

No. 17-923

In the Supreme Court of the United States

MARK ANTHONY REID, PETITIONER

v.

CHRISTOPHER DONELAN, SHERIFF,
FRANKLIN COUNTY, MASSACHUSETTS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1226(c) is properly interpreted to provide that criminal and terrorist aliens who are subject to mandatory detention nonetheless must be afforded bond hearings, with the possibility of release, if detention lasts six months.
2. Whether, if Section 1226(c) provides for such bond hearings, the criminal or terrorist alien is entitled to release unless the government demonstrates by clear and convincing evidence that he is a flight risk or a danger to the community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-48a) is reported at 819 F.3d 486. The opinion of the district court entering a permanent injunction (Pet. App. 1a-20a) is reported at 22 F. Supp. 3d 84. An earlier opinion of the district court granting individual habeas relief (Pet. App. 90a-105a) is reported at 991 F. Supp. 2d 275.

JURISDICTION

On May 27, 2014, the district court granted summary judgment and issued a permanent injunction. On April 13, 2016, the court of appeals issued an opinion reversing and remanding the district court's order. On June 7, 2016, the court of appeals extended the time to file a petition for rehearing until June 30, 2016, and stayed issuance of its mandate. Pet. App. 109a-110a. On June 30, 2016, petitioner filed a petition for rehearing and rehearing en banc. On July 6, 2016, the court of appeals

stayed the appeal pending this Court's disposition of *Jennings v. Rodriguez*, No. 15-1204, 2018 WL 1054878 (Feb. 27, 2017), which was pending at the time. Pet. App. 106a-107a. The petition for rehearing and rehearing en banc remains pending. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. Congress has mandated the detention of certain criminal and terrorist aliens during proceedings to remove them from this country. 8 U.S.C. 1226(c). Section 1226(c) directs that the Attorney General (now the Secretary of Homeland Security) “shall take into custody” aliens who are convicted of certain crimes or have engaged in certain terrorist activities. 8 U.S.C. 1226(c)(1). The Secretary “may release” such an alien from custody “only if” (1) it is “necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation,” and (2) “the alien satisfies the [Secretary]” 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).

In *Jennings v. Rodriguez*, No. 15-1204, 2018 WL 1054878 (Feb. 27, 2018), this Court recently held “that §1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings ‘only if’ the alien is released for witness-protection purposes.” Slip op. 22 (quoting 8 U.S.C. 1226(c)(2)). The Court thus rejected the view that Section 1226(c) could be construed to permit covered criminal aliens to obtain a bond hearing based on the passage of time.

2. Petitioner is a native and citizen of Jamaica who entered the United States in 1978 as a lawful permanent resident. Pet. App. 91a. “Between 1986 and 2010,” petitioner “amassed an extensive criminal history,” including convictions for larceny, assault, and selling illegal drugs. *Id.* at 92a. On November 13, 2012, he was released on parole on his latest convictions. *Ibid.*

That same day, the Department of Homeland Security took petitioner into custody and initiated removal proceedings. Pet. App. 92a. Due to his criminal history, petitioner was subject to mandatory detention pursuant to 8 U.S.C. 1226(c)(1)(B). Pet. App. 92a & n.2. Petitioner conceded the validity of the charges against him, but sought deferral of removal under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and on the ground that removal would be disproportionate in violation of the Fifth Amendment. D. Ct. Doc. 1, at 9 (July 1, 2013).

On April 5, 2013, an immigration judge (IJ) denied petitioner’s requests for relief and ordered him removed from the United States. Pet. App. 24a. On May 5, 2013, petitioner appealed to the Board of Immigration Appeals (BIA). *Id.* at 24a-25a.

