No. 18-35460

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTURO MARTINEZ BAÑOS, *et al.*,
Petitioners-Appellees,

v.

ELIZABETH GODFREY,
ACTING FIELD OFFICE DIRECTOR, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,
Respondents-Appellants.

On Appeal from the United States District Court
for the Western District of Washington at Seattle
No. 2:16-cv-01454-JLR

Hon. James L. Robart

RESPONDENTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

Section 241(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(6), does not require that a bond hearing be held after an individual is subject to immigration detention for more than six months, or that it be held before an immigration judge, or that in such a hearing, the government must prove by clear and convincing evidence that the individual's continued detention is necessary. In fact, section 1231(a)(6) is completely silent as to both the availability of bond hearings and the time limitation that would trigger such hearings. Still, the district court ignored the fact that the Supreme Court of the United States had already applied the canon of constitutional avoidance to section 1231(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), and the district court then erroneously re-applied this cannon thereby imposing new requirements to section 1231(a)(6), *i.e.*, custody re-determination hearings, every 180 days, wherein the government will bear the burden of proof to establish that the detainee is a danger to the community or a flight risk.

When the Supreme Court applied the canon of constitutional avoidance to section 1231(a)(6) in *Zadvydas*, it construed the statute to mean that an individual 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. at 699.

The Supreme Court's decision in *Clark v. Martinez* further reaffirmed *Zadvydas*'s application of the constitutional avoidance cannon in holding that while section 1231(a)(6) may encompass different categories of detained individuals, the statutory text remains the same for everyone. 543 U.S. 371, 378 (2005). Allowing the district court to now give the exact, same words in section 1231(a)(6) a different meaning than in *Zadvydas* and/or *Clark* would be to "invent a statute rather than interpret one." *Id.* And this is exactly what the district court did when it erroneously extended the conclusions in *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011) (*Diouf II*). Moreover, *Diouf II*'s interpretation of section 1231(a)(6) is clearly irreconcilable with the Supreme Court's recent holding in *Jennings v. Rodriguez*, __ U.S. __, 138 S. Ct. 830 (2018).

Because the district court erred in extending *Diouf II*'s impermissible application of the canon of constitutional avoidance to this case, this Court should reverse the district court's decision granting Count II of Petitioners' complaint and conclude that section 1231(a)(6) does not endow immigration detainees with a right to custody re-determination hearings every 180 days, before an immigration judge and where the government will bear the burden of proof to establish that the detainee poses a danger to the community or a flight risk.

STATEMENT OF JURISDICTION

This is a Writ of Habeas Corpus arising under 28 U.S.C. § 2241 (habeas corpus), and 8 U.S.C. 1101 *et seq.* (INA), in which Respondents seek review of the order issued by the district court on April 4, 2018. *See* Respondents' Excerpts of Record (E.R.) 22-26. The district court had jurisdiction under 28 U.S.C. § 2241 which confers it the power to grant writs.

This Court's jurisdiction to review final orders issued by the district court arises under 28 U.S.C. §§ 1291 and 1294. This appeal is timely because it was filed on May 31, 2018, within sixty days of the district court's April 4, 2018 decision.

STATEMENT OF THE ISSUES

The Supreme Court already applied the canon of constitutional avoidance to section 1231(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). Additionally, in *Clark v. Martinez*, 543 U.S. 371, 386 (2005), the Supreme Court explained that section 1231 must be given a consistent interpretation. Did the district court err where it:

1. ignored the Supreme Court's holdings in both *Zadvydas* and *Clark*, and re-applied the canon of constitutional avoidance to section 1231(a)(6) to impose remedies more expansive than those that the Supreme Court determined to be the minimum needed to ease constitutional concerns;

2. misapplied the canon of constitutional avoidance thereby reading provisions into section 1231(a)(6) categorically entitling individuals detained under section 1231(a)(6):

a. after six months,

b. to a custody redetermination hearing,

c. before an immigration judge, and

d. where the burden is on the Government to prove by clear and convincing evidence that further detention is justified; and

3. held that *Jennings* is not clearly irreconcilable with the Ninth Circuit's holding in *Diouf II*?

STATEMENT OF THE CASE AND RELEVANT FACTS

I. Petitioners illegally re-entered the United States and each was subject to a reinstated order of removal under 8 U.S.C. § 1231(a)(5).

A. Martinez entered the United States illegally five times, but, despite having no right to be at liberty in the United States, was released back into the United States on bond after his last illegal re-entry while he awaits the conclusion of his withholding-only proceedings.

