No. 00-38

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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The court of appeals' ruling that the Attorney General is without authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period set forth in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998) contradicts the express language of Section 1231(a)(6), which provides that certain aliens—including aggravated felons and any alien who "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal"—"*may be detained beyond the removal period*" (emphasis added). The Ninth Circuit's ruling squarely conflicts with the decision of the Tenth Circuit in *Duy Dac Ho* v. *Greene*, 204 F.3d 1045 (2000), which held that the Attorney General is authorized by Section 1231(a)(6) to detain such aliens and that that detention is constitutional. The result reached by the Ninth Circuit also cannot be reconciled with *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791, which sustained the continued detention of an alien under Section 1231(a)(6) in comparable circumstances. The ruling below significantly hinders the Attorney General's ability to enforce the immigration laws and to protect the public from criminal aliens in the Ninth Circuit, which covers a

substantial percentage of the aliens under final orders of removal who have been detained under Section 1231(a)(6). Review by this Court therefore is plainly warranted to determine the scope of the Attorney General's detention authority under Section 1231(a)(6).

1. Respondent concedes (Br. in Opp. 17, 22) that the Ninth Circuit's decision in this case squarely conflicts with the Tenth Circuit's decision in *Ho*. Respondent nonetheless contends (*id.* at 13, 17) that the Court should not resolve the conflict until the Tenth Circuit decides another case raising the issue. Respondent does not deny, however, that the Tenth Circuit's decision in *Ho* is final and constitutes binding precedent in that circuit. The circuit conflict therefore is ripe for review.[1] Moreover, the Third Circuit also has held that Section 1231(a)(6) authorizes the detention of aliens beyond the 90-day removal period even though they cannot be promptly removed. *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (1999); see Pet. 23 n.14.[2]

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[1] Contrary to respondent's contention (Br. in Opp. 17), the fact that, in light of *Ho*, an alien has sought initial en banc consideration in another case raising the same issues in the Tenth Circuit does not render the square conflict between the Ninth and Tenth Circuits unripe for review. To the contrary, it confirms that *Ho* is now binding circuit precedent. Furthermore, although Judge Brorby, in his dissent in *Ho*, disagreed with the majority's constitutional ruling, he agreed with the majority that the "plain language" of Section 1231(a)(6) authorizes the Attorney General to detain aliens in circumstances such as these pending their removal. 204 F.3d at 1060. There accordingly is no reason to believe that the Tenth Circuit would change its view on the statutory issue even if it granted rehearing en banc on the constitutional issue.

[2] The Third Circuit held in *Ngo* that the text of Section 1231(a)(6) authorizes the Attorney General to detain an alien beyond the 90-day removal period even where the progress toward the alien's ultimate removal is "agonizingly slow." 192 F.3d at 398. As respondent points out (Br. in Opp. 16 n.16), *Ngo* involved an excludable alien rather than an alien, like respondent, who previously was a lawful permanent resident. Section 1231(a)(6), however, now governs the detention of aliens in both categories. Although the Third Circuit stated in the portion of its opinion rejecting a constitutional challenge to the detention that it was not ad-

The result in this case likewise cannot be reconciled with *Zadvydas*, which upheld the continued detention of an alien in comparable circumstances. The Fifth Circuit in that case did not question the Attorney General's statutory authority to detain the alien, see 185 F.3d at 286 (Section 1231(a)(6) "authorizes detention but makes it discretionary beyond an initial ninety day period"), and it held that the alien's continued detention (subject to periodic review of his dangerousness and flight risk) comported with due process, even though there was not yet a country willing to accept his return and it would be "difficult at best" to locate such a country. *Id.* at 291. The Fifth Circuit concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is *impossible*." *Id.* at 294. (emphasis added). It is clear that *Zadvydas* would be resolved differently by the Ninth Circuit, which requires the immediate release of an alien who cannot be removed in the reasonably foreseeable future. See Pet. App. 31a.

