No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.

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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The Ninth Circuit's wholesale revision of the law governing immigration detention during removal proceedings warrants this Court's review. First, the court rewrote the law governing detention of criminal and terrorist aliens in removal proceedings who "shall" be taken into custody and may be released "only if" a narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c). In the face of those explicit requirements, the Ninth Circuit crafted a sweeping new exception that would allow such criminal or terrorist aliens to be released after a bond hearing if detention lasts for six months. Second, the court of appeals rewrote the law governing detention of aliens seeking admission to the United States, allowing aliens who have not clearly established their admissibility nevertheless to obtain release on bond after six months—and thus a right to enter the interior over the objection of the Secretary of Homeland Security—for the first time in our Nation's history. Third, the

court rewrote the procedures in bond hearings themselves. For aliens detained for six months, the court shifted the burden of proof to the government, demanded clear and convincing evidence, required repeat hearings automatically every six months, and even changed the factors to be considered in bond hearings. The court greatly overstepped the judicial role, and disregarded this Court's precedents in multiple ways. This Court should grant certiorari and reverse.

A. The Ninth Circuit's Revision Of Section 1226(c) Warrants Review

The court of appeals' holding that mandatory detention under Section 1226(c) is capped at six months warrants this Court's review.

1. As respondents recognize (Br. in Opp. 21), the "circuits differ" as to whether a six-month cap must be imposed on detention of aliens under Section 1226(c). Respondents call for "percolat[ion]" (*id.* at 20), suggesting that this split may narrow. In fact, it has recently widened: The First Circuit has just joined the Third and Sixth Circuits in interpreting Section 1226(c) to authorize mandatory detention for a reasonable time, rejecting the rigid six-month cap imposed by the Second and Ninth Circuits. *Reid* v. *Donelan*, No. 14-1270, 2016 WL 1458915, at *9 (Apr. 13, 2016). The First Circuit concluded that "the Third and Sixth Circuits' individualized approach adheres more closely to legal precedent than the extraordinary intervention" of the rigid six-month rule. *Ibid.* The Third Circuit has also repeatedly rejected the Ninth Circuit's approach. See *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 474 n.7 (2015) ("We declined to adopt presumptive thresholds in both *Diop*

and *Leslie*, and we decline to do so now."). The 3-2 split here thus will not be resolved without this Court's intervention.

2. Respondents do not even try to square the Ninth Circuit's rigid six-month cap with Section 1226(c)'s text, history, purpose, or context. Instead, respondents rely solely on constitutional avoidance, arguing (Br. in Opp. 28) that Section 1226(c) is "insufficiently clear" to authorize what they characterize as "prolonged" mandatory detention. But Section 1226(c) unambiguously provides that the Secretary is prohibited from releasing a criminal or terrorist alien detained under that provision based merely on the passage of time: the Secretary "shall" take such an alien into custody, and "may release" the alien "*only if*" the narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(1) and (2) (emphasis added). Congress further confirmed that bar to release in Section 1226(a), providing that aliens in removal proceedings generally may be released on bond—"except as provided in subsection (c)." 8 U.S.C. 1226(a); see 8 U.S.C. 1226(a)(2).

Respondents contend (Br. in Opp. 26) that "all of the Government's concerns" about recidivism and flight can be addressed in the bond hearings the Ninth Circuit ordered, where an immigration judge may deny bond "[i]f an individual poses a danger" or flight risk. But Congress enacted Section 1226(c) specifically to take that determination out of the hands of immigration judges, responding to real-world experience showing that this approach did not protect against flight and recidivism. See *Demore* v. *Kim*, 538 U.S. 510, 518 (2003) (describing the "wholesale failure" of that approach). Congress replaced that individualized

scheme with a categorical judgment that all aliens who are convicted of qualifying criminal offenses pose a danger and undue flight risk and thus may be released "only if" a narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2).

