No. 20-322

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, *ET AL.*,

Petitioners,

v.

ESTEBAN ALEMAN GONZALEZ, *ET AL.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

QUESTIONS PRESENTED

1. Whether an alien who is detained under 8 U.S.C. § 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the alien is a flight risk or a danger to the community.

2. Whether, under 8 U.S.C. § 1252(f)(1), the courts below had jurisdiction to grant classwide injunctive relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases, including the petition stage of this case. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

In two class actions against various officials (hereinafter, the "Government"), aliens detained under 8 U.S.C. § 1231(a)(6) (hereinafter, the "Plaintiffs") seek bond hearings to terminate their detention pending removal. The named class representatives all have reinstated removal orders (that is, they returned to the United States illegally after removal pursuant to an order of removal) and are in withholding-only removal proceedings. *See* Pet. Br. at 7, 9-10. With that summary, IRLI adopts the facts stated by the Government. *See* Pet. Br. at 7-11.

By way of background, removal under 8 U.S.C. § 1231 involves a 90-day "removal period" that generally begins at the later of finality of the removal

---

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

order (including any judicial review) and the alien's release from incarceration for any crimes. 8 U.S.C. § 1231(a)(1)(A)-(B). During the removal period, the alien's detention is mandatory, *id.* at § 1231(a)(2), but after that period aliens remain subject to Government supervision to ensure their availability for subsequent removal proceedings. *Id.* at § 1231(a)(3). With respect to certain inadmissible or criminal aliens, however, the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA") authorizes detention beyond the removal period at the Government's discretion:

> An alien ordered removed who is inadmissible …, removable under [various INA sections because of criminal convictions, national security, or other reasons] or who has been determined … to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6). An alien who illegally reenters the United States after having been removed would be inadmissible for purposes of § 1231(a)(6), even with no criminal record. *See* 8 U.S.C. § 1182(a)(6)(A)(i).

Although the INA allows detention of inadmissible and criminal aliens, 8 U.S.C. § 1231(a)(6), the Ninth Circuit ordered bond hearings after six months' detention based on Circuit precedent—namely, *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011)—that purports to implement *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, this Court relied on the canon of

constitutional avoidance to read § 1231 to include an implied bond-hearing requirement when it appeared unlikely that any country would take the alien. *See* 533 U.S. at 690. The majority held that circumstance to convert a utilitarian detention to ensure the alien's readiness and availability for removal—the INA's "basic purpose [of] effectuating an alien's removal," *id.* at 697—into something punitive. *Id.* at 690. Significantly, the two aliens at issue were former lawful permanent residents ("LPRs") under removal for crimes. *See* 533 U.S. at 684-86.

In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), this Court rejected lower courts' effort to impose a bond-hearing requirement on alien detentions under INA provisions worded similarly to § 1231(a)(6). In doing so, the Court held that the avoidance canon applies only when the statute supports two or more plausible readings, enabling a court to pick a reading that avoids constitutional doubt. *Id.* at 843. In other words, this canon cannot *rewrite* a statute; it can only choose among plausible interpretations of the statute as written. With respect to *Zadvydas*, *Jennings* found that decision to be a "notably generous application of the constitutional-avoidance canon." *Id.* Further, in *Johnson v. Guzman Chavez*, 141 S.Ct. 2271 (2021), this Court held that an "alien … ordered removed … is not entitled to a bond hearing." *Id.* at 2280 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The Court should reject applying *Zadvydas*'s indefinite-detention rationale—based on a situation in which no country would accept the alien—to removals that merely take longer than six months but

are proceeding to a removal endpoint. *See* Section I.A. In addition, this Court should reconsider the entire *Zadvydas* enterprise for several interrelated reasons: (1) different rights are implicated with respect to the *Zadvydas* petitioners, who were former LPRs in removal, and the class representatives here, who are recidivist illegal border crossers; (2) *Zadvydas* began with petitions for writs of *habeas corpus*, which are *as-applied* challenges that do not and cannot decide *facial* constitutional claims; and (3) this Court today must read the INA as cabined by the post-*Zadvydas* regulations, not the INA that *Zadvydas* found ambiguous circa 2001. *See* Section I.B. Having the judiciary compel early release into the United States undercuts not only the Executive's authority to negotiate aliens' return to their home countries but also Congress's intent that lax immigration enforcement not attract illegal immigration in the first place. *See* Section I.C. But even if Plaintiffs prevail on the need for periodic bond hearings, this Court should reject the strict six-month term because the Constitution does not set an arbitrarily six-month presumption for release without considering the difficulties of repatriation during the COVID-19 pandemic. *See* Section I.D.

