No. 18-16465

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTEBAN ALEMAN GONZALEZ, *et al.*,
Petitioners-Appellees,

v.

WILLIAM P. BARR[1], *et al.*,
Respondents-Appellants.

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01869-JSC

Hon. Jacqueline Scott Corley
United States Magistrate Judge

RESPONDENTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

Nothing in the text of 8 U.S.C. § 1231(a)(6) requires bond hearings after six months of immigration detention in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary. Nothing in the statutory text—which does not include the words bond, hearing, or six months—even remotely supports the imposition of these requirements. Yet, the district court, by reapplying the canon of constitutional avoidance, found these requirements.

However, the district court cannot reapply the canon given that the Supreme Court has already correctly applied the canon to § 1231(a)(6) in *Zadvydas v. Davis*, which construed the statute to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. 678, 699 (2001).

This application of the canon to § 1231(a)(6) was reaffirmed by the Supreme Court in *Clark v. Martinez*, which holds that, though there are different categories of individuals detained under § 1231(a)(6), the statutory text remains the same for each category. 543 U.S. 371, 378 (2005). To give the same words of the same statute a different meaning would be to "invent a statute rather than interpret one." *Id.*

But, by extending the holding of *Diouf v. Napolitano*, the district court has improperly used the canon to rewrite § 1231(a)(6) as it pleases. 634 F.3d 1081, 1084 (9th Cir. 2011). This conclusion is affirmed by the Supreme Court's recent decision in

Jennings v. Rodriguez, which cannot "countenance such textual alchemy." 138 S. Ct. 830, 846 (2018).

Therefore, not only is *Diouf's* interpretation of § 1231(a)(6) not plausible, but it is also clearly irreconcilable with the Supreme Court's recent holding in *Jennings*. Thus, the district court erred in extending *Diouf's* impermissible application of the canon of constitutional avoidance here. Accordingly, this Court should reverse the district court's decision granting Petitioners' motion for a preliminary injunction and vacate the injunction without delay.

JURISDICTIONAL STATEMENT

Jurisdiction for this appeal arises under 28 U.S.C. § 1292(a)(1), as an appeal from an interlocutory order of a district court granting an injunction.

STANDARDS OF REVIEW

This Court reviews the district court's legal conclusions *de novo*, and the district court's findings of fact for clear error. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006); *see also Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004) (Review is *de novo* when the district court's ruling rests solely on a premise of law and the facts are either established or undisputed). This Court reviews the district court's decision to grant or deny a preliminary injunction for abuse of discretion. *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010).

ISSUES PRESENTED

(1) Whether the district court erred in reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6) because the canon has already been applied to § 1231(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), thereby violating the holding of *Clark v. Martinez*, 543 U.S. 371, 386 (2005), that the statute must be given a consistent interpretation.

(2) Whether the district court misapplied the canon of constitutional avoidance when it construed 8 U.S.C. § 1231(a)(6) to mean that an alien must be given a bond hearing after six months of detention where the burden is on the Government to prove by clear and convincing evidence that further detention is justified.

(3) Whether the district court erred in holding that *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) is not clearly irreconcilable with the Ninth Circuit's holding in *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011) ("*Diouf*").

STATEMENT OF THE CASE

A. Procedural History

On June 5, 2018, the United States District Court for the Northern District of California granted Petitioners' motion for a preliminary injunction and created a Ninth Circuit-wide class "as to [Petitioners'] statutory claims."[2] Excerpts of Record ("ER")

[2] Petitioners sought to certify a class under Rule 23(b)(2) for both their statutory *and* due process claims. ER at 20. However, because the Supreme Court in *Jennings* remanded that case to the Ninth Circuit to address whether Rule 23 authorized class certification of the petitioners' due process claims, 138 S. Ct. at 832, the district court in this case

at 32. The preliminary injunction enjoins Respondents from detaining Petitioners and class members for more than 180 days in the Ninth Circuit without a bond hearing where the burden is on the Government to prove by clear and convincing evidence that further detention is justified. ER at 33. On July 20, 2018, the district court granted Respondents' Motion for Clarification regarding the class definition. ER at 6-14. Therefore, for purposes of the preliminary injunction and class certification order, the class includes only those individuals detained under § 1231(a)(6) who have "live claims" before an adjudicative body. ER at 5. Thus, the class encompasses a diverse group of individuals who are detained under § 1231(a)(6) but whose underlying claims related to their removal are in various procedural postures.

