2016

Section 6: Immigration

Institute of Bill of Rights Law at The College of William & Mary School of Law

VI. Immigration

In This Section:

Jennings v. Rodriguez

15-1204

Ruling Below: *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015)

Rodriguez sought relief on behalf of himself and others detained for more than six months without bond hearing during immigration proceedings. The requested relief constituted individualized bond hearings with burden on government. The district court denied the petition. Rodriguez appealed. The Court of Appeals reversed and remanded. On remand, the district court, entered preliminary injunction. The government appealed. The Court of Appeals affirmed. The District Court granted summary judgment to class and entered permanent injunction. Parties appealed. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.

Question Presented: Whether aliens subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings if detention lasts six months;

Whether aliens who fall under the mandatory detention provisions of Section 1226(c) must be afforded the same;

Whether the government must demonstrate that the alien is a flight risk or a danger to the community in order to deny release on bond;

Whether the length of detention must be weighed in the decision to release on bond;

Whether new bond hearings must be afforded every six months.

Alejandro RODRIGUEZ; Abdirizak Aden Farah; Jose Farias Cornejo; Yussuf Abdikadir; Abel Perez Ruelas, for themselves and on behalf of a class of similarly situated individuals, Petitioners–Appellees/Cross–Appellants,
and
Efren Orozco, Petitioner,
v.
Timothy ROBBINS, Field Office Director, Los Angeles District, Immigration and Customs Enforcement; Jeh Johnson, Secretary, Homeland Security; Loretta E. Lynch, Attorney General; Wesley Lee, Assistant Field Office Director, Immigration and Customs Enforcement; Rodney Penner, Captain, Mira Loma Detention Center; Sandra Hutchens, Sheriff of Orange County; Nguyen, Officer, Officer–in–Charge, Theo Lacy Facility; Davis Nighswonger, Captain, Commander, Theo Lacy Facility; Respondents–Appellants/Cross–Appellees.

United States Court of Appeals, Ninth Circuit

Decided on October 28, 2015

[Excerpt; some citations and footnotes omitted]

WARDLAW, Circuit Judge:

This is the latest decision in our decade-long examination of civil, i.e. non-punitive and merely preventative, detention in the immigration context. As we noted in our prior decision in this case, *Rodriguez v. Robbins*, thousands of immigrants to the United States are locked up at any given time, awaiting the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. In 2014, U.S. Immigration and Customs Enforcement ("ICE") removed 315,943 individuals, many of whom were detained during the removal process. According to the most recently available statistics, ICE detains more than 429,000 individuals over the course of a year, with roughly 33,000 individuals in detention on any given day.

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, Abel Perez Ruelas, and Efren Orozco ("petitioners") represent a certified class of noncitizens who challenge their prolonged detention pursuant to 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings and determinations to justify their continued detention. Their case is now on appeal for the third time. After a three-judge panel of our court reversed the district court's denial of petitioners' motion for class certification, and after our decision affirming the district court's entry of a preliminary injunction, the district court granted summary judgment to the class and entered a permanent injunction.

Under the permanent injunction, the government must provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge ("IJ"). At that hearing, the government must prove by clear and convincing evidence that the detainee is a flight risk or a danger to the community to justify the denial of bond. The government appeals from that judgment. We affirm in part and reverse in part.

I. Background

On May 16, 2007, Alejandro Garcia commenced this case by filing a petition for a writ of habeas corpus in the Central District of California. Garcia's case was consolidated with a similar case filed by Alejandro Rodriguez, and the petitioners moved for class certification. The motion was denied on March 21, 2008.

A three-judge panel of our court reversed the district court's order denying class certification. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typical of the class's because "the determination of whether [he] is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention"; and Rodriguez, through his counsel, adequately represented the class. The panel also noted that "any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class" could be addressed through "the formation of subclasses."

The government petitioned our court for panel rehearing or rehearing en banc. In response, the panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") does not bar certification of the class and, with that amendment, unanimously voted to deny the government's petition. The full court was advised of the suggestion for rehearing en banc, and no judge requested a vote on whether to rehear the matter. The government did not file a petition for certiorari in the United States Supreme Court.

On remand, the district court certified a class defined as:

> "…all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified."

The district court also approved the proposed subclasses, which correspond to the four statutes under which the class members are detained—8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). The class does not include suspected terrorists, who are detained pursuant to 8 U.S.C. § 1537. Additionally, because the class is defined as non-citizens who are detained "pending completion of removal proceedings," it excludes any detainee subject to a final order of removal.

On September 13, 2012, the district court entered a preliminary injunction that applied to class members detained pursuant to two of these four "general immigration detention statutes"— §§ 1225(b) and 1226(c). Under the preliminary injunction, the government was required to "provide each [detainee] with a bond hearing" before an IJ and to "release each Subclass member on reasonable conditions of supervision ... unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."

The government appealed, and on April 16, 2013, we affirmed. We applied the Court's preliminary injunction standard set forth in *Winter v. Natural Resources Defense Council, Inc.*, which requires the petitioner to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

Evaluating petitioners' likelihood of success on the merits, we began with the premise that "[f]reedom 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." "Thus, the Supreme Court has held that the indefinite detention of a once-admitted alien 'would raise serious constitutional concerns.' "

Addressing those concerns, we recognized that we were not writing on a clean slate: "[I]n a series of decisions since 2001, 'the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.' " First, in *Zadvydas v. Davis*, the Supreme Court resolved statutory and due process challenges

to indefinite detention under 8 U.S.C. § 1231(a)(6), which governs detention beyond the ninety-day removal period, where removal was not practicable—for one petitioner because he was stateless, and for another because his home country had no repatriation treaty with the United States.

Drawing on civil commitment jurisprudence, the Court reasoned:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." To avoid those "serious constitutional concerns," the Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. Noting that the "proceedings at issue here are civil, not criminal," the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation," and recognized six months as a "presumptively reasonable period of detention."

Although in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, disagreed with the majority's application of the canon of constitutional avoidance and argued that the holding would improperly interfere with international repatriation negotiations, Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." Justice Kennedy further noted that although the government may detain non-citizens "when necessary to avoid the risk of flight or danger to the community," due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under *1068 other standards, they no longer present special risks or danger if put at large."

Second, in *Demore v. Kim*, the Court addressed a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. After discussing Congress's reasons for establishing mandatory detention, namely, high rates of crime and flight by removable non-citizens, the Court affirmed its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." Distinguishing *Zadvydas*, the Court in *Demore* stressed that detention under § 1226(c) has "a definite termination point" and typically "lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." Although the Court therefore upheld mandatory detention under § 1226(c), Justice Kennedy's concurring opinion, which created the majority, reasoned that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."

After *Zadvydas* and *Demore*, our court decided several cases that provided further guidance for our analysis in *Rodriguez II*. In

Tijani v. Willis, we held that the constitutionality of detaining a lawful permanent resident under § 1226(c) for over 32 months was "doubtful." "To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens" and held that "[t]wo years and eight months of process is not expeditious." We therefore remanded Tijani's habeas petition to the district court with directions to grant the writ unless the government provided a bond hearing before an IJ within sixty days.

We next considered civil detention in the immigration context in *Casas–Castrillon v. Department of Homeland Security* (*Casas*). There, a lawful permanent resident who had been detained for nearly seven years under § 1226(c) and then § 1226(a) sought habeas relief while his petition for review of his removal order was pending before our court. Applying *Demore*, we reasoned that § 1226(c) "authorize [s] mandatory detention only for the 'limited period of [the non-citizen's] removal proceedings,' which the Court estimated 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the [Board of Immigration Appeals ("BIA")]." We therefore concluded that § 1226(c)'s mandatory detention provision applies only during administrative removal proceedings—i.e. until the BIA affirms a removal order. From that point until the circuit court has "rejected [the applicant's] final petition for review or his time to seek such review expires," the government has discretionary authority to detain the non-citizen pursuant to § 1226(a). We noted, however, that "[t]here is a difference between detention being authorized and being necessary as to any particular person." Because the Court's holding in *Demore* turned on the brevity of mandatory detention under § 1226(c), we concluded that "the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention."

Soon after, in *Singh v. Holder*, we clarified the procedural requirements for bond hearings held pursuant to our decision in *Casas* ("Casas hearings"). In light of "the substantial liberty interest at stake," we held that "due process requires a contemporaneous record of Casas hearings," and that the government bears the burden of proving "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." To evaluate whether the government has met its burden, we instructed IJs to consider the factors set forth in *In re Guerra*, in particular "the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses."

Finally, in *Diouf v. Napolitano*, we extended the procedural protections established in *Casas* to individuals detained under § 1231(a)(6). We held that "prolonged detention under § 1231(a)(6), without adequate procedural protections," like prolonged detention under § 1226(a), "would raise 'serious constitutional concerns.' " To address those concerns, we held that "an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community."

In *Diouf II*, we also adopted a definition of "prolonged" detention—detention that "has

lasted six months and is expected to continue more than minimally beyond six months"—for purposes of administering the Casas bond hearing requirement. We reasoned that:

> "When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one."

Applying these precedents to Rodriguez class members detained under § 1226(c), which requires civil detention of non-citizens previously convicted of certain crimes who have already served their state or federal periods of incarceration, we have concluded that "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." To avoid these constitutional concerns, we held that " § 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.' " "[W]hen detention becomes prolonged," i.e., at the six-month mark, " § 1226(c) becomes inapplicable"; the government's authority to detain the non-citizen shifts to § 1226(a), which provides for discretionary detention; and detainees are then entitled to bond hearings.

In so holding, we rejected the government's attempt to distinguish *Casas* on the basis that "*Casas* concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA," whereas this case involves "aliens awaiting the conclusion of their initial administrative proceedings." We found that this argument reflected "a distinction without a difference": " 'Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.' "

We also noted that our conclusion was consistent with the decisions of the two other circuits that have directly addressed this issue. In *Diop v. ICE/Homeland Security*, the Third Circuit, applying the canon of constitutional avoidance, construed § 1226(c) to "authorize [ ] detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community." Applying that holding to the facts of the case, the Third Circuit held that the petitioner's detention, which had lasted nearly three years, "was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause." Although the court declined to adopt a categorical definition of a "reasonable amount of time" to detain a non-citizen without a bond hearing, it read *Demore* as we do—to connect the constitutionality of detention to its length and to authorize detention only for a "limited time."

Likewise, in *Ly v. Hansen*, the Sixth Circuit held that, to avoid a constitutional problem, removable non-citizens may be detained under § 1226(c) only "for a reasonable period of time required to initiate and conclude removal proceedings promptly." Finding that the petitioner's 500–day–long detention was "unreasonable," the Sixth Circuit affirmed the district court's grant of a writ of habeas

corpus. While maintaining that a "bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period," the court recognized that *Demore's* holding "rel[ies] on the fact that Kim, and persons like him, will normally have their proceedings completed within a short period of time and will actually be deported, or will be released."

As to the *Rodriguez* subclass detained under § 1225(b), we found "no basis for distinguishing between" non-citizens detained under that section and under § 1226(c). The cases relied upon by the government for the proposition that arriving aliens are entitled to lesser due process protections—namely, *Shaughnessy v. United States ex rel. Mezei* and *Barrera–Echavarria v. Rison*—were decided under pre-IIRIRA law and, as such, were inapposite. We therefore held that "to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited." As we had with § 1226(c), we explained that "the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the non-citizen would shift to § 1226(a), which is discretionary and which we have already held requires a bond hearing."

After establishing that class members detained under § 1226(c) and § 1225(b) are entitled to bond hearings after six months of detention, we clarified that the procedural requirements set forth in Singh apply to those hearings. These requirements include proceedings before "a neutral IJ" at which "the government bear[s] the burden of proof by clear and convincing evidence," a lower burden of proof than that required to sustain a criminal charge.

Having found that the class was likely to succeed on the merits, we turned to the other preliminary injunction factors. We found that the class members "clearly face irreparable harm in the absence of the preliminary injunction" because "the deprivation of constitutional rights unquestionably constitutes irreparable injury." The preliminary injunction safeguards constitutional rights by ensuring that "individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained." Similarly, we found that the balance of equities favored the class members because "needless prolonged detention" imposes "major hardship," whereas the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." Finally, we held that the preliminary injunction was consistent with the public interest, which is "implicated when a constitutional right has been violated," and "benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions." We therefore affirmed the district court's order.

During the pendency of *Rodriguez II*, the parties conducted discovery, and class counsel adduced extensive evidence detailing the circumstances under which class members are detained. The parties then filed cross-motions for summary judgment, and the petitioners moved for a permanent injunction to extend and expand the preliminary injunction.

On August 6, 2013, after we issued our decision in *Rodriguez II*, the district court granted summary judgment to the class members and entered a permanent injunction.

The permanent injunction applies to class members detained under any of the four civil "general immigration detention statutes"—§§ 1225(b), 1226(a), 1226(c), and 1231(a)—and requires the government to provide each detainee with a bond hearing by his 195th day of detention. Applying our decisions in *Casas*, *Singh*, and *Rodriguez II*, the district court further ordered that bond hearings occur automatically, that detainees receive "comprehendible notice," that the government bear the burden of proving "by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond," and that hearings are recorded. However, the district court declined to order IJs to consider the length of detention or the likelihood of removal during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing.

