No. 18-1233

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,

v.

THOMAS HOMAN, Deputy Director and
Senior Official Performing the Duties of the Director,
U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
D.C. No. 2:17-cv-11910

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. This Court should reject petitioners' efforts to evade appellate review of the important statutory questions presented by this appeal. 4

II. The district court erred in granting injunctive relief requiring bond hearings for petitioners with final removal orders who are subject to detention under 8 U.S.C. § 1231 12

III. The district court erred in granting injunctive relief requiring bond hearings for petitioners who are criminals subject to mandatory detention—and thus not eligible for bond hearings—under 8 U.S.C. § 1226(c). 16

A. Section 1226(c)—not, as the district court ruled, section 1226(a)—governs detention of criminal petitioners, so those petitioners are statutorily not eligible for bond hearings. 16

B. The district court erred in imposing a presumptive six-month limitation on detention under 8 U.S.C §1226(c) 21

C. Any determination about constitutional requirements for bond hearings for detainees in custody under sections 1226(c) and 1231(a) should be decided by the district court in the first instance. 23

IV. Even if some petitioners should be afforded bond hearings, the injunction should still be modified because it erroneously shifts and elevates the burden of proof for the remedial bond hearings. 24

CONCLUSION 27

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES

Addington v. Texas,
441 U.S. 418 (1979).....26

Bailey v. Callaghan,
715 F.3d 956 (6th Cir. 2013) 5

Carlson v. Landon,
342 U.S. 524 (1952).....26

Casas-Castrillon v. Department of Homeland Security,
535 F.3d 942 (9th Cir. 2008) 8

Cheff v. Schnackenberg,
384 U.S. 373 (1966).....23

C*hevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,
467 U.S. 837 (1984).....17

Deal v. Hamilton County Bd. of Educ.,
392 F.3d 840 (6th Cir. 2004) 17

Demore v. Kim,
538 U.S. 510 (2003).....10, ***passim***

Diouf v. Napolitano,
634 F.3d 1081 (9th Cir. 2011) 8

Dodds v. U.S. Dep't of Educ.,
845 F.3d 217 (6th Cir. 2016) 6

Duncan v. Louisiana,
391 U.S. 145 (1968).....23

In re DeLorean Motor Co.,
755 F.2d 1223 (6th Cir. 1985) 6, 7

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) ..... 1, ***passim***

Ly v. Hansen,
351 F.3d 263 (6th Cir. 2003) 10, 15

McNeil v. Director, Patuxent Inst.,
407 U.S. 245 (1972) 23

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,
945 F.2d 150 (6th Cir. 1991) 7

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) 5

Munaf v. Geren,
553 U.S. 674 (2008) 1, 5

Reno v. Flores,
507 U.S. 292 (1993) 26

Sylvain v. Attorney Gen. of U.S.,
714 F.3d 150 (3d Cir. 2013) 19

Zadvydas v. Davis,
533 U.S. 678 (2001) ..... 2, ***passim***

ADMINISTRATIVE DECISION

In re Rojas,
23 I. & N. Dec. 117 (B.I.A. 2001) 16, 18

FEDERAL STATUTES

8 U.S.C. § 1226 ..... 4, 7, 9

8 U.S.C. § 1226(a) 20

8 U.S.C. § 1226(c) ..... 4, ***passim***

8 U.S.C. § 1226(c)(2) 26

8 U.S.C. § 1231 ..... 4, 7, 11

8 U.S.C. § 1231(a)(1)(B)(i) 19

8 U.S.C. § 1231(a)(1)(B)(iii) 17

8 U.S.C. § 1231(a)(4) 17

8 U.S.C. § 1231(a)(4)(B)(ii)(II) 17

8 U.S.C. § 1252(f)(1) 23

FEDERAL REGULATIONS

8 C.F.R. § 236.1(c)(8) 25

8 C.F.R. § 241.3 12

8 C.F.R. § 241.14 12

INTRODUCTION

The district court's injunction in this case rests on a series of mistakes of statutory interpretation. In issuing that injunction, the district court did exactly what the Supreme Court recently condemned: "rewrite a statute as it pleases" simply because the court "[s]pott[ed] a constitutional issue." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Once the district court's misguided statutory holdings are rejected, there is nothing left to support the injunction—it must be vacated. This Court should reject petitioners' arguments defending the injunction.