B. Relevant Statutes and Case Law

Section 1231(a) authorizes Respondents to detain Petitioners. It provides that "when an alien is ordered removed, the [Secretary of Homeland Security][3] shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). During the 90-day "removal period," the Secretary "shall detain the alien." *Id.* § 1231(a)(2). Once the removal period ends, the Secretary "may" continue to detain

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denied the Petitioners' motion to certify a class based on their due process claim without prejudice. ER at 20.

[3] The statute references the Attorney General, not the Secretary of Homeland Security. However, Congress has transferred responsibility for immigration enforcement functions from the Attorney General to the Secretary. 6 U.S.C. § 251. Pursuant to 6 U.S.C. § 557, section 1231's references to the Attorney General "shall be deemed to refer to the Secretary."

certain aliens, including ones who are inadmissible under 8 U.S.C. § 1182. *Id.* § 1231(a)(6).

In *Zadvydas v. Davis*, the Supreme Court held that § 1231(a)(6) does not authorize the Government to detain an alien indefinitely. 533 U.S. 678, 688–702 (2001). The Court detected ambiguity in the statutory phrase "may be detained," and accordingly applied the canon of constitutional avoidance to limit the length of post-removal-period detention. *Id.* at 689. Specifically, the Court construed § 1231(a)(6) to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to bring about that alien's removal from the United States." *Id.* The Court additionally held that six months is a presumptively reasonable period and that, after six months, § 1231(a)(6) continues to authorize detention "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

The Supreme Court has held that courts must interpret § 1231(a)(6) in accordance with *Zadvydas* (*i.e.*, in a manner that does not raise a due process problem), irrespective of the "presence or absence of constitutional concerns in [an] individual case." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). A contrary approach would render § 1231(a)(6) "a chameleon, its meaning subject to change." *Id.* Because a single statutory text cannot rightly be given "different meanings in different cases," courts must apply *Zadvydas*' construction of § 1231(a)(6) "in all cases." *Id.* at 383, 386.

In *Jennings v. Rodriguez*, the Supreme Court recently reaffirmed the continued

validity of *Zadvydas*. 138 S. Ct. 830, 843-44 (2018). Moreover, the Supreme Court contrasted *Zadvydas'* proper application of the canon of constitutional avoidance with the Ninth Circuit's misapplication of the canon in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). *Id.* The Court explained that merely "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Id.* at 843. Rather, the canon of constitutional avoidance "permits a court to 'choos[e] [only] between competing *plausible* interpretations of a statutory text.'" *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)).

C. Factual Background

Esteban Aleman Gonzalez

Petitioner Esteban Aleman Gonzalez is a citizen of Mexico who applied for admission to the United States in April 2000. ER at 35. During this process, Mr. Gonzalez presented an entry document that belonged to another person. *Id*. An immigration officer found that Mr. Gonzalez was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i) because he sought to procure admission "by fraud or by willfully misrepresenting a material fact." *Id*. Mr. Gonzalez was removed under an expedited removal order. *Id*. Sometime thereafter, Mr. Gonzalez unlawfully reentered the United States. ER at 36. In August 2017, immigration officers arrested him and determined that he was "removable as an alien who ha[d] illegally reentered the United States after having been previously removed." *Id*. (citing 8 U.S.C. § 1231(a)(5)). Mr. Gonzalez

did not contest the finding that he was removable and his removal order was reinstated on August 18, 2017. *Id*.

Mr. Gonzalez expressed a fear that he would persecuted or tortured if he was removed him to Mexico. ER at 37-38. An asylum officer interviewed Mr. Gonzalez, determined that he "has a reasonable fear persecution or torture," and referred him to an immigration judge for "withholding-only" proceedings. *Id*. Thereafter, Mr. Gonzalez moved for a bond hearing. ER at 39-41. An immigration judge denied the motion for lack of jurisdiction and scheduled a July 9, 2018 hearing on the merits of Mr. Gonzalez's withholding-of-removal claim. ER at 39-42. On February 26, 2018, ICE reviewed Mr. Gonzalez's custody status and determined that he would remain in ICE custody "[p]ending a ruling on [his withholding-of-removal] claim" or until he demonstrates that his "removal is unlikely." ER at 43; 8 C.F.R. §§ 241.4, 241.13, 241.14. Mr. Gonzalez was subsequently provided a bond hearing pursuant to the preliminary injunction. *See generally* ECF No. 47.