The government now appeals from the entry of the permanent injunction, arguing that the district court—and we—erred in applying the canon of constitutional avoidance to each of the statutes at issue. Relying on the Supreme Court's decisions in *Zadvydas* and *Demore*, the government argues that none of the subclasses are categorically entitled to bond hearings after six months of detention. Accordingly, the government contends that we should decertify the class and instead permit as-applied challenges to individual instances of prolonged detention, which could occur only through habeas proceedings. Petitioners counter that *Rodriguez II* is the law of the case and law of the circuit, requiring us to affirm the permanent injunction as to the § 1225(b) and § 1226(c) subclasses, and that non-citizens detained pursuant to § 1226(a) and § 1231(a) are entitled to bond hearings for reasons similar to those discussed in *Rodriguez II*. Petitioners cross-appeal the district court's order as to the procedural requirements for bond hearings; they argue that the district court erred in declining to require that IJs consider the likelihood of removal and the total length of detention, and in declining to require that non-citizens detained for twelve or more months receive periodic bond hearings every six months.

II. Nature of Civil Immigration Detention

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.

Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability. Requesting relief from an IJ increases the duration of class members' detention by an average of two months; appealing a claim to the BIA adds, on average, another four months; and appealing a BIA decision to the Ninth Circuit typically leads to an additional eleven months of confinement. Class members who persevere through this lengthy process are often successful: About 71% of class members have sought relief from removal, and roughly one-third of those individuals prevailed. However, many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status.

Class members frequently have strong ties to this country: Many immigrated to the United States as children, obtained legal permanent

resident status, and lived in this country for as long as twenty years before ICE initiated removal proceedings. As a result, hundreds of class members are married to U.S. citizens or lawful permanent residents, and have children who were born in this country. Further, many class members hold steady jobs—including as electricians, auto mechanics, and roofers—to provide for themselves and their families. At home, they are caregivers for young children, aging parents, and sick or disabled relatives. To the extent class members have any criminal record—and many have no criminal history whatsoever—it is often limited to minor controlled substances offenses. Accordingly, when class members do receive bond hearings, they often produce glowing letters of support from relatives, friends, employers, and clergy attesting to their character and contributions to their communities.

Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. Confinement makes it more difficult to retain or meet with legal counsel, and the resources in detention facility law libraries are minimal at best, thereby compounding the challenges of navigating the complexities of immigration law and proceedings. In addition, visitation is restricted and is often no-contact, dramatically disrupting family relationships. While in detention, class members have missed their children's births and their parents' funerals. After losing a vital source of income, class members' spouses have sought government assistance, and their children have dropped out of college.

Lead petitioner Alejandro Rodriguez's story is illustrative. Rodriguez came to the United States as an infant and has lived here continuously since then. Rodriguez is a lawful permanent resident of the United States, and his entire immediate family—including his parents, siblings, and three young children—also resides in the United States as citizens or lawful permanent residents. Before his removal proceedings began, Rodriguez worked as a dental assistant. In 2003, however, Rodriguez was convicted of possession of a controlled substance and sentenced to five years of probation and no jail time. He had one previous conviction, for "joyriding."

In 2004, ICE commenced removal proceedings and subjected Rodriguez to civil detention. An IJ determined that Rodriguez's prior conviction for "joyriding," i.e. driving a stolen vehicle, qualified as an "aggravated felony" that rendered him ineligible for relief in the form of cancellation of removal, and therefore ordered him removed. Rodriguez appealed the IJ's decision to the BIA, which affirmed, and then to the Ninth Circuit. In July 2005, a three-judge panel of our court granted the government's motion to hold Rodriguez's case in abeyance until the Supreme Court decided a related case, *Gonzales v. Penuliar*, which issued eighteen months later, in January 2007. In *Penuliar*, the Supreme Court vacated our court's opinion and remanded for further consideration in light of *Gonzales v. Duenas–Alvarez*, which held that violating a California statute prohibiting taking a vehicle without the owner's consent qualifies as a "theft offense." Between July 2005 and January 2007, while Rodriguez's case was in abeyance, ICE conducted four custody reviews on Rodriguez and repeatedly determined that Rodriguez was required to remain in detention until our court issued a decision on the merits of his claim. In mid–2007, about a month after Rodriguez had moved for class certification, however, ICE

released him. At that point, Rodriguez had been detained for 1,189 days, roughly three years and three months. In April 2008, in the related case on remand from the Supreme Court, our court held that driving a stolen vehicle did not qualify as an aggravated felony. On motion of the parties, we then remanded Rodriguez's petition to the BIA, which granted his application for cancellation of removal, vindicating his right to lawfully remain in the United States.

III. Standard of Review

> "We review a grant of summary judgment de novo." "A permanent injunction 'involves factual, legal, and discretionary components,' so we 'review a decision to grant such relief under several different standards.'" "We review legal conclusions ... de novo, factual findings for clear error, and the scope of the injunction for abuse of discretion."

IV. Discussion

In resolving whether the district court erred in entering the permanent injunction, we consider, first, petitioners' entitlement to bond hearings and, second, the procedural requirements for such hearings. Based on our precedents, we hold that the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk. However, we also conclude that individuals detained under § 1231(a) are not members of the certified class. We affirm the district court's order insofar as it requires automatic bond hearings and requires IJs to consider alternatives to detention because we presume, like the district court, that IJs are already doing so when determining whether to release a non-citizen on bond.5 Because the same constitutional concerns arise when detention approaches another prolonged period, we hold that IJs must provide bond hearings periodically at six month intervals for class members detained for more than twelve months. However, we reject the class's suggestion that we mandate additional procedural requirements.

A. Civil Detention

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Civil detention violates the Due Process Clause except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection. And even in those extreme circumstances, the Court's decisions have been widely criticized. In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.

For example, in numerous cases addressing the civil detention of mentally ill persons, the Court has consistently recognized that such commitment "constitutes a significant deprivation of liberty," and so the state "must have a constitutionally adequate purpose for the confinement." Further, the "nature and duration of commitment" must "bear some

reasonable relation to the purpose for which the individual is committed."

Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future." At all times, the individual's "commitment must be justified by progress toward that goal." Likewise, the state may detain a criminal defendant following an acquittal by reason of insanity in order to "treat the individual's mental illness and protect him and society from his potential dangerousness." However, the detainee "is entitled to release when he has recovered his sanity or is no longer dangerous." Further, although the state may detain sexually dangerous individuals even after they have completed their criminal sentences, such confinement must "take[ ] place pursuant to proper procedures and evidentiary standards." To "justify indefinite involuntary commitment," the state must prove both "dangerousness" and "some additional factor, such as a 'mental illness' or 'mental abnormality.' "

Similarly, the Court has held that pretrial detention of individuals charged with "the most serious of crimes" is constitutional only because, under the Bail Reform Act, an "arrestee is entitled to a prompt detention hearing" to determine whether his confinement is necessary to prevent danger to the community. Further, "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings as to the individual's ability to comply with the court order. If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due Process Clause.

Early cases upholding immigration detention policies were a product of their time. Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive—Congress may not, for example, impose sentences of "imprisonment at hard labor" on non-citizens awaiting deportation—and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the "detention or temporary confinement" of Chinese-born non-citizens "pending the inquiry into their true character, and while arrangements were being made for their deportation." The Court also upheld executive detention of enemy aliens after the cessation of active hostilities because deportation is "hardly practicable" in the midst of war, and enemy aliens' "potency for mischief" continues "even when the guns are silent." Similarly, the Court approved detention of communists to limit their "opportunities to hurt the United States during the pendency of deportation proceedings." The Court recognized, however, that "purpose to injure could not be imputed generally to all aliens subject to deportation." Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review.

More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that "[a] statute permitting indefinite

detention of an alien would raise a serious constitutional problem." Although the state has legitimate interests in "ensuring the appearance of aliens at future immigration proceedings" and "protecting the community," post-removal period detention does not uniformly " 'bear[ ] [a] reasonable relation to the purpose for which the individual [was] committed.' " To avoid constitutional concerns, the Court construed 8 U.S.C. § 1231(a)(6), the statute governing post—removal period detention, to "limit[ ] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." Detention beyond that point requires "strong procedural protections" and a finding that the non-citizen is "specially dangerous."

Soon after *Zadvydas*, the Court rejected a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. While affirming its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," the Court emphasized that detention under § 1226(c) was constitutionally permissible because it has "a definite termination point" and typically "lasts for less than ... 90 days."

Since *Zadvydas* and *Demore*, our court has "grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." As we recognized in *Casas*, "prolonged detention without adequate procedural protections would raise serious constitutional concerns." We have therefore held that non-citizens detained pursuant to § 1226(a) and § 1231(a)(6) are entitled to bond hearings before an IJ when detention becomes prolonged.

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction "between detention being authorized and being necessary as to any particular person." Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community." And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes "prolonged" at the six-month mark. In *Zadvydas*, the Supreme Court recognized six months as a "presumptively reasonable period of detention." By way of background, the Court noted that in 1996, Congress had "shorten[ed] the removal period from six months to 90 days." The Court then explained:

While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. Consequently, for the sake of uniform administration in the federal courts, we recognize that period.

Following *Zadvydas*, we have defined detention as "prolonged" when "it has lasted six months and is expected to continue more than minimally beyond six months." At that point, we have explained, "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial."

B. Entitlement to a Bond Hearing

With this well-established precedent of the Supreme Court and our Court in mind, we review the district court's grant of summary judgment and entry of a permanent injunction. We consider, in turn, whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months.

1. The § 1226(c) Subclass

Section 1226(c) requires that the Attorney General detain any non-citizen who is inadmissible or deportable because of his criminal history upon that person's release from imprisonment, pending proceedings to remove him from the United States. Detention under § 1226(c) is mandatory. Individuals detained under that section are not eligible for release on bond or parole; they may be released only if the Attorney General deems it "necessary" for witness protection purposes, id. § 1226(c)(2).

An individual detained under § 1226(c) may ask an IJ to reconsider whether the mandatory detention provision applies to him, but such review is limited in scope and addresses only whether the individual is properly included in a category of non-citizens subject to mandatory detention based on his criminal history. At a "Joseph hearing," a detainee "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." "A determination in favor of an alien" at a Joseph hearing "does not lead to automatic release," because the government retains discretionary authority to detain the individual under § 1226(a). Instead, such a determination allows the IJ to consider granting bond under the § 1226(a) standards, namely, whether the detainee would pose a danger or flight risk if released.

As a result of § 1226(c)'s mandatory language and the limited review available through a Joseph hearing, individuals are often detained for years without adequate process. Members of the § 1226(c) subclass also tend to be detained for longer periods than other class members: The longest-detained class member was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days. These lengthy detention times bear no relationship to the seriousness of class members' criminal history or the lengths of their previously served criminal sentences. In several instances identified by class counsel, a class member was sentenced to one to three months in prison for a minor controlled substances offense, then endured one or two years in immigration detention. Nor do these detention durations bear any relation to the merits of the subclass members' claims: Of the § 1226(c) subclass members who apply for relief from removal, roughly 40% are granted such relief, a rate even higher than that of the overall class.

In *Rodriguez II*, we held that "the prolonged detention of an alien [under § 1226(c)] without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." To avoid these "constitutional concerns, § 1226(c)'s

mandatory language must be construed 'to contain an implicit reasonable time limitation.' " Accordingly, at the six-month mark, "when detention becomes prolonged, § 1226(c) becomes inapplicable," and "the Attorney General's detention authority rests with § 1226(a)." Under Casas, those detainees are then entitled to a bond hearing.

Contrary to the government's argument, this holding is consistent with the text of § 1226(c), which requires that the government detain certain non-citizens but does not mandate such detention for any particular length of time. Our holding is also consistent with the Supreme Court's decision in *Demore*, which turned on the brevity of the detention at issue.

Since *Rodriguez II*, no intervening changes in the law have affected our conclusions. Neither the Supreme Court nor our Circuit has had occasion to reexamine these issues, and the Third and Sixth Circuits have not changed the positions they adopted in *Diop* and *Ly*, respectively.

Moreover, district courts have relied on *Rodriguez II* in resolving numerous habeas petitions filed by immigration detainees.

Thus, *Rodriguez II* is law of the case and law of the circuit. As we recently explained, the "law of the case doctrine" provides that "a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." Likewise, pursuant to the "'law of the circuit' rule," "a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.' "

The "'general rule' is that our decisions 'at the preliminary injunction phase do not constitute the law of the case.' " Because preliminary injunction decisions are often "made hastily and on less than a full record," they "may provide little guidance as to the appropriate disposition on the merits." However, "there is an exception to the general rule for 'conclusions on pure issues of law.' "

The question resolved in *Rodriguez II*—whether non-citizens subject to prolonged detention under § 1226(c) are entitled to bond hearings—is a pure question of law. We interpreted the statute by applying the canon of constitutional avoidance, and were bound to do so by our prior precedent. The decision was not made "hastily"; it provided a "fully considered appellate ruling" on the legal issues.

2. The § 1225(b) Subclass

Section 1225(b) applies to "applicants for admission" who are stopped at the border or a port of entry, or who are "present in the United States" but "ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." As to all other applicants for admission, the statute provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings.

Under DHS regulations, non-citizens detained pursuant to § 1225(b) are generally not eligible for release on bond. If there are "urgent humanitarian reasons or significant public benefit[s]" at stake, however, the Attorney General has discretion to temporarily parole such an individual into the United States, provided that the individual presents neither a danger nor a risk of flight.

Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts. This lack of review has proven especially problematic when immigration officers have denied parole based on blatant errors: In two separate cases identified by the petitioners, for example, officers apparently denied parole because they had confused Ethiopia with Somalia. And in a third case, an officer denied parole because he had mixed up two detainees' files. As with § 1226(c), the government often cites § 1225(b)'s mandatory language to justify indefinite civil detention without an individualized determination as to whether the detainee would pose a danger or flight risk if released. Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each. These individuals apply for and receive relief from removal at very high rates: 94% apply, and of those who apply, 64% are granted relief. In illustrative cases identified by the petitioners, non-citizens fled to the United States after surviving kidnapping, torture, and murder of their family members in their home countries. Upon arrival, these individuals were detained under § 1225(b), and they remained in detention until the government granted their asylum applications hundreds of days later.

In *Rodriguez II*, we extended Casas and held that to avoid serious constitutional concerns, mandatory detention under § 1225(b), like mandatory detention under § 1226(c), must be construed as implicitly time-limited. Accordingly, "the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien shifts to § 1226(a), which is discretionary and which we have already held requires a bond hearing."

In so holding, we recognized that many members of the § 1225(b) subclass are subject to the "entry fiction" doctrine, under which non-citizens seeking admission to the United States "may physically be allowed within its borders pending a determination of admissibility," but "are legally considered to be detained at the border and hence as never having effected entry into this country." Such non-citizens therefore "enjoy very limited protections under the United States constitution." However, even if the majority of prolonged detentions under § 1225(b) are constitutionally permissible, "the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance." Section 1225(b) applies to several categories of lawful permanent residents who are not subject to the entry fiction doctrine but may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C). Because those persons are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns. We therefore construed the statutory scheme to require a bond hearing after six months of detention under § 1225(b).

The government now argues that "[d]espite years of discovery, petitioners have not identified any member of the Section 1225(b) subclass who is a [lawful permanent resident]." Petitioners represent that they have found lawful permanent residents who have been detained for more than six months under § 1225(b), although their submissions do not identify any specific individuals who fit that description. The question, however, is whether "one possible application of [the] statute raises constitutional concerns." Because the government concedes that detention of lawful permanent residents under § 1225(b) is possible under § 1101(a)(13)(C), "the statute as a whole

should be construed through the prism of constitutional avoidance."

The government also argues that lawful permanent residents treated as seeking admission are entitled to lesser due process protections than other lawful permanent residents. But the government has not provided any authority to support that proposition: The cases cited in the government's brief address statutory and regulatory distinctions between lawful permanent residents treated as applicants for admission and other lawful permanent residents; they do not reflect any constitutional distinction between those groups.

Finally, the government argues that, instead of requiring bond hearings, we could avoid constitutional concerns by interpreting § 1225(b) not to apply to lawful permanent residents. This argument relies on an implausible construction of the statutes at issue. Section 1225(b) applies to "applicants for admission," and § 1101 defines six categories of lawful permanent residents as "seeking an admission into the United States for purposes of the immigration laws."

The Supreme Court's decision in *Kwong Hai Chew v. Colding* is not to the contrary. Chew involved a pre-IIRIRA immigration regulation that applied to "excludable" non-citizens. Because the regulations were silent as to whether that category included lawful permanent residents returning from voyages abroad, the Court distinguished between the "exclusion" of newly arriving non-citizens and the "expulsion" of lawful permanent residents, thereby holding that the regulation did not authorize the Attorney General to detain arriving lawful permanent residents without hearings. Section 1101(a)(13)(C) forecloses an analogous construction of § 1225(b) because it provides that "applicants for admission" includes several groups of lawful permanent residents. In any event, the government's alternative construction of § 1225(b) was never raised before the district court; the argument is therefore forfeited.

Accordingly, we adhere to *Rodriguez II*'s holding regarding the § 1225(b) subclass as law of the case and law of the circuit. The government's attempts to re-litigate *Rodriguez II* are unavailing.

3. The § 1226(a) Subclass

Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The statute expressly authorizes release on "bond of at least $1,500" or "conditional parole." Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. At these hearings, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." "After an initial bond redetermination," a request for another review "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The government has taken the position that additional time spent in detention is not a "changed circumstance" that entitles a detainee to a new bond hearing.

Although § 1226(a) provides for discretionary, rather than mandatory, detention and establishes a mechanism for detainees to seek release on bond, non-citizens often face prolonged detention under that section. In an extreme case identified by the petitioners, a non-citizen with no criminal record entered the United States on a tourist visa and affirmatively applied for asylum,

withholding of removal, and relief under the Convention Against Torture shortly after that visa expired. ICE detained him throughout the ensuing proceedings before the IJ, the BIA, and the Ninth Circuit. At the time petitioners generated their report, he had been detained for 1,234 days with no definite end in sight.

The district court's decision regarding the § 1226(a) subclass was squarely controlled by our precedents. In *Casas*, we held that a non-citizen subjected to prolonged detention under § 1226(a) is entitled to a hearing to establish whether continued detention is necessary because he would pose a danger to the community or a flight risk upon release. Since deciding Casas, we have repeatedly affirmed its holding.

The government does not contest that *Casas* is the binding law of this circuit or that individuals detained under § 1226(a) are entitled to bond hearings. Instead, the government argues that § 1226(a) affords detainees the right to request bond hearings, so there is no basis for requiring the government to automatically provide bond hearings after six months of detention. This argument is foreclosed by *Casas*, which held that "§ 1226(c) must be construed as requiring the Attorney General to provide the alien with [a bond] hearing." The record evinces the importance of *Casas*'s holding on this point: Detainees, who typically have no choice but to proceed pro se, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate. As a result, many class members are not aware of their right to a bond hearing and are poorly equipped to request one. Accordingly, we conclude that class members are entitled to automatic bond hearings after six months of detention. We address the other procedural requirements for these hearings in Section IV.B, infra.

4. The § 1231(a) Subclass

Section 1231(a) governs detention of non-citizens who have been "ordered removed." 8 U.S.C. § 1231(a). The statute provides for mandatory detention during a ninety-day removal period. Id. § 1231(a)(2). Under the statute:

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

The removal period may be extended beyond ninety days if a detainee "fails or refuses" to cooperate in his removal from the United States.

"If the alien does not leave or is not removed within the removal period," he "shall be subject to supervision," but detention is no longer mandatory. Rather, the Attorney General has discretion to detain certain classes of non-citizens and to impose conditions of release on others. Before releasing a detainee, the government must conclude that removal is "not practicable or not in the public interest," that the detainee is "non-violent" and "not likely to pose a threat to the community following release," and that the detainee "does not pose a significant flight risk" and is "not likely to violate the conditions of release."

Here, the class is defined, in relevant part, as non-citizens who are detained "pending completion of removal proceedings, including judicial review." The class therefore by definition excludes any detainee subject to a final order of removal.

Petitioners describe the § 1231(a) subclass as individuals detained under that section who have received a stay of removal from the BIA or a court. However, if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet "administratively final." The non-citizen has not been "ordered removed," and the removal period has not begun, so § 1231(a) is inapplicable. Similarly, as long as a non-citizen's removal order is stayed by a court pending judicial review, that non-citizen is not subject to "the court's final order." In such circumstances, § 1231(a) is, again, inapplicable.

Simply put, the § 1231(a) subclass does not exist. The district court's grant of summary judgment and permanent injunction are therefore reversed to the extent they pertain to individuals detained under § 1231(a).

C. Procedural Requirements

In addition to challenging the class members' entitlement to automatic bond hearings after six months of detention, the government objects to the district court's order regarding the burden and standard of proof at such hearings. The government also appeals the district court's ruling that IJs must consider alternatives to detention. Petitioners cross-appeal the district court's rulings that IJs are not required to consider the ultimate likelihood of removal, assess the total length of detention, or conduct periodic hearings at six-month intervals. We address each issue in turn.

1. Burden and Standard of Proof

The government argues that the district court erred in requiring the government to justify a non-citizen's detention by clear and convincing evidence, an intermediate burden of proof that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt. As we noted in *Rodriguez II*, however, we are bound by our precedent in *Singh*, which held that "the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing."

In *Singh*, we explained that the "Supreme Court has repeatedly reaffirmed the principle that 'due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake ... are both particularly important and more substantial than mere loss of money.' " In the civil commitment context, for example, the Supreme Court has recognized "the state's interest in committing the emotionally disturbed," but has held that "the individual's interest in not being involuntarily confined indefinitely ... is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Drawing on this jurisprudence, *Singh* concluded that "a clear and convincing evidence standard of proof provides the appropriate level of procedural protection" in light of "the substantial liberty interest at stake."

The government now contends that *Singh* was wrongly decided. However, it is well established that only a full court, sitting en banc, may overrule a three-judge panel decision. Right or wrong, we are bound to follow Singh unless intervening Supreme Court authority is to the contrary.

2. Restrictions Short of Detention

The government also argues that the district court erred in "determin [ing] that IJs are required to consider the use of alternatives to detention in making bond determinations." As the district court's order states, however, IJs "should already be considering restrictions short of incarceration." Indeed, *Rodriguez II* affirmed a preliminary injunction that directed IJs to "release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government" satisfied its burden of justifying continued detention.

The government's objections to this requirement are unpersuasive. First, the government relies on *Demore* for the proposition that the government is not required "to employ the least burdensome means" of securing immigration detainees. But *Demore* applies only to "brief period[s]" of immigration detention. "When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required." Further, the injunction does not require that IJs apply the least restrictive means of supervision; it merely directs them to "consider" restrictions short of detention. The IJ ultimately must decide whether any restrictions short of detention would further the government's interest in continued detention.

Second, the government argues that IJs are not empowered to impose conditions of release. However, federal regulations authorize IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS. Accordingly, if DHS detains a non-citizen, an IJ is already empowered to "ameliorat[e] the conditions" by imposing a less restrictive means of supervision than detention.

Finally, the government argues that IJs lack the resources to engage in continuous monitoring of released individuals. However, the government fails to cite any law or evidence indicating that IJs, rather than DHS or ICE agents, would be responsible for implementing the conditions of release. Moreover, the record indicates that Congress authorized and funded an ICE alternatives-to-detention program in 2002, and DHS has operated such a program, called the Intensive Supervision and Appearance Program, since 2004. It is abundantly clear that IJs can and do17 consider conditions of release on bond when determining whether the government's interests can be served by detention only, and we conclude that DHS will administer any such conditions, regardless of whether they are imposed by DHS in the first instance or by an IJ upon later review.

3. Length of Detention and Likelihood of Removal

In their cross-appeal, petitioners argue that the district court erred in failing to require IJs to consider the length of a non-citizen's past and likely future detention and, relatedly, the likelihood of eventual removal from the United States. In our prior decisions, we have not directly addressed whether due process requires consideration of the length of future detention at bond hearings. We have noted, however, that "the due process analysis changes as 'the period of ... confinement grows,' " and that longer detention requires more robust procedural protections. Accordingly, a non-citizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that "detention incidental to

removal must bear a reasonable relation to its purpose." At some point, the length of detention could "become[ ] so egregious that it can no longer be said to be 'reasonably related' to an alien's removal." An IJ therefore must consider the length of time for which a non-citizen has already been detained.

As to the likely duration of future detention and the likelihood of eventual removal, however, those factors are too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing. We therefore affirm the district court's ruling that consideration of those factors "would require legal and political analyses beyond what would otherwise be considered at a bond hearing" and is therefore not appropriate. We note that *Zadvydas* and its progeny require consideration of the likelihood of removal in particular circumstances,18 but we decline to require such analysis as a threshold inquiry in all bond hearings.

4. Periodic Hearings

The record shows that many class members are detained well beyond the six-month mark: Almost half remain in detention at the twelve-month mark, one in five at eighteen months, and one in ten at twenty-four months. Petitioners argue that due process requires additional bond hearings at six-month intervals for class members who are detained for more than six months after their initial bond hearings. We have not had occasion to address this issue in our previous decisions, and it has been a source of some contention in the district courts.

The district court here did not address this proposed requirement. For the same reasons the IJ must consider the length of past detention, we hold that the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as "the period of ... confinement grows."

V. Conclusion

This decision flows from the Supreme Court's and our own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country. By upholding the district court's order that Immigration Judges must hold bond hearings for certain detained individuals, we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the community or risk of flight—to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty. Immigration Judges, a specialized and experienced group within the Department of Justice, are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk after hearing and weighing the evidence. Accordingly, we affirm all aspects of the district court's permanent injunction, with three exceptions: We reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

"Supreme Court to Review No-Bail Policy for Immigrants Awaiting Hearings"

The Wall Street Journal

Jess Bravin

June 20, 2016

The Supreme Court on Monday agreed to hear a Justice Department appeal of a 2015 lower-court decision requiring bail hearings for immigrants who have been in detention for at least six months awaiting deportation proceedings.

However, the American Civil Liberties Union—which won a lower-court ruling requiring bail hearings after six months—said recently disclosed hearing records show a 2003 high-court precedent the Justice Department cited to bolster its case was partly based on government-supplied information that understated the length of immigration detentions.

It isn't clear whether a difference in the time frame would have affected the outcome of the 2003 case. But critics of the government's immigration policies say that prehearing detention with no chance for bail becomes less reasonable the longer it lasts.