First, this Court should reject petitioners' effort to evade appellate review of the district court's statutory rulings. Petitioners ask this Court not to evaluate the district court's statutory holdings at all, arguing that petitioners needed only to show "serious questions going to the merits," that the district court reached independent and adequate constitutional rulings that support its injunction, and that this Court should remand so that the district court can assess the impact of *Jennings* in the first instance. *See* Response Br. 27–35. Each argument is baseless. First, a "serious questions" standard does not apply here. "[A] party seeking a preliminary injunction *must* demonstrate . . . a likelihood of success on the merits." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (emphasis added; internal quotation marks omitted). This Court thus routinely rejects preliminary

injunctions solely because a district court erred in assessing a movant's likelihood of success. Next, the district court reached no constitutional ruling, nor did it ever claim to. It purported instead to interpret what the relevant statutes require, and it rested its analysis on cases that themselves provided only statutory rulings in light of constitutional-avoidance principles. *See* Op. and Order Granting Prelim. Inj. ("Op."), RE 191, Page ID #5335–46. This appeal accordingly presents statutory issues only. Finally, it is unnecessary to remand for consideration of the statutory rulings in light of *Jennings*. *Jennings* readily shows that the district court's statutory rulings are wrong and that the government's reading of the relevant provisions is correct. In line with the customary approach of applying Supreme Court decisions issued while a case is pending on appeal, this Court should apply *Jennings*'s straightforward ruling now to resolve the issues in this appeal.

Second, the Court should reject petitioners' defense of the district court's decision to engraft onto section 1231, as a matter of statutory interpretation, immigration-judge bond-hearing requirements after six months of detention. Petitioners contend that this Court should construe section 1231(a)(6) to contain such a requirement to avoid constitutional problems. But the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), already construed section 1231(a)(6) in light of relevant constitutional

considerations, and announced the full panoply of protections that the statute allows—which do not include bond hearings.

Third, this Court should also reject the argument that petitioners detained under section 1226(c) should be deemed detained under section 1226(a), and so should be entitled to bond hearings. Petitioners' position cannot be squared with section 1226's text, the broader statutory framework, or the manifest public-safety purpose animating Congress's decision to impose mandatory detention on criminal aliens. Petitioners also attempt to defend the district court's ruling that petitioners detained under section 1226(c) are entitled to bond hearings after six months of detention. The Supreme Court has squarely rejected that view, concluding that section 1226 "makes clear that detention of aliens within [section 1226(c)'s] scope *must* continue 'pending a decision on whether the alien is to be removed from the United States.'" 138 S. Ct. at 846 (quoting 8 U.S.C. § 1226(a)). The statute does not recognize release following a bond hearing, let alone a bond hearing upon six months of detention.

Finally, if the Court reaches the issue, it should hold, as the Supreme Court did in *Jennings*, that section 1226(a)—which the district court deemed to govern criminal petitioners detained under section 1226(c)—cannot be construed to require the government to bear the burden of proof at bond hearings, much less by clear and convincing evidence. 138 S. Ct. at 847. Indeed, petitioners now concede that, under

Jennings, the district court's decision lacks any statutory basis. *See* Response Br. 54 n.28. The clear-and-convincing-evidence standard, petitioners now maintain, "arises from due process concerns, not statutory text." *Id.* That constitutional claim should be considered, if at all, on remand—along with any other constitutional and other issues that remain after this Court's resolution of this appeal.

ARGUMENT

As the government has established, the district court's injunction rests on erroneous interpretations of 8 U.S.C. §§ 1226 and 1231. This Court should correct those erroneous statutory rulings, vacate the preliminary injunction, and remand for further proceedings. Petitioners' arguments to the contrary lack merit.

I. This Court should reject petitioners' efforts to evade appellate review of the important statutory questions presented by this appeal.

The district court's injunction rests on its statutory rulings that petitioners detained under 8 U.S.C. §§ 1226(c) and 1231 are entitled to bond hearings once detention has lasted for six months. *See* Op., RE 191, Page ID #5335–46. In asking this Court to vacate the injunction, the government has therefore argued that the district court misinterpreted those two statutes to require bond hearings. *See* Opening Br. 29–45. Yet petitioners argue that this Court should not even reach the statutory issues

presented by this appeal. *See* Response Br. 27–35. This Court should reject petitioners' arguments.

First, petitioners contend that the district court's ruling on three of the four injunction factors (irreparable harm, balance of equities, and the public interest) "are uncontested," Response Br. 27; *see also id.* at 27–30, and that this Court must therefore affirm if there are merely "serious questions going to the merits," *id.* at 35; *see also id.* at 26. Petitioners are mistaken. The preliminary injunction here necessarily fails if the district court erred in assessing likelihood of success. "[A] party seeking a preliminary injunction *must* demonstrate, among other things, a likelihood of success on the merits." *Munaf,* 553 U.S. at 690 (emphasis added; internal quotation marks omitted). This Court thus readily rejects preliminary injunctions solely because a district court erred in assessing the likelihood of success. *See, e.g.*, *Bailey v. Callaghan,* 715 F.3d 956, 960–61 (6th Cir. 2013) (reversing preliminary injunction based on error on likelihood of success on merits, without reaching the other injunction factors); *see also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997) ("a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed").

