Immigration and Nationality Act — Mandatory and Prolonged Detention — Access to Bond Hearings — Jennings v. Rodriguez

Over 350,000 individuals were placed into civil immigration detention in 2016.[1] Held in prison-like detention centers or local jails, detainees wear "orange suits, . . . are shackled during visitation and court visits, . . . are subject to surveillance and strip searches, [and] are referred to by number, not by name."[2] Unlike individuals awaiting criminal trial in jail, seventy-one percent of immigration detainees are required by statute to be detained without any access to a bond hearing.[3] Last Term, in *Jennings v. Rodriguez*,[4] the Supreme Court held that the Ninth Circuit had incorrectly used the canon of constitutional avoidance to read a six-month limit into sections of the Immigration and Nationality Act[5] (INA) that allowed for detention without the possibility of bond.[6] The Court broke from its previous practice of broadly applying the canon to the INA, choosing instead to read the statute in a strictly textualist manner. By rejecting an interpretation of the statute that would allow for regular bond hearings, the Court pushes lower courts to either reject these cases on procedural grounds or grapple with the question of constitutionality directly, thus forcing a choice between the rights of detainees and the plenary power of the political branches. Unless the courts uphold detainees' due process rights, detained immigrants will continue to endure months, or even years, of punishment while they fight to stay in the United States.

Rodriguez was a class action suit on behalf of individuals held pursuant to four statutory provisions. The first, 8 U.S.C. § 1225(b), applies to individuals arriving at the border who are seeking admission into the

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[1] BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [https://perma.cc/J9X2-4AAB].

[2] *See* Transcript of Oral Argument at 8, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1204_2c83.pdf [https://perma.cc/JD4Z-4KD8] (Sotomayor, J.); *see also* Rodriguez v. Robbins (*Rodriguez III*), 804 F.3d 1060, 1073 (9th Cir. 2015). For examples of how prolonged immigration detention has impacted individual lives, see Sylvester Owino, Opinion, *I Spent a Decade in Immigration Detention*, THE HILL (Mar. 7, 2018, 1:30 PM), http://thehill.com/opinion/immigration/377162-i-spent-a-decade-in-immigration-detention [https://perma.cc/7U6P-KDSU]; and *The Stories*, PROLONGED DETENTION STORIES, https://www.prolongeddetentionstories.org/the-stories/ [https://perma.cc/9AF9-WM3C].

[3] *See* Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet [https://perma.cc/ZJC8-ZX6Y] (summarizing data released by Immigration and Customs Enforcement in response to a FOIA request by the Immigrant Legal Resource Center).

[4] 138 S. Ct. 830.

[5] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[6] *Rodriguez*, 138 S. Ct. at 842.

United States. Asylum seekers who establish a credible fear of persecution "shall be detained for further consideration of the application."[7] All others seeking admission who are "not clearly and beyond a doubt entitled to be admitted . . . shall be detained" for removal proceedings.[8] Under the second provision, 8 U.S.C. § 1226(c), "[t]he Attorney General shall take into custody any [noncitizen]" present in the United States who has been convicted of certain enumerated crimes.[9] These individuals may be released "only if the Attorney General decides" it is necessary for witness-protection purposes.[10] Any other individual in removal proceedings "may be arrested and detained" under § 1226(a) — the third provision — and, pending removal, the Attorney General "may release the [noncitizen] on bond of at least $1,500."[11] Those denied bond may remain detained until their proceedings end. Finally, under 8 U.S.C. § 1231(a), individuals who have been ordered removed "shall" be detained for up to ninety days while the government effectuates their removal.[12] All of the *Rodriguez* class members, regardless of the statute applicable to their circumstances, were required to wait in detention while they argued their cases to stay.