Martinez is a native and citizen of Mexico who first entered the United States, without inspection, in 1998. E.R. 333-491. On February 6, 2008, Martinez was convicted in Franklin County, Washington, for the offense of Criminal Trespass in the Second Degree, a misdemeanor, and was sentenced to ninety days imprisonment. *Id.* He was also convicted of Reckless Burning in the second

degree, a misdemeanor, and was sentenced to 364 days of confinement. *Id.* Upon U.S. Immigration and Customs Enforcement (ICE) encountering him at Franklin County Jail, he was granted voluntary departure to Mexico on September 13, 2008, and returned to Mexico on September 20, 2008. *Id.* Within two months, Martinez had already flouted that order and re-entered the United States illegally, with ICE encountering him on December 2, 2008, at Franklin County Jail. *Id.* Shortly thereafter, on January 13, 2009, Martinez was convicted of Possession of a Controlled Substance, Methamphetamine, Without a Prescription, a class C felony and sentenced to thirty days of imprisonment. *Id.* After participating in removal proceedings before an immigration judge, Martinez was ordered removed on February 24, 2009, and was again returned to Mexico on February 25, 2009, this time under a final order of removal. *Id.*

Again, less than a month later, Martinez was back in the country illegally. On March 13, 2009, officers from U.S. Customs and Border Protection (Border Patrol) arrested him and served him with his first Notice of Intent/Decision to Reinstate Prior Order. *Id.* Two days later, on March 15, 2009, Martinez's February 25th order of removal was reinstated and he was removed to Mexico once again. *Id.* Martinez illegally re-entered, yet again, and on May 16, 2012, was convicted of Conspiracy to Distribute Cocaine and Methamphetamine, and sentenced to twenty-four months of confinement. *Id.* During this incarceration,

ICE identified Martinez and took him into its custody upon his release on April 10, 2013. *Id.* On that same day, ICE reinstated the February 2009 removal order for a second time and removed Martinez once again to Mexico on April 19, 2013. *Id.*

Martinez illegally reentered the United States yet again, and following an arrest for Assault-4 DV, ICE encountered him on September 11, 2014. *Id.* The local authorities released Martinez into ICE's custody. *Id.* His February 2009 removal order was again reinstated, but before ICE could effectuate that order, Martinez claimed that he feared returning to Mexico and, after a positive reasonable fear determination on April 30, 2015, he was referred to an immigration judge for withholding-only proceedings. *Id.* An immigration judge held a bond hearing in Martinez's case, granted him bond on October 8, 2015, and ICE released him the next day. *Id.* ICE appealed the bond decision to the Board of Immigration Appeals (Board) and, on August 1, 2016, the Board sustained the appeal and ordered that Martinez be detained without bond pending his withholding-only proceedings. E.R. 521-49. He will argue the merits of his withholding-only request before an immigration judge on December 30, 2020. Petitioner remains in his home and not in ICE custody.

The district court dismissed all of his claims on July 7, 2017. E.R. 250-63. Martinez did not appeal this dismissal.

B. Flores entered the United States illegally three times, but despite having no right to be at liberty in the United States, was released back into the United States on bond after his last illegal re-entry while he pursued his withholding-only request.

Flores is a citizen of El Salvador who first entered the United States, without inspection, on an unknown date. E.R. 186-249. On June 15, 2005, a state court in Troy, Michigan, convicted him of the offense of operating a vehicle while impaired and sentenced him to one day of confinement and twelve-months of probation. *Id.* ICE encountered Flores in the 52-4 Judicial Court in Troy, Michigan, on August 12, 2005, and served him with a Notice to Appear. *Id.* Three days later, on August 15, 2005, ICE released Flores from custody upon his posting of a bond. *Id.* Thereafter, on October 19, 2006, an immigration judge granted Flores voluntary departure. *Id.* The immigration judge conditioned the voluntary departure on two events, that Flores: (1) leave the United States on or before February 16, 2007; and (2) post a voluntary departure bond in the amount of $500 with ICE on or before October 26, 2006. *Id.* On November 1, 2006, a state court in Troy, Michigan, convicted Flores of the offense of Operating Without a License, a misdemeanor. *Id.*

Despite posting the $500 voluntary departure bond, Flores did not depart the United States on or before February 16, 2007. *Id.* Thereafter, on December 3, 2013, ICE/ERO Deportation Officers encountered Flores at his place of residence in SeaTac, WA. *Id.* ICE placed Flores in its custody and transferred him to the