That approach is particularly apt here, since the district court's injunction overwhelmingly rests on its determination that petitioners are likely to succeed on the merits. The district court's 45-page opinion devotes 11 pages to its relevant likelihood-

of-success determinations, but just over a page to the three non-merits injunction factors. *Compare* Op., RE 191, Page ID #5335–46, *with id.*, Page ID #5346–47. The district court's one-paragraph irreparable-harm analysis ignored the government's argument that petitioners' alleged harm was not "legally cognizable or irreparable," and thus could not provide the basis for preliminary relief.[1] Resp'ts Opp'n, RE 158, Page ID #4122. And the district court cited no authority on either the balance of equities or the public interest, even though the government had contested both factors. *See id.*, Page ID #4122–23. In any event, as explained in Parts II and III below, petitioners are wrong on the merits, and so are not entitled to injunctive relief.

It is not enough, moreover, for petitioners to show only "serious questions going to the merits." Response Br. 26, 35. Petitioners invoke *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016), and *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985), as authority for a "serious questions" standard. *See* Response Br. 26, 35. But the cited passage in *Dodds* was not addressing whether a preliminary injunction should be affirmed on appeal; it was addressing a motion to stay a preliminary injunction

[1] Petitioners share responsibility for their alleged harm. Petitioners knew for years—since their removal orders became final—that the government intended to remove them to Iraq, and that at any time they could be arrested and detained for removal. Rather than promptly filing motions to reopen, they waited until after their arrests to seek the injunctive relief that has led to the detention they challenge now.

pending appeal, *see* 845 F.3d at 221—where (in contrast to injunctive relief) "a movant need not always establish a high probability of success on the merits," *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (internal citation omitted). Nor did *DeLorean* adopt a "serious questions" standard that would apply to all preliminary injunctions. The Court there simply found that the four injunction factors need to be balanced, and that "the degree of likelihood of success required may depend on the strength of the other factors." 755 F.2d at 1229 (finding that the bankruptcy court did not abuse its discretion in halting distribution of assets of a related business entity pending an investigation of whether they were attached to the bankruptcy estate and remaining three factors strongly favored creditors).

Second, petitioners contend that the district court's injunction rests not just on statutory grounds, but on alternative "constitutional" grounds that "provide an independent basis for the preliminary injunction." Response Br. 30 (capitalization omitted); *see also id.* at 30–32. Petitioners maintain that the district court held that the Due Process Clause "require[s] that Petitioners be afforded individualized determinations by an impartial adjudicator that their continued detention is justified based on danger or flight risk." *Id.* at 30. Petitioners are wrong. The district court invoked the constitutional-avoidance canon in making statutory rulings only. It reached no constitutional holding to support its injunction.

The district court never said that any statutory provision at issue on this appeal—8 U.S.C. §§ 1226 or 1231—violates the Due Process Clause, or any other constitutional provision, facially or as applied. In addressing petitioners' challenge to detention under section 1231, the district court "cho[se] to follow" *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), and *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), Op., RE 191, Page ID #5337, which reached statutory holdings in light of constitutional-avoidance concerns. The district court described *Diouf* as having "held that *§1231(a)(6) requires* 'an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision.'" Op., RE 191, Page ID #5335 (quoting 634 F.3d at 1085) (emphasis added). And the district court recognized that *Casas-Castrillon* reached a similar conclusion for a section 1226(a) detainee on the view that a contrary conclusion "'would raise serious constitutional concerns'" and "'would be constitutionally doubtful.'" *Id.*, Page ID #5335, 5336 (quoting 535 F.3d at 91) (some internal quotation marks omitted). And in holding that petitioners detained under section 1226(c) should instead be considered detained under section 1226(a), the district court again followed *Casas-Castrillon*, which—as the district court put it—adopted that view because not doing so "would be constitutionally doubtful." *Id.*, Page ID # 5338; *see also id.*, Page ID #5337–39 (relying further on *Casas-Castrillon*). The balance of the district court's analysis of this issue turned, in the district court's own

words, on "the plain language of the *statute*." *Id.*, Page ID #5341 (emphasis added); *see also id.*, Page ID # 5339–41.

Petitioners do not acknowledge these points. Instead, they point to two statements from the district court's opinion. *See* Response Br. 30–31. First: "Petitioners have demonstrated a probability of success both as to their statutory and constitutional arguments . . . ." Op., RE 191, Page ID #5345. Second, petitioners observe that, in its introduction, the district court stated that the relief petitioners sought is "consistent with the demands of our Constitution—that no person should be restrained in his or her liberty beyond what is necessary to achieve a legitimate governmental objective." *Id.*, Page ID #5319. Even standing alone, these lone statements form far too slim a reed on which to conclude that the district court reached a constitutional holding. And those statements plainly cannot be so read in light of the point discussed above—that the district court's opinion itself shows that it reached statutory rulings and that the Constitution entered the analysis only for purposes of constitutional avoidance. Indeed, the district court cited not a single decision holding that section 1226 or section 1231 is unconstitutional.