The 2003 case, *Demore v. Kim*, upheld by a 5-4 vote the government's practice of holding without bail immigrants—even those who are permanent U.S. residents with "green cards"—who became eligible for deportation because they committed a crime.

The majority opinion in that case stressed the "very limited" length of no-bail detentions at issue, relying on figures showing the average detention in 2001 was 47 days, while the 15% of immigrants who appeal a deportation order were in detention for about 4½ months. The figures were provided by the Executive Office for Immigration Review, which conducts the hearings.

The ACLU, which worked on the 2003 case, said the actual average detention time in 2001 was 2½ half weeks longer. "The real number is 65 days," said Michael Tan, an ACLU attorney. The group learned of issues with statistics in the earlier case through a Freedom of Information Act request filed during the current litigation.

Mr. Tan said the government reached the lower number by factoring in categories of aliens that an immigration judge was required to deport—cases that are resolved quickly because there are no issues for the hearing to resolve. Mr. Tan also said the government counted as completed cases that weren't over but only transferred—with the immigrant still in detention—to another immigration court.

Justice Department spokesman Patrick Rodenbush said officials were re-examining

the numbers provided in the Kim case, but after an initial review, "we feel our information to the court was appropriate."

A 2012 Justice Department inspector general report criticized the Executive Office for Immigration Review for reporting its performance in ways that are "incomplete and overstate the actual accomplishments" of its courts.

Theodore Olson, who as solicitor general argued the government's position in 2003, said he had little recollection of the case and didn't remember any internal dispute over the length of detentions."Statistics like that would presumably have come from the agency or agencies responsible," Mr. Olson said. It would be "highly unlikely" for lawyers in his office to delve "into such statistics at a granular level."

David Strauss, a law professor at the University of Chicago, said the possibility of error in a solicitor general brief was troubling because unlike other litigants, the office often introduces new information at the Supreme Court level.

"What the (solicitor general) says in its brief is not subject to the usual testing the legal system provides for its claims," Mr. Strauss said. "The court is really counting on them to get it right because there's no other check."

The court will hear the case on bail hearings in its next term, which begins in October.

The *Kim* case marks the second time in recent years that a records disclosure suggested the Justice Department provided incorrect information to the Supreme Court regarding immigration practices.

In 2012, the department told the court it had incorrectly stated in 2009 that it "facilitated" the return to the U.S. of deported aliens who later win their immigration appeals. The government then altered its practice to conform to what it told the court it already had been doing, government and immigration lawyers say.

Last year, the Ninth U.S. Circuit Court of Appeals in San Francisco held the Constitution's due-process guarantee requires a bail hearing where detained immigrants can argue they will show up later for their date in immigration court and pose no risk to public safety. The Obama administration appealed that decision to the Supreme Court.

In deciding the class-action suit, the Ninth Circuit relied on both the *Kim* precedent and an earlier case holding that immigrants detained indefinitely are entitled to a bail hearing after six months. The appeals court observed that affected immigrants "spend, on average, 404 days in immigration detention," which is considered an administrative matter rather than a form of punishment.

“High Court To Decide If Immigrants Entitled To Bond Hearings”

Law360

Allissa Wickham

June 20, 2016

The U.S. Supreme Court on Monday decided to hear a case over whether certain immigrants are entitled to automatic bond hearings following six months of detention, adding another layer to the national debate over immigrant detention.

The high court granted certiorari to *Jennings v. Rodriguez*, in which the Ninth Circuit ruled, among other things, that immigrants are entitled to bond hearings after six months if they were detained under a provision allowing the government to hold immigrants during their deportation proceedings. As is customary, the justices did not explain their reasoning for taking up the case.

In its March 25 petition, the U.S. Department of Justice had strongly urged the justices to review the October ruling from the Ninth Circuit. The agency claimed the appeals court’s “wholesale revision” of the law on the detention of immigrants during deportation proceedings “oversteps the proper judicial role.”

The government also argued that the court’s decision gets in the way of the Department of Homeland Security’s ability to control U.S. borders.

But Alejandro Rodriguez, a green card holder representing a class of noncitizens challenging their detention, had asked the justices not to hear the appeal.

“The government’s contention that certiorari is warranted to preserve its ability to control the borders and reduce the risk of terrorism is hyperbolic and unsupported by anything in the decision below or the voluminous record compiled in the district court,” Rodriguez had argued.

If the high court were to affirm the Ninth Circuit, the impact of such a ruling could be significant, according to Denise Gilman, the director of the immigration clinic at the University of Texas School of Law. Such a decision would mean "whole swaths of the country" would be in a situation where people held under mandatory detention provisions would have a right to detention review, she previously told Law360.

However, if the justices upheld the Ninth Circuit, the already overburdened immigration courts across the country could find themselves overwhelmed with having to set new hearings, according to Holly Cooper, the associate director of the immigration law clinic at University of California Davis School of Law, who submitted an amicus brief in the *Rodriguez* appeal.

"It would be enormous if every circuit adopted this ruling," Cooper said, noting that "immigration courts would probably almost buckle with the overwhelming need to set new hearings."

The issue of immigrant detention has also popped up in other courts, such as the Second Circuit. The appeals court held in October that the government cannot indefinitely detain immigrants awaiting deportation proceedings following criminal offenses, saying they must be given a bail hearing within six months of being taken into custody.

And in another case, the federal government is asking the Ninth Circuit to overturn a ruling that found the Obama administration's detention of immigrant families violated a 1997 agreement that set national standards for dealing with undocumented children.

The federal petitioners are represented by Solicitor General Donald B. Verrilli Jr.

The respondents have been represented in the case by Alan Thevanesan Arulanantham of the ACU oundation of Southern California, Sean Ashley Commons of Sidley Austin LLP and others.

The case is *David Jennings v. Alejandro Rodriguez*, case number 15-1204, in the U.S. Supreme Court.

“Courts Say Detained Non-Citizens Have The Right To Bond Hearings”

NPR

Richard Gonzales

October 29, 2015

At the same time that immigration is a hot-button issue on the presidential campaign trail, in the courts, immigration advocates are chipping away at the government's authority to detain non-citizens indefinitely.

Two rulings issued this week from the Second Circuit Court of Appeals in New York and the Ninth Circuit Court of Appeals in California say that detainees have the right to a bond hearing while they are fighting their deportation cases.

The practical impact? Thousands of immigrants, legal or not, who were held for indefinite periods now have the right to a release hearing where it will be up to an immigration judge to decide whether they are dangerous or present a flight risk. The courts' rulings apply in the states covered by those circuits.

Ever since 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, the government has detained broad categories of non-citizens for prolonged periods and denied them the right to challenge their detention.

The constitutionality of that section of the law was first challenged in 2003. Since then, there's been a flurry of court rulings.

"Every circuit [appeals] court has ruled that it is unlawful to hold a detainee without that person having the possibility of a hearing," said Ahilan Arulanantham, deputy legal director of the ACLU of Southern California.

The Ninth Circuit, in *Rodriguez v. Robbins*, ruled that the government has to justify "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." It also ruled the government has to consider alternatives to detention such as electronic monitoring devices. Finally, it said detainees should get a bond hearing every six months.

"This decision substantially decreases the likelihood people will get lost in the system for years on end because there will be some examination of why the person is still locked away. It provides them with an elemental component of due process," said Arulanantham.

In a more limited ruling, the Second Circuit in New York, in a case called *Lora v. Shanahan* adopted what it called "a bright-line rule" that detainees must get a hearing within six months of his or her detention.

Two other appellate courts, the Third and the Sixth Circuits, have ruled that a detainee

must file a habeas petition or a lawsuit before getting a hearing.

With respect to the Ninth Circuit ruling, a spokesman for U.S. Immigration and Customs Enforcement said his agency "is aware of the judges' order and reviewing it."

Lynch v. Morales-Santana

15-1191

Ruling Below: *Morales-Santana v. Lynch*, 804 F.3d 520 (2d Cir. 2015)

Luis Morales was born the child of an unwed couple. His father was a US citizen, while his mother was not. Morales attempted to establish himself as a citizen under the doctrine of derivative citizenship. The Board of Immigration Appeals denied his motion to reevaluate his claim. Morales appealed.

The Court of Appeals held that the grant of citizenship was permissible, and that the gender discrepancy placed on the physical presence requirement of derivative citizenship violated equal protection

Question Presented: Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection; and whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

Luis Ramon MORALES–SANTANA, aka Luis Morales, Petitioner,
v.
Loretta E. LYNCH, United States Attorney GENERAL, Respondent.

United States Court of Appeals, Second Circuit

Decided on July 8, 2015, Amended on October 30, 2015

[Excerpt; some citations and footnotes omitted]

LOHIER, Circuit Judge:

Luis Ramon Morales–Santana asks us to review a March 3, 2011 decision of the Board of Immigration Appeals ("BIA") denying his motion to reopen his removal proceedings relating to his claim of derivative citizenship. Under the statute in effect when Morales–Santana was born—the Immigration and Nationality Act of 1952 (the "1952 Act")—a child born abroad to an unwed citizen mother and non-citizen father has citizenship at birth so long as the mother was present in the United States or one of its outlying possessions for a continuous period of at least one year at some point prior to the child's birth. By contrast, a child born abroad to an unwed citizen father and non-citizen mother has citizenship at birth only if the father was present in the United States or one of its outlying possessions prior to the child's birth for a period or periods totaling at least ten years, with at least five of those years occurring after the age of fourteen. Morales–Santana's father satisfied the requirements for transmitting citizenship applicable to unwed

mothers but not the more stringent requirements applicable to unwed fathers. On appeal, Morales–Santana argues principally that this gender-based difference violates the Fifth Amendment's guarantee of equal protection and that the proper remedy is to extend to unwed fathers the benefits unwed mothers receive under § 1409(c). We agree and hold that Morales–Santana derived citizenship at birth through his father. We accordingly REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

BACKGROUND

I. Facts

The following undisputed facts are drawn from the record on appeal. Morales–Santana's father, Jose Dolores Morales, was born in Puerto Rico on March 19, 1900 and acquired United States citizenship in 1917 pursuant to the Jones Act. He was physically present in Puerto Rico until February 27, 1919, 20 days before his nineteenth birthday, when he left Puerto Rico to work in the Dominican Republic for the South Porto Rico Sugar Company.

In 1962 Morales–Santana was born in the Dominican Republic to his father and his Dominican mother. Morales–Santana was what is statutorily described as "legitimat[ed]" by his father upon his parents' marriage in 1970 and admitted to the United States as a lawful permanent resident in 1975. 8 U.S.C. § 1409(a). Morales–Santana's father died in 1976.

II. Statutory Framework

Unlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all. The law in effect at the time of birth governs whether a child obtained derivative citizenship as of his or her birth. Accordingly, the 1952 Act provides the statutory framework applicable to Morales–Santana's nationality claim.

As noted, the 1952 Act limits the ability of an unwed citizen father to confer citizenship on his child born abroad—where the child's mother is not a citizen at the time of the child's birth—more stringently than it limits the ability of a similarly situated unwed citizen mother to do the same. We note that this difference in treatment of unwed citizen fathers and unwed citizen mothers, though diminished, persists in the current statute.

III. Procedural History

In 2000 Morales–Santana was placed in removal proceedings after having been convicted of various felonies. He applied for withholding of removal on the basis of derivative citizenship obtained through his father. An immigration judge denied the application. In 2010 Morales–Santana *525 filed a motion to reopen based on a violation of equal protection and newly obtained evidence relating to his father. The BIA rejected Morales–Santana's arguments for derivative citizenship and denied his motion to reopen.

DISCUSSION

Morales–Santana makes four arguments for derivative citizenship: (1) that his father's physical absence from the United States during the 20 days directly prior to his father's nineteenth birthday constituted a de minimis "gap" in physical presence, and that such gaps should not count against a finding of physical presence for purposes of § 1401(a)(7); (2) that the South Porto Rico Sugar Company, which employed his father after his father moved to the Dominican Republic, was a multi-national United States-

owned company and therefore effectively part of the United States government or an international organization as defined in 22 U.S.C. § 288; (3) that at the time his father moved to the Dominican Republic it was an "outlying possession" of the United States; and (4) as noted, that the different physical presence requirements applicable to unwed fathers and unwed mothers under the 1952 Act violate equal protection.

Consistent with our obligation to avoid constitutional questions if possible, we first address Morales–Santana's three statutory arguments for derivative citizenship.

As to both his statutory and constitutional arguments, we review de novo the question of Morales–Santana's derivative citizenship. "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." No material facts are disputed.

I. Statutory Arguments

Morales–Santana contends that his father's absence from the United States during the 20 days prior to his father's nineteenth birthday constitutes a de minimis "gap" in his father's physical presence and that such gaps should not be held against someone who claims to have satisfied the 1952 Act's physical presence requirement. In support, Morales–Santana points to continuous physical presence requirements under the immigration laws that explicitly excuse de minimis absences. By its plain terms, § 1401(a)(7) had no similar exception. In any event, because Morales–Santana's father left the United States and its outlying possessions 20 days prior to his nineteenth birthday and never returned, there was no "gap" in his father's physical presence that bridged two periods of physical presence. So even if we recognized an exception to the physical presence requirement in § 1401 for de minimis "gaps," we would reject Morales–Santana's claim on this basis.

