] [36] Relatedly, respondents suggest that because § 1231(a)(1)(A) says DHS “shall” remove the alien within the 90-day removal period, and it would be practically impossible to do that in most cases involving withholding-only proceedings, § 1231 must not apply when withholding-only proceedings are pending. See Brief for Respondents 26. But this argument overlooks the rest of § 1231’s directive, which states that DHS “shall” remove the alien within 90 days “[e]xcept as otherwise provided in this section.” § 1231(a)(1)(A). And, as noted above, “this section” provides for post-removal detention and supervised release in the event an alien cannot be removed within the 90-day removal period, §§ 1231(a)(3), (6). Interpreting § 1231 to apply even if withholding-only proceedings remain pending longer than 90 days thus does not “mak[e] it structurally impossible” for DHS “to satisfy its statutory obligation,” as respondents argue. Brief for Respondents 26.⁹

* * *

We reverse the judgment of the U. S. Court of Appeals for the Fourth Circuit.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring except for footnote 4 and concurring in the judgment.

This Court has an “independent obligation” to assess whether it has jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500,

514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). We do not have it here.

Congress has restricted our jurisdiction in removal cases. See 8 U. S. C. § 1252(b)(9); *Jennings v. Rodriguez*, 583 U. S. —, —, 138 S.Ct. 830, 853, 200 L.Ed.2d 122 (2018) (THOMAS, J., concurring in part and concurring in judgment). Under § 1252(b)(9), we can exercise judicial review of “questions of law and fact ... arising from any action taken or proceeding brought to remove an alien” in only two circumstances. One is to review a final order of removal. § 1252(b)(9). The other is to exercise an express grant of jurisdiction elsewhere in § 1252. *Ibid.*; *Jennings*, 583 U. S., at —, 138 S.Ct., at 836–837. Neither circumstance is present here.

Therefore, if respondents’ claims “aris[e] from any action taken or proceeding brought to remove an alien,” the jurisdictional bar in § 1252(b)(9) applies. And for all the reasons I discussed in *Jennings*, challenges to detention during the removal process, such as this one, “fall within the heartland of § 1252(b)(9).” *Id.*, at —, 138 S.Ct., at 854.

*13 Although *Jennings* concerned aliens whom the Government had not yet ordered removed whereas the aliens here have removal orders reinstated against them, the result does not change. Section 1252(b)(9) “cover[s] all claims related to removal proceedings.” *Nasrallah v. Barr*, 590 U. S. —, —, n. 2, 140 S.Ct. 1683, 1696, n. 2, 207 L.Ed.2d 111 (2020) (THOMAS, J., dissenting) (internal quotation marks omitted). That includes claims arising after final orders of removal are issued, such as withholding-of-removal claims. See *id.*, at — – —, 140 S.Ct., at 1695–1696. And it includes claims like the ones here, which involve a part “of the deportation process that necessarily serve[s] the purpose of ensuring an alien’s removal.” *Jennings*, 583 U. S., at —, 138 S.Ct., at 854.

In light of this jurisdictional problem, the Court should vacate and remand with instructions to dismiss for lack of jurisdiction. But “because the Court has held that we have jurisdiction in cases like these” and the Court’s opinion is otherwise correct, I join it except for footnote four. See

Nielsen v. Preap, 586 U. S. —, —, 139 S.Ct. 954, 973, 203 L.Ed.2d 333 (2019) (THOMAS, J., concurring in part and concurring in judgment).

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Respondents in this case are noncitizens previously ordered removed from the United States. After leaving the United States, each of them later returned (illegally). The Government then reinstated their original removal orders. See 8 U. S. C. § 1231(a)(5). Each of the respondents argued to immigration authorities that the Government could not remove them because they reasonably feared persecution or torture in the country to which the Government sought to send them. And pursuant to the United States’ international commitments, the immigration authorities began the process of determining whether the Government should grant withholding-only relief (the withholding or deferral of removal). See § 1231(b)(3)(A); 8 CFR §§ 208.16–208.18, 208.31, 241.8(e), 1208.16–1208.18, 1208.31, 1241.8(e) (2020).