In the response we filed last May to the certiorari petition in *Zadvydas*, we pointed out that the result in that case is inconsistent with the result reached by the Ninth Circuit in this case. 99-7791 Br. in Opp. 16. We nevertheless opposed review in *Zadvydas* at that time because no court of appeals had reached a contrary result on the constitutional issue, the Fifth Circuit had not addressed (and the petitioner did not present to this Court) the statutory argument raised by respondent in this case, and review by the Court of the constitutional issue in *Zadvydas* would be premature in light

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dressing the situation of aliens other than those who are excludable (see 192 F.3d at 398 n.7), it did not suggest that the text of Section 1231(a)(6) would apply differently to the two categories of aliens as a statutory matter.

of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, which the government had then sought to eliminate by filing a petition for rehearing en banc in this case. *Id.* at 16-18. Subsequently, however, we informed the Court by letters dated June 9 and 20, 2000, that the Ninth Circuit had denied rehearing en banc and that the Solicitor General had authorized the filing of a certiorari petition in this case. The Court did not act on the certiorari petition in *Zadvydas* after we submitted those letters, and it remains pending.

We have now concluded – in light of the denial of rehearing en banc in this case, the subsequent filing of this certiorari petition and respondent's brief in opposition—that the Court should grant certiorari in *Zadvydas* as well as in this case. In his brief in opposition in this case, respondent places central reliance on the argument that the Ninth Circuit's statutory interpretation is supported by the doctrine that statutes should be interpreted in a manner that avoids a serious constitutional question See Br. in Opp. i, 3, 11, 14, 18-19, 26, 31-32. Because the constitutional arguments that respondent relies upon in defense of the Ninth Circuit's statutory ruling were rejected by the Fifth Circuit in *Zadvydas*, we believe that it would be appropriate for the Court to grant certiorari in this case and in *Zadvydas* to resolve both the statutory and the constitutional challenges to detention under Section 1231(a)(6) at the same time.

Respondent misapplies the constitutional avoidance doctrine by repeatedly characterizing his detention as "indefinite," which in his view raises a serious constitutional question in these circumstances. See Br. in Opp. i, 3, 11, 18, 20, 26, 28, 30, 32, 34. As we explain in the certiorari petition (at 26), however, the comprehensive administrative procedures for review of aliens in respondent's position (see 8 C.F.R. 241.4; Pet. App. 64a-76a, 90a-91a) forecloses any characterization of his detention as permanent or indefinite. Pet. 26-28. Respondent was afforded an ongoing possibility of

release if he no longer posed a risk of danger or flight. And INS's detention of respondent will necessarily cease upon his removal from this country—a matter on which progress is continuing to be made through international negotiations (see Pet. 17 n.10).[3] See *Zadvydas*, 185 F.3d at 291, 294 (alien's prolonged detention pending removal is not permanent or indefinite because the alien "may be released when it is determined that he is no longer either a threat to the community or a flight risk"; the alien is entitled to automatic, periodic administrative review of his custody; and it has not been clearly established that there is no meaningful possibility of locating a country that would accept the alien's removal or that removal is "impossible"). In any event, the Ninth Circuit's statutory interpretation is not limited to "indefinite" detention; it prohibits even one day of detention of an alien in respondent's position.

2. Quite aside from the existence of conflicting rulings in other circuits, the adverse impact of the decision below

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[3] Respondent's discussion (Br. in Opp. 36-37 & nn.33, 34) of information concerning the government's ongoing negotiations with Cambodia over return of its nationals disregards the reality that the Executive Branch is dealing with ever-shifting international conditions and relations with various countries that are always difficult to predict, and it highlights the difficulties presented by a rule that requires federal courts to make their own predictions about the likelihood of removing aliens to particular countries. See Pet. 16 n.9, 29-30.