Third, petitioners contend that, if the statutory questions presented by this appeal should be addressed, "this Court should remand them to the district court to analyze the impact of" *Jennings* "in the first instance." Response Br. 32 (capitalization omitted);

see also id. at 32–35. As explained below, a remand on the statutory issues is not warranted: *Jennings* provides a straightforward path to resolving the statutory issues now, and this Court should resolve those issues now. That approach harmonizes with this Court's customary approach of applying Supreme Court decisions issued while a case is pending on appeal. *See, e.g., Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (considering impact of *Demore v. Kim,* 538 U.S. 510 (2003), which had been decided after the case was briefed and argued). And because the district court's injunction necessarily falls if its merits ruling falls, there is no need to remand for the district court to "re-exercise its discretion in weighing" the likelihood-of-success factor "against the other[]" factors. Response Br. 33.

Petitioners' request for a remand also stands in stark contradistinction to petitioners' other positions in this appeal, where petitioners have asked this Court to consider purported *factual* developments that post-date each of the injunctions under review. *See* Response Br. 11–12; No. 17-2171 Response Br. 4 & n.3. Petitioners have even taken the unusual step of asking this appellate tribunal to consider a new, untested declaration (from one of their class counsel) on appeal. *See* Response Br. Exh. A;

Motion for Judicial Notice 1–5.[2] The one thing that petitioners do not want this Court to consider and apply is straightforward, on-point, controlling law announced by the Supreme Court. However, applying changes in law are well within this Court's ken—far more so than assessing and applying untested factual averments that post-date the orders under review. Apparently, only when petitioners think that this Court's consideration would be unhelpful to them do they insist that this Court's role is one of "review, not . . . first view." Response Br. 34.

Finally, petitioners take the untenable position that, "[i]f this Court remands, the preliminary injunction should stay in place." Response Br. 34; *see id.* at 34–35. Their justification seems premised, at least in part, on the fact that most of the bond hearings

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[2] Petitioners' judicial-notice request is improper because petitioners ask this Court to credit the truth of untested factual representations that are subject to reasonable dispute. *See Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840, 853 (6th Cir. 2004) (affirming district court's refusal to take judicial notice of declaration where underlying facts were disputed). For example, some of petitioners' data relies on hearsay representations from "class members' lawyers" where the official data was "ambiguous or unclear." Response Br. Exh. A, Schlanger Decl. ¶¶ 7–8. Petitioners do not identify what data was ambiguous or unclear, who provided the clarifying data, or what that person said. Further, petitioners admit that one purpose of the declaration is to show this Court that the preliminary injunction freed "dozens of individuals from unjustified, prolonged deprivations of liberty," Motion for Judicial Notice 5, suggesting that these individuals did not pose danger or flight risks. This requires the Court to accept as true the factual findings of the immigration courts. Moreover, the declaration's numbers regarding bond outcomes rest on the district court's flawed burden framework, *see* Opening Br. 47, and are thus unsound.

ordered by the district court have already been held, so there is no harm in leaving it intact. Yet that feature undermines any basis for allowing the injunction to continue. Without a statutory basis for the injunction, *see infra* Parts II and III, the district court's opinion leaves no basis for the injunction. Vacatur is appropriate.

II. The district court erred in granting injunctive relief requiring bond hearings for petitioners with final removal orders who are subject to detention under 8 U.S.C. § 1231.

As the government has explained, the statutory text and the constitutional considerations discussed in *Zadvydas v. Davis*, 533 U.S. 678 (2001), establish that section 1231 cannot be read to require immigration-judge bond hearings. *See* Opening Br. 29–33. Petitioners counter that "serious constitutional issues are raised by prolonged detention without procedural protections," Response Br. 36 (capitalization omitted); *see id.* at 36–40, and that, "to avoid the constitutional question" raised by prolonged detention, section 1231(a)(6) should be "construed" to "require that the Government justify prolonged detention" at a bond hearing, *id.* at 40, 43; *see id.* at 40–44. This argument is unavailing.