Jose Eduardo Gutierrez Sanchez

Petitioner Jose Eduardo Gutierrez Sanchez is a citizen of Mexico who unlawfully entered the United States in May 2009. ER at 44. Shortly thereafter, Mr. Sanchez was arrested and charged as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). *Id*. An expedited removal order issued and Mr. Sanchez was removed. *Id*. At a later date, Mr. Sanchez unlawfully reentered the United States. ER

at 45. On September 26, 2017, Mr. Sanchez was arrested and immigration officials determined that he was "removable as an alien who ha[d] illegally reentered the United States after having been previously removed" under 8 U.S.C. § 1231(a)(5). *Id*. Mr. Sanchez did not contest that he was removable and his May 2009 removal order was reinstated. *Id*. While in custody, Mr. Sanchez also expressed a fear that he would persecuted or tortured if removed to Mexico. ER at 46 ¶ 6. An asylum officer interviewed him, determined that he reasonably feared persecution or torture, and referred him to an immigration judge for "withholding-only" proceedings. ER at 46-47; *see* 8 C.F.R. §§ 208.31(e), 241.8(e). In withholding-only proceedings, Mr. Sanchez moved for a bond hearing which was denied for lack of jurisdiction. ER at 48-49.

On December 19, 2017, ICE conducted a review of Mr. Sanchez's custody status. ER at 34; 8 C.F.R. §§ 241.4, 241.13, 241.14. ICE relied on Mr. Sanchez's criminal history, including "arrests for possession of marijuana, obstruct/resist public officer, battery spouse, robbery: second degree," and Mr. Sanchez's "multiple illegal entries" to conclude that Mr. Sanchez "would be a danger and a flight risk if released." *Id*. Mr. Sanchez was provided a bond hearing pursuant to the preliminary injunction. *See generally* ECF No. 47. On June 18, 2018, an IJ conducted a hearing on the merits of Mr. Sanchez's withholding-of-removal claim. ER at 50.

SUMMARY OF THE ARGUMENT

I. The injunction must be vacated without delay. The district court erred in reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6) when the canon has already been applied to § 1231(a)(6) by the Supreme Court in *Zadvydas.* 533 U.S. 678 (2001). To allow the same statute to be interpreted in different ways in different cases would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark*, 543 U.S. at 382. Here, the district court did exactly what the Supreme Court rejected in *Clark.* The district court identified a new "category" of § 1231(a)(6) detainees, and instead of properly following the *Zadvydas* application of the canon as required, the district court has attempted to give the same words in the same statute a different meaning. Because a single statutory text cannot rightly be given "different meanings in different cases," courts must apply *Zadvydas*' construction of § 1231(a)(6) "in all cases." *Id.* at 383, 386.

II. Even assuming the district court could apply the canon of constitutional avoidance to § 1231(a)(6) a second time, the district court improperly applied the canon by not focusing on the narrow ambiguity in the statutory text. Instead, the district court arbitrarily rewrote the statute as it pleased. The Immigration and Nationality Act ("INA") clearly authorizes Petitioners' detention under § 1231(a)(6) and the statute creates no entitlement to bond hearings. Moreover, the Supreme

Court's decision in *Jennings* forecloses the district court's improper use of the canon to impose a bond hearing requirement. 138 S. Ct. 830, 842 (2018). Petitioners are therefore not entitled to bond hearings under the INA.

In *Diouf*, the Ninth Circuit held that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" 634 F.3d 1081, 1086 (9th Cir. 2011) (quoting *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008)). "To address those concerns," the court "appl[ied] the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* The district court adopted this analysis, applying the Ninth Circuit's reasoning from *Diouf* and inserting a bond hearing requirement into the statute. ER at 28-32. However, in *Jennings*, the Supreme Court rejected this misguided use of the canon of constitutional avoidance. 138 S. Ct. at 842, 846–47.

