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THE FIGHT FOR IMMIGRATION JUSTICE IS NOT OVER: SCOTUS RULES MANDATORY DETENTION OF CERTAIN IMMIGRANTS SEEKING SAFETY IN THE UNITED STATES

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In *Johnson v. Guzman Chavez*, 594 U.S. __ (2021), the Supreme Court held that noncitizens in withholding-only proceedings are not entitled to a custody redetermination, or bond, hearing before the Immigration Court. This holding effectively leaves thousands of asylum seekers at risk of prolonged and indefinite detention.

By way of background, individuals who return to the United States after having previously been removed are subject to reinstatement of removal. 8 U.S.C. § 1231(a)(5); 8 C.F.R. 241.8(a). However, if someone with a prior removal order expresses a fear of persecution, they are referred for a Reasonable Fear Interview (RFI) where they must demonstrate "a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal." 8 C.F.R. §§ 241.8(e), 208.31(c). If an Asylum Officer determines that there is a reasonable possibility that the noncitizen will face persecution or torture, the noncitizen will be placed into withholding-only proceedings where they are only permitted to apply for withholding of removal or protection under the Convention Against Torture (CAT). 8 C.F.R. § 208.31(e). Neither withholding of removal nor protection under CAT grant lawful permanent residence, but both allow for the noncitizen to obtain work authorization and reside in the United States. An individual granted withholding of removal or protection under CAT

can be removed to a third county (*see* 8 C.F.R. § 1208.16(f)); however, this rarely occurs.

Prior to *Johnson v. Guzman Chavez*, most individuals in withholding-only proceedings were held in immigration detention unless they resided in a jurisdiction where they were eligible for release on bond. Prior to June 29, 2021, according to the Second and Fourth Circuits, the detention of noncitizens in withholding-only proceedings is governed by 8 U.S.C. § 1226(a) and are thus entitled to a bond hearing before an immigration judge pursuant to 8 C.F.R. § 1236.1(d). *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016); *Guzman Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019). According to the Third, Sixth, and Ninth Circuits, the detention of noncitizens in withholding-only proceedings is governed by 8 U.S.C. § 1231(a) and are thus not entitled to a bond hearing under the §1226(a) provisions. *Martinez v. LaRose*, 968 F.3d 555 (6th Cir. 2020); *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017).

The Second Circuit was the first court of appeals to directly address the issue of whether individuals in withholding-only proceedings were entitled to a bond hearing. In *Guerra*, the Second Circuit explained that there are two statutory sections which authorize the detention of noncitizens: 8 U.S.C. § 1226(a), which governs detention "pending a decision on whether the is to be removed from the United States," and 8 U.S.C. § 1231(a), which governs detention of noncitizens subject to a final order of removal. 831 F.3d at 62. Under § 1226(a), noncitizens are eligible for a custody redetermination, or a bond, hearing before the immigration court, so long as they are not classified as arriving noncitizens on their Notices to Appear, nor subject to mandatory detention under §1226(c). Under §1231(a), detention is mandatory for the 90-day "removal period" after a removal order becomes "administratively final," and thereafter, noncitizens are entitled to periodic review of their detention by ICE; however, ICE is permitted to continue detaining the individual and extend the removal period. The Second Circuit reasoned that §1226(a) does not contemplate whether the noncitizen is "theoretically removable but rather whether the will actually be removed." *Guerra*, 831 F.3d at 62. It follows that a noncitizen subject to reinstatement of removal is removable, "but the purpose of withholding only proceedings is to determine precisely whether 'the is to be removed from the United States.'" *Id*. The Second Circuit reasoned that §1226(a) contemplates detention of removal proceedings which are ongoing, whereas

§1231(a) is primarily concerned with defining the 90-day removal period during which a noncitizen "shall" be removed, and thus, §1226(a) governed the detention of noncitizens in withholding-only proceedings. *Id*. In addressing finality of the reinstated removal order, the Second Circuit explained that the decision to remove the noncitizen from the country is not made until the proceedings are complete, and accordingly, the reinstated removal order cannot be administratively final. *Id*. at 64.