Northwest Detention Center in Tacoma, Washington, pending his removal to El Salvador. *Id.* ICE removed him to El Salvador on January 22, 2014. *Id.*

Flores illegally re-entered the United States on April 1, 2014, and the U.S. Border Patrol served him with a Notice of Intent/Decision to Reinstate Prior Order (Form I-871). *Id.* The United States District Court for the District of Arizona convicted Flores for the offense of Illegal Entry under 8 U.S.C. § 1325 on July 9, 2014, and sentenced him to confinement for seventy five days. *Id.* ICE thereafter removed him to El Salvador via Mesa, Arizona. *Id.*

Flores again illegally re-entered the United States; this time, ICE/ERO Deportation Officers encountered Flores on December 15, 2015, while in Seattle, Washington. *Id.* ICE took him into custody, served him with a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) on December 21, 2015, and transferred him to the Northwest Detention Center in Tacoma, Washington, pending removal to El Salvador. *Id.*

Before ICE could execute his reinstated removal order, on December 28, 2015, Flores claimed he feared returning to El Salvador. *Id.* On January 4, 2016, an immigration officer referred Flores's case to the San Francisco Asylum Office. *Id.* He received a positive reasonable fear determination on January 19, 2016, and was referred to withholding-only proceedings. *Id.* Flores then requested a custody redetermination hearing and, on August 30, 2016, an immigration judge denied his

request. *Id.* The Board of Immigration Appeals (Board), however, remanded Flores's case to the immigration judge on February 3, 2017, and ordered the immigration judge to provide Flores with a custody re-determination hearing. *Id.* The immigration judge held a custody re-determination hearing on February 16, 2017, and ultimately denied his request because Flores presented a flight risk. *Id.* A week later, on February 23, 2017, an immigration judge held a withholding-only hearing and, on March 7, 2017, the immigration judge denied Flores's request for relief and ordered him removed. *Id.* Flores filed an appeal of that decision with the Board, which dismissed his appeal on July 14, 2017. *Id.*

ICE/ERO requested travel documents for Flores on July 19, 2017. *Id.* The Consulate of El Salvador interviewed Flores on July 26, 2017, and travel documents were issued. *Id.* He was removed to El Salvador on April 11, 2018.

C. Ventura repeatedly flouted the laws of the United States, illegally entering the country and driving under the influence.

Ventura, a citizen and national of Mexico, first entered the United States, without inspection, on March 14, 2014. E.R. 186-249. Upon apprehension, ICE served Ventura with a Notice and Order of Expedited Removal, and removed him to Mexico two days later, on March 16, 2014. *Id.* Sometime thereafter, Ventura illegally re-entered the United States and, on May 27, 2016, the McMinnville Police Department in Oregon cited and arrested Ventura for the offense of Driving Under the Influence of Alcohol. *Id.* A state court sentenced him to a diversion

program. *Id.*

On October 18, 2016, ICE encountered Ventura at his residence in McMinnville, Oregon. ICE served Ventura with a Notice of Intent/Decision to Reinstate Prior Order. *Id.* At that time, Ventura made an oral claim of fear of return to Mexico and, on November 4, 2016, and eventually was referred to an immigration judge on November 8, 2016, for withholding-only proceedings. *Id.*

An immigration judge denied Ventura's requests for relief under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and under Article III of the U.N. Convention Against Torture on March 14, 2017. *Id.* Ventura did not appeal that order. E.R. 186-249. On April 25, 2017, Ventura was removed from the United States to Mexico. *Id.*

II. Considering itself not bound by the Supreme Court's interpretation of *Zadvydas*, the district court certified a class and directed the government to conduct automatic custody re-determination hearings every 180 days, and shifted the burden of proof to Respondents.

On September 14, 2016, petitioner Arturo Martinez Baños (Martinez) filed a petition for a writ of habeas corpus and class certification complaint on behalf of himself, individually, and all others similarly situated to him. E.R. 521-49. Martinez filed his motion for class certification on October 20, 2016. E.R. 492-520. On January 9, 2017, however, Martinez sought to amend his complaint and, on January 31, 2017, he then filed an Amended Petition for Writ of Habeas Corpus and Class Action Complaint adding two additional individual petitioners – Edwin

Flores Tejada and German Ventura Hernandez – on January 31, 2017, E.R. 293-332, and an Amended Motion for Class Certification on February 8, 2017, E.R. 264-92.