Alejandro Rodriguez was one of those class members. Rodriguez is a Mexican citizen who was brought to the United States as an infant.[13] He became a lawful permanent resident in 1987.[14] The government detained Rodriguez in April 2004[15] after he had been convicted for "joyriding" in 1998[16] and possession of a controlled substance in 2003.[17] An immigration judge issued a final order of removal in July 2004.[18] Rodriguez remained in detention for the next three years as he appealed the order, first to the Board of Immigration Appeals (BIA), and then to the Ninth Circuit.[19] In May 2007, as his immigration appeals continued, Rodriguez filed a habeas petition in the District Court for the Central District of California, seeking a bond hearing on whether his continued

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[7] 8 U.S.C. § 1225(b)(1)(B)(ii) (2012).

[8] *Id.* § 1225(b)(2)(A).

[9] *Id.* § 1226(c)(1).

[10] *Id.* § 1226(c)(2).

[11] *Id.* § 1226(a).

[12] *Id.* § 1231(a)(1)–(2).

[13] *Rodriguez*, 138 S. Ct. at 838; Respondents' Brief at 5, *Rodriguez*, 138 S. Ct. 830 (No. 15-1204).

[14] *Rodriguez*, 138 S. Ct. at 838.

[15] *Id.*

[16] Petition for Writ of Habeas Corpus at 7, Garcia v. Hayes, No. CV07 3239 (C.D. Cal. May 16, 2007).

[17] *Rodriguez III*, 804 F.3d 1060, 1073 (9th Cir. 2015).

[18] *Rodriguez*, 138 S. Ct. at 838.

[19] *Id.*

detention was justified.[20] The case was consolidated with another and, together, petitioners moved for class certification.[21]

The district court certified a class of noncitizens who had been detained for longer than six months pending removal proceedings, were not held under a national security statute, and had not been afforded a bond hearing in that time.[22] The class was divided into four subclasses, one for each statutory provision under which class members were held.[23] The district court then granted summary judgment in favor of the detained class members and entered a permanent injunction, ordering the government to provide bond hearings to detainees after six months of detention.[24] Following Ninth Circuit precedent, the order also required that bond hearings occur automatically and that the burden of proving "by clear and convincing evidence that a detainee is a flight risk or a danger to the community" falls to the government.[25]

With respect to three out of the four classes, the Ninth Circuit affirmed.[26] The court observed that indefinite civil detention without individualized hearings raised due process concerns outside of a few extreme circumstances, and it thus invoked the canon of constitutional avoidance.[27] Relying on the six-month limitation that the Supreme Court read into the statute governing post-removal-period detention,[28] as well as the Ninth Circuit's own line of cases limiting excessively long immigration detention,[29] the Ninth Circuit read the three sections governing the remaining subclasses to implicitly require a bond hearing after six months of detention, and then a new hearing every six months afterward.[30]

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[20] *Id.*

[21] *Id.* After Rodriguez moved for certification, the government released him unexpectedly. Respondents' Brief, *supra* note 13, at 6. It then argued unsuccessfully that his release rendered the case moot. *Id.* Upon his release, Rodriguez had been detained for 1189 days. *Rodriguez III*, 804 F.3d at 1073.

[22] Class Certification Order, Rodriguez v. Hayes, No. CV 07-03239 (C.D. Cal. Apr. 5, 2010), ECF No. 77. The court initially denied certification, but was reversed on appeal. Rodriguez v. Hayes (*Rodriguez I*), 591 F.3d 1105, 1111 (9th Cir. 2010).

[23] *Rodriguez III*, 804 F.3d at 1066.

[24] Order, Judgment and Permanent Injunction at 4–5, Rodriguez v. Holder, No. CV 07-03239 (C.D. Cal. Aug. 6, 2013), ECF No. 353.

[25] *Rodriguez III*, 804 F.3d at 1071; *see also* Singh v. Holder, 638 F.3d 1196, 1206 (9th Cir. 2011); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 944 (9th Cir. 2008).