The question in this case is whether respondents are entitled to a bond hearing while immigration authorities engage in the lengthy process of determining whether respondents have the legal right (because of their fear of persecution or torture) to have their removal withheld. The Court points to two statutory provisions that might answer that question. The first, § 1226, is a more general provision governing detention, and favors respondents. It says that “pending a decision on whether the alien is to be removed from the United States,” 8 U. S. C. § 1226(a), the Government “may release the alien on ... bond” or “conditional parole.” §§ 1226(a)(2)(A), (B); see also 8 CFR §§ 236.1(c)(8), 1236.1(c)(8) (authorizing parole where the alien has demonstrated that “such release would not pose a danger to property or persons” and he or she “is likely to appear for any future proceeding”). The second, § 1231, is a provision that more specifically applies to “aliens ordered removed,” and can be read to favor the Government because it does not expressly provide for a bond hearing during what it calls the 90-day “removal period.” 8 U. S. C. § 1231(a)(2); see also 8 CFR § 241.13(b)(2)(ii). The Government claims that §

1231 applies to respondents and allows the Government to deny them bond hearings while their withholding-only relief proceedings take place.

The Court agrees with the Government. In its view, respondents’ circumstances fall within the scope of what § 1231 calls a “removal period.” §§ 1231(a)(1)(A)–(B). And it believes that section implicitly allows the Government to deny bond hearings during the 90-day removal period. See *ante*, at ———; § 1231(a)(2). I agree that we have jurisdiction to review the decision below. See *ante*, at ———, n. 4; see also *Jennings v. Rodriguez*, 583 U. S. ———, ——— – ———, 138 S.Ct. 830, 875–876, 200 L.Ed.2d 122 (2018) (BREYER, J., dissenting). In my view, however, respondents do not fall within the scope of § 1231. Hence, § 1231 does not apply. Rather, respondents’ circumstances are governed by the more general section that concerns the conditions of detention pending a final determination on removal. See § 1226. And they are entitled to the bond hearings for which that general section provides. See § 1226(a)(2).

I

*14 Readers should keep in mind two subsections of § 1231’s relevant statutory text. The first subsection at issue makes clear what § 1231 is about, namely, a “removal period.” It then sets forth a general rule. It says:

“(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’).” 8 U. S. C. § 1231(a)(1)(A).

(Readers should also note that while many of the provisions at issue here refer to the “Attorney General,” Congress has elsewhere transferred enforcement of some of those provisions to the Secretary of Homeland Security. See *Nielsen v. Preap*, 586 U. S. ———, ———, n. 2, 139 S.Ct.

954, 959–960, n. 2, 203 L.Ed.2d 333 (2019).) The second subsection sets forth a restriction on removal (the restriction-on-removal provision), an exception to the general rule. It says:

“(3) Restriction on removal to a country where alien's life or freedom would be threatened

“(A) In general

“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.” § 1231(b)(3)(A).

This restriction on removal when an alien fears persecution or torture embodies an important international legal obligation that the United States has undertaken. See Refugee Act of 1980, 94 Stat. 107, codified in part at 8 U. S. C. § 1231(b)(3); see also Protocol Relating to the Status of Refugees, Art. 1, § 1, Jan. 31, 1967, 19 U. S. T. 6223, 6225, T. I. A. S. No. 6577 (United States acceding to Articles 2 through 34 of the Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 U. N. T. S. 150). The United States also follows a policy that withholds or defers removal “of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” § 2242, 112 Stat. 2681–822, note following 8 U. S. C. § 1231, p. 844; 8 CFR §§ 208.16–208.18 (implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 85). These policy commitments, embodied in § 1231’s restriction-on-removal provision, apply to any alien ordered removed, including respondents, who are entitled to ask for withholding-only relief. See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35, n. 4, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006); 8 CFR §§ 208.31, 241.8(e), 1208.31, 1241.8(e).