Plaintiffs' claims also suffer from statutory and Article III jurisdictional defects. First, under 8 U.S.C. § 1252(f)(1), the lower courts lacked jurisdiction for classwide injunctive relief. *See* Section II.A. But even this Court would lack jurisdiction if Plaintiffs lacked Article III standing to press their claims. Article III standing is lacking here for several reasons. First, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and its progeny deny aliens in

Plaintiffs' position a right to enter the United States pending completion of the immigration process; without an underlying right, Plaintiffs lack not only standing generally, *see* Section II.B.1, but also lack procedural standing because they lack concrete injury. *See* Section II.B.2. Second, because detained aliens can simply abandon their challenge to removal and leave the United States, any detention represents a "self-inflicted injury" not caused by the Government. *See* Section II.B.3.

ARGUMENT

I. ILLEGAL ALIENS DETAINED UNDER 8 U.S.C. § 1231 DO NOT HAVE THE RIGHT TO PERIODIC BOND HEARINGS.

Amicus IRLI agrees with the Government that the Ninth Circuit erred in holding that § 1231 implicitly requires a bond hearing after six months of detention. *See* Pet. Br. at 33-48; *see also Guzman Chavez*, 141 S.Ct. at 2280 (8 U.S.C. § 1231 does not require bond hearings). In addition, this Court should either reconsider *Zadvydas* or narrow it to its facts—an as-applied challenge by former LPRs who could not be removed to any other country—which are inapposite to a facial or as-applied challenge by illegal aliens who have not yet been admitted into the United States and for whom there is no showing of the futility of eventual removal.

A. Implied protections against *indefinite* detention do not extend to *every* detention.

The Ninth Circuit panel majority felt bound by the *Diouf* circuit precedent implementing *Zadvydas*, with no reconsideration based on this Court's supervening

Jennings decision. Accepting the *Zadvydas* premise—namely, when no other country appears likely to take an alien, indefinite detention could become punitive—in no way compels a conclusion that detention *to effect removal* is punitive. Given the confusion by the Ninth and Third Circuits on this question, *see also* Pet. at 22, 25 (split in circuit authority on this question); Pet. Br. at 22-23 (same), it is clear that this Court should clarify the respective bounds of *Zadvydas* and *Jennings* for detentions in removal proceedings.

In *Jennings*, this Court focused on a few textual differences between the detention provisions there—which provided for "detention pending a decision on whether the alien is to be removed"—and § 1231(a)(6), which does not address the duration of detention. *Jennings*, 138 S.Ct. at 846 (interior quotation marks omitted). So long as removal remains viable because another country may take the alien, that is a distinction without a difference. The entire point of detention under § 1231 is to facilitate the removal of the alien. While the removal effort is ongoing and potentially viable, detention remains within the INA's "basic purpose [of] effectuating an alien's removal." *Zadvydas*, 533 U.S. at 697. As in *Jennings*, there is no ambiguity and thus no occasion for an alternate reading that incorporates a constitutionally implied safety valve for indefinite detentions.

Even if this Court found the same ambiguity that the *Zadvydas* majority found, that "notably generous" application of the constitutional-avoidance canon would have no place here. *Jennings*, 138 S.Ct. at 843. A detention that ends in removal—as most do—does not invoke the same constitutional doubt as one with

no foreseeable endpoint. Excluding an alien seeking admission is an act of sovereignty, and "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Instead, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).[2] There would be no constitutional doubt here, even if there were statutory ambiguity.

B. This Court should reconsider or narrow *Zadvydas*.

Several features of this Court's *Zadvydas* decision warrant revisiting, or at least, narrowing that decision to its facts.

First, the aliens in *Zadvydas* were LPRs who lost their legal residency because they were convicted of crimes. The Due Process Clause's protections may apply to such aliens, but not to illegal entrants such as the class representatives here. *Plasencia*, 459 U.S.

---

[2] Although *Demore* discusses precedents dating back more than a century on detention during deportation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724 ("IIRIRA"), changed the nomenclature: "What was formerly known as 'deportation' is now called 'removal' in IIRIRA." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 n.1 (2006). What *Demore* discusses about detention during deportation is applicable to detention during removal here.

at 32; *Mezei*, 345 U.S. at 212. Far from having formerly been lawfully present like the *Zadvydas* petitioners, Plaintiffs here were *unlawfully present*, were *removed*, and *unlawfully reentered*.