[26] *Rodriguez III*, 804 F.3d at 1090. However, the Ninth Circuit ruled that the fourth subclass, comprised of individuals held under § 1231(a), was improperly certified. *Id.* at 1074, 1085–86.

[27] *See id.* at 1074–75.

[28] Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

[29] *See* Rodriguez v. Robbins (*Rodriguez II*), 715 F.3d 1127, 1138 (9th Cir. 2013); *Singh*, 638 F.3d at 1200; Diouf v. Napolitano (*Diouf II*), 634 F.3d 1081, 1084, 1092 (9th Cir. 2011); *Casas-Castrillon*, 535 F.3d at 949; Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005).

[30] *Rodriguez III*, 804 F.3d at 1089–90.

The Supreme Court granted certiorari.[31] After two rounds of briefing[32] and oral arguments,[33] the Court reversed and remanded.[34] Writing for the Court, Justice Alito[35] held that the Ninth Circuit incorrectly applied the canon of constitutional avoidance.[36] The Court emphasized that the canon may apply only if, "after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."[37] The Ninth Circuit thus erred by adopting implausible interpretations of each of the three statutory provisions in order to avoid the constitutional question.[38] As nothing in the text of any of the statutory provisions "even hint[ed]" that detention should be limited to six months,[39] the Court admonished the Ninth Circuit for "rewrit[ing] a statute as it please[d]."[40]

The Court supported its rejection of the Ninth Circuit's reading with textualist analysis. First, the Court stated that the plain meaning of § 1225(b) "mandate[s] detention" for the duration of relevant proceedings.[41] In so holding, the Court had to distinguish the case at hand from *Zadvydas v. Davis*,[42] "a notably generous application of the constitutional-

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[31] Jennings v. Rodriguez, 136 S. Ct. 2489 (2016) (mem.).

[32] The government submitted a letter with its initial briefing, correcting statistics on length of detention that it had submitted to the Court with briefing in *Demore v. Kim*, 538 U.S. 510 (2003). Letter from Ian Heath Gershengorn, Acting Solicitor Gen., U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk of the Court, Supreme Court of the U.S. (Aug. 26, 2016) [hereinafter *Demore* Correction Letter]. Citing the letter in a footnote of its brief, the government noted that the *Demore* Court relied on erroneous calculations in finding that "'removal proceedings are completed in an average time of 47 days,' . . . . [and] that the total time for appealed cases was 'about five months.'" Brief for the Petitioners at 34 n.10, *Rodriguez*, 138 S. Ct. 830 (No. 15-1204) (quoting *Demore*, 538 U.S. at 529–30). However, the corrected calculations found that the average detention time in cases without appeals was actually thirty-four days. *Id.* For cases that were appealed to the BIA, length of detention was "considerably longer than five months," *id.* — an average of 382 days and a median of 272 days. *Demore* Correction Letter, *supra*, at 3.

[33] The Court ordered supplemental briefing on the question of whether the Constitution required regular bond hearings, *see* Jennings v. Rodriguez, 137 S. Ct. 471 (2016), and then calendared the case for reargument.

[34] *Rodriguez*, 138 S. Ct. at 836.

[35] Justice Alito was joined by Chief Justice Roberts and Justice Kennedy. Justices Thomas and Gorsuch joined in all but Part II. Justice Sotomayor joined only Part III-C, which rejected the procedural protections that the district court and the Ninth Circuit had read into § 1226(a). *See id.* at 847–48. Justice Kagan recused herself after the second round of oral arguments upon discovering that she had authorized the filing of a pleading in the case while serving as Solicitor General. Letter from Hon. Scott S. Harris, Clerk of the Court, Supreme Court of the U.S., to Noel J. Francisco, U.S. Dep't of Justice & Ahilan T. Arulanantham, ACLU Found. of S. Cal. (Nov. 10, 2017).

[36] *Rodriguez*, 138 S. Ct. at 836.

[37] *Id.* at 842 (quoting Clark v. Martinez, 543 U.S. 371, 385 (2005)).