Thereafter, Magistrate Judge Tsuchida issued an order for supplemental briefing on the class definition on September 8, 2017, E.R. 183-85, and on September 13, 2017, denied Petitioners' request for the issuance of a preliminary injunction. E.R. 181-82. After the parties submitted their supplemental briefs on the class definition proposed by the Court, E.R. 158-80, Magistrate Judge Tsuchida recommended on October 17, 2017, that the Court re-define the class as:

> [a]ll individuals who:
>
> (1) were placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington after having a removal order reinstated, and
>
> (2) have been detained for 180 days: (a) without a custody hearing or (b) since receiving a custody hearing,"

and further recommended that Petitioners' request for class certification be granted. E.R. 132-57. The district court adopted Magistrate Judge Tsuchida's recommendation *in toto* on December 11, 2017. E.R. 129-31. After both parties filed summary judgment motions, E.R. 67-104, Magistrate Judge Tsuchida issued his Report and Recommendation granting summary judgment in favor of

Petitioners on January 23, 2018. E.R. 27-43.

The Magistrate Judge, while recognizing the government's paramount interest in ensuring that all pertinent individuals be available for removal, E.R. 35, extended *Diouf II* and applied it to individuals subject to a reinstated order of removal. In light of this, the Magistrate Judge concluded that class members were entitled to automatic custody hearings every six months. *Id.* The Magistrate Judge reasoned that the detainee's interest in being free from prolonged detention outweighed the government's interest in the continued detention of recidivists, even if the underlying removal order could never be subject to a collateral challenge. *Id.* The Magistrate Judge, however, declined to address Petitioners' claims that Respondents also violated the Due Process Clause, and recommended that summary judgment be granted in favor of Respondents as to this cause of action. *Id.*

On February 27, 2018, only four days after Respondents filed their objections to the Report and Recommendation, the Supreme Court of the United States issued its decision in *Jennings*. Both parties filed notices of supplemental authority with the district court regarding the applicability of *Jennings* to this case. E.R. 44-66. Finding that *Jennings* did not abrogate *Diouf II*, the district court adopted the Report and Recommendation, on April 7, 2018, and granted Count II of the complaint construing 8 U.S.C. § 1231(a)(6) as requiring periodic bond

hearings and dictating that the burden is on the Government at such hearings. E.R. 22-26.

In its April 7, 2018 decision, the district court first addressed the impact of *Jennings* on *Diouf II* and this case. The district court ultimately reasoned that *Diouf II* was not clearly irreconcilable with *Jennings*, as *Jennings* concerned only the detention authority as enacted in 8 U.S.C. §§ 1225(b)(1), 1225(b)(2), and 1226(a), and not section 1231(a)(6). *Id.* It further explained that *Jennings* did not impact *Diouf II*, and concluded that *Diouf II* remained binding law. *Id.*

Addressing *de novo* Respondents' objections, the district court stated in mere conclusory fashion that Respondents simply did not raise "any novel issue" not previously addressed by the Magistrate Judge. *Id.* The district court then summarily concluded without any explanation that it found the reasoning in the Report and Recommendation persuasive and rejected Respondents' objections. *Id.*

SUMMARY OF THE ARGUMENT

The district court erred in reapplying the canon of constitutional avoidance to 8 U.S.C. § 1231(a)(6) where the Supreme Court already had applied it in *Zadvydas*. Allowing section 1231 to be interpreted differently in separate cases, not only runs afoul of the Supreme Court's decision in *Zadvydas*, but "render[s] 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. By choosing to ignore the Supreme Court's clear interpretation of section 1231(a)(6) and, instead, applying *Diouf II* to the case, the district court did exactly what the Supreme Court cautioned against in *Clark* – the district court erroneously gave the same words in section 1231(a)(6) a different meaning than that given in *Zadvydas*. Because a single statutory text cannot rightly be given "different meanings in different cases," the district court was obligated to apply, and now this Court must apply, *Zadvydas*'s construction of section 1231(a)(6) "in all cases." *Id.* at 383, 386.

Even assuming the district court could apply the canon of constitutional avoidance to section 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. What is clear is that through the INA, Congress authorized Petitioners' detention under section 1231(a)(6) for beyond the ninety-day removal period. Congress, however, did not create within section 1231(6)(a) an entitlement to bond hearings. Indeed, the Supreme Court's decision in *Jennings* further forecloses the district court's improper use of the canon to impose such a bond hearing requirement where none exists. 138 S. Ct. at 842. Petitioners are therefore not entitled to bond hearings under the INA.