Judicial fiats such as the lower courts' actions here improperly rely on the Due Process Clause to enact the judges' personal preferences. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) ("extending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]"). The federal courts have the duty to apply the Constitution, but that duty does not encompass policymaking under the guise of substantive due process.

Second, the *Zadvydas* petitioners began their cases as petitions for writs of *habeas corpus* under 28 U.S.C. § 2241 to challenge their detention beyond 90 days. *See Zadvydas*, 533 U.S. at 684 (Mr. Zadvydas), 686 (Mr. Ma). A *habeas* proceeding "authorizes the federal courts to entertain … claim[s] that [the petitioners] are being held in custody in violation of the Constitution," but "it is not a grant of power to decide constitutional questions not necessarily subsumed within that claim." *Cty. Court v. Allen*, 442 U.S. 140, 154 (1979). At most, *Zadvydas* decided the as-applied claims of former LPRs under detention pending removal with no likely prospect that another country would accept them. That holding is quite limited, and it does not apply here.

Third, because *habeas* proceedings are as-applied challenges, *id.*, *Zadvydas* does not necessarily extend

to proceedings with different facts or procedural postures. Prevailing in an as-applied challenge such as *Zadvydas* is simply different from prevailing in a facial challenge such as the instant cases. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 567-68 (2011); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 188 (1991). Because "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior quotation marks and alterations omitted), federal courts should be wary of granting the facial systemic relief that the Ninth Circuit ordered here.

Fourth, differences between facial and as-applied relief undermine not only the Ninth Circuit's decisions but also the *Zadvydas* majority's invocation of the canon of constitutional avoidance in the first place. If § 1231(a)(6) raises constitutional doubt as applied to LPRs under detention pending removal with no likely prospect that another country will accept them, that would not justify *facial* relief if the statute were entirely lawful for aliens such as the class representatives here:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

United States v. Salerno, 481 U.S. 739, 745 (1987). It is simply inaccurate to say that the statute as seen by the *Zadvydas* majority raises *facial* constitutional doubt.

Fifth, because non-mutual estoppel is unavailable against the Government, *United States v. Mendoza,*

464 U.S. 154, 162-63 (1984), this Court must consider the INA as it stands today, not as it stood when the Court decided *Zadvydas* in 2001. In particular, this Court must consider the Government's post-*Zadvydas* regulations, 8 C.F.R. § 241.13, which narrow the ambiguity perceived by the *Zadvydas* majority. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2311-12 (2016) (relying on extant regulations to gauge the constitutionality of a statute); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987) ("regulations …. defining the statutory concept … have the force of law"). Unlike in 2001, the regulations would cabin any perceived constitutional doubt, if indeed the statute were amenable to the doubt canon.[3]

C. A bond-hearing requirement undercuts federal policies.

By setting immigration policy on a systemic basis, the Ninth Circuit's decisions intrude on the plenary power of Congress to set immigration policy. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (recognizing "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (interior quotation marks omitted); *Plasencia*, 459 U.S. at 32 (controlling immigration an act of sovereignty). Even if *Zadvydas* correctly decided the issue with respect to detained former LPRs with

---

[3] If this Court relaxed *Zadvydas*, it is possible that the Government would relax the post-*Zadvydas* implementing regulations, but any recission would be reviewable under the Administrative Procedure Act ("APA"). *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1907 (2020).

no likely prospect that another country would accept them, it would not justify further judicial intrusion into immigration policy.

First, the nation must speak with one voice on the issue of immigration. *Arizona v. United States*, 567 U.S. 387, 394-95 (2012). Foreign countries may value relations with the United States, but they also value remittances from their citizens unlawfully present in the United States. *See*, *e.g.*, Jordan E. Dollar & Allison D. Kent, *In Times of Famine, Sweet Potatoes Have No Skin: A Historical Overview and Discussion of Post-Earthquake U.S. Immigration Policy Towards the Haitian People*, 6 INTERCULTURAL HUM. RTS. L. REV. 87, 113 (2010). By compelling the release of illegal aliens into the United States, the judiciary undermines the Government's ability to negotiate the return of foreign nationals. An illegal alien at large can send money home; a detained illegal alien cannot.

Second, compelling the release of illegal aliens serves as a magnet for further illegal immigration. It equates to a billboard reading "come to the United States, spend six months in detention, and get released." Contrary to that message, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). The decisions of the Ninth Circuit erode a deterrent effect from our immigration laws. That erosion leads to an influx of illegal aliens, which then leads to systemic overload that makes the Government unable to process all the claims from arriving aliens. This Court should reel in the lower federal courts by narrowing

the scope of court involvement in setting immigration policy.