In *Demore*, this Court upheld Congress's categorical judgment as applied to a lawful permanent resident (LPR) who had "spen[t] six months in INS custody." 538 U.S. at 531. That leaves no room for the proposition that criminal aliens cannot be detained for six months without an individualized hearing. Respondents note (Br. in Opp. 28 n.8) that the alien in *Demore* did not argue for a six-month cap. But the fact that *Demore* was fully litigated without anyone even noticing such a cap's supposed existence further underscores that the six-month rule has no basis in the statutory text or purpose. And to the extent the Ninth Circuit relied on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), to impose a six-month cap, see Br. in Opp. 27-29; Pet. App. 28a-31a, this Court in *Demore* specifically *rejected* the alien's reliance on *Zadvydas*. See 538 U.S. at 527-529; see Pet. 21. In doing so, this Court explained that, unlike in *Zadvydas*, detention during removal proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings" and has an "obvious termination point" at the entry of a final order of removal. 538 U.S. at 528-529. Those bases for mandatory detention do not disappear after six months.

Respondents emphasize (Br. in Opp. 7) that the average detention time for class members was 404 days. But averages for class members are skewed upwards by the fact that an alien is only a class member if he

has been detained for at least six months. The "average" thus omits every alien released in less time.

Respondents also fail to differentiate delays caused by aliens. On average, alien-requested continuances accounted for 105.9 days of pre-order detention by class members; and 22.7% of class members requested continuances totaling 181 days or more. E.R. 175, 186. This means that, under the court of appeals' rigid six-month rule, approximately *a fifth of class members* are entitled to release based solely on their own delay, unless the *government* can prove flight risk or danger by clear and convincing evidence. The Congress that prescribed mandatory detention under Section 1226(c) in 1996 did not at the same time open up such a loophole.

B. The Ninth Circuit's Revision Of Section 1225(b) Warrants Review

This Court should similarly review the Ninth Circuit's imposition of a six-month cap on mandatory detention under 8 U.S.C. 1225(b). The Ninth Circuit fashioned a right for inadmissible aliens seeking admission to be released into the interior of this country if their removal proceedings last for six months—no matter the reason for the delay—and the government is unable to prove, by clear and convincing evidence, that they will not flee or be a danger to the community. That holding has no basis in the Constitution or any statute or regulation, and radically breaks from longstanding legal principles governing protection of the Nation's borders.

1. Respondents again rely solely on the canon of constitutional avoidance, this time based on speculation about the possibility of a rare case in which a returning LPR might be detained for more than six

months under Section 1225(b). See Br. in Opp. 13-16. But Section 1225(b)'s text, structure, context, and history cannot fairly be read to impose a categorical rule requiring bond hearings at the six-month mark. Throughout the history of United States immigration law, Congress has never provided bond hearings for aliens detained at the threshold of entry to the country pending the outcome of proceedings to exclude them. Consistent with that unbroken tradition, Congress has provided that aliens who are seeking admission, but who are "not clearly and beyond a doubt entitled to be admitted," "shall be detained" for removal proceedings. 8 U.S.C. 1225(b)(2)(A). And arriving aliens in expedited removal proceedings "shall" be removed without a hearing or "shall be detained" pending a credible-fear determination; "shall be detained" until removed if they lack such a fear; and "shall be detained" pending consideration of asylum if they have such a fear. 8 U.S.C. 1225(b)(1)(A)(i), (B)(ii), (iii)(I), and (IV).

Controlling regulations in turn provide that arriving aliens in removing proceedings "shall be detained" and that immigration judges in the Department of Justice's Executive Office for Immigration Review "may not" hold bond hearings for them. 8 C.F.R. 235.3(c), 1003.19(h)(2)(i)(B), 1235.3(c). Instead, an arriving alien who has not established his admissibility may be released only by the Secretary of Homeland Security, pursuant to his distinct discretionary parole authority under 8 U.S.C. 1182(d)(5); see 8 C.F.R. 212.5(b) and (c), 235.3(b)(4)(ii) and (c).

