

No. 03-878

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**In the Supreme Court of the United States**

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

v.

SERGIO SUAREZ MARTINEZ

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**BRIEF IN OPPOSITION**  
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Christine Stebbins Dahl  
Assistant Federal Defender  
101 SW Main Street, Suite 1700  
Portland, Oregon 97204  
(503) 326-2123  
*Counsel for Respondent*

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## QUESTION PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court considered the government's authority under 8 U.S.C. § 1231(a)(6) to continue to detain for the purpose of removal those persons whose removal from the United States could not be accomplished in the reasonably foreseeable future. This Court interpreted the statute to limit such detention to a "reasonable time," and applied it to former permanent residents. In this case, the Ninth Circuit Court of Appeals, citing *Lin Guo Xi v. INS*, 298 F.3d 832 (9<sup>th</sup> Cir. 2002), summarily affirmed the application of *Zadvydas* to Sergio Suarez Martinez, a Mariel Cuban who had been paroled into the United States in 1980 and was ordered removed in 2001. Although it detained Mr. Martinez under section 1231(a)(6) for nearly two years, the government made no effort to remove him, conceded it was unable to do so within the foreseeable future, and ultimately asked the Ninth Circuit to summarily affirm the district court's conditional release order pursuant *Lin Guo Xi*.

Given that section 1231(a)(6) draws no distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability, this case presents the question whether the Ninth Circuit correctly applied *Lin Guo Xi*, in which it adhered to this Court's statutory construction of section 1231(a)(6) in *Zadvydas*.

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## BRIEF IN OPPOSITION

Petitioners Phil Crawford, Interim Field Office Director, Portland, Oregon, U.S. Immigration and Customs Enforcement, and John Ashcroft, Attorney General of the United States, seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The government has asked this Court to hold its petition pending final resolution of the petition to review *Benitez v. Wallis*, 337 F.3d 1289 (11<sup>th</sup> Cir. 2003), *cert. granted*, 2004 WL 67860 (U.S. Jan. 16, 2004) (No. 03-7434). The respondent, Mr. Martinez, opposes the issuance of a writ in his case. Although the question presented here cannot seriously be distinguished from that in *Benitez*, the Ninth Circuit resolved it correctly and the Eleventh Circuit did not. Because his conditional release is at stake, Mr. Martinez opposes holding this petition pending final disposition of *Benitez*. Instead, Mr. Martinez requests consolidation with *Benitez* for argument should the Court grant the writ.

## OPINIONS BELOW

The order of court of appeals is unreported and appears at 1a of the Appendix to the Petition for Writ of Certiorari. The order of the district court is unreported and appears at 2a of the Appendix to the Petition.

## JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1). The government's petition appears to have been timely filed.

### STATEMENT

Certain errors in the government's statement require correction. The government has never before suggested that Mr. Martinez attempted to enter the United States illegally. *Petition* at 2 ("Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift."). In fact, he did not. He fled Cuba by boat as part of the "Freedom Flotilla" that enjoyed U.S. government approval.<sup>1</sup> Mr. Martinez arrived in Key West, Florida on June 8, 1980, and was immediately paroled into United States pursuant to 8 U.S.C. § 1182(d)(5). *Gov't Supp. Mtn. to Hold in Abeyance* (CR 12) at 2.

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<sup>1</sup>Comments by President Carter at a press conference in Miami on May 5, 1980, indicated government approval of the flotilla:

[L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. ... But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

*United States v. Frade*, 709 F.2d 1387 (11<sup>th</sup> Cir. 1983).

The government omits to state that it identified section 1182(d)(5) as an independent source of authority to detain Mr. Martinez for the first time before the Ninth Circuit. *Compare Petition* at 3. In its district court pleadings, the government identified only section 1231(a)(6) as the source of its authority and made no attempt to distinguish *Lin Guo Xi*. *E.g., Gov't Supp. Mtn. to Hold in Abeyance* (CR 12) at 4; *Appellants' Response to Petitioner-Appellee's Motion for Summary Affirmance and Request for Summary Affirmance* (CA 03-35053) (July 9, 2003) at 2. The government did not suggest section 1182(d)(5) provided independent authority to detain Mr. Martinez until it moved for summary affirmance in the Circuit. *Appellants' Response to Petitioner-Appellee's Motion for Summary Affirmance and Request for Summary Affirmance* (CA 03-35053) (July 9, 2003) at 7.

Finally, while noting annual custody reviews pursuant to parole regulations applicable to Mariel Cubans, 8 C.F.R. § 212.12(g), *Petition* at 8, the government omits to state Mr. Martinez alleged these regulations were constitutionally deficient and yielded an unreliable result because they do not provide detainees a meaningful opportunity to challenge continued detention and are so lacking in important safeguards as to create a significant risk of erroneous deprivation of liberty interests. *See Brief in Support of Petition* (CR 9) at 25. The government never addressed this argument, and the district court's order granting the habeas petition did not disclose

whether this argument informed its decision. *Compare Order Granting Petitioner's Motion to Dissolve Stay and for Immediate Release* (CR 24).

### REASON FOR DENYING THE PETITION

The petition should be denied because the Ninth Circuit correctly concluded it was bound by this Court's statutory construction of section 1231(a)(6) in *Zadvydas*, and applied the same statute in the same manner. Because Congress chose to treat all of the categories of aliens the same in section 1231(a)(6), this Court has no occasion to rewrite the statute. It has the same meaning for everyone to whom it applies.

Contrary to the Eleventh Circuit's analysis in *Benitez*, the Ninth Circuit began with the statutory construction issue, and having resolved the issue in favor of the petitioner, concluded it had no occasion to address the underlying constitutional issues.