III. Because *Diouf* is clearly irreconcilable with *Jennings*, the district court cannot continue to extend the holding of *Diouf* to alter the statutory text of § 1231(a)(6). *Diouf* must be rejected "as having been effectively overruled" by the "clearly irreconcilable" Supreme Court decision in *Jennings*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (holding that prior circuit precedent is binding unless it is "clearly

irreconcilable" with intervening higher authority). Instead of analyzing the statutory text, the *Diouf* court simply spotted a constitutional issue and arbitrarily "rewr[o]te [the] statute" to "address [constitutional] concerns." *Jennings*, 138 S. Ct. at 843. The district court cannot attempt to do the same here. As *Jennings* clarified, "[t]hat is not how the canon of constitutional avoidance works." *Id*.

For all of these reasons, the district court's preliminary injunction must be vacated.

ARGUMENT

I. The district court erred in reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6) because the canon has already been applied to § 1231(a)(6) by the Supreme Court in *Zadvydas*.

The district court erred in reapplying the canon of constitutional avoidance to § 1231(a)(6) a second time. The canon of constitutional avoidance in statutory interpretation is not a method of adjudicating constitutional questions by other means. *Clark*, 543 U.S. at 380. Instead, "it is a tool for choosing between competing plausible interpretations of a statutory text." *Id*. The canon is thus "a means of giving effect to congressional intent, not of subverting it." *Id*. The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them. *Id*. at 385. To allow the same statute to be interpreted in different cases in different ways would "render every statute a chameleon, its

meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id*. at 382.

Zadvydas was the first case to apply the canon of constitutional avoidance to the text of § 1231(a)(6). 533 U.S. 678 (2001). In *Zadvydas*, the Supreme Court determined that the phrase "may be detained" in § 1231(a)(6) is ambiguous and susceptible to two competing interpretations. *Id*. at 689. Either the statute permits "indefinite detention" with no limitation, or the statute contains an "implicit limitation" that restricts detention under § 1231(a)(6) "to a period reasonably necessary to bring about that alien's removal from the United States." *Id*. Because "a statute permitting indefinite detention of an alien raises a serious constitutional problem," the Supreme Court applied the canon of constitutional avoidance and selected the second interpretation. *Id*. at 690. As such, the Court held that six months is the presumptively reasonable post-removal detention period pursuant to § 1231(a)(6). *Id*. After the six-month period, if the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. *Id*. If the Government cannot do so, the alien must be released. *Id*.

Four years after *Zadvydas*, the Supreme Court was faced with the text of § 1231(a)(6) again. This time, at issue was whether the *Zadvydas* interpretation of the statute applied to all categories of individuals detained under § 1231(a)(6) or only

specific sub-categories. *Clark*, 543 U.S. at 377-78. *Clark*'s conclusion was that the answer to whether the *Zadvydas* construction of the statute applies to *all* § 1231(a)(6) detainees "must be yes." *Id*. at 378. The Court held that "the operative language of § 1231(a)(6), '*may* be detained beyond the removal period,' applies without differentiation to [all categories] of aliens that are its subject. *To give these same words a different meaning for each category would be to invent a statute rather than interpret one*." *Id*. (emphasis added).

Relying upon *Zadvydas'* analysis of the text of § 1231(a)(6), *Clark* explains that the competing interpretations at issue were that "[t]he [statute's] construction could either be construed 'literally' to authorize indefinite detention or (as the Court ultimately held) it can be read to 'suggest [less than] unlimited discretion' to detain." *Clark*, 543 U.S. at 378 (citing *Zadvydas*, 533 U.S. at 689, 697). However, the statute could not be interpreted to do *both* at the same time. *Clark*, 543 U.S. at 383. As such, *Clark* holds that *Zadvydas'* application of the canon of constitutional avoidance continues to apply to *all* of the text of § 1231(a)(6) because to find otherwise would render the statute a "chameleon." *Id*. at 382.