In *Guzman Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019), the Fourth Circuit reasoned along similar lines. The Court concluded that §1226 and §1231 "fit together to form a workable statutory framework," where the §1226 applies "before the government has the actual authority to remove a noncitizen from the country," and that §1231 applies "once the government has that authority." 940 F.3d at 876. And thus, "because the government lacks the authority to actually execute orders of removal while withholding-only proceedings are ongoing the petitioners are detained under § 1226." *Id*. (internal citations omitted).

The Ninth Circuit disagreed with the Second Circuit and held that noncitizens in withholding-only proceedings are detained pursuant to §1231(a). *Padilla-Ramirez v. Bible*, 882 F. 3d 826 (9th Cir. 2017). The noncitizen in this case, Mr. Raul Padilla-Ramirez, had previously been deported after his application for asylum was denied. *Id*. at 829. He re-entered the United States a few years later undetected and was transferred to ICE custody after dismissal of unrelated criminal charges in 2015. While in ICE custody, Mr. Padilla-Ramirez expressed a fear of return to his native El Salvador, passed his RFI, and was placed into withholding-only proceedings. *Id*. After being denied the opportunity to seek bond before the immigration court, Mr. Padilla-Ramirez filed a petition for writ of habeas corpus, which was dismissed by the district court, and he appealed to the Ninth Circuit.

The Ninth Circuit upheld the decision of the lower court, concluding that §1231(a) governed Mr. Padilla-Ramirez's detention, and ruled that he was not entitled a bond hearing under §1226(a). *But see* *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (holding that prolonged detention under §1231(a)(6) is prohibited without an individualized hearing to determine whether the person is a flight risk or a danger to the community). In reaching their decision, the Ninth Circuit first analyzed the removal period and assessed whether Mr. Padilla-Ramirez's reinstated removal order was "administratively final." The

Court concluded that under a plain reading of §1231(a)(5), a reinstated removal order is administratively final. *Id*. at 831. The Court reasoned that the removal order was final when it was first executed, and if reinstated, it is reinstated from its original date and thus retains the same administrative finality. *Id*. The Court also reasoned that since the reinstatement provision is in the same section in the Act entitled "Detention and removal of *ordered removed*," Congress intended for the detention of noncitizens subject to reinstatement to be governed by that section, which require that the order be administratively final. *Id*. The Court concluded that withholding-only proceedings do not affect the administrative finality of the removal order; but rather, only determine whether a noncitizen ought to be removed to a particular country, and thus §1231(a) governs their detention. *Id.* at 832.

The Third Circuit in *Guerrero-Sanchez* v. *Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018) agreed with the Ninth Circuit. Mr. Rafael Guerrero-Sanchez had reentered the United States after having previously been ordered removed, passed his RFI, and was placed into withholding-only proceedings. Having been denied a bond hearing, Mr. Guerrero-Sanchez filed a petition for writ of habeas corpus. The district court held that his detention was governed by §1226(a) and ordered his release after nearly two years in ICE custody. 905 F.3d at 210. On appeal, the government argued that Mr. Guerrero-Sanchez was detained pursuant to §1231(a), and not entitled to a bond hearing. In response, Mr. Guerrero-Sanchez argued that he was detained pursuant to §1226(a) and was entitled to a bond hearing; and also, even if detained pursuant to §1231(a), he was still entitled to a bond hearing given his prolonged detention. *Id*. at 211. The Court ultimately held that §1231(a) governed Mr. Guerrero-Sanchez's detention, that his reinstated removal order was administratively final, and "that §1231(a)(6) affords a bond hearing after prolonged detention to any who falls within the ambit of that provision." *Id*.