Relying on the 1966 Act, Morales–Santana next argues that his father's employment with the South Porto Rico Sugar Company in the Dominican Republic immediately after leaving Puerto Rico satisfied the statute's physical presence requirement by effectively continuing his physical presence through the requisite period. It is true that the 1966 Act provided that employment with the United States Government or with an international organization, as defined in 22 U.S.C. § 288, satisfied the physical presence requirement. But Morales–Santana's argument lacks merit because his father's employment with the South Porto Rico Sugar Company, a multinational company, did not constitute employment with the United States Government. Nor did it constitute employment with an international organization as defined in 22 U.S.C. § 288, since the South Porto Rico Sugar Company was neither "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation," nor "designated by the President" as such.

As his final statutory argument, Morales–Santana contends that the Dominican Republic was an "outlying possession" of the United States for purposes of the 1952 Act when Morales–Santana's father was there in 1919. Two factors convince us that Congress did not intend to include the Dominican Republic within the scope of the term "outlying possession" in § 1401.4

First, there is no treaty or lease pursuant to which the Dominican Republic was acquired. This stands in contrast to the Philippines, Guam, Puerto Rico, and the U.S. Virgin Islands, all of which were acquired by the United States by treaty, and all of which were outlying possessions when the United States exercised sovereignty over them. The case of Guantanamo Bay, Cuba is a little different in that it involves both a lease and a treaty, but it yields the same result vis-à-vis the Dominican Republic. In *Boumediene v. Bush*, the Supreme Court determined that the "complete jurisdiction and control" by the United States over Guantanamo Bay constituted "de facto " sovereignty over it. The Court added, though, that in a 1903 Lease Agreement between Cuba and the United States, the former granted the latter "complete jurisdiction and control" over Guantanamo Bay and that "[u]nder the terms of [a] 1934 [t]reaty, ... Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons" Guantanamo Bay. By contrast, there is no lease or treaty that conferred to the United States de facto or de jure sovereignty over the Dominican Republic.

Second, we acknowledge the historical fact that the United States exercised significant control during its military occupation of the Dominican Republic from 1916 to 1924. But that control did not extinguish the sovereignty of the Dominican Republic. Indeed, the Proclamation of the Military Occupation of Santo Domingo by the United States specifically declared that the purpose of the temporary military occupation was "to give aid to [the Dominican Republic] in returning to a condition of internal order" without "destroying the sovereignty of" the Dominican Republic.

Having rejected Morales–Santana's statutory arguments for derivative citizenship, we now consider his constitutional equal protection argument.

II. Equal Protection

Morales–Santana argues principally that the 1952 Act's treatment of derivative citizenship conferral rights violates the Fifth Amendment's guarantee of equal protection.5 As we have explained, under the 1952 Act, an unwed citizen mother confers her citizenship on her child (born abroad to a non-citizen biological father) so long as she has satisfied the one-year continuous presence requirement prior to the child's birth. The single year of presence by the mother can occur at any time prior to the child's birth—including, for example, from the mother's first birthday until her second birthday. An unwed citizen father, by contrast, faces much more stringent requirements under 8 U.S.C. § 1409(a), which incorporates § 1401(a)(7). He is prevented from transmitting his citizenship (to his child born abroad to a non-citizen mother) unless he was physically present in the United States or an outlying possession prior to the child's birth for a total of at least ten years. Because five of those years must follow the father's fourteenth birthday, an unwed citizen father cannot transmit his citizenship to his child born abroad to a non-citizen mother before the father's nineteenth birthday. Eighteen-year-old citizen fathers and their children are out of luck.

As both parties agree, had Morales–Santana's mother, rather than his father, been a citizen continuously present in Puerto Rico until 20 days prior to her nineteenth birthday, she would have satisfied the requirements to confer derivative citizenship on her child. It is this gender-based difference in treatment

that Morales–Santana claims violated his father's right to equal protection.

The Government asserts that the difference is justified by two interests: (1) ensuring a sufficient connection between citizen children and the United States, and (2) avoiding statelessness. In what follows, we apply intermediate scrutiny to assess these asserted interests, and we conclude that neither interest is advanced by the statute's gender-based physical presence requirements. After determining that these physical presence requirements violate equal protection, we apply the statute's severance clause and determine that Morales–Santana, under the statute stripped of its constitutional defect, has citizenship as of his birth.

A. Level of Scrutiny

We apply intermediate, "heightened" scrutiny to laws that discriminate on the basis of gender. Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives. Furthermore, the justification for the challenged classification "must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

In urging us to apply rational basis scrutiny instead, the Government relies on *Fiallo v. Bell*. In *Fiallo*, the Supreme Court applied rational basis scrutiny to a section of the 1952 Act that gave special preference for admission into the United States to non-citizens born out of wedlock seeking entry by virtue of a relationship with their citizen mothers, but not to similarly situated non-citizens seeking entry by virtue of a relationship with their citizen fathers. The Court reasoned that rational basis scrutiny was warranted because "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens," and "[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments."

But *Fiallo* is distinguishable. In *Fiallo*, the children's alienage implicated Congress's "exceptionally broad power" to admit or remove non-citizens. Here, by contrast, there is no similar issue of alienage that would trigger special deference. Because Morales–Santana instead claims pre-existing citizenship at birth, his challenge does not implicate Congress's "power to admit or exclude foreigners," and therefore is not governed by *Fiallo*.

Our view of *Fiallo*'s limited scope is grounded in Supreme Court and circuit caselaw. As an initial matter, we note that the Supreme Court has never applied the deferential *Fiallo* standard to issues of gender discrimination under § 1409, despite being asked to do so on at least three occasions. Justice Stevens' opinion in Miller succinctly described *Fiallo*'s limitation: "It is of significance that the petitioner in this case, unlike the petitioners in *Fiallo*, ... is not challenging the denial of an application for special [immigration] status. She is contesting the Government's refusal to ... treat her as a citizen. If she were to prevail, the judgment ... would confirm her pre-existing citizenship."

Although no opinion in Miller received a majority of votes, we observed in *Lake v. Reno* that "seven justices in Miller would have applied heightened scrutiny ... [to INA]

section 309(a)." Later, in *Lewis v. Thompson*, we explained *Lake*'s holding in a way that makes it clear that heightened scrutiny, rather than *Fiallo*'s more deferential standard of review, should apply to Morales–Santana's claim: "[W]e have already held in *Lake*, drawing an inference from the various opinions of the Justices in *Miller*, that citizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration." Our sister circuits that have considered *Fiallo*'s application to claims similar to Morales–Santana's are in accord.

For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. In assessing the validity of the gender-based classification, moreover, we consider the existence of gender-neutral alternatives to the classification.

B. Governmental Interests and Tailoring

Having determined that intermediate scrutiny applies, we examine the two interests that the Government claims support the statute's gender-based distinction.

1. Ensuring a Sufficient Connection Between the Child and the United States

The Government asserts that Congress passed the 1952 Act's physical presence requirements in order to "ensur[e] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship." As both parties agree, this interest is important, and Congress actually had it in mind when requiring some period of physical presence before a citizen parent could confer citizenship on his or her child born abroad.

The Government invokes this important interest but fails to justify the 1952 Act's different treatment of mothers and fathers by reference to it. It offers no reason, and we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad.

We recognize that our determination conflicts with the decision of the Ninth Circuit in *Flores–Villar* which addressed the same statutory provisions and discussed the same governmental interest in ensuring a connection between child and country. The Ninth Circuit concluded that in addition to preventing or reducing statelessness—an objective we address below—"[t]he residence differential ... furthers the objective of developing a tie between the child, his or her father, and this country." The Ninth Circuit provided no explanation for its conclusion, and the Government provides none here.

Instead, the Government relies on Nguyen to explain why the different physical presence requirements for unwed men and women reflect a concern with ensuring an adequate connection between the child and the United States. We are not persuaded. In *Nguyen*, the Court upheld the Immigration and Nationality Act's requirement that a citizen father seeking to confer derivative citizenship on his foreign-born child take the affirmative step of either legitimating the child, declaring paternity under oath, or obtaining a court order of paternity. The Nguyen Court determined that two interests supported the legitimation requirement for citizen fathers of children born abroad.

The first interest, "assuring that a biological parent-child relationship exists," is irrelevant to the 1952 Act's physical presence requirements because derivative citizenship separately requires unwed citizen fathers to have legitimated their foreign-born children. Here, Morales–Santana's father established his biological tie to Morales–Santana by legitimating him. His physical presence in Puerto Rico for ten years as opposed to one year prior to Morales–Santana's birth would have provided no additional assurance that a biological tie existed.

The Nguyen Court identified a second interest in ensuring "that the child and the citizen parent have some demonstrated opportunity or potential to develop" a "real, meaningful relationship." The Court explained that a biological mother, by virtue of giving birth to the child, "knows that the child is in being and is hers," but that an unwed biological father might in some cases not even "know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity." Rather than requiring a case-by-case analysis of whether a father or a mother has a "real, meaningful relationship" with a child born abroad, "Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop." This interest in ensuring the "opportunity for a real, meaningful relationship" between parent and child is likewise not relevant to the 1952 Act's physical presence requirements. By legitimating his son, Morales–Santana's father took the affirmative step of demonstrating that an opportunity for a meaningful relationship existed. And again, requiring that Morales–Santana's father be physically present in Puerto Rico prior to Morales–Santana's birth for ten years instead of one year would have done nothing to further ensure that an opportunity for such a relationship existed.

So we agree that unwed mothers and fathers are not similarly situated with respect to the two types of parent-to-child "ties" justifying the legitimation requirement at issue in Nguyen. But unwed mothers and fathers are similarly situated with respect to how long they should be present in the United States or an outlying possession prior to the child's birth in order to have assimilated citizenship-related values to transmit to the child. Therefore, the statute's gender-based distinction is not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.

2. Preventing Statelessness

Having concluded that the Government's interest in establishing a connection between the foreign-born child and the United States does not explain or justify the gender-based distinction in the 1952 Act's physical presence requirements, we now turn to the Government's other asserted interest. The Government argues that Congress enacted different physical presence requirements in § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) to reduce the level of statelessness among newborns. For example, a child born out of wedlock abroad may be stateless if he is born inside a country that does not confer citizenship based on place of birth and neither of the child's parents conferred derivative citizenship on him.

The avoidance of statelessness is clearly an important governmental interest. Contrary to the Government's claim, though, avoidance of statelessness does not appear to have been Congress's actual purpose in establishing the physical presence requirements in the 1952 Act, and in any event the gender-based

distinctions in the 1952 Act's physical presence requirements are not substantially related to that objective.

a. Actual Purpose

Some historical background is useful to understand Congress's purpose in establishing the 1952 Act's gender-based physical presence requirements. Until 1940, a citizen father whose child was born abroad transmitted his citizenship to that child if the father had resided in the United States for any period of time prior to the child's birth. Consistent with common law notions of coverture, and with the notion that the husband determined the political and cultural character of his dependents (wife and children included), prior to 1934 married women had no statutory right to confer their own citizenship. But for unmarried citizen mothers, the State Department's practice since at least 1912 was to grant citizenship to their foreign-born children on the theory that an unmarried mother "stands in the place of the father" and is in any event "bound to maintain [the child] as its natural guardian."

In 1940 Congress for the first time explicitly addressed the situation of children born out of wedlock. It enacted Section 205 of the 1940 Act, which provided that citizen fathers and married citizen mothers could transmit citizenship to their child born abroad only after satisfying an age-calibrated ten-year physical presence requirement, but that unmarried citizen mothers could confer citizenship if they had resided in the United States at any point prior to the child's birth. The 1952 Act retained this basic statutory structure, though it imposed a somewhat more stringent requirement that unmarried mothers have been physically present in the United States for a continuous period of one year in order to confer citizenship.

Neither the congressional hearings nor the relevant congressional reports concerning the 1940 Act contain any reference to the problem of statelessness for children born abroad. The congressional hearings concerning the 1952 Act are similarly silent about statelessness as a driving concern.10 Notwithstanding the absence of relevant discussion concerning the problem of statelessness for children born abroad in the legislative history, the Government points to the Executive Branch's explanatory comments to Section 204 of the proposed nationality code that Congress would ultimately enact as the 1940 Act. These comments refer to a 1935 law review article entitled A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality by Durward V. Sandifer. According to the article, in 1935 approximately thirty countries had statutes assigning children born out of wedlock the citizenship of their mother. From the comments and the article, the Government urges us to infer that "Congress was aware" there existed "a substantial risk that a child born to an unwed U.S. citizen mother in a country employing [laws determining citizenship based on lineage, rather than place of birth] would be stateless at birth unless the mother could pass her citizenship to her child," and that this risk was "unique" to the children of unwed citizen mothers.

Based on our review of the Executive Branch's explanatory comments and the Sandifer article, we decline the Government's invitation. The explanatory comments do not mention statelessness and do not refer to the Sandifer article's discussion of statelessness. In any event, the Sandifer article itself does not support the Government's argument that the children of unwed citizen mothers faced a greater risk of statelessness than the children of unwed citizen fathers.

While the Executive Branch's comments ignore the problem of statelessness, they arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock. Other contemporary administrative memoranda similarly ignore the risk of statelessness for children born out of wedlock abroad to citizen mothers.