Here, the district court did exactly what the Supreme Court rejected in *Clark*. The district court identified a new "category" of § 1231(a)(6) detainees, and instead of properly following the *Zadvydas* application of the canon as required, the district court has attempted to give the same words in the same statute a different meaning. The

district court improperly read into the text of § 1231(a)(6) a requirement that after an individual is detained in the Ninth Circuit for 180 days the Government provide the detainee with a bond hearing before an immigration judge, at which the Government bears the burden of proof to justify continued detention. ER at 27.

This directly contradicts *Zadvydas*' application of the canon in three key ways. First, *Zadvydas* provides that detainees, *not* the Government, bear the initial burden when challenging their continued detention under § 1231(a)(6). *Zadvydas*, 533 U.S. at 690. Second, *Zadvydas* provides that the proper remedy if a detainee meets their burden is release from detention, *not* a bond hearing. *Id.* Third, *Zadvydas* provides that district courts, *not* immigration judges, make the determination of whether an alien should be released from § 1231(a)(6) detention. *Id.*

Under the holding of *Clark*, the district court cannot apply the canon of constitutional avoidance to the text of § 1231(a)(6) in a different way. Following the district court's approach would render § 1231(a)(6) "a chameleon, its meaning subject to change." *Id.* Because a single statutory text cannot rightly be given "different meanings in different cases," courts must apply *Zadvydas*' construction of § 1231(a)(6) "in all cases." *Id.* at 383, 386. Therefore, this Court should reverse the district court's decision granting Petitioners' motion for a preliminary injunction.

II. Even assuming the district court could apply the canon of constitutional avoidance to § 1231(a)(6) a second time, the court misapplied the canon when it construed the statute to require bond hearings where the burden is on the Government to justify further detention.

Assuming *arguendo* that the canon of constitutional avoidance could be applied to § 1231(a)(6) a second time, *cf. Clark*, 543 U.S. at 382-86, the district court improperly applied the canon by not focusing on the narrow ambiguity in the statutory text, and instead arbitrarily rewrote the statute as it pleased. The INA clearly authorizes Petitioners' detention under § 1231(a)(6) and the statute creates no entitlement to bond hearings.[4] Moreover, the Supreme Court's decision in *Jennings* forecloses the district court's improper use of the canon to impose a bond hearing requirement. 138 S. Ct. at 842. Petitioners are therefore not entitled to bond hearings under the INA.

In *Diouf*, the Ninth Circuit held that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" 634 F.3d 1081, 1086 (9th Cir. 2011) (quoting *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008)). "To address those concerns," the court "appl[ied]

[4] For example, the Named Petitioners' removal periods began on August 18, 2017 and September 26, 2017, when their reinstated removal orders became administratively final. *See Padilla-Ramirez v. Bible*, 882 F.3d 826, 830–32 (9th Cir. 2017). Their removal periods ended 90 days later, on November 16, 2017 (Aleman Gonzalez) and December 25, 2017 (Gutierrez Sanchez). During the removal periods, 8 U.S.C. § 1231(a)(2) *required* ICE to detain Petitioners. Since the removal periods ended, § 1231(a)(6) authorizes ICE to detain Petitioners because (1) they are inadmissible under 8 U.S.C. § 1182, and (2) Petitioners have not met their burden to establish that there is no significant likelihood of their removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701.

the canon of constitutional avoidance and construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* The district court adopted this analysis, applying the Ninth Circuit's reasoning from *Diouf* and inserting a bond hearing requirement into the statute. ER at 28-32.

However, in *Jennings*, the Supreme Court rejected this misguided use of the canon of constitutional avoidance. 138 S. Ct. at 842, 846–47. Specifically, the Court held that the Ninth Circuit grossly misapplied the canon when it concluded that three other detention statutes—8 U.S.C. §§ 1225(b), 1226(a), 1226(c)—afford detained aliens the right to bond hearings. *Id.* The Supreme Court confirmed the validity of the doctrine of constitutional avoidance, but clarified its proper application. The Court explained that merely "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Id.* at 843. Rather, the canon of constitutional avoidance "permits a court to 'choos[e] [only] between competing *plausible* interpretations of a statutory text.'" *Id*. (quoting *Clark*, 543 U.S. at 381). Therefore, the Court held, the canon does not permit courts to impose a bond hearing requirement on §§ 1225(b), 1226(a), and 1226(c) because those statutes cannot plausibly be interpreted to require bond hearings. *Id.* at 846-47.