To start, the Supreme Court already identified and resolved the problem that petitioners identify. The Supreme Court already recognized that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem," *Zadvydas*, 533 U.S. at 690; the Court has already avoided that problem by construing section

1231(a)(6) (specifically, its provision that an alien "may be detained" after the removal period) to mean that an alien who has been ordered removed may not be detained beyond "a period reasonably necessary to secure removal," *id.* at 699; and the Court has already provided a framework for ensuring that the duration of detention under section 1231(a)(6) is reasonable in light of the liberty interest at stake, *see id.* at 701. The Court concluded that six months of detention is presumptively reasonable and that, after that 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 either rebut that showing or release the alien. *Id.*[3]

Besides already having addressed the prolonged-detention issue that petitioners identify, the Supreme Court has also signaled rejection of the additional protections that petitioners advocate—an immigration-judge bond-hearing requirement. As the government has explained, nothing in the text of section 1231(a)(6) supports such a

[3] The Post-Order Custody Review (POCR) procedure complements the *Zadvydas* standard. *See* 8 C.F.R. §§ 241.3, 241.14. The district court erred in discounting the individualized POCRs denying release that many, but not all, petitioners received on the basis that they recited ICE's interest in ensuring the alien's pending removal but did not consider "any legitimate bond issue." Op., RE 191 Page ID #5345. This ignores that ICE provided the pertinent justification for continuing detention: preventing flight. *See Zadvydas*, 533 U.S. at 690 (recognizing the legitimate detention justification of "ensuring the appearance of aliens at future immigration proceedings," a justification which is "weak or nonexistent where removal seems a remote possibility at best").

requirement—let alone a requirement for such a hearing upon six months of detention. *See* Opening Br. 29–30. Section 1231(a)(6) contemplates release only through an order of supervision—strongly implying that there are "no *other* circumstances under which aliens detained" under section 1231(a)(6) "may be released." *Jennings*, 138 S. Ct. at 844 (addressing section 1225(b)). Because "[n]othing in the text of" section 1231(a)(6) "even hints that th[at] provision[]" requires a bond hearing after six months, such a requirement is not a "plausible interpretation[]" of the statute and so the canon of constitutional avoidance cannot be invoked to impose such a requirement. *Id.* at 843. That point is underscored by the fact that *Zadvydas* already "represents a notably generous application of the constitutional-avoidance canon." *Id.*

In urging this Court to embrace a six-month bond-hearing requirement, petitioners emphasize that section 1231(a)(6)'s language is "permissive," "allow[s] for release of individuals who demonstrate lack of danger and flight risk," and "contains no language expressly limiting release from detention to a certain procedure." Response Br. at 41-42. But none of those points overcomes the fact that nothing in section 1231(a)(6)'s text provides for bond hearings, much less at the six-month mark in every case. Because the statute may not "plausibly be read to contain" that requirement, petitioners' interpretation cannot prevail. *Jennings*, 138 S. Ct. at 843. Similarly, although petitioners claim that *Zadvydas* "establishes that the text of" section 1231(a)(6) is

"ambiguous with respect to the length of detention it authorizes," Response Br. 43, that point does not justify invoking the avoidance canon to engraft onto section 1231(a)(6) a procedural mechanism that its text does not support. Finally, if "prolonged detention without a bond hearing raises serious constitutional problems," *id.* at 39; *see id.* at 39–40, despite the procedural protections the Supreme Court construed section 1231(a)(6) to contain precisely to avoid those problems, then the district court should squarely address the constitutional question on remand. Any such constitutional problems cannot be addressed by construing the statute to contain a bond-hearing requirement.[4]

[4] Petitioners' discussion of due-process limitations on civil confinement, *see* Response Br. 36–40, has no bearing on the issues in this appeal, since the district court reached only statutory rulings and the constitutional-avoidance canon does not permit the interpretation undergirding the district court's injunction. And petitioners' reliance *Ly v. Hansen*, *see id.* at 39–40, is misplaced now that *Jennings* has discredited that decision's constitutional-avoidance-based analysis. 351 F.3d 263, 270 (6th Cir. 2003) (by "construing the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, we avoid the need to mandate [additional] procedural protections").

III. The district court erred in granting injunctive relief requiring bond hearings for petitioners who are criminals subject to mandatory detention—and thus not eligible for bond hearings—under 8 U.S.C. § 1226(c).

A. Section 1226(c)—not, as the district court ruled, section 1226(a)—governs detention of criminal petitioners, so those petitioners are statutorily not eligible for bond hearings.

As explained in the opening brief, 8 U.S.C. § 1226(c) mandates the detention of the relevant criminal petitioners here. *See* Opening Br. 34–43. Petitioners attempt to defend the district court's view that section 1226(a) instead governs those petitioners' detention. *See* Response Br. 44–50. Their arguments lack merit.