[38] *Id.*

[39] *See id.* at 843; *see also id.* at 846–48.

[40] *Id.* at 843.

[41] *Id.* at 842.

[42] 533 U.S. 678 (2001).

avoidance canon."[43] In *Zadvydas*, the Court relied heavily on Congress's inclusion of the word "may" — a term too ambiguous to mandate long-term detention — in the statute to impose a presumptive six-month limit on post-removal-order detention.[44] Such ambiguous language was missing from § 1225(b).[45]

The Court found § 1226(c) to employ "even clearer" language, as it included a provision that allowed the Attorney General to release individuals "'*only if*' . . . doing so is necessary for witness-protection purposes," thus foreclosing release in any other circumstances.[46] Here, the Court relied on *Demore v. Kim*,[47] which distinguished *Zadvydas* and refused to extend a six-month presumption of reasonable detention to § 1226(c) detention *during* removal proceedings.[48] The *Demore* Court had emphasized that, unlike the provision at issue in *Zadvydas*, which left the possible period of detention completely open ended, § 1226(c) provided a clear end to detention: when the removal proceeding at hand was complete.[49] The Court in *Rodriguez* reiterated this reasoning, refusing to impose a limit on § 1226(c) detention in the present case.[50]

Finally, the Court quickly dismissed the Ninth Circuit's reading of § 1226(a). The Court found 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 bond hearings every six months, consideration of length of detention in bond determinations, or the establishment of a clear and convincing standard of proof.[51]

Because the courts below had decided the case on statutory grounds, the Court remanded the case to the Ninth Circuit so that it could consider the petitioners' constitutional arguments in the first instance.[52] The Court also noted that the Ninth Circuit should reexamine whether a class action would still be appropriate.[53] Specifically, the Court presented three issues that the Ninth Circuit should consider on remand: whether it still has jurisdiction over the case, despite 8 U.S.C.

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[43] *Rodriguez*, 138 S. Ct. at 843.

[44] *Zadvydas*, 533 U.S. at 697.

[45] *Rodriguez*, 138 S. Ct. at 844. The Court also rejected Rodriguez's argument that § 1225(b)'s authorization of detention "for" further proceedings allows for detention only until those proceedings *begin*, as this interpretation defied the most natural reading of the text. *Id.* at 844–45.

[46] *Id.* at 846 (quoting 8 U.S.C. § 1226(c)(2) (2012)).

[47] 538 U.S. 510 (2003).

[48] *See id.* at 527–31.

[49] *Id.* at 528–29.

[50] *Rodriguez*, 138 S. Ct. at 846. The Court also cited a clear end to § 1225(b) detention — the completion of the asylum application — as additional reasoning for rejecting a time limit under that provision. *Id.* at 844.

[51] *Id.* at 847 (omission in original) (quoting 8 U.S.C. § 1226(a)).

[52] *Id.* at 851.

[53] *See id.* at 851–52.

§ 1252(f)(1), which prohibits lower courts from granting class action injunctive relief from §§ 1221–1232; whether Rule 23(b)(2) of the Federal Rules of Civil Procedure is still satisfied in light of *Wal-Mart Stores, Inc. v. Dukes*,[54] which held that the rule applies only when a single judgment would provide relief to every member of the class; and whether a class action is the best way to resolve Due Process Clause claims, as the process required may vary depending on individual circumstances.[55]

Justice Thomas concurred in part and concurred in the judgment,[56] arguing that § 1252(b)(9) — which bars judicial review of nonfinal, discretionary decisions made under §§ 1225 and 1226 — only allows for judicial review of final orders of removal.[57] Because Rodriguez was not appealing a final order of removal, no Article III court had jurisdiction over the case.[58] While Justice Thomas would have dismissed for lack of jurisdiction, he concurred with the majority on the merits.[59]