First, the Court addressed §§ 1225(b) and 1226(c) and held that the canon of constitutional avoidance did not apply to these statutes *at all* because they contain no

ambiguity with respect to the Government's detention authority. *Id.* at 844. Instead, those sections *require* mandatory detention for a certain period, with limited exceptions, and do not grant the Government any discretionary authority to release detainees. *Id.*; *see* 8 U.S.C. § 1225(b) (providing that certain aliens "shall be detained"); 8 U.S.C. § 1226(c) (providing that the Government "shall take into custody" certain aliens and may release only under limited circumstances). The Court found that this mandatory language negated any ambiguity in these statutes and thus precluded *any* application of the canon of constitutional avoidance.

Second, the Supreme Court addressed § 1226(a) and held that—in contrast to §§ 1225(b) and 1226(c)—the section contains discretionary language rather than mandatory language. 138 S. Ct. at 847-48. Specifically, § 1226(a) provides that certain aliens "*may* be arrested and detained" and the Government "*may* continue to detain" or "*may* release" the detainee. 8 U.S.C. § 1226(a) (emphasis added). The Supreme Court concluded that this discretionary "may detain" language could render the statute ambiguous and thus permit the application of the canon of constitutional avoidance. 138 S. Ct. at 847–48. However, the Court rejected the Ninth Circuit's application of the canon to § 1226(a), wherein the Ninth Circuit had ordered the Government to "provide procedural protections that go well beyond [] existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." *Id.*

The Supreme Court rejected this as an implausible reading of the statute, noting that "[n]othing in § 1226(a)'s text—which [actually] says only that the Attorney General "may release" the alien "on ... bond"—*even remotely supports* the imposition" of a periodic bond hearing requirement or placing the burden on the Government to justify further detention. *Id.* (emphasis added). The Court further noted that § 1226(a)'s text does not "even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released." *Id.* For these reasons, the Supreme Court rejected these erroneous "procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation." *Id.* at 842.

Here, the district court's application of the canon of constitutional avoidance to § 1231(a)(6) must fail for the same reasons that the Supreme Court rejected the Ninth Circuit's application of the canon to § 1226(a). Indeed, the operative language of § 1231(a)(6) directly mirrors that of § 1226(a). *Compare* 8 U.S.C. § 1226(a) ("an alien *may* be arrested and detained" (emphasis added)) *with* 8 U.S.C. § 1231(a)(6) (an alien [. . .] *may* be detained" (emphasis added)). While the district court correctly held—in accordance with *Jennings* and *Zadvydas*—that this discretionary "may detain" language renders § 1231(a)(6) ambiguous and thus permits the application of the canon of constitutional avoidance, ER at 30-31, the Court improperly applied the canon. Instead of interpreting the statutory text and choosing between competing plausible

interpretations, the district court merely spotted a constitutional issue and rewrote the statute. *Id.* This is *exactly* what the Supreme Court rejected in *Jennings*.

Like § 1226(a), § 1231(a)(6) does not say anything about periodic bond hearings, and absolutely nothing at all in the text of 1231(a)(6) supports the imposition of a mandatory bond hearing requirement where the Government bears the burden to justify further detention. Indeed, the district court's imposition of a bond hearing requirement into § 1231(a)(6) is even more egregious than what the Supreme Court rejected in *Jennings*. Whereas the text of § 1226(a) at least mentions release on bond—though notably *not* a periodic bond hearing requirement—the text of § 1231(a)(6) does not even contain the word "bond." Because the Supreme Court in *Jennings* held that the discretionary "may detain" language in § 1226(a) cannot plausibly be interpreted to require bond hearings, the district court's interpretation of § 1231(a)(6) to require such hearings must also be implausible. Therefore, this Court should reverse the district court's decision granting Petitioners' motion for a preliminary injunction.