Specifically, the district court adopted *Diouf II*'s analysis that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns.'" 634 F.3d at 1086 (quoting *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008)). In doing so, the district court further adopted *Diouf II*'s mistaken re-application of the canon of constitutional avoidance which read section 1231(a)(6) "as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Id.* But, the Supreme Court rejected this ill-advised re-application of the canon of constitutional avoidance in *Jennings*. 138 S. Ct. at 842, 846–47. Because *Diouf II* is clearly irreconcilable with *Jennings*, the district court cannot continue to extend the holding of *Diouf II*, thus altering the statutory text of § 1231(a)(6).

Instead of analyzing the statutory text, the *Diouf II* 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 erred when it did just that in this case. "That is not how the canon of constitutional avoidance works." *Id.* Accordingly, this Court should reject the district court's re-application of the canon of constitutional avoidance, and find *Diouf II* "as having been effectively overruled" by the "clearly irreconcilable" Supreme Court decision in *Jennings*, and reverse the district court's *Diouf II*-based order entitling Petitioners and those similarly situated with a custody re-determination hearing

every 180 days, before an immigration judge and where the government will bear the burden of proof to establish that the detainee poses a danger to the community or a flight risk.

ARGUMENT

I. Standard 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).

II. Immigration detention overview.

A. Pre-Order Detention.

Congress granted the Secretary of Homeland Security authority to detain individuals while their removal proceedings are pending under 8 U.S.C. § 1229a. *See, generally* 8 U.S.C. § 1226. While on the one hand, Congress granted broad discretion to the Secretary to release these individuals on bond pending the conclusion of their removal proceedings, 8 U.S.C. § 1226(a), Congress totally withheld discretion from the Secretary to release certain categories of criminal aliens during the agency adjudication of their removal case. *See, generally*, 8

U.S.C. § 1226(c)(1) (providing that certain criminal and terrorist aliens "shall" be taken into custody); 8 U.S.C. § 1226(c)(2) (prohibiting release except when necessary to provide protection to a witness, and the alien satisfies the Secretary of Homeland Security that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding"). The Supreme Court finds this mandatory detention provision to be constitutional. *Demore v. Kim*, 538 U.S. 510, 531 (2003) (finding mandatory detention of criminal aliens during removal proceedings under 8 U.S.C. § 1226(c) constitutionally valid even where there has been no individualized finding that the alien is dangerous or unlikely to appear for his deportation hearing).

In the pre-order context, the Department of Homeland Security makes initial custody or bond determinations, 8 C.F.R. § 1236.1, and these are subject to review by an immigration judge if the detainee seeks such review. 8 C.F.R. § 1003.19. The decision of the immigration judge may thereafter be appealed to the Board. 8 C.F.R. §§ 1003.19(f), 1003.38. But, the "discretionary judgment regarding the application of [section 1226] shall not be subject to [judicial] review," 8 U.S.C. § 1226(e), though, certainly, constitutional challenges to § 1226 are reviewable. *Demore*, 538 U.S. at 521.

B. Administratively Final Order of Removal.

Congress provided that an order of removal entered by an immigration judge is deemed "final" either 30 days after the immigration judge enters the order of removal, 8 U.S.C. § 1101(a)(47)(B) (stating that removal order is final upon "the expiration of the period in which the alien is permitted to seek review of such order by the [Board]"), or if the order was timely appealed to the Board, "upon a determination by the Board of Immigration Appeals affirming such order[.]" *See also* 8 C.F.R. § 1241.1 (in pertinent part specifying that Board affirmance of a removal order results in an administratively final order of removal). Only on either of those two dates does a removal order become administratively final.

C. Post-Order Detention.

Detention following entry of an administratively final order of removal is governed by 8 U.S.C. § 1231(a). Under this provision, Congress has required that "the Attorney General shall remove the alien from the United States within a period of 90 days [the removal period]." 8 U.S.C. § 1231(a). The removal period begins, inter alia, on the date the order of removal becomes administratively final, or "if the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order." 8 U.S.C. § 1231(a)(1)(B)(i)-(iii). Following expiration of the removal period, the government has discretionary authority to continue detention of certain categories

of criminal, terrorist, and dangerous individuals under § 1231(a)(6). 8 U.S.C. § 1231(a)(6) (providing that an individual inadmissible under 8 U.S.C. § 1182, removable under 8 U.S.C. § 1227(a)(1)(C), (2), (4), or determined to be a risk to the community or unlikely to comply with removal "may be detained beyond the removal period").

