

**In the Supreme Court of the United States**

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JAVIER MARTINEZ, PETITIONER,

V.

LOWELL CLARK, WARDEN, NORTHWEST ICE  
PROCESSING CENTER; NATHALIE ASHER, FIELD  
OFFICE DIRECTOR, U.S. IMMIGRATION AND  
CUSTOMS ENFORCEMENT; ALEJANDRO MAYORKAS,  
SECRETARY, DEPARTMENT OF HOMELAND  
SECURITY; MERRICK B. GARLAND, U.S. ATTORNEY  
GENERAL, RESPONDENTS.

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER

The parties agree that this case “should be held pending the decision” in *Wilkinson v. Garland*, cert granted, 143 S. Ct. 2687 (2023) (No. 22-666) (argued Nov. 28, 2023). Resp’ts’ Mem. at 3. As both parties explain, the decision in *Wilkinson* “may bear on the proper resolution of petitioner’s first question presented.” *Id.*; *see also* Pet. for Writ of Cert. at 14–17 (similar).

Mr. Martinez writes only to address Respondents’ erroneous claim that Mr. Martinez failed to raise the second question presented, namely, whether 8 U.S.C. § 1226(e) does not apply where a district court grants relief on a petition for writ of habeas corpus ordering a bond hearing for an individual subject to mandatory detention pursuant to § 1226(c). *See* Resp’ts’ Mem. at 3. The record in this case is clear that Mr. Martinez raised this issue. In the proceedings below, Respondents initially contested jurisdiction at the Court of Appeals, filing a motion to dismiss Mr. Martinez’s appeal to the Ninth Circuit Court of Appeals that invoked § 1226(e). *See* Mot. to Dismiss at 9–13, *Martinez v. Clark*, No. 21-35023 (9th Cir. filed July 20, 2021), ECF No. 15. In response, Mr. Martinez explicitly argued that his bond hearing was not held under § 1226 because he had been detained under § 1226(c), which prohibits bond hearings. Resp. to Mot. to Dismiss at 2, *Martinez v. Clark*, No. 21-35023 (9th Cir. filed July 30, 2021), ECF No. 16. As he explained, he instead received a bond hearing pursuant to the district court’s order granting a writ of habeas corpus and the Due Process Clause. *Id.* And for that reason, Mr. Martinez asserted, § 1226(e) does not apply, as his petition for a writ of habeas corpus challenging the bond

decision did not seek review of “the application of *this section*,” nor did it seek review of a “denial of bond” “*under this section*.” *Id.* at 1 (emphasis in original) (quoting 8 U.S.C. § 1226(e)).

The Ninth Circuit subsequently denied Respondents’ motion without prejudice, noting that Respondents could renew any jurisdictional arguments in their answering brief. Order, *Martinez v. Clark*, No. 21-35023 (9th Cir. filed Sept. 9, 2021), ECF No. 19. But Respondents’ brief never raised any jurisdictional arguments. *See* Resp’ts’ Br., *Martinez v. Clark*, No. 21-35023 (9th Cir. filed Nov. 8, 2021), ECF No. 20. Nevertheless, in its decision, the Ninth Circuit held that the district court lacked jurisdiction over many of Mr. Martinez’s claims, relying on the arguments in Respondents’ previously denied motion. In doing so, the Court noted that § 1226(e) applied to Mr. Martinez’s case. App. 12–13. Subsequently, Mr. Martinez again argued in his petition for rehearing or rehearing en banc that § 1226(e) does not apply to this case because his petition did not seek to challenge a bond hearing held pursuant to § 1226. *See* Pet. for Reh’g at 4–5, *Martinez v. Clark*, No. 21-35023 (9th Cir. filed Sept. 8, 2022), ECF No. 34.

Respondents thus err in asserting that Petitioner did not raise this argument until his unsuccessful petition for rehearing en banc. At each stage of the appellate proceedings in this case, Mr. Martinez preserved his claim that § 1226(e) does not apply to his petition for a writ of habeas corpus. In any event, no party questions that the issue of whether the district court had jurisdiction is properly before the Court, and “[o]nce a federal claim is properly presented, a party can make any argument in

support of that claim; parties are not limited to the precise arguments they made below.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (citation omitted).

## CONCLUSION

The Court should hold this case in abeyance pending the outcome in *Wilkinson*. If the Court decides not to grant the petition in light of its decision in *Wilkinson*, then it should grant the petition to address the predicate issue of whether 8 U.S.C. § 1226(e) is applicable in this context.

Respectfully submitted this 3<sup>rd</sup> day of January, 2024.

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