III. *Diouf* is "clearly irreconcilable" with *Jennings*.

Diouf must be rejected "as having been effectively overruled" by the "clearly irreconcilable" Supreme Court decision in *Jennings*. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (holding that prior circuit precedent is binding unless it is "clearly irreconcilable" with intervening higher authority). Instead of analyzing the statutory text, the *Diouf* court

simply spotted a constitutional issue and arbitrarily "rewr[o]te [the] statute" to "address [constitutional] concerns." *Jennings*, 138 S. Ct. at 843; *Diouf*, 634 F.3d at 1085–86. As *Jennings* clarified, "[t]hat is not how the canon of constitutional avoidance works." 138 S. Ct. at 843. Accordingly, *Diouf*'s interpretation of § 1231(a)(6) to require bond hearings conflicts with the Supreme Court's clear directive in *Jennings*. Thus, when the *Diouf* court construed § 1231(a)(6) to require bond hearings, it did not plausibly interpret the statutory text.

Lower courts are bound not only by the explicit holdings of higher courts' decisions but also by their "mode of analysis" and "explications of the governing rules of law." *Miller*, 335 F.3d at 900. Therefore, when a decision from the Supreme Court has "undercut the theory or reasoning underlying [a] prior circuit precedent in such a way that the cases are clearly irreconcilable, . . . a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion . . . as having been effectively overruled." *Id.* Because *Jennings* and *Diouf* are clearly irreconcilable in their analytical approaches to the canon of constitutional avoidance, *Diouf's* application of the canon has been overruled by intervening Supreme Court precedent. Therefore, neither this Court nor the district court are bound by *Diouf* and instead must follow *Jennings* and *Zadvydas*.

The conclusion that *Diouf* is clearly irreconcilable becomes even stronger when one considers that the immigration detention authority cases in the Ninth Circuit are

built upon each other like a precariously balanced Jenga tower: (1) *Jennings* reversed the Ninth Circuit's judgment in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), which, as to § 1226(a) detainees, explicitly applied the Ninth Circuit's prior holding in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008); and (2) in *Diouf*, the Ninth Circuit "extended the procedural protections established in *Casas* to individuals detained under § 1231(a)(6)." *See Rodriguez*, 804 F.3d at 1068–69; *see also* Appendix A, Case Chart. Because *Jennings* reversed a judgment that explicitly applied the holding in *Casas*, and because *Diouf* explicitly extended *Casas*, *Jennings* and *Diouf* are clearly irreconcilable.

Though the "clearly irreconcilable requirement is a high standard," the differences between *Jennings* and *Diouf* create more than "some tension" or mere "doubt." *U.S. v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017). Instead, the continued application of *Diouf* "runs afoul" of *Jennings*' intervening higher authority. *Id.* In *Casas* and *Diouf*, as in *Rodriguez*, the Ninth Circuit did "violence to the text of the statute" by importing a bond hearing requirement on statutes that included no corresponding language. *Hamama v. Homan*, Case Nos. 17- 2171, 18-1233, 2018 U.S. App. LEXIS 35896 (6th Cir. Dec. 20, 2018). There is no meaningful distinction between the court's constitutional avoidance analysis in *Rodriguez* and the constitutional avoidance analysis in *Diouf*. Each case employs the same flawed analysis rejected by the Supreme Court in *Jennings*.

In a string of post-*Jennings* decisions, district courts in the Ninth Circuit have mistakenly held that *Diouf* "remains good law." *See, e.g.*, *Ramos v. Sessions*, No. 3:18-CV-413, 2018 WL 1317276, at *3 (N.D. Cal. Mar. 13, 2018); *Borjas-Calix v. Sessions*, 2018 WL 1428154 (D. Ariz. Mar. 22, 2018); *Banos v. Asher*, No. 16-1454JLR, 2018 WL 1617706 (W.D. Wash. Apr. 4, 2018); *Mercado-Guillen v. Nielsen*, 2018 WL 1876916 (N.D. Cal. Apr. 19, 2018). Those decisions emphasize that *Jennings* "expressly contrast[ed] . . . sections 1225 and 1226 with . . . section 1231(a)(6)." *Ramos*, 2018 WL 1317276, at *3. Although *Jennings* indeed distinguished §§ 1225(b) and 1226(c) from § 1231(a)(6), it did not do so with respect to the relevant issue — whether § 1231(a)(6) can plausibly be construed to require bond hearings.