In *Zadvydas*, the Supreme Court analyzed whether an individual admitted to the United States, but subsequently ordered removed, may continue to be detained beyond the ninety-day removal period pursuant to section 1231(a)(6). 533 U.S. at 688-702. In a case where no stay of removal was involved, the Supreme Court held that section 1231(a)(6) does not generally authorize the indefinite detention of removable individuals; rather, absent "special" circumstances, the statute permits the detention of such persons only for a period reasonably necessary to bring about their removal. *Id*. at 698-99. Applying this statutory interpretation, the Supreme Court determined that six (6) months was a presumptively reasonable period. *Id*. at 701. The Supreme Court further explained that once a presumptively-reasonable six-month period of post-removal order detention passes, the detainee bears the initial burden of establishing that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," after which the government must come forward with evidence to rebut that showing. *Id*.; *see also* 8 C.F.R. § 241.13. Only where the detainee establishes that there is no

significant likelihood of removal in the reasonably foreseeable future, should such individual be released from immigration detention. *Id*.

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

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 to more than one construction; and the canon functions as a means of choosing between possible analyses. *Id*. at 385. Where a district court gives a different meaning to the already defined statute, as the district court here did for section 1231, it is essentially creating a new statute; 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.

The Supreme Court already applied the canon of constitutional avoidance to the text of section 1231(a)(6) in *Zadvydas*. *See*, *generally*, 533 U.S. 678 (2001).

There, the Supreme Court determined that the phrase "may be detained" in section 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 section 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 section 1231(a)(6). *Id.* After the six-month period, and only *if* the alien provides to the Department of Homeland Security 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.* *Zadvydas*, at no point, spoke in terms of section 1231(a)(6) requiring, or even suggesting, that this challenge to custody be made before an immigration judge, or that the burden of proof initially rested on Respondents.

Four years after the Supreme Court decided *Zadvydas*, the Supreme Court faced again the breadth of the text of section 1231(a)(6). *Clark*, 543 U.S. at 377-78. At issue that time was whether the *Zadvydas* interpretation of the statute

applied to all categories of individuals detained under section 1231(a)(6), or only to specific sub-categories. *Clark* concluded that *Zadvydas*'s construction of the statute "must" apply to *all* individuals detained under section 1231(a)(6). *Id.* at 378. The Court explained 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*'s analysis of section 1231(a)(6)'s text, *Clark* clarifies that the competing interpretations at issue were if "[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). Simply put, 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*'s application of the canon of constitutional avoidance continues to apply to all of the text of section 1231(a)(6); to agree with the district court's new re-application of the canon of constitutional avoidance to section 1231(a)(6) effectively renders the statute a "chameleon." *Id.* at 382.

Here, the district court did exactly what the Supreme Court rejected in *Clark*. Instead of properly following the *Zadvydas* application of the canon as required, the district court gave the same words in the same statute a different meaning. The district court improperly read into the text of section 1231(a)(6) a requirement that once an individual is detained in the Ninth Circuit for 180 days the Government must provide the detainee with a bond hearing (at 180 days and every 180 days thereafter) before an immigration judge, at which the Government bears the burden of proof to justify continued detention. E.R. 22-26. This directly contradicts *Zadvydas*'s 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 section 1231(a)(6). *Zadvydas*, 533 U.S. at 690. Second, *Zadvydas* provides that the proper remedy for a detainee that 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 section 1231(a)(6) detention. *Id.*

Moreover, *Clark* simply does not allow the district court to apply the canon of constitutional avoidance to the text of section 1231(a)(6) in a different way than *Zadvydas*. The district court's decision here untenably rendered section 1231(a)(6) "a chameleon[.]" *Id.* Because a single statutory text cannot rightly be given

"different meanings in different cases," the district court was bound to apply *Zadvydas*'s construction of section 1231(a)(6) "in all cases[,]" including Petitioners' case here. *Id.* at 383, 386. This Court should, therefore, reverse the district court's decision granting Count II of Petitioners' complaint and conclude that section 1231(a)(6) does not endow immigration detainees with a right to a custody re-determination hearings every 180 days, before an immigration judge and where the government will bear the burden of proof to establish that the detainee poses a danger to the community or a flight risk.