Justice Breyer dissented.[60] In his opinion, Justice Breyer asserted that the majority's reading of the statute would "at the very least . . . raise 'grave doubts' about the statute's constitutionality."[61] To Justice Breyer, it was clear that individuals held on American soil would receive Fifth Amendment due process protections, including the prohibition on arbitrary detention.[62] Justice Breyer then reviewed the Court's detention jurisprudence[63] and concluded that it "generally has not held that bail proceedings are unnecessary."[64] Having established that reading the statute to allow indefinite periods of detention with no access to bond hearings would raise a constitutional question, the dissent found reason enough to invoke the avoidance canon.[65] The dissent proceeded to read each of the three statutory provisions to authorize periodic bond

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[54] 564 U.S. 338 (2011).

[55] *Rodriguez*, 138 S. Ct. at 851–52. The Ninth Circuit has since ordered briefing on all three questions, as well as the constitutional claims. Order, Rodriguez v. Jennings, No. 07-cv-03239 (9th Cir. Apr. 12, 2018), ECF No. 150.

[56] Justice Thomas was joined by Justice Gorsuch, except as to footnote 6.

[57] *See Rodriguez*, 138 S. Ct. at 853 (Thomas, J., concurring in part and concurring in the judgment).

[58] *Id.* at 853–54. Justice Alito, writing for himself, Chief Justice Roberts, and Justice Kennedy, argued that § 1252(b)(9) did not strip the Court of jurisdiction to review this case. *See id.* at 839–41 (plurality opinion).

[59] *Id.* at 859 (Thomas, J., concurring in part and concurring in the judgment).

[60] Justice Breyer was joined by Justices Ginsburg and Sotomayor.

[61] *Id.* at 861 (Breyer, J., dissenting) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

[62] *Id.* at 862–63.

[63] *See id.* at 866–69.

[64] *Id.* at 866.

[65] *Id.* at 869. The majority opinion explicitly rejected the dissent's approach to the avoidance canon and found that the dissent was able to read a six-month bond hearing requirement into the statute only by "inflicting linguistic trauma." *Id.* at 848 (majority opinion).

hearings.[66] Finally, the dissent addressed the majority's questions regarding class certification and jurisdiction, arguing that, even if the case were decided on constitutional grounds, the lower courts would still be able to grant relief to the entire class.[67] "It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right [to be free from arbitrary detention]," Justice Breyer concluded.[68] "I would find it far more difficult, indeed, I would find it alarming, to believe that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement . . . all without hope of bail."[69]

The canon of constitutional avoidance calls on the Court to avoid deciding constitutional questions if the statute could be interpreted to foreclose those questions.[70] The Court has regularly applied a looser understanding of the canon when it confronts questions that invoke separation of powers concerns. Accordingly, the Court has consistently applied the canon broadly in its immigration cases, which often require the Court to balance its own power to protect individual liberties against the plenary power of the political branches. *Jennings v. Rodriguez* breaks from this pattern. By deviating from precedent, the Court stifled the clearest route to due process protections for noncitizens who have been detained for excessively long periods of time. Whether lower courts decide to dismiss these cases on class action procedural grounds or address the constitutional question directly, the end result will likely be minimal protections against indefinite detention for noncitizens.

When confronted with a constitutionally suspect statute, a court has three options: it can strike down the statute, thus creating a countermajoritarian problem; it can uphold the statute, and appear to endorse it, despite its questionable constitutionality; or it can avert the question altogether by reading the provision in a way that avoids the constitutional violation.[71] The Court has often cited a texualist formation of the canon: it may be used only "after the application of ordinary textual analysis . . . as *a means* of *choosing between*" plausible interpretations.[72] However, avoiding the question may be particularly appealing in cases where the Court is asked to strike down legislative or executive acts in

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[66] *Id.* at 869–75 (Breyer, J., dissenting).

[67] *Id.* at 875–76.

[68] *Id.* at 876.

[69] *Id.*

[70] *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[71] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 69–71 (2d ed. 1986); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961); *see also* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 416–17 (2005).