First, petitioners contend that the government's reading of section 1226(c)'s "when the alien is released" language, "set forth in *In re Rojas*, 23 I. & N. Dec. 117, 121 (B.I.A. 2001), depends on an arbitrary and unpersuasive set of interpretive moves." Response Br. 45. But *Rojas* reached its holding—that an alien who has been convicted of a predicate offense does not become exempt from the detention mandate if he "was not immediately taken into custody by [DHS]," 23 I. & N. Dec. 117, 119—based on the statute's text, structure, context, and history, as well as practical considerations. The BIA concluded that it would be "inconsistent with our understanding of the statutory design to construe [section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on

whether there is a delay between their release from criminal custody and their apprehension by [DHS]." *Id.* at 124. The BIA instead concluded that the "when the alien is released" clause defines when DHS's duty to take a criminal alien into custody is triggered. At most, the function of section 1226(c)(1)'s "when the alien is released" language is ambiguous, and the BIA's decision warrants deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Second, petitioners argue that, unless section 1226(c) is read to authorize the government to detain a criminal alien only if it apprehends the alien immediately upon release from criminal custody, section 1226(c)'s "when the alien is released" language would be reduced to "mere surplusage." Response Br. 46; *see id.* at 46–47. But that is not so. The "when the alien is released" clause provides when the detention mandate should start, and thereby directs federal officials not to apprehend a criminal petitioner until that petitioner has been released from his underlying criminal custody. This provision allows the States to vindicate their interests in criminal justice, and reflects the comity and respect for state sovereignty that Congress sought to preserve in the INA. The statutory scheme bears this out. Section 1226(c)'s post-removal-order analogue specifies that the removal period—during which detention for removal is mandatory—may begin upon release from criminal custody. *See* 8 U.S.C. § 1231(a)(1)(B)(iii). Congress permitted States to fully punish aliens for criminal

violations before removal by specifying that DHS "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." *Id.* § 1231(a)(4); *see id.* § 1231(a)(4)(B)(ii)(II) (permitting early removal in certain circumstances when State agrees it is in the "best interest of the State"). These provisions in sections 1226 and 1231 clearly contemplate that federal immigration authorities will assume custody over criminal aliens after the State has an opportunity to vindicate its interest in criminal justice. The government's interpretation thus does not render the "when the alien is released" language to be surplusage, but instead sensibly treats the alien's release from criminal custody as antecedent to any applicable mandatory detention authority.

Third, petitioners argue that the district court's reading of 1226(c)'s "when the alien is released" language is "consistent with the structure and purpose of the statue." Response Br. 47 (internal quotation marks omitted). But the district court's view in fact disserves section 1226(c)'s public-safety purpose (and, as explained just above, is inconsistent with the statute's structure). On the district court's view, many (perhaps most) criminal aliens will become exempt from mandatory custody for a reason—a gap in custody—that is "irrelevant for all other immigration purposes" and largely outside the government's control. *Rojas,* 231 I. & N. Dec. at 122. Moreover, a significant portion of criminal aliens whose removal proceedings are reopened will be released on

bond and thus enabled to flee or reoffend, thereby causing just what section 1226(c) is meant to prevent. Petitioners' interpretation "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous criminals." *Sylvain v. Attorney Gen. of U.S.,* 714 F.3d 150, 160–61 (3d Cir. 2013). Such a windfall grows larger in the context here, where section 1226(c)'s "when the alien is released" language is misconstrued to apply to those criminal petitioners subject to its mandatory detention regime solely by virtue of their own action to seek reopening of their removal proceedings.

Fourth, petitioners argue that section 1226(c)'s "when the alien is released" language cannot apply to reopened proceedings because the statute cannot be read to apply to criminal aliens "being moved from one form of immigration custody to another." Response Br. 49; *see id.* at 49–50. But there is no basis in text or structure to suggest that section 1226(c) does not apply to criminal aliens in reopened proceedings. *Cf. Sylvain* at 157 ("The text does not explicitly remove [mandatory detention] authority if an alien has already left [criminal] custody."). Under petitioners' theory, criminal aliens who successfully reopen their removal proceedings would be immunized from Congress's categorical decision to ensure their mandatory detention. This approach

turns Congress's statutory detention scheme on its head. The Court can reject this view—and can resolve this matter without even reaching the question whether delayed apprehension following criminal release affects mandatory detention authority.

Finally, petitioners dismiss the government's explanation that their detention authority reverted to section 1226(c) by operation of law when the reopening of their proceedings placed them back into removal proceedings. *See* Response Br. 49. Petitioners contend that the government "does not explain" the "reasons" for its position. *Id.* But the government explained those reasons. "When the criminal petitioners' motions to reopen were granted, their removal orders were no longer final and governed by section 1231." Opening Br. 39–40. That follows straightforwardly from 8 U.S.C. § 1231(a)(1)(B)(i) (cited at Opening Br. 40), which reflects that section 1231 no longer governs when a removal order ceases to be "administratively final"—as when a motion to reopen is granted. It then follows that "[t]he reopening of" the criminal petitioners' removal proceedings then "placed [those] petitioners back into the position they would be in if removal proceedings were now initiated against them: mandatory detention under section 1226(c)." *Id.* at 40.

