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' REPLY BRIEF

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director

GISELA A. WESTWATER
Assistant Director

GLADYS M. STEFFENS GUZMÁN
Trial Attorney
U.S. Department of Justice
Office of Immigration
Litigation District Court Section
P.O. Box 868, Ben Franklin
Station Washington, DC 20044
Telephone: (202) 305-7181
E-mail:
Gladys.Steffens-Guzman@usdoj.gov

Attorneys for Respondents-Appellants

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INTRODUCTION

The Court should reverse the district court's injunction requiring the government to provide class members with automatic bond hearings after six months of detention at which the government must bear the burden of justifying continued detention. The district court's decision relies on the very same construction of constitutional avoidance – and applies the very same relief – that the Supreme Court found inconsistent with three distinct immigration statutes in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Moreover, 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), to avoid the same constitutional problem (unduly prolonged detention) that the district court sought to avoid here. But there is no canon of constitutional re-avoidance. And in any event, particularly in light of *Jennings*, section 1231(a)(6) cannot be fairly read to require bond hearings at the six-month mark. Indeed, the lesson from *Jennings* is that courts cannot interpret immigration-detention statutes to mandate bond hearings (particularly at the six-month mark), when the statute does not say anything about bond hearings or a six-month cap.

Appellees filed their Answering Brief on May 24, 2019. Therein, they countered that the government is improperly re-litigating *Diouf v, Napolitano*, 634 F.3d 1081 (9th 2011) (*Diouf II*), and that, in any event, *Diouf II* squarely controls

this case. But *Jennings* has abrogated *Diouf II*. In *Diouf II*, the court, instead of analyzing the statutory text of section 1231(a)(6), spotted a potential constitutional issue and rewrote the statute to imbue substantive and procedural rights beyond those established by *Zadvydas*. By ignoring the Supreme Court's clear interpretation of section 1231(a)(6) and, instead, applying *Diouf II* to the case, the district court made the same mistake the Supreme Court rejected in *Jennings*. 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 Supreme Court's decision in *Jennings*, and reverse the district court's injunction.

ARGUMENT

It is well-established that one panel of this court cannot reconsider or overrule the decision of a prior panel. *United States v. Dunn*, 728 F.3d 1151, 1156 (9th Cir. 2013) (citing *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005)); *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992); *accord Hart v. Massanari*, 266 F.3d 1155, 1171-74 (9th Cir. 2001) (three-judge panel "may not any more disregard [an] earlier panel's opinion than it may disregard a ruling of the Supreme Court"). But, as is the case here, an exception to this fundamental rule of stare decisis arises when the "theory or reason underlying the prior circuit precedent" has been undermined by an intervening Supreme Court or en banc

decision "in such a way that the cases are clearly irreconcilable," *Miller v. Gamie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), or where an intervening statutory change has superseded the earlier precedent, *e.g.*, *United States v. Gomez-Mendez*, 486 F.3d 599, 604-05 (9th Cir. 2007) (declining to follow earlier en banc decision interpreting sentencing guideline because guideline was subsequently amended).

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* is no longer binding and this Court instead should follow *Jennings* and *Zadvydas*.

I. The *Zadvydas* standard, not *Diouf II*, applies to all aliens detained under section 1231(a)(6).

In *Jennings*, the Supreme Court reiterated how the constitutional avoidance canon framework operates. 138 S.Ct. at 836. *Jennings* noted that "a court relying on that canon still must *interpret* the statute, not rewrite it." *Id.* (emphasis in original). In evaluating how this Court applied the constitutional-avoidance canon

in that case, *Jennings* ultimately concluded that this Court incorrectly applied *Zadvydas* to sections 1225 and 1226 because those sections, unlike section 1231, were not ambiguous as to whether an individual detainee is entitled to a bond hearing and when detention under those provisions would end. Rather, each section clearly provided a remedy and an endpoint to the detention (*i.e.*, detention until such time as immigration proceedings have concluded). *Id.* at 842. Not only did the Supreme Court in *Jennings* determine that the constitutional avoidance canon cannot be invoked to import new procedures into statutes that specifically preclude those procedures, it also made clear that section 1231(a) could not be construed to require procedural protections beyond those already announced in *Zadvydas*.