[72] Clark v. Martinez, 543 U.S. 371, 385 (2005); *see also Rodriguez*, 138 S. Ct. at 842.

areas where the political branches exercise broad discretion, as the countermajoritarian problem in these cases is more acute. It makes sense, then, that the Court has applied the avoidance canon more broadly in the immigration context than a purely textualist application of the canon would suggest.[73] Beginning in *United States v. Witkovich*,[74] the Court rejected "the tyranny of literalness" by limiting a statute's delegation of "unbounded authority" to the Attorney General to question deportable noncitizens.[75] In *Zadvydas*, the Court read a six-month reasonableness limitation into post-removal-period detention[76] and demanded a clear statement from Congress before authorizing long-term detention of unremovable noncitizens.[77] In *Clark v. Martinez*,[78] the Court refused to uphold indefinite detention of those found inadmissible at the border without clear congressional action.[79] Even in *Demore v. Kim*, which the *Rodriguez* Court cited as support for rejecting an implied limit to detention,[80] the Court did not rely on textual analysis. Instead, the Court looked to legislative history, which showed congressional intent to combat the risk of flight among immigrants released on bond.[81] Thus, even in cases in which the Court refused to apply the avoidance canon, it did not make that decision based on textualist analysis.

In comparison with the Court's past treatment of constitutional avoidance in the immigration context, *Jennings v. Rodriguez* breaks new ground by requiring multiple plausible interpretations under a strict textualist reading before the canon may be applied. The majority insisted that the statute could not plausibly be read differently than the majority's textualist interpretation. This assertion, however, was in the face of three dissenters[82] and five circuit courts in addition to the

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[73] *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude [noncitizens] as a fundamental sovereign attribute exercised by the Government's political departments."); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255, 260–61 (explaining and criticizing the Court's self-declared powerlessness to review immigration statutes); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–60 (1990) (describing the history and development of the Court's treatment of plenary power in immigration cases); *see also* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 490 (2018) ("[F]ederal courts regularly engage in rigorous forms of statutory interpretation to construe federal immigration law to protect immigrant rights.").

[74] 353 U.S. 194 (1957).

[75] *Id.* at 199.

[76] Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

[77] *Id.* at 697.

[78] 543 U.S. 371 (2005).

[79] *See id.* at 386–87.

[80] *Rodriguez*, 138 S. Ct. at 846.

[81] *See* Demore v. Kim, 538 U.S. 510, 517–22 (2003).

[82] *Rodriguez*, 138 S. Ct. at 869–75 (Breyer, J., dissenting).

Ninth[83] holding that an alternative reading of the statute was plausible enough to invoke the canon. Now that the Court has rejected a statutory construction that avoids the due process question at issue, it appears the Ninth Circuit will have to confront the question directly, leaving it to choose between striking down a broad statutory delegation or upholding a statute that allows for noncitizens to be held indefinitely without an individualized hearing.

The Court did leave the Ninth Circuit with a third option, one that it strongly hinted should be the solution: resolve the case on procedural grounds. Rescinding class certification or dismissing for lack of jurisdiction would be simpler than delving into the questions of due process and the scope of plenary power. Upholding the current permanent injunction under a due process violation would require the Ninth Circuit to distinguish *Demore*, in which the Court held that at least some cases of indefinite detention without bond are constitutional.[84] The court would also need to reject sweeping language in previous cases that describes the political branches' plenary power over immigration issues[85] and limits protections for noncitizens.[86] Finally, the Ninth Circuit would need to find that a bright-line presumption of six months is what the Constitution calls for, a conclusion that may not convince the more conservative members of the Supreme Court.[87] The Ninth Circuit has thoroughly engaged with the case law on due process and detention,[88] but holding an entire statutory scheme to be unconstitutional is a large step for any court to take.