B. The district court erred in imposing a presumptive six-month limitation on detention under 8 U.S.C. § 1226(c).

As explained in the opening brief, neither the statutory text nor the constitutional-avoidance canon provides any basis for the district court's presumptive limitation on detention under section 1226(c). *See* Opening Br. 43–45. Petitioners contend that the district court appropriately ordered bond hearings after six months of detention under section 1226(c) (*see* Response Br. 51–54) because: (1) "administrability" requires drawing such a line, *id.* at 52; (2) a six-month limit on detention "finds support" in *Zadvydas* and other immigration statutes and regulations, *id.* at 52; *see id.* at 52–53; and (3) there are criminal and civil-commitment contexts where "additional process" is afforded after six months, *id.* at 53; *see id.* at 53–54. Those arguments lack merit.

The Supreme Court recently and unequivocally rejected the view that bond hearings are required after six months of section 1226(c). Section 1226 "makes clear," the Court concluded, "that detention of aliens within [section 1226(c)'s] scope *must* continue 'pending a decision on whether the alien is to be removed from the United States.'" *Jennings*, 138 S. Ct. at 846 (quoting 8 U.S.C. § 1226(a)). Section 1226(c) is clear that "aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." *Id.* The statute

does not recognize release following a bond hearing, let alone a bond hearing upon six months of detention.

Considerations of "administrability" (Response Br. 52) provide no basis for reading the statute to contain a requirement that it plainly forecloses. Nor does the analogy to *Zadvydas*, which serves as petitioners' and the district court's basis for requiring bond hearings at the six-month mark for detention under section 1226(c). *See id.* at 51–53. The Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), rejected that analogy. *See id.* at 516. *Demore* explained that the two situations were "materially different. *Id.* at 527. The detention in *Zadvydas* no longer "serve[d] its purported immigration purpose" because "removal was no longer practically attainable." *Id. Zadvydas* involved "indefinite" and "potentially permanent" detention because it "ha[d] no obvious termination point." *Id.* at 528–29 (quoting *Zadvydas,* 533 U.S. at 690–91, 697). By contrast, "detention pending a determination of removability" is inherently temporary because it has an "obvious termination point": the end of removal proceedings. *Id.* at 529 (quoting *Zadvydas,* 533 U.S. at 697). *Jennings* similarly rejects the view that *Zadvydas* calls for a different reading of section 1226(c). *See* 138 S. Ct. at 846 (noting that *Demore* "distinguished § 1226(c) from the statutory provision in *Zadvydas"* and that "the conclusion of removal proceedings . . . and not some arbitrary time limit devised by courts [is what] marks the end of the Government's detention

authority under § 1226(c).”). Finally, petitioners’ reliance on criminal and civil-commitment cases, *see* Response Br. 53–54 (citing *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968); *McNeil v. Director, Patuxent Inst.,* 407 U.S. 245, 250–52 (1972); and *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966)), is misplaced. Those cases do not support immigration bond hearings at the six-month mark. The principal dissent in *Demore* made a similar argument, relying on non-immigration cases. *See* 538 U.S. at 547–51 (Souter, J., concurring in part and dissenting in part). Yet the Court concluded that the relevant precedents were those “firmly and repeatedly endors[ing] the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Id.* at 522 (collecting cases).

C. Any determination about constitutional requirements for bond hearings for detainees in custody under sections 1226(c) and 1231(a) should be decided by the district court in the first instance.

If this Court agrees that sections 1226 and 1231 do not offer any basis for holding that petitioners are entitled to bond hearings after six months of immigration detention, the Court should vacate the injunction and remand to the district court to resolve, in the first instance, any claim that there is a constitutional right to such hearings. *See* Opening Br. 46. As explained, the district court ruled on statutory grounds in concluding that petitioners were entitled to bond hearings. *See supra* Part I. The district court’s reliance on cases that applied the canon of constitutional

avoidance to interpret sections 1226 and 1231 to have implicit temporal limitations—specifically to require bond hearings after six months of immigration detention—allowed the district court to duck a proper analysis of petitioners' alleged constitutional entitlement to such bond hearings. *See* Opening Br. 46. Because the district court did not conduct a separate constitutional analysis on any due process right to bond hearings, and the parties did not meaningfully brief this issue below, this Court should not resolve this question in the first instance now.[5]

IV. Even if some petitioners should be afforded bond hearings, the injunction should still be modified because it erroneously shifts and elevates the burden of proof for the remedial bond hearings.