As the Supreme Court emphasized in *Jennings*, *Zadvydas* already provides a "notably generous" construction of section 1231(a)(6) that limits detention of aliens already ordered removed to "a period reasonably necessary to secure removal[.]" *Jennings*, 138 S.Ct. at 843 (citing *Zadvydas*, 533 U.S. at 699-701). While the Supreme Court recognized that six months was a presumptively reasonable period for effectuating removal, even after six months, the burden for continuing detention does not fall to the government unless and until the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," at which point the Government must either

rebut that showing or release the alien. *Jennings*, 138 S.Ct. at 843 (citing *Zadvydas*, 533 U.S. at 699-701).

It is this *Jennings* framework which the district court was obligated to apply in this case, to wit, (1) look to *Zadvydas*'s construction of section 1231(a); and (2) consider *Diouf II*'s applicability to Appellees' case while avoiding re-writing *Zadvydas*'s construction of 1231(a)(6) (*i.e.*, without writing into the statute a remedy other than the post-order review system already in place, or a different endpoint to the detention – a time other than where the government cannot establish a significant likelihood of removal in the reasonably foreseeable future). Because *Diouf II* created a different remedy (bond hearings) and a different endpoint to the detention (a time where the government cannot prove an individual's flight risk or dangerousness), the district court reached its conclusion by applying *Diouf II* in clear contravention of *Jennings*.

A. *Diouf II* is not a "clarifi[cation of] the detention framework[;]" it is an impermissible re-writing of the statute.

Appellees' only argument is that *Diouf II* is merely an extension of, and thus consistent with, *Zadvydas* and *Clark*. *See* Appellees' Answering Bf at 22-41. Appellees are wrong. The statute has only one meaning. In *Clark v. Martinez*, 543 U.S. 371, 386 (2005); the Court already concluded that *Zadvydas*'s construction of the statute "must" apply to *all* individuals detained under section 1231(a)(6). 543 U.S. at 378. In fact, 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). As such, in light of *Clark*, Appellees' assertion that *Zadvydas* allows for the layering of additional, contradictory relief, is without merit.

The district court did exactly what the Supreme Court rejected in *Clark* by purporting to exclude a subset of individuals from the applicability of *Zadvydas*. *See* Appellees' Answering Bf at 31-36 ("*Diouf II* thus does for all persons detained under § 1231(a)(6) what *Zadvydas* did for a subset . . ."). 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. Contradicting *Zadvydas*'s application of the canon in key ways, the district court improperly read into the text of section 1231(a)(6) a requirement that once an individual is detained in the Western District of Washington 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 because of flight risk or dangerousness factors. But this is a misinterpretation of *Zadvydas*'s holding.

First, *Zadvydas* provides that aliens, not the government, bear the initial burden when challenging their continued detention under section 1231(a)(6). 533 U.S. at 690. Second, the proper remedy for a detainee that meets their burden is release from detention, not a bond hearing. *Id.* Third, *Zadvydas* was explicit in that district courts, not immigration judges, make the determination of whether an alien should be released from section 1231(a)(6) detention. *Id.* Simply put, contrary to *Diouf II*'s conclusion, and Appellees' insistence, reading into section 1231(a)(6) a new obligation that the government provide a bond hearing, before an immigration judge, wherein the government will bear the burden to prove dangerousness, Appellees' Answering Bf at 34, is the very definition of improper re-application of the canon of constitutional avoidance to a statute whose parameters were already defined by the Supreme Court.

Jennings and *Clark* do 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*, and the district court was bound to apply *Zadvydas*'s construction of section 1231(a)(6) "in all cases[,]" including Appellees' case here. *Id.* at 383, 386.

B. The district court misread and misapplied both *Jennings* and *Zadvydas* and created different processes and burden-shifting schemes.