3. On July 1, 2013, while the BIA was still considering petitioner’s appeal of the IJ’s order that he be removed, petitioner filed a petition for a writ of habeas corpus in federal district court. Pet. App. 93a. He contended that Section 1226(c) no longer applied and that he had become entitled to a bond hearing because his removal proceedings had lasted more than six months. The district court granted petitioner habeas relief, con-

struing Section 1226(c) to contain an implicit “reasonableness” limitation after which a bond hearing is required. *Id.* at 96a-104a. The court followed the Ninth Circuit in adopting the “bright-line rule” that a criminal alien becomes automatically entitled to a bond hearing at the six-month mark. *Id.* at 97a. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), rev’d, No. 15-1204, 2018 WL 1054878 (Feb. 27, 2018). The court also concluded that it would grant petitioner a bond hearing even under a fact-specific approach to defining reasonableness. Pet. App. 102a. After a bond hearing, petitioner was released on \$25,000 bond.*

The district court thereafter certified a class of all aliens detained within Massachusetts pursuant to Section 1226(c) “for over six months and [who] have not been afforded an individualized bond hearing.” Pet. App. 89a. The court granted summary judgment to the class and entered a permanent injunction requiring the government to provide bond hearings to all class members, *i.e.*, after six months. *Id.* at 17a-20a. The court declined, however, to shift the burden to the government to establish that the alien was a flight risk or danger by clear and convincing evidence. *Id.* at 14a-17a.

4. On April 13, 2016, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 21a-48a. First, the court construed Section 1226(c) to contain an implicit “reasonableness” limitation, but it rejected the bright-line six-month rule and instead construed “reasonableness” to be determined on a case-by-case basis. *Id.* at 32a. Applying that case-by-case analysis, the court

* On May 24, 2014, petitioner was arrested yet again. Gov’t C.A. Br. 12. Those charges were dropped, and petitioner was again released from immigration custody on \$25,000 bond. *Id.* at 12 n.5.

of appeals affirmed the judgment granting habeas relief to petitioner. *Id.* at 48a.

The court of appeals vacated the injunction as to the class members, however, and vacated and remanded the order granting class certification. Pet. App. 46a. The court explained that the “bright-line” six-month rule the district court had read into Section 1226(c) “was an essential predicate to class certification,” and that its rejection of that rule and requirement of “an individualized approach” made the class “substantially overbroad.” *Ibid.* “It may well be that no suitable class can be formed,” the court noted. *Id.* at 47a.

On April 27, 2016, petitioner moved to stay the issuance of the mandate pending this Court’s disposition of the government’s petitions for writs of certiorari in *Jennings v. Rodriguez*, No. 15-1204, and *Shanahan v. Lora*, No. 15-1205, which were pending at that time. On June 7, 2016, the court of appeals extended the time to file petitions for rehearing until June 30, 2016, and stayed issuance of its mandate. Pet. App. 109a-110a.

On June 20, 2016, this Court granted the government’s petition for a writ of certiorari in *Jennings*. On June 30, 2016, petitioner filed a petition for rehearing and rehearing en banc. On July 6, 2016, the court of appeals stayed the appeal pending the outcome of *Jennings*. Pet. App. 106a-107a.

5. On February 27, 2018, this Court decided *Jennings*, holding that Section 1226(c) unambiguously prohibits release of covered aliens on bond during removal proceedings, except under the narrow witness-protection exception. The Court also stated that the court of appeals “should reexamine whether respondents can continue litigating their claims as a class.” Slip op. 29.

DISCUSSION

Petitioner filed this petition for a writ of certiorari, even though his petition for rehearing en banc was still pending in the court of appeals, in response to the possibility that Justice Kagan's recusal from *Jennings* could cause the Court to divide evenly on the questions presented both in that case and here regarding the interpretation of 8 U.S.C. 1226(c). Specifically, petitioner contended (Pet. 8-9) that, if the Court were to divide evenly on those questions in *Jennings*, it should grant review of this petition to resolve them here instead. This Court has subsequently decided *Jennings* without dividing evenly. And the Court's holding in *Jennings* confirms both that the court of appeals here correctly vacated the district court's injunction, which was predicated on interpreting Section 1226(c) to authorize bond hearings after six months, and that the court of appeals correctly vacated the class certification order and remanded to the district court with instructions to reconsider that issue. This Court's decision in *Jennings* therefore eliminated any basis for granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 2018