13-2509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CLAYTON RICHARD GORDON, on behalf of himself and others similarly situated

Petitioner - Appellee

PRECIOSA ANTUNES; GUSTAVO RIBEIRO FERREIRA; VALBOURN SAHIDD LAWES; NHAN PHUNG VU

Petitioners

v.

ERIC H. HOLDER, JR., Attorney General; JOHN SANDWEG, Acting Director; SEAN GALLAGHER, Acting Field Office Director; CHRISTOPHER J. DONELAN; MICHAEL G. BELLOTTI, Sheriff; STEVEN W. TOMPKINS, Sheriff; THOMAS M. HODGSON, Sheriff; JOSEPH D. MCDONALD, JR., Sheriff; RAND BEERS, Acting Secretary of Homeland Security

Respondents - Appellants

Appeal from the United States District Court for the District of Massachusetts No. 3:13-cv-30146-MAP

BRIEF FOR PETITIONER - APPELLEE

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INTRODUCTION

The government asks this Court to take away its authority to decide whether to release appellee Clayton Richard Gordon or detain him during his immigration proceedings. After his arrest in 2008 for a drug offense, Gordon rebuilt his life and started a family; he has been a lawful permanent resident for over 30 years. But in June 2013, Gordon was abruptly detained by immigration authorities. Because Gordon was not detained "when [he was] released" from custody for his drug offense, the district court held that his detention was not mandatory under 8 U.S.C. § 1226(c), and ordered a bond hearing. That decision was compelled by this Court's ruling in *Saysana* v. *Gillen*, 590 F.3d 7 (1st Cir. 2009), by the text and structure of § 1226(c), and by the absurd results and serious constitutional concerns that flow from the government's view that noncitizens can be thrown into mandatory detention years or decades after being released from criminal custody for a predicate offense.

The mandatory detention provision instructs immigration authorities to detain certain noncitizens "when [they are] released" from custody for offenses that render them removable from the United States, and it generally prohibits immigration authorities from releasing them

during their removal proceedings. 8 U.S.C. § 1226(c). This Court has recognized that § 1226(c) is a "limited" exception that curtails the discretion that immigration authorities otherwise possess, under 8 U.S.C. § 1226(a), to decide whether to detain or release a noncitizen in removal proceedings. *Saysana*, 590 F.3d at 17.

This Circuit's district courts, including the court below, agree that mandatory detention does not apply to noncitizens taken into immigration custody well after being released from predicate criminal custody. A006-34;[1] *Castaneda* v. *Souza*, 952 F. Supp. 2d 307 (D. Mass.), appeal docketed, No. 13-1994 (1st. Cir. Aug. 7, 2013); *Oscar* v. *Gillen*, 595 F. Supp. 2d 166, 169 (D. Mass. 2009). They rely on two key conclusions. First, § 1226(c) applies mandatory detention only to noncitizens detained "when . . . released." Second, noncitizens taken into immigration custody long after being released from criminal custody have not in fact been detained "when . . . released." The court below observed that the government's approach produces extreme results that Congress could not have intended.

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[1] Citations to "A[page number]" refer to the government's addendum.

This is a case in point. After Gordon's 2008 drug offense, he started a family, bought a home, ran a successful business, and was active in his community. A011-12. When Gordon was detained by Immigration and Customs Enforcement ("ICE") some five years later, it was not because he presented any threat to public safety or risk of flight. Indeed, after the district court held that Gordon's detention was not mandatory, the government held a bond hearing and released Gordon on bond.

Yet the government argues that it has *no choice* but to keep Gordon detained. It contends, and the Board of Immigration Appeals ("BIA") has held, that mandatory detention applies to all noncitizens who committed offenses listed in § 1226(c)(1)(A) through (D), no matter whether they were detained "when . . . released" from custody for such an offense. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

The BIA's view—which can apply mandatory detention to people detained more than *15 years* after a release from criminal custody—has been accepted by two courts of appeals. *Sylvain* v. *Att'y Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375 (4th Cir. 2012). But, for three reasons, it is incorrect.