IV. Even assuming *arguendo* that the district court could apply the canon of constitutional avoidance to section 1231(a)(6) a second time, the court misapplied the canon when it construed the statute to require bond hearings, before an immigration judge, where the burden rests on the Government to justify further detention.

Assuming arguendo that the canon of constitutional avoidance could be applied to section 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. There is no doubt that the INA clearly authorizes Petitioners' detention under section 1231(a)(6) and the statute does not create any entitlement to bond hearings held before an immigration judge, where the government bears the burden of proof, let alone every 180 days. More importantly, 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.

Still, the district court in this case adopted the Ninth Circuit's reasoning in *Diouf II* and misread a bond hearing requirement into the statute. E.R. 22-26. In *Diouf II*, the Ninth Circuit held that "prolonged detention under section 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)). Addressing those possible constitutional concerns, the *Diouf II* 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 Supreme Court in *Jennings*, however, rejected this faulty use of the canon of constitutional avoidance. 138 S. Ct. at 842, 846-47. Specifically, the *Jennings* Court held that the Ninth Circuit grossly misapplied the canon when it concluded that three other related detention statutes – 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) – afforded detained aliens the right to bond hearings. *Id.* While the Supreme Court did confirm the validity of the doctrine of constitutional avoidance, it clarified its proper application. The Supreme 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). Consequently, the Court concluded, the canon does not permit courts to impose a bond hearing requirement on sections 1225(b), 1226(a), and 1226(c) because those statutes cannot plausibly be interpreted to require bond hearings. *Id.* at 846-47.

First, addressing sections 1225(b) and 1226(c), the Supreme Court reasoned that the canon of constitutional avoidance simply did not apply to these statutes because they do not contain any ambiguity regarding the Government's detention authority. *Id.* at 844. Instead, these 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 understood that this mandatory language negated any ambiguity in these statutes and thus precluded any application of the canon of constitutional avoidance.

Second, addressing section 1226(a), the Supreme Court clarified that, in contrast to sections 1225(b) and 1226(c), section 1226(a) contains discretionary language rather than mandatory language. 138 S. Ct. at 847-48. Section 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 the 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. It, nonetheless, rejected the Ninth Circuit's application of the canon to section 1226(a), wherein the Ninth Circuit 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 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.* The Court further noted that section 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 [Ninth Circuit] 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 section 1231(a)(6) must fail for the same reasons that the Supreme Court

rejected the Ninth Circuit's application of the canon to section 1226(a). Indeed, the operative language of section 1231(a)(6) directly mirrors that of section 1226(a). *Compare* 8 U.S.C. § 1226(a) ("an alien may be arrested and detained") *with* 8 U.S.C. § 1231(a)(6) (an alien [. . .] may be detained"). While the district court correctly held – in accordance with *Jennings* and *Zadvydas* – that the discretionary "may detain" language renders section 1231(a)(6) ambiguous and thus permits the application of the canon of constitutional avoidance, E.R. 22-26, 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 section 1226(a), section 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 will initially bear the burden to justify further detention. Whereas the text of section 1226(a) at least mentions release on bond – though notably not a periodic bond hearing requirement – the text of section 1231(a)(6) does not even contain the word "bond." Because the Supreme Court in *Jennings* held that the discretionary "may detain" language in section 1226(a) cannot plausibly be interpreted to require bond hearings, the district court's interpretation of section

1231(a)(6) to require such hearings must also be implausible. Accordingly, this Court should reverse the district court's decision granting Count II of Petitioners' complaint and conclude that section 1231(a)(6) does not endow immigration detainees with a custody re-determination hearing every 180 days, before an immigration judge and where the government will bear the burden of proof to establish that the detainee poses a danger to the community or a flight risk.

V. *Diouf II* is "clearly irreconcilable" with *Jennings*.

This Court should reject *Diouf II* "as having been effectively overruled" by the "clearly irreconcilable" Supreme Court decision in *Jennings*. *See also*, *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). Contrary to *Clark*, the *Diouf II* Court simply spotted a constitutional issue and arbitrarily "rewr[o]te [the] statute" to "address [constitutional] concerns" instead of just simply analyzing the statutory text. *Compare Diouf II*, 634 F.3d at 1085-86, *with Jennings*, 138 S. Ct. at 843. As *Jennings* admonished, "[t]hat is not how the canon of constitutional avoidance works." 138 S. Ct. at 843. As such, *Diouf II*'s interpretation of section 1231(a)(6) to require bond hearings conflicts with the Supreme Court's clear directive in *Jennings*. So, when the *Diouf II* Court construed section 1231(a)(6) to require bond hearings, it did so without

interpreting 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. 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 II* are clearly irreconcilable in their analytical approaches to the canon of constitutional avoidance, *Diouf II*'s application of the canon has been overruled by intervening Supreme Court precedent. Neither this Court nor the district court below are bound by *Diouf II* and instead must follow *Jennings* and *Zadvydas*.

