

No. 17-923

IN THE
Supreme Court of the United States

MARK ANTHONY REID,

Petitioner,

—V.—

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

Respondents.

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

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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REPLY BRIEF FOR THE PETITIONERS

In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), this Court decided that the language of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(c), prohibits release of covered individuals on bond during removal proceedings, except under the narrow witness-protection exception. *Id.* at 846-47. As a result of that decision, as a matter of statutory construction, noncitizens can be detained for years without ever receiving a hearing to determine whether there is any need for their detention. However, the Court in *Jennings* left open the separate question of whether such detention comports with the Constitution, instead remanding the case to the Court of Appeals to consider that question in the first instance. *Id.* at 851.

The Court should grant certiorari in the present case because it presents a clean vehicle for the full Court to decide a key constitutional question that the Court left unresolved in *Jennings*—whether Section 1226(c) violates the Due Process Clause. Absent prompt resolution of the constitutional issue following *Jennings*, thousands of persons may be detained even though they would be (and in many cases, have been) found not to pose a flight risk or danger to the community. Those who have the means may file individual cases in federal courts, leading to the risk of duplicative litigation and conflicting decisions.¹ By granting the Petition, the Court would

¹ In light of this Court's decision in *Jennings*, Petitioners withdraw the question of whether the immigration statutes require that individuals otherwise subject to mandatory

have the opportunity to resolve the central constitutional issue it left open in *Jennings*.

Contrary to the Respondents' contention, that constitutional issue has been preserved in the instant case. The issue has also already been fully briefed before the Court this Term in *Jennings*, since the Court specifically requested briefing on the constitutional issue before Justice Kagan's recusal in that case. Respondents do not contest that this is a pressing question of constitutional law that affects the liberty of thousands of people. The Court should grant certiorari in order to resolve that constitutional question now.

I. The constitutionality of prolonged detention without a hearing warrants immediate review

As Petitioners previously noted, Pet. 11, the constitutional issues presented here implicate the liberty of thousands of individuals, all of whom are subject to prolonged incarceration under the INA. Respondents do not contest this fact. Br. in Opp. 6. This Court has repeatedly affirmed that “[f]reedom

detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. This case still presents two questions: (1) whether the Constitution requires that individuals subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months, and (2) whether, at such bond hearings, the individual is entitled to release unless the Government demonstrates by clear and convincing evidence that the individual is a flight risk or a danger to the community. Pet. i.

from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

Jennings decided that as a statutory matter, Section 1226(c) “mandates detention of any alien falling within its scope,” and “detention may end prior to the conclusion of removal proceedings ‘only if the alien is released for witness-protection purposes.” *Jennings*, 138 S. Ct. at 847. As a result, absent a decision on the constitutionality of prolonged detention under the statute, thousands of individuals will be subject to mandatory prolonged incarceration without any hearing to challenge their continued imprisonment. But after requesting briefing on the question, the Court ultimately left the constitutionality of such prolonged detention unresolved. Given the urgent and fundamental interests at stake, the Court should take the opportunity now to resolve the constitutional question.

II. The constitutionality of Section 1226(c) was squarely presented and considered below

Respondents claim that *Jennings* “eliminated any basis for granting certiorari” in the instant case, arguing that the district court’s injunction granting class relief “was predicated on interpreting Section 1226(c) to authorize bond hearings after six months.” Br. in Opp. 6. But certiorari remains proper, as

Petitioners briefed the constitutional issues below,² and the district court’s statutory interpretation was clearly predicated on its understanding of what the Constitution required. *See, e.g.*, Pet. App. 13a (describing interpretation of Section 1226(c) as “constitutionally mandated”); *id.* at 96a (“To comply with the constitution’s due process requirement, § 1226(c) must be read to include a ‘reasonableness’ limit on the length of time an individual can be detained without an individualized bond hearing.”); *id.* at 101a n.7 (“Absent an approach that deals with this issue globally, Defendants will likely continue to apply their incorrect interpretation of the statute in violation of the Fifth Amendment.”). The district court also considered the constitutional issues as applied to Petitioner Mark Reid’s detention. *Id.* at 103a (noting “due process concerns” from the continued detention of Mr. Reid). Thus, in the government’s appeal before the First Circuit, it

² *See* Memorandum in Support of Mark Reid’s Pet. for Writ of Habeas Corpus and for Summary Judgment at 18-21, 25, *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014) (No. 3:13-cv-30125-MAP), ECF No. 2 (asserting freestanding Due Process and Eighth Amendment claims); Pet. for Writ of Habeas Corpus and for Summary Judgment at 18-21, *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014) (No. 3:13-cv-30125-MAP), ECF No. 4 (asserting violations of Fifth Amendment substantive due process, Fifth Amendment procedural due process, and Eighth Amendment excessive bail clause as separate causes of action from statutory claims); Plaintiffs’ Memorandum of Law in Support of Cross-Motion for Summary Judgment at 7-9, *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014) (No. 3:13-cv-30125-MAP), ECF No. 124 (preserving Eighth Amendment claims and arguing that Petitioners’ “prolonged detention by Defendants violates their substantive due process rights” and “procedural due process”).

