

No. 23-5673

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IN THE SUPREME COURT OF THE UNITED STATES

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JAVIER MARTINEZ, PETITIONER

v.

LOWELL CLARK, WARDEN, ET AL.

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

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MEMORANDUM FOR THE RESPONDENTS

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Petitioner is in removal proceedings and detained under 8 U.S.C. 1226(c), which requires detention of noncitizens who have committed certain criminal offenses. Pet. App. 12. The Board of Immigration Appeals (Board) denied petitioner's request for release on bond based on its agreement with an immigration judge's determination that petitioner "is a danger to the community," id. at 63, and petitioner filed a habeas petition challenging the lawfulness of his detention, id. at 9. Under 8 U.S.C. 1226(e), "[t]he Attorney General's discretionary judgment regarding the application of [Section 1226] shall not be subject to review," and

"[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

8 U.S.C. 1226(e). The district court denied the habeas petition, concluding that the government had satisfied its burden of proving petitioner's dangerousness in the bond hearing. Pet. App. 24-27. On appeal, the court of appeals held that the district court lacked jurisdiction to review the Board's dangerousness determination because "that is exactly the type of discretionary judgment that § 1226(e) insulates from judicial review." Id. at 17. Although the statute includes an exception permitting judicial review of "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D), the court of appeals rejected petitioner's contention that his challenge to the dangerousness determination is reviewable under that exception, Pet. App. 18; see id. at 13.

1. Petitioner primarily contends (Pet. i, 14-17) that his challenge to the agency's dangerousness determination is subject to judicial review as a mixed question of fact and law under Section 1252(a)(2)(D). As petitioner correctly observes (Pet. 4), this Court is currently considering a related contention in Wilkinson v. Garland, cert. granted, 143 S. Ct. 2687 (2023) (No. 22-666) (argued Nov. 28, 2023). In Wilkinson, the question presented is whether the agency's determination that a noncitizen has not

"established" the "exceptional and extremely unusual hardship" necessary to qualify for cancellation of removal under 8 U.S.C. 1229b(b)(1)(D) is subject to judicial review as a mixed question of law and fact under Section 1252(a)(2)(D). Pet. at i, Wilkinson, supra (No. 22-666) (quoting 8 U.S.C. 1229b(b)(1)). Because the Court's resolution of that question may bear on the proper resolution of petitioner's first question presented, respondents agree with petitioner that this petition should be held pending the decision in Wilkinson and then disposed of as appropriate in light of that decision.

2. Petitioner alternatively contends (Pet. i, 17-23) that the Court should grant review to determine whether Section 1226(e) applies in cases where an agency conducts a bond hearing for a noncitizen detained under Section 1226(c) based on a district court's determination that due process requires such a hearing. Because petitioner did not raise that argument until his unsuccessful petition for rehearing en banc, the court of appeals did not consider it. This Court's "traditional rule \* \* \* precludes a grant of certiorari \* \* \* when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

There is no reason to depart from the traditional rule here. Petitioner's contention that Section 1226(e) is inapplicable to

his case lacks merit. Section 1226(e) applies to any "discretionary judgment regarding the application of" Section 1226, and the provision specifically bars a court from "set[ting] aside any action or decision \* \* \* regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

8 U.S.C. 1226(e). Petitioner has not cited any court of appeals' decision that nonetheless finds that Section 1226(e) is inapplicable to a petition for judicial review of a bond determination for a noncitizen who is detained under Section 1226(c).\*

Respectfully submitted.

ELIZABETH B. PREGOLAR  
Solicitor General

DECEMBER 2023

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\* Respondent waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.