The conclusion that *Diouf II* is clearly irreconcilable becomes even stronger when one considers that the immigration detention cases in the Ninth Circuit are built upon each other like a house of cards: (1) in *Diouf II*, the Ninth Circuit "extended the procedural protections established in *Casas* to individuals detained under § 1231(a)(6)," *see Rodriguez v. Robbins*, 804 F.3d 1060, 1068-69 (*Rodriguez III*); (2) *Jennings*, in turn, reversed the Ninth Circuit's judgment in *Rodriguez III*, which, as to section 1226(a) detainees, explicitly applied the Ninth

Circuit's prior holding in *Casas*, *see also* Appendix A, Case Chart. Because *Jennings* reversed a judgment that unequivocally applied the holding in *Casas*, and because *Diouf II* explicitly extended *Casas*, *Jennings* and *Diouf II* are clearly irreconcilable.

Though the "clearly irreconcilable requirement is a high standard," the differences between *Jennings* and *Diouf II* 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 II* "runs afoul" of *Jennings*'s intervening higher authority. *Id.* In *Casas* and *Diouf II*, 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. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018). There is no meaningful distinction between the court's constitutional avoidance analysis in *Rodriguez* and the constitutional avoidance analysis in *Diouf II*. 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 II* "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*, No. 16-0685, 2018 WL 1428154 (D. Ariz. Mar. 22, 2018); *Mercado-Guillen v. Nielsen*, No. 18-0727, 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 sections 1225(b) and 1226(c) from section 1231(a)(6), it did not do so with respect to the relevant issue – whether section 1231(a)(6) can plausibly be construed to require bond hearings.

Jennings distinguished sections 1225(b)(1) and (b)(2) from section 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, sections 1225(b)(1) and (b)(2) unambiguously mandate that aliens within their scope "shall" be detained, whereas section 1231(a)(6) ambiguously provides that post-removal-order aliens "may be detained." *Id.* at 844. Consequently, whereas sections 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 section 1231(a)(6) unclear." *Id.*

But, the fact that *Jennings* distinguished sections 1225(b)(1) and (b)(2) from section 1231(a)(6) on the permissible-length-of-detention issue does not detract from the fact that *Jennings* and *Diouf II* are clearly irreconcilable on the issue of bond hearings. Under *Jennings*'s reasoning, section 1231(a)(6) cannot plausibly be construed to require bond hearings. *Id.* at 842. Because *Jennings* changes the statutory interpretation landscape, especially in the context of immigration

detention, *Diouf II*'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. Accordingly, this Court "should consider [itself] bound by the intervening higher authority" and reverse the district court's decision granting Count II of Petitioners' complaint. *Miller*, 335 F.3d at 900. The district court's statutory interpretation of section 1231(a)(6) is simply not plausible.

CONCLUSION

This Court should reverse the district court's decision granting Count II of Petitioners' complaint and conclude that section 1231(a)(6) does not endow immigration detainees with a custody re-determination hearing every 180 days, before an immigration judge and where the government will bear the burden of proof to establish that the detainee poses a danger to the community or a flight risk.

Dated: March 25, 2019

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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 7,177 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 25, 2019

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STATEMENT OF RELATED CASES

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

1. *Aleman Gonzalez, et al. v. Sessions, et al.*, No. 18-16465 (9th Cir.)
2. *Alfaro v. Whitaker*, No. 18-16643 (9th Cir.)
3. *Higareda Frutos v. Session*, No. 18-16027 (9th Cir.)
4. *Mercado-Guillen v. Nielsen*, No. 18-16122 (9th Cir)
5. *Trinidad v. Sessions*, No. 18-16208 (9th Cir.)
6. *Rodriguez v. Holder*, No.CV-07-3239-TJH-RNBX (C.D. Cal. Aug. 6, 2013)

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 25, 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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