The Sixth Circuit in *Martinez v. LaRose*, similarly held that noncitizens in withholding-only proceedings are detained pursuant to §1231(a). 968 F. 3d at 557. The petitioner in this case, Mr. Walter Martinez, had been previously deported in 2008. Upon return to El Salvador, he was brutally beaten by the MS-13 gang and the police who worked with the gang. He fled to the United States again, passed his RFI, and was held in immigration detention for two years. Mr. Martinez filed a petition for writ of habeas corpus, arguing that his prolonged detention had violated his due process rights and requesting that he

be given an individualized bond hearing. *Id*. His habeas petition was dismissed, where the district court held that §1226(a) does not apply to his detention, and under § 1231(a), "his due process claims fail because his removal is reasonably foreseeable." *Id*. at 558. The Sixth Circuit upheld the decision and declined to adopt a similar six-month test as had been done in *Guerrero-Sanchez* v. *Warden York County Prison*.

Johnson v. Guzman Chavez

The Supreme Court in *Johnson v. Guzman Chavez* addressed the circuit split and examined whether noncitizens in withholding-only proceedings are entitled to a bond hearing before the immigration court.

Justice Alito writing on behalf of the conservative majority ultimately agreed with the Third, Sixth, and Ninth Circuits, holding that the detention of noncitizens in withholding-only proceedings is governed by 8 U.S.C. § 1231(a), noncitizens in withholding-only proceedings are not entitled to a bond hearing, and that the reinstated removal orders are administratively final. Notably, the Court refers to noncitizens as "aliens" an astonishing 214 times in its decision, despite recent efforts to abolish the use of the dehumanizing term. The Court, in rejecting the arguments of counsel for the noncitizens, found that withholding-only proceedings only address whether the noncitizen is to be removed *to* a particular country, and not *from* the United States, concluding that the reinstated removal order remains final throughout these proceedings. *Guzman Chavez*, 594 U.S. at 11. The Court acknowledges that although very few individuals are ever removed to a third country, this reality does not negate the fact that withholding-only proceedings are country specific. *Id*.

The majority cites to §1231(a) in rendering its decision. The Court explained that the 90-day removal period in §1231(a)(1)(A) 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). The removal period may be extended in certain conditions, including: if the noncitizen takes actions which prevent their removal; if DHS stays the removal if it is not practicable or proper; or if the noncitizen is inadmissible, removable as a result of certain violations, or is a risk to the community. §§ 1231(a)(1)(C), 1231(c)(2)(A), 1231(a)(6). By taking a plain

reading of the statute, the Court states, the reinstated removal orders have long been final, and "there is nothing left for the BIA to do with respect to the removal order other than to execute it." 594 U.S. at 10. The majority sidesteps any analysis under *Chevron* or *Auer*, and resorts to a pseudo-textual interpretation of the INA, continuing a trend also observed in *Sanchez v. Mayorkas*, 593 U.S. ___ (2021), where the Supreme Court similarly refused to engage in a *Chevron* analysis. The majority seeks to justify its holding and prohibition of bond hearings for noncitizens in withholding-only proceedings by commenting " 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." *Id*. at 20.

Agreeing with the Fourth and Second Circuits, the dissent argues that §1226(a) governs the detention of noncitizens in withholding-only proceedings where there is a pending decision on whether the noncitizen is to be removed from the United States. The dissent also finds that the reinstated removal order is not final while withholding-only proceedings are pending. The dissent remarks that withholding-only proceedings involve a full hearing before the immigration court, may be appealed to the Board of Immigration Appeals (BIA) and seek judicial review thereafter, which can take well over two years before the case is resolved. *Guzman Chavez*, 594 U.S. at 5 (Breyer, J., dissenting). The dissent questions whether Congress intended to deny bond hearings "to individuals who reasonably fear persecution or torture, and who, as a result, face proceedings that may last for many months or years." *Id.* at 6.

The dissent also finds that §1231(a)(1)(A)'s language, "except as otherwise provided in this section," and the later restriction-on-removal provision indicate that §1231(a) is not the appropriate governing statute for the detention of withholding-only applicants. *Id*. The dissent reasons that the removal period for withholding-only applicants cannot begin until their proceedings have concluded – that is, "the order is not 'final' until the immigration judge and the BIA finally determine whether the restriction on removal applies and prohibits removal." *Id*. at 7. By adopting the majority's rationale that the reinstated removal order is final as of the date it was originally executed, it creates uncertainty around how, if it all, the removal period can apply to withholding-only applicants.