As Appellees recognize throughout their Answering Brief, *Zadvydas*'s principles are the ones that are applicable to all aliens detained under section

1231(a)(6). As such, the sole inquiry before the district court should have been, and was, whether the Appellees' detention violated the standard articulated in *Zadvydas* after the *Jennings* Court cautioned that "*Zadvydas* represents a notably generous application of the constitutional-avoidance canon" and courts may not "transmute existing statutory language into its polar opposite." *Jennings*, 138 S. Ct. at 846. In *Zadvydas*, the Court applied the constitutional avoidance canon and concluded that, if section 1231(a)(6) were interpreted to permit indefinite detention, it would raise significant constitutional doubt. *Zadvydas*, 533 U.S. at 697-99. But, the Supreme Court recognized that the government would retain discretion to detain final-order aliens beyond the presumptively reasonable 180-day period, albeit subject to the significant likelihood of removal in the reasonably foreseeable future (SLRRFF) inquiry. *Id.* at 701 ("[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.").[1] As such, under *Zadvydas*, section 1231(a) is constitutional in all of its applications.

The district court's holding stretches an already "notably generous" reading of the statute past its breaking point. The creation of a six-month absolute rule is

[1] The Supreme Court also noted that *Zadvydas* did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696.

not only irreconcilable with *Jennings*'s no-re-write mandate, but has the added consequence of inverting the alien's burden to show that prolonged detention is contrary to law by establishing that there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701. This analysis, in essence, re-applies the canon of constitutional avoidance taking the burden of proof regarding eligibility for release as established by Congress and affirmed by the Supreme Court in *Zadvydas* and turns it on its head. 8 U.S.C. § 1231(a), and 8 C.F.R. § 241.4; *Zadvydas*, 533 U.S. at 701. The district court and Appellees ignore the fact that the Supreme Court consistently authorizes prolonged civil detention where the burden to establish eligibility for release is on the alien. *Demore v. Kim*, 538 U.S. 510, 531 (2003); *Zadvydas*, 533 U.S. at 701; *Reno v. Flores*, 507 U.S. 292, 313 (1993) (the government may rely on "reasonable presumptions and generic rules").

More importantly, even when faced with a case involving the possibility of indefinite detention, the *Zadvydas* court itself placed the burden on the alien to justify release. 533 U.S. at 701. By agreeing with the district court and Appellees and concluding that *Diouf II* is not irreconcilable with *Jennings*, this Court would be effectively eliminating the an alien's burden as established by *Zadvydas* to first show that there is no SLRRFF before their release may be granted. This Court would, instead, mandate, in contravention with *Zadvydas*, that the government

provide Appellees with an individual bond hearing before an immigration judge where the government will bear the burden of proof. By not finding that *Diouf II* is clearly irreconcilable with *Jennings*, this Court will increase the proportion of recidivists who will be released and who, based on their prior flouting of the laws of the United States by illegally reentering, are more than likely to abscond. *See, e.g.*, *Demore*, 538 U.S. at 518.

A court "must interpret the statute, not rewrite it." *Jennings*, __ U.S., 138 S. Ct. at 836. Section 1231(a)(6), like the detention statutes at issue in *Jennings*, does not "say[] anything whatsoever about bond hearings." *Id.* at 842. The district court, thus should not have gone further than the Court did in *Zadvyydas* and re-write section 1231(a)(6) to impose a six-month absolute rule, or to require a determination of dangerousness and flight risk where the statute says nothing of that sort. *See id.* "The constitutional-avoidance canon does not countenance such textual alchemy." *Id.* at 846.