argued for reversal of “the district court’s finding that Reid’s detention was unconstitutional under the circumstances.” Opening Brief for Appellants/Cross-Appellees at 54, *Reid v. Donelan*, 819 F.3d 486 (2016) (No. 14-1270).³

Similarly, Petitioners briefed the constitutional issues before the Court of Appeals, Brief for Appellee/Cross-Appellant at 20-23, 54-60, *Reid v. Donelan*, 819 F.3d 486 (2016) (No. 14-1270), and that opinion was predicated on the court’s understanding that “[t]he concept of a categorical, mandatory, and indeterminate detention raises severe constitutional concerns.” Pet. App. 30a. Recognizing that “every federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause imposes some form of ‘reasonableness’ limitation upon the duration of detention that can be considered justifiable under that statute,” *ibid.*, the Court of Appeals held that “at a certain point the constitutional imperatives of the Due Process Clause begin to eclipse the claimed justifications for such bridling custodial power.” *Id.* at 47a-48a.

In arguing that *Jennings* obviates the need for review, Respondents ignore the constitutional claim squarely presented here—an issue on which the court of appeals and district court both plainly expressed a view. The lower courts clearly understood the Constitution to bar prolonged detention without a hearing, though they said so in

³ Neither party now seeks review of the district court’s decision granting Mark Reid’s individual habeas petition.

the context of construing a statute to avoid constitutional issues. Thus, far from having “no occasion to consider” the urgent constitutional concerns implicated by prolonged detention, *Jennings*, 138 S. Ct. at 851, the lower courts both reached decisions that were informed by these concerns as preserved by Petitioners. Moreover, there is no need for further consideration of the question in the courts of appeals, given that all of them discussed the constitutional issues involved in their statutory rulings. See Pet. App. 30a, 47a-48a; *Sopo v. United States Attorney General*, 825 F.3d 1199 (11th Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev’d sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003). The *Jennings* decision therefore does not diminish the propriety of certiorari in this case; to the contrary, it points to the need for a vehicle in which the full Court can decide the constitutional issue.⁴

⁴ While this Court has discretion not to decide issues not ruled upon directly by the lower courts, as it did in *Jennings*, it also has discretion to decide such issues where they are properly presented, “particularly in cases coming . . . from the federal courts.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984). Here, as in *Crisp*, there is “no reason to refrain from addressing” the constitutional question, given that it “was plainly raised in petitioners’ complaint, it was acknowledged by both the District Court and the Court of Appeals, the District Court made findings on all factual issues necessary to resolve this question, and the parties have briefed and argued the question.” *Id.* at 698; see also, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (resolving “purely legal question” without remand “notwithstanding that it was not addressed by the

III. This case continues to present an ideal vehicle to decide the constitutionality of prolonged mandatory detention pursuant to 8 U.S.C. 1226(c)

As stated in the Petition, this case also presents a suitable and ready vehicle to decide these pressing questions. Pet. 8-9. Before Justice Kagan’s recusal in *Jennings*, this Court specifically requested and received full briefing and separate argument on the constitutional issues in that case. *See Jennings v. Rodriguez*, No. 15-1204 (Dec. 15, 2016) (order directing the parties to file supplemental briefs); *Jennings v. Rodriguez*, No. 15-1204 (June 26, 2017) (order restoring the case to the calendar). Once Justice Kagan was recused, however, the Court exercised its discretion not to decide the constitutional questions in that case, with only eight Justices participating.

Since *Jennings* will never afford the full Court the opportunity to address the constitutional questions, the Court should grant certiorari here. Because numerous circuits have already expressed a view about what the Due Process Clause requires, further percolation will not advance the Court’s substantive consideration of the merits. This case affords an opportunity to decide the constitutional question promptly, without further delay, thereby avoiding further irreparable harm to noncitizens

Court of Appeals”); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (declining to remand on merits after reversing Court of Appeals’ dismissal for lack of jurisdiction, given that a “pure issue of law” was “appropriate for our immediate resolution”).

unnecessarily and unconstitutionally detained.⁵ For these reasons, this case provides a timely vehicle for the Court to consider these urgent constitutional issues.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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⁵ This case presents a particularly strong vehicle because it is unambiguously a habeas case. Pet. Motion for Representative Habeas Action or Class Certification at 1, *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014) (No. 3:13-cv-30125-MAP), ECF No. 33 (seeking certification of “representative habeas class,” or Rule 23 class in the alternative); *cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 858 (2018) (Thomas, J., concurring) (concluding 8 U.S.C. 1252(b)(9) deprived Court of jurisdiction where respondents “[did] not seek habeas relief”).

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