Nos. 13-56706

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID MARIN,[1] *et al.*,
Respondents-Appellants,

v.

ALEJANDRO RODRIGUEZ, *et al.*,
Petitioners-Appellees.

RESPONDENTS-APPELLANTS' MOTION TO VACATE PERMANENT INJUNCTION

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), David Marin is substituted as the Los Angeles Field Office Director for Immigration and Customs Enforcement.

INTRODUCTION

On February 27, 2018, the Supreme Court reversed this Court's decision in *Rodriguez v. Robbins*, 804 F. 3d 1060 (9th Cir. 2015) ("*Rodriguez III*"), a decision affirming the permanent injunction entered by the District Court for the Central District of California. That injunction requires the government to provide bond hearings to a class of immigration detainees detained for six months in the Central District of California under 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) and 1231(a). *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). The class sought injunctive relief primarily as a remedy for their claims that those statutes are properly interpreted to require bond hearings after six months of detention. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("*Rodriguez I*"). The class argued the statutes "must be enjoined as unconstitutional" "only . . . to the extent [the statutes] cannot be interpreted as requiring provision of a bond hearing." *Id*.

In light of the Supreme Court's decision in this case, the injunction must be vacated. The Supreme Court's decision eliminates any statutory basis for enjoining operation of the statutes by confirming that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) must be construed as remaining operative throughout administrative removal proceedings. The class's alternative constitutional arguments provide no basis for leaving the injunction in place. Even if the district court had resolved (or

were to later resolve) any of those claims, and even if it were to interpret the constitution to impose some fixed or other specific limitation on the duration of detention, the injunction nonetheless still would need to be vacated under 8 U.S.C. § 1252(f)(1). As this Court recognized in *Rodriguez I*, 591 F.3d at 1120, section 1252(f)(1) prevents courts from enjoining operation of the detention provisions at issue in this case on a class-wide basis as a constitutional remedy. The permanent injunction must, therefore, be vacated forthwith.

PROCEDURAL HISTORY

In 2007, Alejandro Rodriguez brought a habeas petition, on behalf of himself and others similarly situated in the Central District of California, challenging his prolonged immigration detention without a bond hearing as violating the Immigration and Nationality Act and the Due Process Clause. *Rodriguez I*, 591 F.3d at 1110. The district court initially denied class certification, but was reversed by this Court in *Rodriguez I*, 591 F.3d at 1111. On remand, the district court certified a primary class of aliens detained by the U.S. Department of Homeland Security ("DHS") for six months or longer in the Central District of California and four subclasses corresponding to the statutes under which the class members are detained: 8 U.S.C. §§1225(b), 1226(a), 1226(c), and 1231(a). *Rodriguez III*, 804 F. 3d at 1066.

On September 13, 2012, the district court granted preliminary injunctive relief to aliens in the section 1225(b) and section 1226(c) subclasses. *See Rodriguez v.*

Hayes, 2012 WL 7653016 (C.D. Cal. Sept. 13, 2012). It required the government to provide bond hearings to aliens detained under section 1225(b) and section 1226(c). *Id*. This Court affirmed the injunction in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) ("*Rodriguez II*"). The *Rodriguez II* decision held that, to avoid constitutional concerns, the statutes "'must be construed to contain an implicit reasonable time limitation'" of six months. *Rodriguez II*, 715 F.3d at 1138 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001)). The Court therefore held "subclass members who have been detained . . . for six months are entitled to a bond hearing because the applicable *statutory* law, not constitutional law, requires one." *Id*. (emphasis in original).

On August 6, 2013, the district court granted summary judgment to the class and entered a permanent injunction. *Rodriguez v. Holder*, 2013 WL 5229795, at *1-2 (C.D. Cal. August 6, 2013) ("Order"). The permanent injunction enjoins the operation of the four detention provisions, 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a), to require bond hearings for aliens detained under those provisions for six months. *Id*. at *3-4. It further requires bond hearings to satisfy certain procedural requirements, including that the government prove that a detainee is a flight risk or a danger to the community by clear and convincing evidence to justify the denial of bond. *Id*. It also imposes a number of affirmative obligations on the government, including requiring the automatic scheduling of bond hearings prior to 195 days of

detention and reporting and disclosure requirements. *Id*. The district court based the decision on its own preliminary injunction order and this Court's statutory decision in *Rodriguez II*, without any discussion of the constitutional claims. *Id*. at *2-4.

This Court affirmed in part and reversed in part the permanent injunction order in *Rodriguez III*, 804 F. 3d at 1090. In affirming, the Court again relied on statutory interpretation, via the canon of constitutional avoidance, to extend the *Rodriguez II* holding to detention under section 1226(a). *Id*. at 1084-85. The Court reversed the district court and ordered a number of additional procedural requirements, including requiring bond hearings every six months and requiring immigration judges to consider additional factors at bond hearings. *Id*. at 1087-189. The Court also reversed as to the section 1231(a) subclass based on its conclusion that the subclass "does not exist" because aliens with a stay of removal are not detained under section 1231. *Id*. at 1086.

The government successfully petitioned for review of the *Rodriguez III* decision to the Supreme Court. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). Although Petitioners-Appellants did not cross-petition on this Court's section 1231 holding, the parties agreed not to modify the injunction while the case was before the Supreme Court. As a result, the government is continuing to provide bond hearings to aliens in all four subclasses in the Central District of California.