A

The procedures to determine whether an alien qualifies for withholding-only relief are complex. Any alien, including one

“whose removal is reinstated” under 8 U. S. C. § 1231(a)(5), must be afforded the opportunity to “expres[s] a fear of returning to the country of removal” specified in the order of removal. 8 CFR § 208.31(a) (boldface omitted). An asylum officer will then interview the individual to determine whether that individual “has a reasonable fear of persecution or torture.” § 208.31(c). (Asylum officers found that each respondent here has a “reasonable fear.” *Romero v. Evans*, 280 F.Supp.3d 835, 837 (E.D. Va. 2017).) If so, an immigration judge will “full[y] consid[er] ... the request for withholding of removal only.” §§ 208.31(e); 1208.31(e). If the immigration judge denies the claim, the alien can appeal to the Board of Immigration Appeals (BIA) and, as applicable, seek judicial review. §§ 208.31(e), (g), 1208.31(e), (g); 8 U. S. C. §§ 1252(a)(1), (4).

*15 Studies have found that this procedure often takes over a year, with some proceedings lasting well over two years before eligibility for withholding-only relief is resolved. See Hausman, ACLU Immigrants’ Rights Project, Fact-Sheet: Withholding-Only Cases and Detention 2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf (finding an average length of detention of 114 days when neither party appealed the immigration judge’s final decision, 301 days when at least one party appealed and the BIA rendered a final decision, and 447 days when the BIA remanded the case and the immigration judge made a final decision); see also, e.g., *Martinez v. Larose*, 968 F.3d 555, 558 (C.A.6 2020) (alien detained for over 28 months while awaiting withholding-only relief eligibility determination).

Studies have also found that, once withholding-only relief is granted, the alien is ordinarily not sent to another, less dangerous country. Rather, the alien typically remains in the United States for the foreseeable future. See Brief for Respondents 6 (noting only 1.6% of noncitizens granted withholding-only relief were ever actually removed to an alternative country (citing American Immigration Council & National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* 7 (Oct. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf)).

These figures—particularly the length of time needed to complete the related administrative proceedings—raise an obvious question. Typically, Congress permits aliens initially placed in removal proceedings to apply for bond (while such proceedings transpire). See 8 U. S. C. § 1226(a)(2). That makes sense. A bond hearing does not mean an alien will run away. Bond is normally granted only if the immigration judge has assurance that the alien will not abscond and is instead “likely to appear for any future proceeding.” 8 CFR §§ 236.1(c)(8), 1236.1(c)(8). And an alien’s release from detention during such proceedings may have collateral effects. See Katzmann, *When Legal Representation Is Deficient: The Challenge of Immigration Cases for the Courts*, 143 *Daedalus* 37, 43–44 (2014) (describing how those detained during removal proceedings are less likely to achieve the outcomes they seek).

I can understand why Congress might not want to grant a bond hearing to an alien whose circumstances fall within the removal period. That period, after all, should normally be brief. The statute says “90 days.” 8 U. S. C. § 1231(a)(1)(A). But why would Congress want to deny a bond hearing to individuals who reasonably fear persecution or torture, and who, as a result, face proceedings that may last for many months or years (while their withholding-only proceedings wend their way toward completion)? I can find no satisfactory answer to this question.

B

Does the statutory provision’s *language* nonetheless require the majority’s result? In my view, it does not. Reread the first seven words of that provision’s general rule. They say that the provision’s removal rules apply “[e]xcept as otherwise provided in this section.” § 1231(a)(1)(A) (emphasis added). And later in the same section, following that “except clause,” the restriction-on-removal provision says that “the Attorney General *may not remove*” an alien who falls within its terms. § 1231(b)(3)(A) (emphasis added); see also note following § 1231, at 884. Why does that provision, then, not count as what the general statutory rule calls an “except[ion]?”