II. The *Zadvydas* post-order custody review process already provides adequate procedural safeguards

Appellees' and the district court's concern that prolonged detention under section 1231(a)(6) does not occur without "adequate procedural protections," *see* Appellee's Answering Bf at 24-27, 42-45, is already addressed by *Zadvydas* and the regulations through the post-order custody review process. The Supreme Court held in *Demore* that, "[i]n the exercise of its broad power over naturalization and

immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." 538 U.S. at 521 (internal citations omitted). Undoubtedly, detention is a "constitutionally valid aspect of the deportation process." *Id.* at 523. The district court, nevertheless, ultimately ordered that an automatic hearing be provided to Appellees every six months in light of *Diouf II*'s concern that adequate procedural protections be in place for those individuals facing prolonged detention under section 1231(a)(6). This disregards the current post-order custody review regulations already in place and promulgated in order to codify the Supreme Court's instructions in *Zadvydas*.

The post-order custody review regulations in place for almost two decades protect class members from unlawful detention because the regulations, in implementing *Zadvydas*, provide class members with regular review of their custody status throughout their detention. 8 C.F.R. § 241.4. Under these regulations, a detainee is entitled to review of his or her custody status prior to the expiration of the removal period, 8 C.F.R. § 241.4(k)(1), and at annual intervals thereafter, 8 C.F.R. § 241.4(k)(2), with the right to request interim reviews not more than once every three months in the interim period between annual reviews. 8 C.F.R. § 241.4(k)(2)(iii). As mentioned above, the regulations provide adequate procedural protections requiring that detainees are not to be detained if there is "no significant likelihood of removal in the reasonably foreseeable future."

8 C.F.R. § 241.13; *see also* 8 C.F.R. § 241.13(g)(1) (requiring, in pertinent part, that the government "shall promptly make arrangements for the release of the alien subject to appropriate conditions" if there is no significant likelihood of removal in the reasonably foreseeable future). Simply put, nothing in section 1231(a)(6) itself or the applicable regulations entitles any of the Appellees to mandatory in-person review before an immigration judge, or requires that the government bears the burden of proof to demonstrate that the ongoing detention remains justified. This is particularly the case where *Zadvydas* requires that an individual detained under section 1231(a)(6) bear the initial burden of proof when challenging whether his or her removal is significantly likely to occur in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701.

The decision to continue the Appellees' detention because they have not demonstrated that there is no SLRRFF conforms to both the letter and spirit of the relevant statutory and regulatory scheme. To affirm the district court's decision of an absolute six-month rule where the government provide individuals subject to a reinstated order of removal who are in withholding-only proceedings with individualized bond hearings would result in abrogating existing regulations and would thereby place a heavy burden on the administrative process and immigration courts at the period closest to an individual's removal. This runs afoul of the laws and regulations that consistently recognize the Executive Branch's authority to

remove individuals in an expeditious manner. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (citations omitted). To best balance the paramount considerations addressed by section 1231(a)(6) and *Zadvydas*, and to provide for sufficient custody reviews under the circumstances, the Executive Branch properly amended and promulgated the rigorous series of regulations now in place. 8 C.F.R. §§ 241.4, 241.13.

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. Accordingly, this Court "should consider [itself] bound by the intervening higher authority" and reverse the district court's decision granting Count II of Appellees' complaint as the district court's statutory interpretation of section 1231(a)(6) is simply not plausible under *Jennings*, *Clark*, *Zadvydas*, and the post-custody review regulatory framework.

CONCLUSION

The Court should vacate the injunction entered by the district court and remand for further proceedings consistent with this opinion. Dated: June 14, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section

GISELA A. WESTWATER
Assistant Director, Office of Immigration Litigation – District Court Section

/s/ *Gladys M. Steffens Guzmán*
GLADYS M. STEFFENS GUZMÁN
Trial Attorneys District Court Section
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(t): (202) 305-7181
(e): gladys.steffens-guzman@usdoj.gov

Attorneys for Respondents-Appellants

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)(ii) because this brief contains 2,948 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: June 14, 2019

/s/ *Gladys M. Steffens Guzmán*
GLADYS M. STEFFENS GUZMÁN
Trial Attorney
U.S. Department of Justice
Attorney for Respondents-Appellants

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 June 14, 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.

/s/ *Gladys M. Steffens Guzmán*
GLADYS M. STEFFENS GUZMÁN
Trial Attorney
U.S. Department of Justice
Attorney for Respondents-Appellants