As the government has explained, *Jennings* dooms the district court's order of release for detainees in custody under section 1226. *See* Opening Br. 47–48. *Jennings* held that section 1226(a)—which the district court deemed to govern criminal petitioners detained under section 1226(c)—cannot be construed to require the

[5] The government has also explained that "the Court should direct the district court to assess whether it has authority to grant injunctive relief on a class-wide basis at all, particularly with respect to constitutional claims." Opening Br. at 48. Petitioners do not contest that the district court should consider the effect that 8 U.S.C. § 1252(f)(1) may have on such constitutional claims. *See* Response Br. 31 n.18 (arguing instead that the government "misreads §1252(f)(1)"). Nor do petitioners dispute that reconsideration of class-certification is appropriate on remand. *See id.* (contending instead that "the class issues are not before this Court"). Given the importance of these matters, the Court should provide appropriate instructions to the district court. *See* Opening Br. 48–51.

government to bear the burden of proof at bond hearings, much less by clear and convincing evidence. 138 S. Ct. at 847.

Petitioners now concede that, under *Jennings*, the district court's decision lacks any statutory basis. The clear-and-convincing-evidence "standard of proof," petitioners now maintain, "arises from due process concerns, not statutory text," Response Br. 54 n.28, and so rely on due process case law in urging this Court should affirm the district court's imposition of its elevated burden of proof, *see id.* at 54–56.

This Court should reject this argument. To the extent that petitioners argue that the district court could impose this burden out of constitutional avoidance, they are wrong. *Jennings* clearly rejects such an approach. *Jennings*, 138 S. Ct. at 843 ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases."). The district court never reached a constitutional ruling as to this burden, but instead imposed this burden in line with its constitutional-avoidance approach. *See supra* Part I.

And to the extent that petitioners argue that the Constitution demands such burden shifting, that question is not properly before this Court and should be considered, if at all, on remand. Petitioners did not meaningfully advance that position below. Such an argument would, moreover, face a considerable uphill battle. The Supreme Court has affirmed the constitutionality of detention pending removal proceedings even though the government has *never* borne the burden to justify that

detention by clear-and-convincing evidence. *E.g., Demore,* 538 U.S. at 531; *Reno v. Flores,* 507 U.S. 292, 306 (1993); *Carlson v. Landon,* 342 U.S. 524, 538 (1952); *see Zadvydas,* 533 U.S. at 701. Indeed, *Demore* upheld mandatory detention under section 1226(c), which expressly puts the burden on the alien in the only situation in which release is permitted. Section 1226(c) prohibits release of the specified criminal or terrorist aliens, except that the alien may be released if it is "necessary" for witness protection and "the alien satisfies the Attorney General" 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." 8 U.S.C. § 1226(c)(2) (emphasis added). Likewise, in *Zadvydas,* the Court placed the burden on the alien who is subject to potentially indefinite post-order detention to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. And longstanding regulations place the burden on the alien in bond hearings under section 1226(a), 8 C.F.R. § 236.1(c)(8)—yet petitioners do not contend that those regulations are unconstitutional as applied in an initial bond hearing. In considering petitioners' constitutional claim, a court would need to grapple with these—and other—points. This Court should not do so in the first instance.[6]

[6] Petitioners rely on *Addington v. Texas*, 441 U.S. 418 (1979) in contending that the government must bear a heightened burden to justify civil detention. *See* Response Br. 54–55; *see also id.* at 36–40. *Addington* is inapposite and does not support petitioners.

CONCLUSION

This Court should vacate the district court's injunction and remand this case for further proceedings.

Unlike with the involuntary commitment at issue in *Addington*, the government has plenary authority over immigration and the exclusion or expulsion of aliens. *See Flores,* 507 U.S. at 305 ("Over no conceivable subject is the legislative power of Congress more complete.") (brackets and citations omitted). Detention here is a vital incident of removal proceedings in which the alien enjoys significant protections, the opportunity to apply for relief from removal, and the ability to voluntarily end removal proceedings and the immigration detention incident to them. On top of this, unlike civil commitment, "detention pending a determination of removability" is inherently temporary. *Demore,* 538 U.S. at 529 (quoting *Zadvydas,* 533 U.S. at 697).

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CERTIFICATE OF SERVICE

I certify that on April 20, 2018, the above brief was served on all counsel of record through the Court's CM/RE system.

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CERTIFICATE OF COMPLIANCE

I certify that the above brief contains 6476 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure: it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14-point typeface.

/s/ William C. Silvis
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Hamama, et al., v. Rebecca Adducci, et al.

Eastern District of Michigan, Case No. 17-cv-11910

Record Entry No.	Page ID #	Date Filed	Description
158	4122, 4122-23	11/30/2017	Respondents' Opposition to Petitioners' Motion for a Preliminary Injunction on Detention Issues
191	5319, 5335-46, 5346-47	1/2/2018	Opinion & Order Granting Petitioners' Motion for Preliminary Injunction