D. The six-month trigger for a bond hearing is improper during a health pandemic.

Even if this Court both decides against revisiting the whole of *Zadvydas* and decides that *Zadvydas* applies here, this Court should relax the six-month presumption for the reasonableness of a period of detention. What seemed reasonable to this Court in 2001 does not necessarily equate to that same period's being reasonable during the COVID-19 pandemic.

The term "reasonable" necessarily includes review of the specific context. *Cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952) (Due Process Clause considers reasonableness in context). During the COVID-19 pandemic, the Government may need more time than usual to arrange removal to foreign nations. The pandemic obviously slows governmental response times on both sides of removal transactions between our Government and the foreign nations that will receive or repatriate the affected aliens. *Amicus* IRLI respectfully submits that—if the Court insists on the fiction of reading a reasonable period into the INA—a reasonable period today likely would be substantially longer than the six-month period found reasonable in *Zadvydas*.

II. THERE IS NO JURISDICTION FOR RELIEF.

Even if the lower courts were right on the merits for *some* applications of 8 U.S.C. § 1231, the lower courts lacked jurisdiction *for these Plaintiffs' claims*, not only to issue injunctive relief but also to reach the

merits at all. First, under 8 U.S.C. § 1252(f)(1)'s plain language, the lower federal courts lack jurisdiction for injunctive relief on a classwide basis. At a minimum, there should be no injunctive relief on behalf of a class of illegal aliens. Second, while the INA alone prohibits classwide injunctive relief for the lower courts, Article III poses a bar to relief even in this Court and applies to declaratory relief as well as injunctive relief. Thus, there should be no relief whatsoever for the individual illegal aliens here.

A. Under 8 U.S.C. § 1252(f)(1), the lower courts lack jurisdiction for classwide injunctive relief.

Under 8 U.S.C. § 1252(f)(1)'s plain language, the lower federal courts lack jurisdiction to issue injunctive relief in class litigation. "It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231," but the "ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999); *accord* Pet. Br. at 15-33. That provision alone takes injunctive relief off the table, although other jurisdictional barriers to declaratory relief apply equally to injunctive relief. *See* Section II.B, *infra* (arguing that Article III standing is absent here).

Notably, the INA's withholding injunctive relief from Plaintiffs—as a class of the "individual alien" to whom 8 U.S.C. § 1252(f)(1) applies—does not withhold judicial review or even injunctive relief from *everyone*. Either on the "front end" or the "back end," interested parties other than the "individual alien" covered by 8 U.S.C. § 1252(f)(1) can seek APA review

and obtain injunctive relief as long as they have cognizable interests.

First, on the front end of interpreting what the INA prohibits, a reviewing court could find that one other than an "individual alien" who had a right to judicial review before the 1996 INA amendments retained that right of review because repeals by implication are disfavored, requiring "clear and manifest" legislative intent to repeal the prior authority. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). Under this line of reasoning, someone with Article III standing and an APA claim within the INA's zone of interests would keep the claim that they already had. 5 U.S.C. § 559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter …, except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). The 1996 amendments post-date the APA's enactment and do not expressly supersede the APA. While the "individual alien" had his or her APA claim displaced by the INA's special statutory review, 5 U.S.C. § 703, a plaintiff that lacks such an INA claim should retain its pre-1996 APA claim.

Second, on the back end, even if this Court in a future case presenting the issue would find 8 U.S.C. § 1252(f)(1) to have intended to displace all judicial review in the lower federal courts—without regard to whether the plaintiff had an INA claim for relief—plaintiffs without an INA claim would have judicial

review if they would otherwise lack any opportunity whatsoever for judicial review of agency action. *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958). That extraordinary relief is not available where—as here—review is available in a future enforcement proceeding, *Board of Governors of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43-44 (1991), but it would be available to parties with a sufficient interest and no other opportunity for judicial review.

B. Under Article III, all federal courts lack jurisdiction.

Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, § 2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). As relevant here, courts assess a plaintiff's Article III standing under a tripartite test for an "injury in fact": judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Plaintiffs lack not only a cognizable injury but also causation; given that lack of substantive standing, they also lack procedural standing to litigate the availability of bond hearings.

1. Plaintiffs lack an injury in fact because they have no cognizable right.

This Court has made it abundantly clear that Plaintiffs have no right to be in the United States: "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32.

Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Finally, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. Quite simply, Plaintiffs' Due Process claims cannot succeed here because Plaintiffs already are receiving the process due them.