Jennings distinguished §§ 1225(b)(1) and (b)(2) from § 1231(a)(6) with respect to whether those statutes can plausibly be interpreted to limit the permissible length of detention. 138 S. Ct. at 843–44. As *Jennings* noted, §§ 1225(b)(1) and (b)(2) unambiguously mandate that aliens within their scope "shall" be detained, whereas § 1231(a)(6) ambiguously provides that post-removal-order aliens "may be detained." *Id.* at 844. Thus, whereas §§ 1225(b)(1) and (b)(2) cannot plausibly be construed to limit the permissible length of detention, "Congress left the permissible length of detention under § 1231(a)(6) unclear." *Id.*

However, the fact that *Jennings* distinguished §§ 1225(b)(1) and (b)(2) from

§ 1231(a)(6) on the permissible-length-of-detention issue does not detract from the fact that *Jennings* and *Diouf* are clearly irreconcilable on the issue of bond hearings. Under *Jennings'* reasoning, § 1231(a)(6) cannot plausibly be construed to require bond hearings. *See id.* at 842. Because *Jennings* changes the statutory interpretation landscape, especially in the context of immigration detention, *Diouf's* holding requiring bond hearings is "clearly irreconcilable" with the holding of *Jennings. Miller*, 335 F.3d at 900; *Robertson*, 875 F.3d at 1291. Therefore, this Court "should consider [itself] bound by the intervening higher authority" and vacate the preliminary injunction. *Miller*, 335 F.3d at 900. The district court's statutory interpretation of § 1231(a)(6) is simply not plausible.[5]

CONCLUSION

This Court should reverse the district court's decision granting Petitioners' motion for a preliminary injunction. Petitioners' purported statutory claim fails on the merits.

[5] Respondents recognize that the law in this circuit states that § 1252(f)(1) does not apply to statutory claims. *See Rodriguez v. Hayes*, 578 F.3d 1032, 1046 (9th Cir. 2009) (holding "8 U.S.C. § 1252(f) prohibits only injunction of the operation of 8 §§ 1221-1231, not injunction of a violation of the statutes."). However, because Petitioners' "statutory" claim fails, the district court's rationale for circumventing § 1252(f)(1)'s prohibition on class-wide injunctive relief against the operation of § 1231(a)(6) must also fail. The injunctive relief issued by the district court falls squarely within §1252(f)(1). Respondents reserve the right to challenge this ruling *en banc*.

Dated: March 1, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Respondents are aware of two related cases at this time. These are:

1. *Martinez Banos, et al., v. Asher, et al.*, No. 2:16-01454-JLR-BAT (W.D. Wash. Apr. 4, 2018); and

2. *Rodriguez v. Holder*, No.CV-07-3239-TJH-RNBX (C.D. Cal. Aug. 6, 2013)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: March 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 1, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX A

Case	Year	Detention Statute(s)	Holding
Zadvydas v. Davis, 533 U.S. 678 (2001)	2001	8 U.S.C. § 1231(a)(6)	Applies the canon of constitutional avoidance to § 1231(a)(6) to determine that an alien may not be detained beyond a period reasonably necessary to bring about that alien's removal from the United States (six months). After six months, § 1231(a)(6) continues to authorize detention until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.
Casas-Castrillon v. DHS, 535 F.3d 942 (9th Cir. 2008)	2008	8 U.S.C. § 1226(a)	Applies the canon of constitutional avoidance to § 1226(a) to determine that detainees must receive 180-day bond hearings
Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011)	2011	8 U.S.C. § 1231(a)(6)	Extends the holding of *Casas* to find that § 1231(a)(6) detainees must receive 180-day bond hearings
Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*")	2013	8 U.S.C. § 1226(c) and § 1225(b)	Extends the holding of *Casas* to find that § 1226(c) and § 1225(b) detainees receive 180-day bond hearings
Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*")	2015	8 U.S.C. § 1226(a), § 1226(c) and § 1225(b)	Reaffirms that § 1225(b), § 1226(a), and § 1226(c) detainees receive 180-day bond hearings
Jennings v. Rodriguez, 138 S. Ct. 830 (2018)	2018	8 U.S.C. § 1226(a), § 1226(c) and § 1225(b)	Reverses *Rodriguez III*