Who Is Affected By This Decision?

As examined in our previous articles (here, here, and here), the Trump administration eviscerated asylum protections in the United States. Under this and other flawed case law and policies, thousands of asylum seekers were deported despite having very real fears of violence in their countries of origin. Upon returning to their home countries, and facing the exact violence they anticipated, noncitizens return to the United States again seeking safety.

Although the Biden administration has taken important steps to undo some of the most egregious Trump-era policies (such as restoring asylum eligibility for survivors of domestic violence and family units, and empowering judges to manage their own dockets), the administration continues to follow the unlawful practice of expelling migrants and asylum seekers under the supposed authority of Title 42, resulting in thousands of asylum seekers being forcibly denied entry into the United States. Because asylum seekers still face the same dangers they fled, they are forced to seek irregular entry into the United States; and, depending on their individual situation and whether they have a prior removal order, may be subjected to withholding-only proceedings.

Now in the United States a second or third time after previously being unfairly removed, these individuals are only eligible for withholding of removal or protection under CAT, which do not lead to permanent lawful status. Withholding of removal and protection under CAT are also both extremely difficult protections to achieve – far more difficult than winning asylum. And in light of *Johnson v. Guzman Chavez*, noncitizens in withholding-only proceedings will have to fight for these narrow protections from the confines of immigration detention, where they are at high risk of contracting COVID-19, likely to experience difficulties in accessing evidence they need for their cases, as well as less likely to find competent counsel.

Strategies for Noncitizens in Withholding-Only Proceedings Seeking Release From Immigration Detention

Although *Guzman Chavez* prevents noncitizens in withholding-only proceedings from seeking bond under §1226(a) authority, there remain several avenues to advocate for release:

Advocates and attorneys may request that ICE exercise prosecutorial discretion in vacating reinstatement orders and issuing notices to appear, which will allow noncitizens to pursue all relief in ordinary removal proceedings. 8 U.S.C. § 1229(a); *Villa-Anguiano v. Holder*, 727 F.3d 873, 878-79 (9th Cir. 2013) (“ICE

agents, to whom § 1231(a)(5) delegates the decision to reinstate a prior removal order, may exercise their discretion not to pursue streamlined reinstatement procedures.") It follows that the noncitizen would then be detained pursuant to §1226(a) and thus entitled to a bond hearing.

Individuals may also seek release from ICE custody as a matter of prosecutorial discretion. Noncitizens may be released on parole or on their own recognizance. In seeking release, noncitizens must establish that they are not a danger to the community nor a flight risk, and should submit evidence of strong equities which would convince ICE to exercise its discretion in releasing the noncitizen from ICE custody. (See CLINIC's Guide to Obtaining Release From Immigration Detention for helpful tips on preparing these requests for release).

Noncitizens may also continue seeking bond hearings in the Third and Ninth Circuits, where these jurisdictions have ruled that noncitizens in withholding-only proceedings are permitted to seek custody review after their detention has become prolonged (usually at six months). *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). In other jurisdictions, noncitizens can seek release via a petition for writ of habeas corpus, arguing that their indefinite detention violates their due process rights. *Zadvydas v. Davis*, 533 U.S. 678 (2001). (See the American Bar Association's Guide for Seeking Release from Indefinite Detention After Receiving A Final Order of Deportation for tips and sample petitions).

Johnson v. Guzman Chavez significantly restricts the ability to obtain release from ICE custody for noncitizens in withholding-only proceedings. Although practitioners have many other tools at their disposal to advocate for the release of their clients, what is ultimately needed are concrete legislative changes that make clear noncitizens in withholding-only proceedings are bond eligible, or more broadly, legislation which challenges the existence of immigration detention for all noncitizens.

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