Although Plaintiffs understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve. *Plasencia*, 459 U.S. at 32; *Demore*, 538 U.S. at 523. Moreover, Plaintiffs can avoid detention by simply abandoning their challenge to removal. *See* Section II.B.3, *infra*. Plaintiffs' ability to end their detention by simply leaving the United States distinguishes Plaintiffs from dissimilarly situated citizens in civil and criminal detentions, as well as aliens who have successfully asserted Due Process claims. With respect to citizens, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) (interior quotation marks omitted). Nor can Plaintiffs' claim that *Zadvydas* implicitly overruled *Mezei*. In *Zadvydas*, 533 U.S. at 697, deportation proved impossible, so detention during removal

became punitive, with no endpoint. Plaintiffs' detentions all have endpoints.[4]

2. Plaintiffs cannot raise procedural claims because they lack any underlying substantive rights.

As indicated in Section II.B.1, *supra*, Plaintiffs lack an independent right to be in the United States while their immigration proceedings resolve. Accordingly, they cannot sidestep the Government's plenary authority over admission by purporting to challenge only their detention's *procedures*, rather than their admission. Because they lack a substantive right to be in the United States, Plaintiffs also lack a procedural right to bail hearings beyond those already afforded them (*e.g.*, upon material change in their circumstances or *habeas corpus* rights).

Under Article III, Plaintiffs cannot have a procedural due-process right absent an underlying substantive right: "the procedures in question [must be] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and which is "apart from his interest in having the procedure observed." *Defenders of Wildlife*, 504 U.S. at 573 n.8; *Summers v. Earth Island Inst.*,

---

[4] Plaintiffs cannot argue that "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to protection under the Due Process Clause." *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (interior quotation marks and alterations omitted). The *Diaz* aliens were "paroled into the United States," 426 U.S. 67, 74 n.7, which distinguishes them from Plaintiffs. Accordingly, the process due Plaintiffs under *Mezei* differs from the process due the paroled *Diaz* aliens. The dispute is not whether Plaintiffs deserve Due Process, but what process is due.

555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing"); *cf. Christopher v. Harbury,* 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). The Due Process Clause does not afford Plaintiffs the right to be released into the United States pending resolution of their immigration proceedings. *Plasencia*, 459 U.S. at 32; *Mezei*, 345 U.S. at 212; *Demore*, 538 U.S. at 523 ("detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"). Plaintiffs lack a procedural right to a bond hearing because they lack a concrete right to be released into the United States pending the conclusion of their removal proceedings.

3. Plaintiffs' detentions are self-inflicted injuries, and thus raise no Article III case or controversy.

The detentions here are all caused by a detainee's decision to try to avoid removal. Each detainee is free to pursue admission or to avoid removal from abroad. The only thing that keeps most—and probably all—class members in detention is their own decision to remain here while the process resolves. Thus, while Plaintiffs may try to analogize their detentions to compelled detention in the criminal or civil contexts that apply to residents of this Nation, that analogy is inapposite. Contrary to compelled detainees, the detainees here "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590

(1947) (interior quotation marks omitted). The detainees' ability to escape detention by simply leaving the United States undermines Plaintiffs' claims in two respects, one going to the equities and the other to jurisdiction.

First, because the detainees choose detention over the other perfectly viable and lawful choice—leaving the United States—they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. Since no one is keeping them here, they cannot challenge the legislative grace that allows them to stay at the taxpayers' expense. It does not matter whether detainees knew the law prior to coming here: "We have long recognized … that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotation marks omitted). And, in any event, they know the law now.

Second, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *Amicus* IRLI does not dispute that the detainees may have an Article III case or controversy with the United States on whether the detainees can enter the United States, but "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Plaintiffs cannot bootstrap a *Due Process claim* to release into the United States when their actual case involves only an *immigration claim* on whether they can enter or

remain in the United States. Until their immigration claims resolve, Plaintiffs must choose between detention and leaving. The choice they make does not entitle them to raise new claims, premised only on their own choice. To the contrary, these illegal aliens have two choices: (1) removal, or (2) detention while they challenge removal. They cannot elect to stay here and then challenge the terms the INA sets for staying.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by coming here and then protesting the terms of being here. *Clapper*, 568 U.S. at 418. Having the right to a determination of admissibility does not create the right to reside in the United States while the system answers the first question. If they want the certainty of avoiding detention while their immigration proceedings resolve, Plaintiffs need to seek relief or admission from abroad.

CONCLUSION

The decisions of the Ninth Circuit should be reversed.

October 21, 2021

Respectfully submitted,

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com