On February 27, 2018, the Supreme Court reversed this Court's judgment and conclusively rejected this Court's interpretation of 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c). *Jennings*, 138 S. Ct. 836. The Supreme Court declined to consider the constitutional challenges to the statutes "in the first instance" because this Court "had no occasion to consider [the] constitutional arguments on their merits." *Jennings*, 138 S. Ct. at 851. On remand, the Supreme Court directed this Court—prior to addressing any constitutional claims—to "decide whether it continues to have jurisdiction despite 8 U.S.C. § 1252(f)(1)" and "reexamine whether respondents can continue litigating their claims as a class" in light Federal Rule of Civil Procedure 23(b)(2), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011). *Id*. at 851-52. The Supreme Court issued its judgment in the case on April 2, 2018.

The government now seeks to vacate the permanent injunction. On April 6, 2018, counsel for the government attempted to contact class counsel by phone and later by email regarding their position on this motion. Class counsel indicated that they will "likely oppose" the motion and requested to meet and confer on the motion and a briefing schedule next week. The government will confer with class counsel regarding a briefing schedule and, if agreement on a schedule is reached, seek entry of a schedule by the Court.

ARGUMENT

I. This Court should vacate the injunction because *Jennings* eliminates its legal basis.

The Supreme Court conclusively resolved the class's statutory claims in the government's favor and eliminated any basis for maintaining the injunction. The Supreme Court reversed this Court's ruling that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) require bond hearings after six months of immigration detention as a matter of statutory construction. *Jennings*, 138 S. Ct. at 836. With respect to section 1225(b), the Supreme Court held that, subject to release on parole, sections 1225(b)(1) and (b)(2) unambiguously require detention of certain applicants for admission until the end of applicable asylum or removal proceedings, without a bond hearing. *Id*. at 837-46. With respect to section 1226(c), the Supreme Court rejected this Court's suggestion that the statute is silent as to the length of detention, and held that section 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." *Id*. at 846-47. Finally, with respect section 1226(a), the Supreme Court rejected this Court's imposition of procedural requirements beyond the initial bond hearing provided for in existing regulations. The Court stated that nothing in the statutory text of section 1226(a) required the Government to bear the burden in bond hearings

or required that certain factors be considered by an immigration judge. *Id*. at 847-48. As a result, there is no statutory basis for the district court's injunction.

The *Jennings* decision forecloses the continued viability of the district court's injunction. Nothing in the district court's six-page order can be fairly read as offering any additional grounds for granting class-wide relief beyond the statutory reasoning set forth in *Rodriguez II* and affirmed in *Rodriguez III*. Order at *3. Because the Supreme Court has reversed those decisions, the district court's injunction must be vacated.

II. Petitioners-Appellants' alternative constitutional arguments provide no basis for leaving the injunction in place.

To the extent the class here would argue that the constitution itself mandates exactly the same rigid six-month limitation and the additional procedural innovations in the district court's injunction, across all of myriad applications of the different statutes at issue—which it clearly does not—that argument would not justify leaving the district court's permanent injunction in place. Those constitutional claims have never been independently adjudicated in this case, and even if they had been, the district court would lack jurisdiction to enjoin operation of 8 U.S.C. § 1225, 1226, and 1231 as a remedy. The text of 8 U.S.C. § 1252(f) makes this plain: "Regardless of the nature of the action or claim . . . no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of

such provisions to an individual alien against whom proceedings . . . have been initiated." The Supreme Court has described the provision as "nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting class-wide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999).

In *Rodriguez I*, this Court addressed section 1252(f)(1) in reversing the district court's decision denying class certification. This Court concluded that "Section 1252(f) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes." 591 F.3d at 1120. The Court held that section 1252(f)(1) did not bar class certification because the class "here does not seek to enjoin the operation of the immigration detention statutes but to enjoin conduct it asserts is not authorized by the statutes." *Id*. The Court characterized the class's argument that "the immigration statutes . . . must be enjoined as unconstitutional" as an alternative argument "that may never be reached" and declined to apply section 1252(f)(1). *Id*.

Now that the Supreme Court has disposed of the statutory claims, the Court's reasoning in *Rodriguez I* "does not seem to apply," *Jennings*, 138 S. Ct. at 852, and the injunction, as a constitutional remedy, plainly exceeds the district court's jurisdiction as set out in section 1252(f)(1). The district court's order imposes

affirmative obligations on the government that are undeniably injunctive in nature. *Rodriguez I*, 591 F.3d at 1120 ("Unlike injunctions, declaratory judgments do not impose affirmative obligations that are backed by a contempt sanction.") (citing *Steffel v. Thompson*, 415 U.S. 452, 471 (1974)). The order is titled "Order and Permanent Injunction," and it "permanently enjoins" "all agents, employees, [and] assigns" of the Secretary of Homeland Security and the Department of Justice to provide each class member with a bond hearing "by the class member's 195th day of detention." Order at *1, *3. It requires the bond hearing "recorded or transcribed so that a written record can be made available" and dictates timing and service requirements for bond hearing notices. *Id*. It includes extensive reporting requirements and obligates the government to "notify class counsel" if it "determine[s] that an individual is not a classmember" and explain the "the reasons the [government] believe[s] the individual is not a class member." *Id*. at *3-4. These injunctive requirements far exceed the "milder" declaratory relief this Court has indicated are available consistent with section 1252(f)(1). *Rodriguez I,* 591 F.3d at 1119; *see also Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011). Section 1252(f)(1) thus eliminates the district court's authority to rewrite bond procedures by injunction. Accordingly, the injunction must be vacated.

CONCLUSION

The Court should vacate the injunction. Consistent with the Supreme Court's remand instructions, the Court should thereafter enter a briefing schedule to allow the parties to address whether Petitioners-Appellees "can continue litigating their claims as a class" in light of Federal Rule of Civil Procedure 23(b)(2) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011), *Jennings*, 138 S. Ct. at 851-52, including the question of whether the Court should remand to the district court to address those issues in the first instance.

Dated: April 6, 2018

Respectfully submitted,

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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 April 6, 2018. 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/ Sarah Stevens Wilson
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