The possible release of such aliens into the country through bond hearings before an immigration judge after six months also would subvert Congress's pur-

pose of giving the Secretary "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. 1103(a)(5). Even assuming that there might be a constitutional doubt raised in a rare case involving an LPR, respondents' rigid across-the-board "solution" dwarfs the size of any potential constitutional doubt, and in any event is unnecessary because an as-applied constitutional challenge would be available in that rare situation.

Any doubt concerning the constitutionality of Section 1225(b)'s mandatory-detention provisions could arise, at most, in a tiny fraction of cases. Respondents do not dispute that Section 1225(b) is valid as applied to "likely the vast majority" of subclass members. Pet. App. 86a. Respondents point (Br. in Opp. 14-15) to the possibility that an LPR returning from abroad could be detained for more than six months during removal proceedings. But in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court upheld the detention of a returning LPR at the border for 21 months without any hearing. See Pet. 10, 12, 15-16. And in any event, LPRs generally are exempt from detention under Section 1225(b), subject only to narrow exceptions that Congress crafted against the settled backdrop of *Mezei*. See 8 U.S.C. 1101(a)(13)(C). The court of appeals in turn found that the record included zero examples of LPR class members actually detained under Section 1225(b); respondents assert (Br. in Opp. 16) that the correct number is one. Either way, the number of clearly valid applications overwhelms respondents' asserted example, even assuming it raised a serious constitutional question despite *Mezei*. Cf. *id.* at 6 (discussing

statistical sampling of "approximately 1,000" class members).

Respondents' six-month limitation is also unnecessary to address the concerns they raise. If a returning LPR is detained under the narrow circumstances identified in 8 U.S.C. 1101(a)(13)(C)—and if *Mezei* has not already foreclosed a constitutional challenge, if alien-caused delay or other factors did not reasonably justify the time for conducting removal proceedings, and if the Secretary has not addressed the situation through an exercise of parole authority—that alien could raise an as-applied constitutional challenge through habeas corpus and, if the alien prevailed, could obtain a tailored remedy. But Congress surely did not intend to enact a massive loophole through the core of Section 1225(b), depriving the Secretary of plenary control over the border and providing a windfall to thousands of aliens whose detention is perfectly valid, based on speculation about potential constitutional issues that might arise in a tiny fraction of cases and that could be resolved without creating that loophole in the first place.

Respondents contend (Br. in Opp. 1, 13) that the six-month cap is "dictated" by *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). But *Clark*'s statement that "[t]he lowest common denominator, as it were, must govern," *id.* at 380, does not establish that, whenever a litigant identifies any potential for a constitutional problem—no matter how rare—courts should rewrite the entire statute to avoid the problem at all costs. That passage merely describes the effect of having previously given the statute at issue a limiting construction in a case involving possible constitutional concerns: That construction applies in subsequent

cases, even absent the constitutional concerns that prompted it. *Id.* at 378.

The question here is instead *whether* Section 1225(b) must be given the Ninth Circuit's counter-textual and profoundly counter-historical limiting construction in the first place. *Clark* elsewhere teaches that constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." 543 U.S. at 381. "The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382. Accordingly, even if one application could be doubtful, the statute should not be construed to avoid the potential problem if (1) the proposed limitation is not a plausible interpretation of statutory ambiguity; or (2) the presumption that Congress ordinarily intends to avoid constitutional problems is overcome because the limitation would subvert—rather than effectuate—Congress's intent. As set forth above, the court of appeals' rigid six-month rule fails both steps.