For those who are or will be detained under the present statutes, however, it is due process or nothing. Noncitizens have due process rights,[89] and those rights should extend to protect against arbitrary, in-

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[83] *See* Sopo v. U.S. Attorney Gen., 825 F.3d 1199, 1213–14 (11th Cir. 2016), *vacated as moot*, 890 F.3d 952 (11th Cir. 2018); Reid v. Donelan, 819 F.3d 486, 494–95 (1st Cir. 2016); Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015), *vacated and remanded*, 138 S. Ct. 1260 (2018); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263, 267–68 (6th Cir. 2003).

[84] *See Demore*, 538 U.S. at 531.

[85] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305 (1993) ("[O]ver no conceivable subject is the legislative power of Congress more complete." (alteration in original) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

[86] *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

[87] *See* Transcript of Oral Argument, *supra* note 2, at 42 (Alito, J.) ("Where does it say six months in the Constitution? Why is it six? Why isn't it seven? Why isn't it five? Why isn't it eight?").

[88] *Rodriguez III*, 804 F.3d 1060, 1074–78 (9th Cir. 2015) (summarizing case law on civil detention and limits on immigration detention).

[89] *See, e.g.*, *Flores*, 507 U.S. at 306 ("It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." (citing Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100–01 (1903))); *see also* Transcript of Oral Argument, *supra*

definite detention. In its brief, the government conceded that, at a certain point, lengthy detention without an individualized hearing could violate the Due Process Clause;[90] however, it argued that those cases should be brought as individual as-applied constitutional challenges in habeas proceedings.[91] Unfortunately, for most detained individuals, "who are often pro se, indigent, and not proficient in English," habeas is not a realistic route to judicial review.[92] Without access to automatic bond hearings, detainees likely will continue to be held for extended and indeterminate periods of time,[93] without an avenue for review.

Detention, even if not formally punishment, is a "high price to pay for contesting deportation."[94] As the abuses that immigrants have suffered while in detention continue to come to light,[95] lower courts have stepped in to protect individual rights.[96] Unfortunately, in *Jennings v. Rodriguez*, the Court foreclosed the simplest way for those courts to protect noncitizens from being held without reason. Even if the Ninth Circuit gets past the Court's procedural questions and finds a constitutional violation, it seems unlikely that an increasingly conservative Supreme Court would support a holding that required periodic, automatic bond hearings for noncitizens. Without such a holding, however, noncitizens will remain subject to arbitrary detention. That a group of individuals held within our borders may be detained indefinitely, without an individualized finding of necessity, cannot be reconciled with the concept of due process. To attempt to do so would diminish the meaning of due process for us all.

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note 2, at 17 (Kagan, J.) ("[C]ould we torture those people, could we put those people into forced labor? Surely, the answer to that is no.").

90 Brief for the Petitioners, *supra* note 32, at 49.

91 *Id.* at 14–15, 46–47.

92 Respondents' Brief, *supra* note 13, at 13; *see also* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 309–33 (2006) (describing the many challenges an incarcerated, pro se petitioner faces in obtaining habeas relief).

93 *See Demore* Correction Letter, *supra* note 32, at 1–6.

94 Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 362 (David A. Martin & Peter H. Schuck eds., 2005).

95 *See, e.g.*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 3–8 (2017); S. POVERTY LAW CTR. ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 8–13 (2016); Dan Barry et al., *Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention*, N.Y. TIMES (July 14, 2018), https://nyti.ms/2NQcboD [https://perma.cc/F7JY-RVFW].

96 *See, e.g.*, Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018) (ordering federal government to reunify children separated from parents at border); Hamama v. Adducci, 261 F. Supp. 3d 820, 840–41 (E.D. Mich. 2017) (enjoining deportation of Iraqi nationals who were not given time to seek motions to reopen and other relief); *see also* Hamama v. Adducci, 285 F. Supp. 3d 997, 1027 (E.D. Mich. 2018) (ordering bond hearings for class members detained for over six months).