First, both this Court's analysis in *Saysana* and the plain meaning of § 1226(c) foreclose the government's interpretation. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For its part, *Saysana* confirms that § 1226(c)'s "when . . . released" language, and not just the list of offenses in § 1226(c)(1)(A) through (D), helps to define the noncitizens who are subject to mandatory detention; it rejects a contrary view that would apply § 1226(c) to noncitizens detained years after their release from criminal custody. Indeed, the BIA itself acknowledges the inconsistency between its decision in *Rojas* and this Court's decision in *Saysana*. *Matter of Garcia Arreola*, 25 I&N Dec. 267, 270-71 & n.4 (BIA 2010).

Even without *Saysana*, § 1226(c) unambiguously applies only to noncitizens detained at the time of their release. As a threshold matter, the statute's plain text and basic structure indicate that a noncitizen who has not been detained "when . . . released" falls outside the reach of § 1226(c), and is instead subject to the government's default discretion to detain or release noncitizens under § 1226(a). The government's contrary view requires detention without bond of noncitizens who long ago

returned to their communities, a result that Congress did not intend and which would raise serious constitutional concerns.

Moreover, the phrase "when the alien is released" requires prompt action by immigration authorities. Although the government argues that "when . . . released" could simply mean "any time after" release, Gov't Op. Br. 18, statutory text and basic logic dictate otherwise. Congress used the phrase "when . . . released" to require prompt government action, not to express indifference about when noncitizens should be detained.

Second, even if § 1226(c) were ambiguous, the BIA's interpretation is unreasonable and not entitled to deference. *Chevron*, 467 U.S. at 843. *Rojas* distorts the statutory text and yields extreme results that Congress could not have intended. And the government's defense of *Rojas* is not faithful either to *Rojas* itself—which acknowledged that "when . . . released" connotes immediacy—or to other BIA cases involving § 1226(c).

Finally, the government incorrectly relies on cases holding that, where a remedy for government tardiness is not specified by statute, courts should not fashion a remedy that sanctions the government. Gov't Op. Br. 12, 40-53. Those cases cannot apply here because § 1226 *does*

specify what happens to noncitizens who are not detained "when . . . released"; the government may detain or release them under § 1226(a). Moreover, applying § 1226(a) never sanctions the government. When the court below ruled that Gordon's detention was governed by § 1226(a), it did not extinguish some "authority to mandatorily detain [Gordon] without bond," as the government argued below. ECF No. 21 at 3. Instead, that ruling affirmed the government's authority over Gordon's detention, which the government then exercised by releasing Gordon on bond. In contrast, applying § 1226(c) would have *curtailed* the discretionary authority that is *conferred* upon the executive branch by § 1226(a).

Accordingly, rather than defer to the flawed reasoning of *Rojas*, the district court properly applied the ordinary tools of statutory construction and the straightforward reasoning of *Saysana*. This court should uphold its ruling that Gordon's detention was governed by the discretionary authority of § 1226(a), and that a bond hearing was warranted.

STATEMENT OF ISSUES

I. Under § 1226(a), immigration officials may decide whether to detain or release a noncitizen during his removal proceedings "[e]xcept as

provided in" § 1226(c), the mandatory detention provision. Did the district court correctly rule that § 1226(c) unambiguously applies only to noncitizens detained "when [they are] released" from custody for a predicate offense, and that Gordon's detention five years after his release from criminal custody did not constitute detention "when . . . released"?

II. Did the district court correctly rule that even if § 1226(c) is ambiguous, the BIA's interpretation is unreasonable and therefore not entitled to *Chevron* deference?

III. Did the district court correctly rule that "loss-of-authority" cases like *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990)—which hold that courts should not invent sanctions that strip the government of authority to act after a statutory deadline—are not implicated by the district court's holding that Gordon's detention fell within the government's discretionary authority of § 1226(a)?

STATEMENT OF THE CASE

Gordon filed a class action complaint and petition for writ of habeas corpus on August 8, 2013. He alleged that he and others similarly situated were not properly subject to mandatory immigration detention under

§ 1226(c) because they had not been taken into immigration custody at the time of their release from the predicate criminal custody. ECF No. 1 at 1-2. The district court held that Gordon's detention under § 1226(c) was unlawful. A004. On October 23, 2013, it granted Gordon's petition for writ of habeas corpus, ordering that he receive a bond hearing. A004-5. Gordon received that hearing and was released on bond. A012-13 n.4. Subsequently, the district court issued a memorandum providing a more detailed explanation of its October 23 ruling. A007-8.