In sum, we discern no evidence (1) that Congress enacted the 1952 Act's gender-based physical presence requirements out of a concern for statelessness, (2) that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers, or (3) that Congress believed that the problem of statelessness was greater for children of unwed citizen mothers than for children of unwed citizen fathers. We conclude that neither reason nor history supports the Government's contention that the 1952 Act's gender-based physical presence requirements were motivated by a concern for statelessness, as opposed to impermissible stereotyping.

b. Substantial Relationship Between Ends and Means

Even assuming for the sake of argument that preventing statelessness was Congress's actual motivating concern when it enacted the physical presence requirements, we are persuaded by the availability of effective gender-neutral alternatives that the gender-based distinction between § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) cannot survive intermediate scrutiny. As far back as 1933, Secretary of State Cordell Hull proposed just such a gender-neutral alternative in a letter to the Chairman of the House Committee on Immigration and Naturalization. Secretary Hull suggested that the immigration laws be revised "to obtain the objective of parity between the sexes in nationality matters" by "remov [ing] ... discrimination between" mothers and fathers "with regard to the transmission of citizenship to children born abroad." Hull proposed the following language:

> PROPOSED AMENDMENT ...
>
> (d) A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

And unlike the legitimation requirement at issue in Nguyen, which could be satisfied by, for example, "a written acknowledgment of paternity under oath," the physical presence requirement that Morales–Santana challenges imposes more than a "minimal" burden on unwed citizen fathers. It adds to the legitimation requirement ten years of physical presence in the United States, five of which must be after the age of fourteen. In our view, this burden on a citizen father's right to confer citizenship on his foreign-born child is substantial.

For these reasons, the gender-based distinction at the heart of the 1952 Act's physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective.

3. Remedy

We now turn to the most vexing problem in this case. Here, two statutory provisions— § 1409(c) and (a)18—combine to violate equal protection. What is the remedy for this

violation of equal protection, where citizenship is at stake? Ordinarily, "when the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."

As we see it, "equal treatment" might be achieved in any one of three ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year continuous presence provision in § 1409(c) and requiring every unwed citizen parent to satisfy the more onerous ten-year requirement if the other parent lacks citizenship; or (3) severing the ten-year requirement in §§ 1409(a) and 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship. In selecting among these three options, we look to the intent of Congress in enacting the 1952 Act. For reasons we explain below, we conclude that the third option is most consistent with congressional intent.

We eliminate the first option with ease. The 1952 Act contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act ... shall not be affected thereby." The clause makes clear that only one of the provisions in § 1409, rather than both, should be severed as constitutionally infirm. It also means that our holding, which relates only to the application of these provisions to unmarried parents, should not be construed to affect the physical presence requirement for married parents.

We reject the second option—contracting, as opposed to extending, the right to derivative citizenship—with more circumspection. The Government urges us to adopt this option, arguing that the alternative allows the exception for unwed mothers to swallow the rule, thereby inflicting more damage to the statute's language and structure and reflecting a more radical change than the 1952 Congress intended. This argument fails for two reasons. First, the argument misunderstands our task, which is not to devise the "cleanest" way to alter the wording and structure of the statute, but to determine what result Congress intended in the event the combined statutory provisions were deemed unconstitutional. Second, the Government's argument neglects the historical background against which Congress enacted the relevant provisions. Although a close call, history does not convince us that the members of Congress passing the 1952 Act would have viewed the extension of the one-year requirement as a more radical change than the alternative, in which all unwed citizen parents must satisfy the ten-year age-calibrated requirement if the other parent lacks citizenship. To the contrary, the ten-year requirement for fathers and married mothers imposed by Congress in 1940 appears to have represented a significant departure from long-established historical practice. From 1934 until the enactment of the 1940 Act, for example, women had the statutory right to confer citizenship on their foreign-born children and were required merely to have resided in the United States for any duration prior to the child's birth. The same bare-minimum requirement applied to men for the vast majority of the time since the founding, from 1790 until 1940. Moreover, the 1952 Act's addition of a one-year continuous physical presence requirement for unmarried citizen mothers represented a relatively minor change in the baseline minimal residency requirement applicable to all men and women prior to 1940. On the other hand, of course, we recognize that the 1952 Congress,

presumably with the benefit of this long history, nevertheless decided to retain the ten-year residency requirement. Whether this related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors, we cannot tell with confidence.

Neither the text nor the legislative history of the 1952 Act is especially helpful or clear on this point, and ultimately what tips the balance for us is the binding precedent that cautions us to extend rather than contract benefits in the face of ambiguous congressional intent. Indeed, we are unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance.

Lastly, the Government contends that, in giving Morales–Santana the relief he seeks, we are granting citizenship, which we lack the power to do. This argument rests on a mistaken premise. Although courts have no power to confer "citizenship on a basis other than that prescribed by Congress," Morales–Santana has not asked us to confer citizenship, and we do not do so. Instead, Morales–Santana asks that we exercise our traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." In other words, if Morales–Santana "were to prevail, the judgment in [his] favor would confirm [his] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." Correcting the constitutional defect here would at a minimum entail replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c). The alternative remedy suggested by the Government—that all unwed parents be subject to the more onerous ten-year requirement—would prove no less controversial: we have no more power to strip citizenship conferred by Congress than to confer it. Nor, finally, has Congress authorized us to avoid the question. Conforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection, we conclude that Morales–Santana is a citizen as of his birth.

CONCLUSION

For the foregoing reasons, we REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

"Gender-Based Citizenship Law Gets U.S. Supreme Court Review"

Bloomberg

Greg Stohr

June 28, 2016

The U.S. Supreme Court will consider the constitutionality of a provision in federal law that makes it harder for some foreign-born children of American men to become citizens than children born abroad to American women.

The nation's highest court agreed to hear the Obama administration's appeal of a ruling that conferred citizenship on Luis Ramon Morales-Santana, a man born in the Dominican Republic who was facing deportation after being convicted of a 1995 robbery and attempted murder in New York.

Under federal law, a child born abroad to an unmarried American mother and non-American father can claim U.S. citizenship if the mother lived continuously in the U.S. for a year at some point before the birth. The residency requirements are more stringent if the father is American and the mother isn't.

A New York-based federal appeals court said the distinction amounted to unconstitutional discrimination on the basis of gender. The panel said Morales-Santana, born in 1962 to a Dominican mother and a American father, was entitled to invoke the more lenient rules that would have applied had his mother been the U.S. citizen.

The Supreme Court tried and failed to resolve the issue five years ago, splitting 4-4 in a similar case. Justice Elena Kagan wasn't able to take part in that dispute, presumably because she had been involved as an Obama administration lawyer.

The new case is *Lynch v. Morales-Santana*, 15-1191.

“Supreme Court citizenship case: Should the genders of parents' matter?”

Christian Science Monitor

Christina Beck

June 28, 2016

The Supreme Court announced Tuesday that it will consider whether or not United States citizenship law that favors children of unwed American mothers over those with unwed American fathers is a gender-based violation of the US Constitution's equal rights provision.

If children born abroad have unwed parents, and only one is an American citizen, current immigration law gives different treatment depending on the gender of the American parent. Despite attempts at reform, children of unwed American mothers today have an easier time gaining US citizenship than the children of American fathers.

This disparity will come before the court through the case of Luis Ramon Morales-Santana, the son of an American citizen father, who was denied American citizenship.

Under current law, American fathers are required to spend at least five years living in the United States before their children born abroad and out of wedlock are allowed to seek citizenship. (A 2012 amendment lowered the time requirement from ten years.) American women, however, are only required to prove that they have lived in the United States for one year before their children can seek citizenship.

In July 2015, the second US Court of Appeals in New York struck down the law, saying that the rule was an example of "impermissible stereotyping," and that it imposed an unfair burden on fathers. After the US Justice Department's loss at the appellate level in New York, the department took the case to the Supreme Court.

Since 2000, the US has been trying to deport Mr. Morales-Santana, who was born in 1962 in the Dominican Republic and has legally lived in the US since 1975. In 1995, he was convicted of four counts of attempted murder and two counts of robbery.

Morales-Santana’s now-deceased father missed the five year residency cut off by just twenty days, he said. His parents married in 1970. Morales-Santana argues that his father should have legally been considered a resident for the entire five year period, including his time in the Dominican Republic, since he was working for a US-owned company. In 2015, the 2nd Court of Appeals in New York rejected his four arguments for derivative citizenship.

He had also claimed, however, that the different rules for mothers' and fathers' residence in the US violated his father's right to equal protection. The court ruled that the 1952 Nationality Act's different gender-based residency requirements did nothing to advance the government's stated interests with the Act: avoiding statelessness and ensuring a sufficient connection between citizen children and the United States.

Critics of the 2nd Circuit Court's decision argue that the Constitution's Equal Protection clause should not apply to foreign citizens, saying that Congress has the right to establish any rule it wants regarding the residency requirements for US citizens and their offspring.

Conservative critics also say that this decision could be a slippery slope, leading to widespread judicial amnesty for non-citizens.

The Supreme Court will hear the case in the next cycle, and will issue a ruling before June 2017. The last time the court ruled on a similar case it came to a split 4-4 decision after Justice Elena Kagan recused herself, likely because of her previous position in the Justice Department.

"Supreme Court Agrees to Hear Birthright Citizenship Case"

Jackson Lewis Immigration Blog

Maggie Murphy

June 28, 2016

The U.S. Supreme Court has agreed to decide whether a man born outside the U.S., out of wedlock, to a U.S. citizen father and a noncitizen mother could benefit from birthright citizenship. A decision in this case can mean protection from deportation for many. Lynch v. Morales-Santana, 804 F.3d 520 (2d Cir. 2015), cert. granted (U.S. June 28, 2016) (No. 15-1191).

Birthright citizenship laws have changed throughout the years, and when deciding whether someone is entitled to citizenship by birth, one must review the laws in place at the time of his birth. Luis Ramon Morales-Santana was born outside the U.S. to unwed parents – his mother was a noncitizen and his father was a U.S. citizen. At that time, the laws in place prohibited the transmission of citizenship to Morales-Santana by his U.S. citizen father.

The U.S. Court of Appeals for the Second Circuit, in New York, granted Morales-Santana citizenship, ruling that fathers should have the same benefits as mothers under the statute. The Court held that the citizenship rule applied "archaic and overbroad stereotypes" to parenting roles for children born to unwed parents and violated equal protection rights. The U.S. Department of Justice asked the Supreme Court to reverse this opinion, arguing that a court cannot create new citizenship rules and regulations.

Citizenship laws can be very confusing. Under current citizenship laws for children born out of wedlock to a U.S. citizen father and a noncitizen mother, the child benefits from birthright citizenship if the father is physically present in the U.S. five years prior to the child's birth, two of which are after the age of 14 (military service counts). The child can also benefit from birthright citizenship if a blood relationship is established, the father agrees to support the child until he or she is 18, and, while the child is under 18, one of three factors is met: (1) the child is legitimated; (2) the father acknowledges paternity; or (3) paternity is established by court adjudication.

The Supreme Court reviewed a similar case several years ago, when the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, upheld the citizenship transmission rules. At that time, Justice Elena Kagan had to recuse herself, and the decision was 4 – 4.

Jackson Lewis will report on the Supreme Court's decision, expected by June 2017. If the Court upholds the Second Circuit decision, ruling in favor of equal protection for fathers, it could result in citizenship rights

for thousands of individuals born abroad to U.S. citizen fathers and may provide remedies to individuals currently facing deportation.

“2nd Circ. Axes Citizenship Rule Weighted Against Fathers”

Law360

Allissa Wickham

July 8, 2015

The Second Circuit ruled Wednesday that strict citizenship requirements for a child born outside the U.S. to an unmarried citizen father and non-citizen mother ran afoul of the Fifth Amendment, finding that a green card holder fighting deportation had actually derived citizenship at birth through his father.

A three-judge panel for the Second Circuit, which included U.S. District Judge Jed Rakoff sitting by designation, found that petitioner Luis Ramon Morales-Santana is a citizen by birth, and reversed the Board of Immigration Appeals' denial of his bid to reopen removal proceedings.

The case deals with a gender discrepancy between how citizenship is given to children born abroad to unwed parents, based on whether the mother or father was a non-citizen.

Under the Immigration and Nationality Act of 1952, which was the law in effect when Morales-Santana was born, a child born outside the U.S. to an unmarried citizen mother and non-citizen father has citizenship at birth if the mother was present in the U.S. or one of its territories for a continuous period of at least a year before the child was born, according to the Second Circuit.

However, if child’s parents are an unwed citizen father and non-citizen mother, he has citizenship only if the dad was present in the U.S. or related territory before the child was born for at least 10 years, with at least five of those years occurring after age of 14, the court said.

Morales-Santana, whose dad satisfied the citizenship conferral requirements for unmarried mothers but not for fathers, claimed this gendered difference violated the Fifth Amendment’s guarantee of equal protection, and claimed unwed fathers should have the same benefits given to unwed mothers under the statute. The Second Circuit panel agreed, in an opinion authored by Circuit Judge Raymond Lohier Jr.

“We agree and hold that Morales-Santana derived citizenship at birth through his father,” Lohier wrote.

Morales-Santana was born in the Dominican Republic in 1962 and is the child of a U.S. citizen father and a Dominican mother. Although he entered the U.S. as a green card holder in 1975, he was placed in deportation proceedings in 2000 after having been convicted of felonies, the court said.

Although he applied for withholding of removal based on derivative citizenship secured through his father, Morales-Santana was rebuffed by both an immigration judge and the BIA.