Just a year ago the Supreme Court held that 8 U.S.C. § 1231(a)(6) "limits an alien's post-removal-period detention" to a reasonable time period and "does not permit indefinite detention" by the Immigration and Naturalization Service ("INS"). *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). We are now presented with the question of whether this statute bears the same meaning for an individual deemed inadmissible to the United States under 8 U.S.C. § 1182. The answer is yes. Our analysis of § 1231(a)(6) begins and ends with *Zadvydas*. Because the Supreme Court construed the statute, we are bound by that framework and thus are not called upon to address the scope of any constitutional claims of an inadmissible alien.

*Lin Guo Xi*, 298 F.3d at 833 -834.

The Ninth Circuit, employing traditional canons of statutory construction, looked first to the language of the statute and concluded that it expressly applies to both inadmissible (formerly referred to as excludable) and removable (formerly referred to as deportable) aliens. *Id.* The plain language of the detention statute provides:

An alien ordered removed who is [A] *inadmissible under section 1182* of this title, [B] removable for violations of [nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security,] or [C] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6)(emphasis added).

The Ninth Circuit found that although *Zadvydas* only concerned the second category (removable aliens), this Court's construction addressed the statute as a whole, and thus, the holding of *Zadvydas* was not limited to the second prong:

Although *Zadvydas* concerned the second prong of the statute--relating to deportable aliens--the Court's ultimate holding addresses the statute as a whole: "we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal court review." 533 U.S. at 682. In assessing the applicability of the statute, the Court spoke broadly, noting that it "applies to certain categories of aliens who have been ordered removed, namely *inadmissible* aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons...." *Id.* at 688 (emphasis added). Concluding that the

statute “does not permit indefinite detention,” the Court pointedly used the term “aliens” as opposed to “deportable aliens:”

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

*Lin Guo Xi*, 298 F.3d at 835 (quoting *Zadvydas*, 533 U.S. at 689).

The Ninth Circuit rejected the INS’s argument that the statute should be construed differently depending upon the category into which the alien fell. The Ninth Circuit found the plain language of the statute forbids such a “bifurcated construction,” and such an approach would be “untenable.” *Lin Guo Xi*, 298 F.3d at 836-37. Because the statute no longer distinguishes between “excludable” and “deportable” aliens, there is no sound or principled basis to interpret and to apply it one way for one category, but a different way for the other. *See Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting) (“Section 1231(a)(6) permits continued detention not only of removable aliens but also of inadmissible aliens, for instance those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority”).

The INS argued as much in its briefing to this Court:

[The Supreme] Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally

intends the language to have the same meaning. That rule is “at its most vigorous when a term is repeated within a given sentence.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). *A fortiori* here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, *Congress must be understood to have intended the same language to confer the same authority with respect to each category.*

Brief for the Petitioners at 47, *Ashcroft v. Ma*, (No. 00-38) (U.S. June 28, 2001) (emphasis added). Any argument by the government that the statute should now be interpreted differently for inadmissible aliens must be rejected. *See also Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting) (“[I]t is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.”); *id.* at 717 (“[T]hat Mariel Cubans and other illegal, inadmissible aliens will be released . . . would seem a necessary consequence of the majority’s construction of the statute.”).

The Ninth Circuit properly concluded it was bound by this Court’s construction of section 1231(a)(6).

We thus abide by the Supreme Court’s interpretation of § 1231(a)(6) and hold that Lin may not be subjected to indefinite detention. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (“It is [the Supreme Court’s] responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute mean[s] ....”); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat) 152, 160 (1825) (“[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction....”).

298 F.3d at 836. The Ninth Circuit's having correctly applied in *Lin Guo Xi* this Court's binding precedent and the clear language of section 1231(a)(6), there is no reason for this Court to disturb the order pursuant to which the government released Mr. Martinez on reasonable conditions.

### CONCLUSION

The petition for writ of certiorari should be denied. In the alternative, Mr. Martinez requests consolidation for argument with *Benitez*.

Respectfully submitted,

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Christine Stebbins Dahl  
Assistant Federal Defender  
101 S.W. Main Street, Suite 1700  
Portland, OR 97204  
(503) 326-2123  
Counsel for Respondent

January 2004

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PORTLAND, OREGON, UNITED STATES IMMIGRATION  
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**CERTIFICATE OF SERVICE AND MAILING**

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I, Christine Stebbins Dahl, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION on the counsel for the petitioners by depositing in the United States Post Office, in Portland, Oregon on January 20, 2004, first class postage prepaid, two true, exact and full copies thereof addressed to:

Theodore B. Olson  
Solicitor General  
Department of Justice, #5614  
10th & Constitution, N.W.  
Washington, D.C. 20530

Peter D. Keisler  
Assistant Attorney General  
Office of Immigration Litigation  
Civil Division – Department of Justice  
P.O. Box 878, Ben Franklin Station  
Washington, DC 20044

Donald E. Keener, Attorney  
Emily A. Radford, Attorney  
John Andre, Attorney  
Office of Immigration Litigation  
Civil Division – Department of Justice  
P.O. Box 878, Ben Franklin Station  
Washington, DC 20044

Ken Bauman  
Assistant United States Attorney  
United States Attorney’s Office  
600 U.S. Courthouse  
1000 SW Third Avenue  
Portland, OR 97204-2902

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Christine Stebbins Dahl  
Counsel for Respondent

SUBSCRIBED AND SWORN to before me this January 20, 2004.

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Notary Public of Oregon