Read on. Following the “general” terms governing the removal period rule, § 1231 says:

“(B) Beginning of Period

“The removal period *begins on* the latest of the following:

***16** “(i) *The date the order of removal becomes administratively final.*

“(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.

“(iii) If the alien is detained or confined ..., the date the alien is released from detention or confinement.” § 1231(a)(1) (emphasis added).

No one here claims that § 1231 authorizes detention without a bond hearing *before* the removal period begins. And the most natural reading of the italicized language should lead to the conclusion that the removal period has not yet begun. The removal period does not commence until the administrative proceedings are over, *i.e.*, until “the order of removal” is “administratively final.” And the order is not “final” until the immigration judge and the BIA finally determine whether the restriction on removal applies and prohibits removal (unless and until the Government can identify a willing alternative receiving country).

II

A

The majority believes we must read the statute differently. It reads the “except clause” as serving only to extend the “length of the removal period,” *ante*, at ———, not to exempt the removal procedures altogether. In its view, the time during which respondents seek administrative relief from the order of removal due to a reasonable fear of persecution or torture nevertheless remains within the “removal period,” which the restriction-on-removal provision simply extends. (And, as I said, the majority assumes that § 1231 allows the Government to deny bond hearings during the 90-day “removal period.”)

While this is a possible reading, it is not what the statute actually says. The statute begins with the phrase “except as otherwise provided in this section,” and it follows that clause with basic operative language, namely, “the Attorney General

shall remove the alien.” § 1231(a)(1)(A). It does not say, “within a period of 90 days *except if this section provides for a longer period.*” The majority’s interpretation is an awkward way to read that sentence.

The majority then points to three statutory phrases to which it believes the “except clause” applies. Those phrases, it says, are evidence that the “except clause” simply instructs that “the removal period may be extended” for three reasons. *Ante*, at ———. The first provision, plainly titled “Suspension of period,” “extend[s]” the “removal period ... beyond a period of 90 days” if the alien, for example, fails to seek appropriate travel documents. § 1231(a)(1)(C) (boldface omitted). A second provision allows the Government to “detain [n] beyond the removal period” individuals who have committed certain serious crimes or pose “a risk to the community or [are] unlikely to comply with the order of removal.” § 1231(a)(6). And a third allows the Government to “stay the removal of an alien” if “immediate removal is not practicable or proper” or the alien is “needed to testify” in a prosecution. §§ 1231(c)(2)(A)(i), (ii).

The third example, however, is beside the point, for it comes equipped with its own bond and supervised released possibility, staying (rather than extending) the removal period. See § 1231(c)(2)(C); 8 CFR § 241.6(a). The first two examples are unlike the restriction-on-removal provision in that their language simply suggests, not invalidation of the removal order’s identified country of removal, but an extension of the removal period beyond 90 days. See 8 U.S.C. § 1231(a)(1)(C) (“exten[d] beyond a period of 90 days”); § 1231(a)(6) (“detain [n] beyond the removal period”). The restriction-on-removal provision contains no such language. I add that the majority’s exceptions, unlike the restriction-on-removal provision, typically do not entail proceedings that last (and keep the alien in the United States) for many months or years. Nor do they call into question whether the removal order will ultimately be implemented. These inconsistencies suggest the “except clause” does more than merely extend the 90-day limit.

B

***17** The majority’s interpretation of the words “administratively final” is no more convincing. The majority

says that these words apply only to the finality of the original removal orders, *i.e.*, the orders issued before respondents left the country and returned, as of the time those orders were first issued. After all, the majority adds, see *ante*, at — — —, a further subsection of § 1231 says that “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien ... may not apply for any relief under this chapter.” § 1231(a)(5).