According to Morales-Santana's attorney, Stephen Broome of Quinn Emanuel Urquhart & Sullivan LLP, his client was initially proceeding before the appeals court pro se, before Broome was appointed to the case. Broome described the litigation as "hard-fought," with briefings that cited letters of executive agencies going back to the 1920s.

"When you're challenging an immigration statute under the equal protection clause, I think ... that's an uphill battle, but I think the result they reached is 100 percent right," Broome said, adding that he was "thrilled" with the decision.

Broome said the current version of the INA is still discriminatory in that unwed citizen mothers face a one-year physical requirement, while unwed citizen fathers face an age-calibrated presence requirement that is much higher.

Although the court was only analyzing the version of the INA that was in effect when Morales-Santana was born, its reasoning would apply equally to the current law, according to Broome.

Notably, the Second Circuit's decision conflicts with the Ninth Circuit's 2008 holding in Flores-Villar, which upheld the residence requirements on U.S. citizen fathers' ability to transmit citizenship to kids born abroad outside of marriage to a non-citizen.

As Broome pointed out, that ruling was ultimately upheld in a 4-4 Supreme Court decision after Justice Elena Kagan recused herself, possibly because she was solicitor general at the time of the Ninth Circuit appeal. Having not definitively ruled on the issue and now facing a circuit split, the high court may be tempted to take up this case if the government should appeal, Broome said.

A representative for the U.S. Department of Justice did not respond to a request for comment Wednesday.

Morales-Santana is represented by Stephen Broome and Todd Anten of Quinn Emanuel Urquhart & Sullivan LLP, who handled the case pro bono.

Attorney General Loretta Lynch is represented by Kathryn M. McKinney, Janette L. Allen and Imran Raza Zaidi of the U.S. Department of Justice.

The case is *Morales-Santana v. Lynch*, case number 11-1252, at the U.S. Court of Appeals for the Second Circuit.

United States v. Texas

15-674

Ruling Below: *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)

Several states sought injunctive relief against the implementation of Deferred Action for Parents of Americans and Lawful permanent Residents and Deferred Action for Childhood Arrivals. The District Court for the Southern District of Texas granted preliminary injunctive relief on the grounds that implementation would likely violate the Administrative Procedure Act. The government appealed and filed for a stay or narrowing of scope. The Court of Appeals denied the motion, then later issued a holding. The CoA held that states had special solicitude in determining Article III standing, that Texas satisfied injury element for Art. III standing, that review was available under the Administrative Procedure Act, that Texas was likely to succeed on merits of claim with regards to policy-directive exemption and agency-rule exemption under the APA and on merits of substantive APA claim. Thus, preliminary injunction was warranted.

The Supreme Court affirmed the holding of the Court of Appeals due to a split 4-4 decision. The US Department of Justice has asked the Supreme Court to rehear the case, on the grounds that a definitive decision by a full Court is necessary.

Question Presented: Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; whether the guidance is arbitrary and capricious or otherwise not in accordance with law; whether the guidance was subject to the APA's notice-and-comment procedures; and whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.

UNITED STATES, et al., Petitioners
v.
TEXAS, et al.

Supreme Court of the United States

Decided on June 23, 2016

The judgment is affirmed by an equally divided Court.

"White House Asks Supreme Court for New Review of Immigration Policy With 9 Justices"

The Wall Street Journal

Jess Bravin

July 18, 2016

The Obama administration moved Monday to expedite future Supreme Court review of its immigration policy, asking the court to rehear the issue as soon as a ninth justice is seated.

Last month the Supreme Court deadlocked 4-4 over the administration's appeal of lower court orders that stymied its plans to grant work authorization to more than four million illegal immigrants whose children are U.S. citizens or lawful residents. The tie vote left intact a decision of the Fifth U.S. Circuit Court of Appeals in New Orleans, which froze the plan while a Texas-led coalition of Republican-leaning states pursued litigation contending the program exceeds the administration's authority.

The immigration case was one of four Supreme Court deadlocks since the February death of conservative Justice Antonin Scalia. President Barack Obama nominated U.S. Judge Merrick Garland to replace Justice Scalia. But Senate Republicans have declined to act on the nomination and said the decision should wait for the next president.

The request, made in a motion for rehearing, could allow the case to return to the Supreme Court's docket more quickly than waiting for the litigation to make a second journey through federal trial and appellate courts.

In its petition, the Justice Department acknowledged that "ordinarily, it is exceedingly rare for this Court to grant rehearing" after a decision has been issued. But it said that on several occasions the court has agreed to rehear a case when a deadlock was caused by a temporary vacancy.

"In such situations, the court has not infrequently held the case over the court's summer recess, holding oral arguments months later," the department said.

For example, after Justice Benjamin Cardozo died in 1938, the court deadlocked in a case concerning the seizure of an automobile that illegally transported liquor. The court granted the government's petition for rehearing, "then heard the case after Justice [Felix] Frankfurter was confirmed" the following year.

The Justice Department said it was more important to rehear the immigration case than the other 2016 deadlocks, because of its national importance and the fact that the issue couldn't return to the court in different cases filed by private parties.

“Unless the court resolves this case in a precedential manner, a matter of ‘great national importance’ involving an ‘unprecedented and momentous’ injunction barring implementation of the [immigration policy] will have been effectively resolved for the country as a whole by a court of appeals that has divided twice,” the Justice Department said.

“Obama administration asks Supreme Court to reconsider immigration plan”

The Washington Post

Robert Barnes

July 18, 2016

The Obama administration asked the Supreme Court Monday to reconsider the president’s plan to shield millions of undocumented immigrants from deportation once the court again has nine members.

The court last month said it was split 4 to 4 on whether lower courts were correct when they blocked implementation of President Obama’s plan, which he announced in 2014 after Congress failed to pass comprehensive immigration reform. Obama’s plan would have shielded those who have been in the country for years without committing serious crimes and have family ties to those here legally.

The request is a long shot, and Acting Solicitor General Ian Heath Gershengorn acknowledged in the filing that it is “exceedingly rare” for the court to grant such a petition.

But the action draws attention to the fact that the Republican Senate has not agreed to a hearing or vote on Judge Merrick Garland, Obama’s nominee to fill the seat of Justice Antonin Scalia, who died in February.

The petition said an issue as important as immigration should not be decided by lower courts without definitive Supreme Court review.

But the court itself could have held the case for a rehearing and decided not to.

And as a practical matter, it will be the next president who decides either to endorse or even expand Obama’s executive action, as Democrat Hillary Clinton has said she will do, or end it, as Republican Donald Trump has vowed.

“Supreme Court Tie Blocks Obama Immigration Plan”

The New York Times

Adam Liptak and Michael D. Shear

June 23, 2016

The Supreme Court announced on Thursday that it had deadlocked in a case challenging President Obama’s immigration plan, effectively ending what Mr. Obama had hoped would become one of his central legacies. The program would have shielded as many as five million undocumented immigrants from deportation and allowed them to legally work in the United States.

The 4-4 tie, which left in place an appeals court ruling blocking the plan, amplified the contentious election-year debate over the nation’s immigration policy and presidential power.

When the Supreme Court agreed to hear the case in January, it seemed poised to issue a major ruling on presidential power. That did not materialize, but the court’s action, which established no precedent and included no reasoning, was nonetheless perhaps its most important statement this term.

The decision was just nine words long: “The judgment is affirmed by an equally divided court.”

But its consequences will be vast, said Walter Dellinger, who was acting solicitor general in the Clinton administration. “Seldom have the hopes of so many been crushed by so few words,” he said.

The president spoke after the 4-4 ruling by the Supreme Court on Thursday that deals a blow to his plan to spare millions of illegal immigrants from deportation.

Speaking at the White House, Mr. Obama described the ruling as a deep disappointment for immigrants who would not be able to emerge from the threat of deportation for at least the balance of his term.

“Today’s decision is frustrating to those who seek to grow our economy and bring a rationality to our immigration system,” he said before heading to the West Coast for a two-day trip. “It is heartbreaking for the millions of immigrants who have made their lives here.”

The decision was one of two determined by tie votes Thursday — the other concerned Indian tribal courts — and one of four so far this term. The court is scheduled to issue its final three decisions of the term, including one on a restrictive Texas abortion law, on Monday.

Mr. Obama said the court’s immigration ruling was a stark reminder of the consequences of Republicans’ refusal to consider Judge Merrick B. Garland, the president’s nominee to fill the vacancy on the

Supreme Court created by the death of Justice Antonin Scalia.

"If you keep on blocking judges from getting on the bench, then courts can't issue decisions," Mr. Obama said. "And what that means is then you are going to have the status quo frozen, and we are not able to make progress on some very important issues."

The case, United States v. Texas, No. 15-674, concerned a 2014 executive action by the president to allow as many as five million unauthorized immigrants who were the parents of citizens or of lawful permanent residents to apply for a program that would spare them from deportation and provide them with work permits. The program was called Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA.

Mr. Obama has said he took the action after years of frustration with Republicans in Congress who had repeatedly refused to support bipartisan Senate legislation to update immigration laws. A coalition of 26 states, led by Texas, promptly challenged the plan, accusing the president of ignoring administrative procedures for changing rules and of abusing the power of his office by circumventing Congress.

"Today's decision keeps in place what we have maintained from the very start: One person, even a president, cannot unilaterally change the law," Ken Paxton, the Texas attorney general, said in a statement after the ruling. "This is a major setback to President Obama's attempts to expand executive power, and a victory for those who believe in the separation of powers and the rule of law."

The court did not disclose how the justices had voted, but they were almost certainly split along ideological lines. Administration officials had hoped that Chief Justice John G. Roberts Jr. would join the court's four-member liberal wing to save the program.

The case hinged in part on whether Texas had suffered the sort of direct and concrete injury that gave it standing to sue. Texas said it had standing because it would be costly for the state to give driver's licenses to immigrants affected by the federal policy.

Chief Justice Roberts is often skeptical of expansive standing arguments. But it seemed plain when the case was argued in April that he was satisfied that Texas had standing, paving the way for a deadlock.

Mr. Obama said the White House did not believe the terse ruling from the court had any effect on the president's authority to act unilaterally. But he said the practical effect would be to freeze his efforts on behalf of immigrants until after the November election.

He also predicted that lawmakers would eventually act to overhaul the nation's immigration system.

"Congress is not going to be able to ignore America forever," he said. "It's not a matter of if; it's a matter of when. We get these spasms of politics around immigration and fear-mongering, and then our traditions and our history and our better impulses kick in."

White House officials had repeatedly argued that presidents in both parties had used similar executive authority in applying the nation's immigration laws. And they said

Congress had granted federal law enforcement wide discretion over how those laws should be carried out.

But the court's ruling may mean that the next president will again need to seek a congressional compromise to overhaul the nation's immigration laws. And it left immigration activists deeply disappointed.

"This is personal," Rocio Saenz, the executive vice president of the Service Employees International Union, said in a statement. "We will remain at the front lines, committed to defending the immigration initiatives and paving the path to lasting immigration reform."

The lower court rulings in the case were provisional, and the litigation will now continue and may again reach the Supreme Court when it is back at full strength. In the meantime, it seems unlikely that the program will be revived.

In February 2015, Judge Andrew S. Hanen of Federal District Court in Brownsville, Tex., entered a preliminary injunction shutting down the program while the legal case proceeded. The government appealed, and a divided three-judge panel of the United States Court of Appeals for the Fifth Circuit in New Orleans affirmed the injunction.

In their Supreme Court briefs, the states acknowledged that the president had wide authority over immigration matters, telling the justices that "the executive does have enforcement discretion to forbear from removing aliens on an individual basis." Their quarrel, they said, was with what they called a blanket grant of "lawful presence" to millions of immigrants, entitling them to various benefits.

In response, Solicitor General Donald B. Verrilli Jr. told the justices that this "lawful presence" was merely what had always followed from the executive branch's decision not to deport someone for a given period of time.

"Deferred action does not provide these individuals with any lawful status under the immigration laws," he said. "But it provides some measure of dignity and decent treatment."

"It recognizes the damage that would be wreaked by tearing apart families," Mr. Verrilli added, "and it allows individuals to leave the shadow economy and work on the books to provide for their families, thereby reducing exploitation and distortion in our labor markets."

The states said they had suffered the sort of direct and concrete injury that gave them standing to sue.

Judge Jerry E. Smith, writing for the majority in the appeals court, focused on an injury said to have been suffered by Texas, which he said would have to spend millions of dollars to provide driver's licenses to immigrants as a consequence of the federal program.

Mr. Verrilli told the justices that Texas' injury was self-inflicted, a product of its decision to offer driver's licenses for less than they cost to produce and to tie eligibility for them to federal standards.

Texas responded that being required to change its laws was itself the sort of harm that conferred standing. "Such a forced change in

Texas law would impair Texas' sovereign interest in 'the power to create and enforce a legal code,'" the state's lawyers wrote in a brief.

Judge Hanen grounded his injunction on the Obama administration's failure to give notice and seek public comments on its new program. He found that notice and comment were required because the program gave blanket relief to entire categories of people, notwithstanding the administration's assertion that it required case-by-case determinations about who was eligible for the program.

The appeals court affirmed that ruling and added a broader one. The program, it said, also exceeded Mr. Obama's statutory authority.