2. Respondents contend (Br. in Opp. 2) that it is "hyperbolic" for the government to be concerned that the court of appeals has wrested control of the border from the Secretary and given inadmissible aliens a right to a hearing before an immigration judge—and to enter the country if the government cannot satisfy the high burden of proof the Ninth Circuit has imposed on it. But "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States* v. *Flores-Montano*, 541 U.S. 149, 153 (2004). One aspect of the

Executive's plenary authority over the border is that "an alien who seeks admission to this country may not do so under any claim of right"; rather, "admission is a privilege granted by the sovereign United States Government" and "only upon such terms" and "in accordance with the procedure which the United States provides." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). The Ninth Circuit's sharp break from those foundational principles, firmly established in our immigration laws and jurisprudence, is itself extraordinarily important.[1]

Furthermore, a concrete impact is already being felt. Respondents trumpet (Br. in Opp. 11-12) that approximately 70% of aliens (across all subclasses) are granted bond after *Rodriguez* hearings, and approximately 70% of those post bond and are released. But that simply illustrates the practical impact of the ruling below. None of those aliens were otherwise entitled to a bond hearing, and approximately one

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[1] Respondents contend (Br. in Opp. 19) that the government "is *already* providing bond hearings" to certain Section 1225(b) subclass members. (citing *In re X-K-*, 23 I. & N. Dec. 731, 734-735 (B.I.A. 2005)). But *X-K-* does not address aliens newly arriving at ports of entry; it addresses "certain other aliens" who already crossed the border without inspection, were encountered within 14 days and 100 miles of the border, and then passed a credible fear interview. *Id.* at 732-733; see 8 U.S.C. 1225(b)(1)(A)(iii). *X-K-* rested on a perceived "regulatory gap" in that situation, not any broader principle. 23 I. & N. Dec. at 735. By contrast, the Ninth Circuit's ruling newly gives immigration judges the power (and, by shifting the burden to the government, presumptively requires immigration judges) to allow inadmissible aliens to enter the country over the Secretary's objection. And *X-K-* observed that "[t]here is *no question* that Immigration Judges lack jurisdiction over arriving aliens who have been placed in * * * removal proceedings." *Id.* at 732 (emphasis added).

third of aliens overall who are released on bond fail to appear. See Pet. 27.

C. The Ninth Circuit's Revision Of Bond-Hearing Procedures Warrants Review

Finally, the Court should grant certiorari to review the court of appeals' holdings that the government must bear the burden of proof at bond hearings on flight risk and danger and do so by clear and convincing evidence, that periodic bond hearings must occur automatically, and that immigration judges must consider detention length as a factor. This radical revision of the procedures that have long governed bond hearings is itself of great importance and is intertwined with review of the six-month caps imposed by the Ninth Circuit, as that revision amplifies the real-world impact of mandating bond hearings.

The court of appeals' procedural innovations are contrary to Section 1226(c) and longstanding regulations. Respondents contend (Br. in Opp. 33) that Section 1226(c) "says nothing as to prolonged detention." But Section 1226(c) plainly covers detention for the entire duration of removal proceedings: The Secretary "may release" a covered alien during removal proceedings "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). And to satisfy even that narrow exception, the burden is on "the alien"—not the government. *Ibid.*

Respondents similarly assert (Br. in Opp. 33) that the regulations establishing procedures for bond hearings—where they are available at all—do not address "prolonged detention." But the regulations unambiguously apply in *all* bond determinations. Comprehensive regulations entitled "Apprehension, custody, and detention" state that DHS officers "may" release an

alien detained under Section 1226(a) on bond, "provided that *the alien* must demonstrate" he is not a flight risk or danger. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added). After such an initial custody determination, "including the setting of a bond," the alien may ask an immigration judge to ameliorate "the conditions under which he or she may be released," and the immigration judge "is authorized" to detain the alien, "release the alien," and "determine the amount of bond, if any." 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). And aliens do not obtain subsequent hearings automatically; they must show that "circumstances have changed materially." 8 C.F.R. 1003.19(e). The Ninth Circuit did not construe those provisions. It invalidated them and wrote new rules in their place.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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