This last mentioned provision, however, is not relevant here. It cannot prevent an alien from seeking what is in effect a modification of, a change in, or a withholding of, the “prior order of removal” for reasons of fear of persecution or torture. After all, § 1231(b)(3)(A) says the contrary. Government practice is also to the contrary. See note following § 1231, at 884; 8 CFR §§ 208.31, 241.8(e), 1208.31, 1241.8(e). And all here agree that the aliens are legally entitled to seek that withholding-only relief. See *Fernandez-Vargas*, 548 U.S., at 35, n. 4, 126 S.Ct. 2422.

Now consider the temporal problem. The time when the majority says the reinstated removal order became “administratively final” is the time at which the original order of removal became final. But to take the words “administratively final” as referring only to that time would lead to a very peculiar statute. It means that most reinstated removal orders will have become administratively final many years before the proceedings during which they are reinstated. Recall that in most instances the 90-day removal period begins when the removal order becomes administratively final. If the majority is right, in the case of most respondents, the 90-day removal period began long before the aliens left the country, let alone returned. Did the 90-day removal period

begin to run at that earlier time? Did it run and then terminate? Is there now no removal period? Read as the majority does, the 90-day limit that governs all of § 1231 would not apply at all to aliens in respondents’ circumstances.

For this reason, I believe the better reading of those words would be to apply them to any removal orders, reinstated or not, that are not yet “administratively final.” And here, the orders are not final until the administrative proceedings (concerning eligibility for withholding-only relief on account of fear of persecution or torture) are complete. Cf. *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (agency action is not “final” until, *inter alia*, all “rights or obligations have been determined ... from which legal consequences will flow” (internal quotation marks omitted)).

* * *

In sum, I can find no good reason why Congress would have wanted categorically to deny bond hearings to those who, like respondents, seek to have removal withheld or deferred due to a reasonable fear of persecution or torture. And I do not agree with the majority's reading of the statute's language as denying them that opportunity. If, as I believe, § 1231 does not apply to the withholding-only relief proceedings before us, then, as the majority concedes, see *ante*, at — — —, § 1226 applies, and grants them bond hearings. I would apply that provision and afford respondents bond hearings.

With respect, I dissent.

All Citations

--- S.Ct. ----, 2021 WL 2653264

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Although many of the provisions at issue in this case refer to the Attorney General, Congress has also empowered the Secretary of Homeland Security to enforce the Immigration and Nationality Act. See

[Nielsen v. Preap](#), 586 U. S. —, — n. 2, 139 S.Ct. 954, 959–960 n. 2, 203 L.Ed.2d 333 (2019); see also Brief for Petitioners 2–3, and n. 1; Brief for Respondents 7, and n. 2.

2 There is one exception. For certain criminal aliens and aliens who have connections to terrorism, detention is mandatory and release is permitted in very limited circumstances. See [8 U. S. C. § 1226\(c\)](#); [Nielsen](#), 586 U. S., at —, —, —, —, 139 S.Ct., at 959–960, 970–971. That exception does not apply here.

3 In one of the proceedings, the District Court certified a Virginia-wide class of aliens detained during withholding-only proceedings. [940 F.3d at 871](#). The Government did not challenge below, and does not challenge in this Court, the District Court’s decision to certify the class, and we do not address that decision here.

4 We have jurisdiction to review the decision below. See [Jennings v. Rodriguez](#), 583 U. S. —, — —, —, 138 S.Ct. 830, 839–841, 200 L.Ed.2d 122 (2018) (plurality opinion).

5 The other two triggers for the removal period—a court order lifting a stay and the release from non-immigration detention or confinement—do not apply here. See [§§ 1231\(a\)\(1\)\(B\)\(ii\)–\(iii\)](#).

6 Respondents do argue, however, that some lower courts’ interpretation of the phrase “final order of removal” as it is used in [8 U. S. C. § 1252\(b\)\(1\)](#) requires that this Court adopt respondents’ interpretation of [§ 1231](#) here. Brief for Respondents 24–26, and n. 8. We express no view on whether the lower courts are correct in their interpretation of [§ 1252](#), which uses different language than [§ 1231](#) and relates to judicial review of removal orders rather than detention.