“Obama's immigration plan appears to be in trouble after Supreme Court hearing”

The Los Angeles Times

David G. Savage

April 18, 2016

President Obama's far-reaching plan to ease life for millions of immigrants in the U.S. illegally ran into solid conservative opposition at the Supreme Court on Monday, putting its fate in doubt.

The administration’s supporters were left to hope that justices — evenly divided between Republican and Democratic appointees since the death of Justice Antonin Scalia — might dismiss the Texas case on a legal technicality by finding the state of Texas cannot show it would be sufficiently harmed by the president’s program.

But the comments and questions during Monday’s argument suggested the court’s four conservatives probably would side with Texas and 25 other Republican-led states, while the four liberals would vote to uphold Obama’s plan.

If so, the 4-4 split would be a defeat for the administration, keeping in place a federal judge’s order that has blocked the plan from taking effect.

At issue is whether the president has the authority to temporarily remove the threat of deportation and offer a work permit to more than 4 million immigrant parents of children who are U.S. citizens or lawful permanent residents.

Obama’s lawyers argued that U.S. immigration laws give the chief executive broad leeway in deciding whom to deport, including the authority to take no action against millions of working immigrants who have families here and no serious criminal records.

But in the opening minutes of arguments Monday, Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy said Obama’s order appeared to go further by in effect changing the law and reclassifying millions of immigrants so that they may stay and work legally in the U.S.

Roberts asked the president’s attorney whether there were any limits to executive authority when it comes to deportation. “Could the president grant deferred removal to every unlawfully present alien in the United States?” Roberts asked.

No, replied U.S. Solicitor Gen. Donald Verrilli Jr., noting that the law still calls for arresting criminals.

“OK. So not criminals. Who else?” Roberts continued.

Justice Samuel A. Alito Jr. interjected to say that, under the administration's legal theory, a future president might decide unilaterally on an "open borders" policy, regardless of what Congress decided.

Verrilli disagreed. "That's a million miles from where we are now," he said.

Kennedy, whose vote is seen as crucial for the administration, leaned forward. "Well, it's 4 million people from where we are now," he said. "What we're doing is defining the limits of discretion. And it seems to me that is a legislative, not executive, act."

Allowing the president to take the lead in defining which immigrants can stay is "backward," Kennedy said. "The president is setting the policy and Congress is executing it. That's just upside down."

The sharp exchange served notice that the court's conservatives are unlikely to uphold Obama's order as being within his executive authority.

The administration's fallback argument is that the case should be dismissed because Texas suffered no injury and therefore has no standing to sue. The state has complained it must shoulder the cost of issuing driver's licenses to the immigrants.

Roberts, who has been skeptical of granting standing to states to challenge federal policies, said Texas looked to have a real complaint. "Texas says: Our injury is we have to give driver's license here, and that costs us money," the chief justice told Verrilli.

Standing is sometimes a wild card in cases over which the justices are deeply divided.

In 2004, eight justices were split over whether public schools could have students recite the phrase "one nation under God" in the Pledge of Allegiance. Scalia had recused himself, and a tie vote would have affirmed the U.S. 9th Circuit Court of Appeals' ruling that the practice was unconstitutional. Instead, the justices defused the controversy by deciding that Michael Newdow, the father who sued on his daughter's behalf, did not have standing.

The most important recent test of a state's standing came in 2007 when Massachusetts, California and a coalition of "blue states" sued the George W. Bush administration for failing to take action on climate change under the Clean Air Act. By a 5-4 vote, the court's liberals, joined by Kennedy, upheld the state's claim on the theory that rising seas could damage their coastlines.

Roberts dissented in that case, but he mentioned the ruling twice Monday. "We said in Massachusetts vs. EPA that we have a special solicitude for claims of the states," he said, a comment that suggested he was not ready to throw out the Texas case on standing.

Thomas Saenz, president of the Mexican American Legal Defense and Educational Fund, joined Verrilli in support of Obama's order, known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. He said he was there on behalf of three Texas mothers who seek "relief from the daily fear they will be separated from their families and detained or removed from their homes."

Arguing on the other side, Texas Solicitor Gen. Scott Keller called Obama's order an "unprecedented unlawful assertion of executive power" and potentially "one of the largest changes in immigration policy in our nation's history."

He ran into sharp questions from the court's liberal justices. They steadily defended the president's executive action and said it was consistent with past presidents who extended relief to large groups of immigrants.

"We still go back to the basic problem: 11.3 million people," said Justice Ruth Bader Ginsburg. Congress has not appropriated the money to arrest and deport millions of otherwise law-abiding immigrants, she said, so it makes sense to allow some of them to work legally and raise families.

The justices will meet this week to discuss the case and vote on whether to affirm or reverse the lower court. A decision is likely to be announced in June.

“U.S. Supreme Court to decide major case on Obama immigration plan”

Reuters

Lawrence Hurley

January 19, 2016

The U.S. Supreme Court on Tuesday paved the way for a major ruling on the limits of presidential powers, agreeing to decide the legality of President Barack Obama's unilateral action to shield more than 4 million illegal immigrants from deportation.

The court agreed to hear Obama's bid to resurrect his plan, undertaken in 2014 through executive action bypassing the Republican-led Congress, that was blocked last year by lower courts after Texas and 25 other Republican-governed states sued to stop it. A ruling is due by the end of June.

The case is not the first time Obama has asked the Supreme Court to rescue a major initiative. The court in 2012 and 2015 rejected conservative challenges to his signature healthcare law.

The White House expressed confidence the court would now deem as lawful Obama's immigration action, which was crafted to let millions of illegal immigrants whose children are American citizens or lawful permanent residents to get into a program that protects them from deportation and supplies work permits.

Texas and the other states contend Obama exceeded his presidential powers and usurped the authority of Congress. Texas Attorney General Ken Paxton, a Republican, said courts have long recognized the limits to presidential authority.

"The court should affirm what President Obama said himself on more than 20 occasions: that he cannot unilaterally rewrite congressional laws and circumvent the people's representatives," Paxton said.

The nine justices will review a November ruling by the New Orleans-based 5th U.S. Circuit Court of Appeals that upheld a February 2015 decision by U.S. District Judge Andrew Hanen in Brownsville, a city along the Texas border with Mexico, to halt Obama's action.

With some of his major legislative initiatives suffocated by Republican lawmakers, the Democratic president has resorted to executive action to get around Congress on issues including immigration, gun control and the Obamacare law. The most recent executive action came this month when he acted unilaterally to expand background checks for certain gun purchases.

His executive actions have antagonized Republicans who accuse him of unlawfully taking actions by executive fiat that only Congress can perform.

The case raises several legal issues, including whether states have legal standing to sue the U.S. government over decisions on how to enforce federal laws.

'FAITHFULLY EXECUTED'

The high court added a separate question on whether the president's action violated a provision of the U.S. Constitution that requires the president to "take care that the laws be faithfully executed."

The Obama administration called the president's action mere guidance to immigration officials on how to exercise discretion given by Congress on how to enforce immigration laws.

Obama's action was "consistent with the actions taken by presidents of both parties, the laws passed by Congress and the decisions of the Supreme Court," White House spokeswoman Brandi Hoffine said.

Those eligible for Obama's program, directed at illegal immigrants with no criminal record, would be able to work legally and receive some federal benefits. States were not required to provide any benefits. His order expanded on a 2012 program that provided similar relief for people who became illegal immigrants as children.

The case could have repercussions beyond immigration because it would set a precedent for the circumstances under which states can sue the federal government over a range of executive actions. Future presidents, Republican or Democratic, could face new constraints if the states win.

The case is one of the most important the Supreme Court will decide during its current term, along with a challenge to a restrictive Texas abortion law.

If the court sides with Obama, he would have until his term ends in January 2017 to implement the immigration plan. With the U.S. presidential election looming in November, it would be up to the next president to decide whether to keep it in place.

Obama's action came after a bipartisan immigration policy overhaul bill passed by the Senate died in the House of Representatives.

The immigration issue has driven a wedge between Hispanics, an increasingly important voting bloc, and Republicans, many of whom have offered tough words about illegal immigrants. Most of the estimated 11 million illegal immigrants are Hispanics, coming from Mexico and other Latin American countries.

The ruling is due just months before the presidential election. The two leading Democratic presidential hopefuls, Hillary Clinton and Bernie Sanders, said on Tuesday the court should uphold Obama's action. Republican candidates Ted Cruz and Marco Rubio said as president they would undo Obama's immigration moves.

Senate Democratic Leader Harry Reid said Obama’s executive action relied on well-established constitutional authority.

He said he recently met with the illegal immigrant parents of U.S citizens and lawful permanent residents, saying that "these law-abiding men and women continue to live in constant fear of being separated from their

children. These families must be allowed to step out of the shadows and fully contribute to the country that they love and call home."

"A Ruling Against the Obama Administration on Immigration"

The Atlantic

Matt Ford

November 10, 2015

The U.S. Fifth Circuit Court of Appeals blocked a series of President Obama's executive orders on immigration on Monday night, frustrating the administration's efforts to shield millions of undocumented immigrants from deportation and delivering a major setback to a core policy initiative of the president's second-term agenda.* The Justice Department said on Tuesday morning that it would appeal the ruling to the U.S. Supreme Court.

A three-judge panel ruled against the Obama administration on a 2-1 vote in Texas v. United States, upholding a lower court's injunction against two programs. Obama created one of the programs, called Deferred Action for Parents of Americans, or DAPA, and expanded another, called Deferred Action for Childhood Arrivals, or DACA in a unilateral effort to reshape the U.S. immigration system after the 2014 midterm elections. Texas and 25 other states sued the United States soon thereafter, in an attempt to halt the executive actions.

Since the Constitution grants exclusive power over immigration law to the federal government, the states' lawsuit might seem quixotic. To circumvent this, Texas and the other states contend that by granting deferred action to an estimated five million undocumented immigrants, the Obama administration's executive actions force the states to either provide services to them or change their state laws to avoid doing so. Texas, the only state whose standing was explicitly recognized by the court, specifically argued that the immigrants' "lawful presence" would require the state to provide them with "state-subsidized driver's licenses" and unemployment insurance.

The Obama administration argues that the changes are well within the executive branch's discretionary power to enforce existing immigration law. But conservative opponents counter that the executive actions are an unconstitutional usurpation of Congress's power to write American laws. President Obama announced his policy change last November after considerable pressure from immigration-reform activists and Dreamers and in response to the defeat of comprehensive immigration reform in Congress.

In their decision, two judges sided with the states and the lower court in Texas, citing both the impact on Texas and the breadth of the Obama administration's changes as reasons to uphold the injunction. "At its core, this case is about the Secretary's decision to change the immigration classification of

millions of illegal aliens on a class-wide basis," wrote Judge Jerry Smith in his majority opinion.

The administration's interpretation of the Immigration and Naturalization Act, Smith wrote, would effectively vest the Secretary of Homeland Security with the power "to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility." In other words, Smith wrote, "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization."

In her dissent, the third judge, Carolyn King, counseled judicial restraint in what she framed as a policy dispute instead of a legal one. "Because the DAPA Memorandum contains only guidelines for the exercise of prosecutorial discretion and does not itself confer any benefits to DAPA recipients, I would deem this case non-justiciable," she wrote. "The policy decisions at issue in this case are best resolved not by judicial fiat, but via the political process."

King then dives into a lengthy, point-by-point rebuttal of the majority's interpretation of Texas's standing to challenge the executive actions, their assertion that the creation of DAPA violated the Administrative Procedure Act, and their other conclusions about the case. Her colleagues, in an unusual step, praised a dissent that strenuously criticized them. "Our dedicated colleague has penned a careful dissent, with which we largely but respectfully disagree," the other two judges said in a footnote. "It is well-researched, however, and bears a careful read." She did not reciprocate their praise. "I have a firm and definite conviction that a mistake has been made," King concluded.

The legal saga does not end there. On Tuesday, the Department of Justice announced it would seek further review from the U.S. Supreme Court. In June, my colleague David Graham wrote about some activists' hopes that a Supreme Court showdown could make immigration reform the central issue of the 2016 elections.

Advocates hope that such a decision would make candidates of both parties, but particularly Republicans, take a stand on a specific immigration question. Rather than simply being able to say that they support comprehensive immigration reform—a vague statement—they will be asked what their views are on a clear legal matter, noted Clarissa Martínez-De-Castro, deputy vice president of the National Council of La Raza. The issue plays in down-ballot elections, too. There are Senate elections in several states with large Latino populations that are expected to be close, including Illinois, Florida, Nevada, and Colorado.

To get the case before the Court this term will require some alacrity from the Justice Department. As South Texas College of Law professor Josh Blackman noted, the Obama administration is under a tight deadline this month to ensure the case is decided during the last full Supreme Court term of his presidency.

[Texas's] brief in opposition must be filed 30 days after the case is "placed on the docket." Therefore, if the [Obama administration's] cert petition is filed anytime between now and November 20 or so, Texas's brief in opposition would be filed on or before December 22, and the petition could be distributed for the January 8 conference.

The only wild card is if Texas either (a) waives the brief in opposition, forcing the Court to order them to file one, and thus stretching the clock or (b) requests an extension, pushing us past the January 8 conference. But in all likelihood, this case will be argued the last week in April or the first week in May of 2016, with a decision in June 2016.

That assumes that the justices would accept the case if given the opportunity—a strong possibility, but a far from certain conclusion. If the Supreme Court declines to hear the case, the lower court's preliminary injunction would stand until the case's final resolution, which could come under a new president.