Published INS statistics show that the INS successfully removed two Cambodian nationals in fiscal year 1994, 14 in 1995 (two of whom were criminals), four in 1996, and ten in 1997. *1997 Statistical Yearbook of the Immigration and Naturalization Service* 180, 183 (Oct. 1999). We have been informed by the INS that the two removed in 1994, ten of the 14 in 1995, one of the four in 1996, and two of the ten in 1997 were removed to Cambodia. We have been further informed by the INS that it removed 16 Cambodians to Cambodia in 1998, 13 in 1999, and seven in the first ten months of fiscal year 2000. The INS's ability to remove such aliens was based on varying circumstances, such as possession of current travel documents or the alien's family obtaining travel documents directly from the Cambodian government.

within the Ninth Circuit itself has grown substantially even since the certiorari petition was filed. See Pet. 15-16. As of September 15, 2000, there are approximately 487 habeas corpus actions currently pending in the district courts in the Ninth Circuit and approximately 149 appeals currently pending in the Ninth Circuit involving legal issues that are the same or substantially similar to those presented by this case, and the Ninth Circuit has already summarily affirmed district court release orders in eleven additional cases in light of the decision below. So long as the Ninth Circuit's decision in this case stands as controlling precedent in that Circuit, the district courts are required in such cases to order the release by the INS of any alien who is situated similarly to respondent, regardless of the degree of danger or risk of flight he presents if released.

Respondent attempts to discount that broad impact by asserting (Br. in Opp. 14) that the courts in the Ninth Circuit are not summarily releasing aliens, but "continue to reach individualized release decisions based upon the facts of the particular case." See also *id*. at 23; Br. in Opp. App. 21a-24a. Those assertions are misleading. Under the Ninth Circuit's ruling, the facts pertaining to the risk of danger or flight posed by the release of a particular alien are wholly irrelevant if a court determines that there is not a reasonable likelihood that the alien will be removed in the reasonably foreseeable future. Pet. App. 23a, 25a. Accordingly, when a court finds that there is not a reasonable likelihood of removing an alien in the reasonably foreseeable future, the alien is ordered released, *regardless* of the basis for the Attorney General's decision under Section 1231(a)(6) to detain the alien. Indeed, respondent himself elsewhere insists (Br. in Opp. 4 n.2) that the risk of danger or flight posed by his release is not relevant to the question of statutory construction presented by this case—an assertion that cannot be squared with Section 1231(a)(6)'s express authorization for the Attorney General to detain an alien

"who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

3. Respondent contends (Br. in Opp. 13, 21-22) that this Court's review of the statutory question should await the INS's adoption of its final regulations further formalizing the administrative process for periodic review of decisions to detain aliens such as respondent under Section 1231(a)(6). Respondent suggests (Br. in Opp. 13) that "the INS may remedy any present conflict on its own," and asserts (*id.* at 21 & n.21) that the final regulations adopted by the INS may be consistent with the Ninth Circuit's ruling. That suggestion is without merit.

The very premise of the proposed regulations is that the Attorney General *does* have the authority, as both a statutory and a constitutional matter, to detain aliens like respondent, who cannot be returned to their country of nationality for the time being, but who are aggravated felons or aliens found by the Attorney General to pose a risk of flight or danger to the community if released. 65 Fed. Reg. 40,540 (June 30, 2000). The proposed regulations are designed to clarify and codify the procedures for deciding how to exercise that authority. Any delay in resolving questions concerning the scope of the Attorney General's authority under Section 1231(a)(6) will undermine the validity of the INS's regulations, which are designed to ensure the even-handed exercise of that authority nationwide. Indeed, if the Ninth Circuit's ruling remains binding precedent, courts will require the Attorney General to release all aliens in respondent's position in that circuit, without the exercise of the individualized judgment and discretion that Section 1231(a)(6) expressly contemplates and that her proposed regulations are designed to implement.

4. Respondent argues (Br. in Opp. 23-25) that further review of this case is not warranted because continued detention of criminal aliens such as respondent is not necessary.

Respondent asserts that the INS is "still able to supervise" aliens after they are released and is able to "compel their appearances." *Id.* at 23. But supervision conditions can be violated, as they were by respondent when he assaulted a female companion, thus posing a danger to the community. That is why the INS's custody determination takes into account, among other things, the alien's probation history and evidence of any rehabilitative effort or recidivism. See 8 C.F.R. 241.4(a); Pet. App. 78a. Similarly, every year many criminals and aliens fail to respond to notices to appear for various legal proceedings. That is why the INS's custody determination takes into account any history of failures to appear. 8 C.F.R. 241.4(a); Pet. App. 78a. In any event, respondent simply ignores the fact that Congress explicitly provided that an alien's "risk to the community" and likelihood of "comply[ing] with the order of removal" are factors the Attorney General may take into account in making detention decisions under Section 1231(a)(6).