7 Respondents attempt to distinguish our approach in [Zadvydas v. Davis](#), 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), by arguing that there is a difference between the Government’s inability to remove an alien due to the grant of withholding-only relief and its inability to remove an alien because of the geopolitical and practical concerns that prevented removal in that case. But the premise of respondents’ argument is that a decision about whether an alien “is to be removed” remains pending during withholding-only proceedings because it is not certain that the Government will actually be able to remove the alien from the country. The same lack of certainty existed in [Zadvydas](#), where the Government’s attempt to return an alien to the country listed in the removal order was rebuffed for geopolitical or practical reasons, and the Government had to search for an alternative.

8 The dissent contends that the second of these provisions, [§ 1231\(c\)\(2\)\(A\)](#), is “beside the point” because another provision in that subsection and a regulation provide that DHS has the authority to release on bond an alien for whom it had previously stayed immediate removal so that the alien could testify in a prosecution. See *post*, at —. But DHS’s ability to release certain aliens on bond tells us nothing about the meaning of the phrase “[e]xcept as otherwise provided” in [§ 1231\(a\)\(1\)\(A\)](#). The point is that other provisions in [§ 1231](#) contemplate situations in which DHS is not required to remove an alien in less than 90 days. The dissent otherwise dismisses the remaining two provisions as “unlike the restriction-on-removal provision” in that they “sugges[t] ... an extension of the removal period beyond ninety days.” *Post*, at —. But that is the very feature that makes these provisions relevant to [§ 1231\(a\)\(1\)\(A\)](#).

9 The parties offer two other arguments, neither of which we need address. The Government asks that we apply deference under [Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to its interpretation of [§ 1231](#). But [Chevron](#) deference does not apply where the statute is clear. For their part, respondents argue that the canon of constitutional avoidance favors application of [§ 1226](#), not [§ 1231](#), to their detention. But that canon “comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one

construction.” *Jennings*, 583 U. S., at — (slip op., at 12) (internal quotation marks omitted). As already explained, the text makes plain that § 1231, not § 1226, governs.

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1 **MARK BRNOVICH**
2 **ARIZONA ATTORNEY GENERAL**
(Firm State Bar No. 14000)

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

3 Joseph A. Kanefield (No. 15838)
4 Brunn (Beau) W. Roysden III (No. 28698)
5 Drew C. Ensign (No. 25463)
6 Anthony R. Napolitano (No. 34586)
7 Robert Makar (No. 33579)
2005 N. Central Ave
8 Phoenix, AZ 85004-1592
9 Phone: (602) 542-8958
Joe.Kanefield@azag.gov
Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
Anthony.Napolitano@azag.gov
Robert.Makar@azag.gov

David M. Dewhirst*
Solicitor General
215 N Sanders St.
Helena, MT 59601
Phone: (406) 444-4145
David.Dewhirst@mt.gov

**pro hac vice granted*

Attorneys for Plaintiff State of Montana

10 *Attorneys for Plaintiffs State of Arizona*
11 *and Mark Brnovich in his official capacity*

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 State of Arizona; State of Montana; and
15 Mark Brnovich, in his official capacity as
16 Attorney General of Arizona,

17 Plaintiffs,

18 v.

19 United States Department of Homeland
20 Security; United States of America;
21 Alejandro Mayorkas, in his official
22 capacity as Secretary of Homeland
23 Security; Troy Miller, in his official
24 capacity as Acting Commissioner of
25 United States Customs and Border
26 Protection; Tae Johnson, in his official
27 capacity as Acting Director of United
28 States Immigration and Customs
Enforcement; and Tracy Renaud, in her
official capacity as Acting Director of U.S.
Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
INJUNCTION PENDING APPEAL**

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Plaintiffs have moved for an injunction pending appeal. For good cause shown, the Court hereby **GRANTS** the motion.