Respondent's fact-bound attempts (Br. in Opp. 4 n.2; 7 & nn.8, 9; 8 n.10; 10 n.12; 21 n.21; 24-25 & nn.25, 26) to convince the Court that the INS's continued detention of him was not necessary because he did not pose a danger to the community and would abide by release conditions ignore both the record in this case and the fact that, under the court of appeals' ruling, the INS is prohibited from detaining respondent and all other aliens comparably situated *whether or not* they pose a serious danger to the community or would comply with release conditions.[4]

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[4] The letter informing respondent of the INS's decision to continue him in detention specifically noted that, in making that decision, the assistant district director considered numerous factors, including respondent's criminal convictions, "[o]ther criminal history," "[e]vidence of rehabilitative effort or recidivism," and "[p]rior immigration violations and history." Pet. App. 78a. As we have explained (Pet. 6 n.2), respondent's immigration file revealed that he had been associated with a gang "for some time" and had been arrested on two other occasions with one of the codefendants in his manslaughter case (see A.R. 50), contrary to respondent's assertion

5. As we demonstrate in the certiorari petition (at 17-23), the court of appeals' construction of Section 1231(a)(6) is fatally flawed. The court rewrites an unambiguous statutory provision that was specifically designed, following a series of legislative amendments, to authorize the Attorney General to detain dangerous criminal aliens who are under final orders of removal.

The court of appeals' interpretation of Section 1231(a)(6) to allow detention beyond the 90-day period only for a "reasonable" time, Pet. App. 25a, finds no support in the text of the statute. To the contrary, the statute's text, structure, and history reveal that Congress intended that the Attorney General be authorized to detain aggravated felons and aliens who she found to pose a risk to the community or a likelihood of noncompliance with the removal order. Pet. 17-23.

In defending the Ninth Circuit's addition of a judicially fashioned "reasonable" time limitation to Section 1231 (a)(6), respondent relies (Br. in Opp. 27-28, 30) on lower-court decisions rendered approximately 70 years ago under statutory provisions repealed in 1952. Those long-since superseded statutory provisions and decisions have no bearing on the present question.

As we explain in the certiorari petition (at 18-22), since at least 1990, Congress has unequivocally exempted the deten-

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(Br. in Opp. 7 n.8) that his history of gang activities "consists solely of the manslaughter offense for which he was convicted." The record also revealed that the immigration judge who had refused respondent's request for release while his removal proceedings were pending had found that respondent posed a danger if released because of the lack of any evidence that he had been rehabilitated during his state imprisonment term and because he had denied his involvement in gang activity, denied knowledge of the killing, and denied abusing drugs, despite information to the contrary. See Pet. 6. Finally, respondent's post-release arrest on charges of assaulting a female companion reflects his continued involvement in violent conduct that the State is attempting to prosecute through its appeal of the dismissal of those charges. See Pet. 13 n.6; Br. in Opp. 10 n.12.

tion of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to other aliens. Indeed, Congress has consistently allowed, and at times *mandated*, that the Attorney General continue to detain aggravated felons. Nothing in the last decade of amendments to the Immigration and Nationality Act suggests that Congress intended that after 1996, instead of having six months to effectuate removal with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable" time beyond 90 days, which in this case was deemed no time at all.

To the extent respondent identifies any ambiguity in the statute (see Br. in Opp. 26), however, that is no basis for adoption of the court of appeals' interpretation. Rather, it is the INS's plainly reasonable interpretation of Section 1231 (a)(6) that is entitled to judicial deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). See Pet. 18.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *Zadvydas* v. *Underdown*, No. 99-7791, in which we are today filing a supplemental brief suggesting that the Court grant certiorari in that case as well.

Respectfully submitted.

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