The district court stayed briefing on class certification pending its resolution of the legal question at issue here. ECF No. 25. After the district court granted Gordon's habeas petition, the case continued with additional named representatives. ECF Nos. 72, 99. On March 27, 2014, the court certified a class of noncitizens who are or will be detained under § 1226(c) in Massachusetts and were not taken into immigration custody within 48 hours (excluding weekends and holidays) of their release from the relevant criminal custody. ECF No. 114 at 7.[2]

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[2] Plaintiffs have estimated that the class includes about 50 of the approximately 200 detainees subjected to detention under § 1226(c) in Massachusetts at any given time. ECF No. 1 at 9. The government identified 46 class members in December 2013. 12/19/13 Tr. at 27.

STATEMENT OF FACTS

I. Gordon's Detention

Clayton Richard Gordon is a native of Jamaica who arrived in the United States in 1982 as a lawful permanent resident. He was six years old. Gordon joined the National Guard in 1994 and then served in active duty with the U.S. Army. He was honorably discharged in 1999. A011.

In 2008, Gordon was arrested after police found cocaine in his home. He was released from custody within one day of his arrest. Gordon pleaded guilty in state court to a charge of possession of narcotics with intent to sell, for which he received a seven-year suspended sentence and three years of probation. He successfully completed his probation. A011.

Gordon met his fiancee around 2008, and they had a son in 2010. They purchased a home together in Bloomfield, Connecticut. Gordon also developed a successful business and initiated a project to open a halfway house for women released from incarceration. A011-12; ECF No. 3-8.

On June 20, 2013, without any warning, Gordon was stopped by ICE agents after he left for work. He was taken into ICE custody at the Franklin County Jail and House of Correction in Greenfield,

Massachusetts. Relying on his 2008 offense, the Department of Homeland Security ("DHS") determined that Gordon was subject to mandatory detention under § 1226(c). A012.

Gordon asked for a bond hearing in immigration court. The immigration judge found that Gordon was subject to mandatory detention because (1) he had been convicted of an aggravated felony (his drug offense); and (2) he had been arrested and, consequently, "released" from custody in connection with that crime in 2008. Gordon Add. 1 (immigration judge's custody order). Accordingly, the immigration judge did not consider whether Gordon posed a flight risk or danger that warranted his continuing detention during the course of his immigration proceedings. *Id.*

Gordon's detention without the possibility of release placed tremendous financial and emotional strain on his family. His fiancee struggled to keep up with mortgage payments and to care for the couple's young son on her own. With Gordon abruptly vanished, Gordon's son began acting out and asking constantly for his father. Meanwhile, Gordon's community also suffered as his dream of opening a transitional

home was put on hold. ECF No. 3-7 at ¶¶ 11-15.

II. Statutory Background

A. The Mandatory Detention Provision

Section 1226 of Title 8 governs detention during immigration removal proceedings. Section 1226(a) supplies general discretionary authority to detain a noncitizen, or release him on bond or conditional parole, during removal proceedings. A noncitizen detained under § 1226(a) is entitled to a bond hearing, at which an immigration judge decides if detention is justified by public safety concerns or flight risk. 8 C.F.R. §§ 1003.19, 1236.1(d); *Matter of Guerra*, 24 I&N Dec. 37, 37-38 (BIA 2006). Section 1226(a) applies "[e]xcept as provided in subsection (c)."

Section 1226(c), the mandatory detention provision, is a narrow exception to the government's discretion to detain or release under § 1226(a). It requires the detention of noncitizens who are "deportable" or "inadmissible" based on certain grounds "when [they are] released" from custody for an offense triggering one of these grounds. 8 U.S.C. § 1226(c)(1). These noncitizens may be released from detention only in narrow circumstances not present here. *Id.* § 1226(c)(2). Noncitizens

detained under § 1226(c) are not entitled to bond hearings and receive no individual determination of whether they pose any danger or flight risk justifying their detention.

Section 1226 provides, in relevant part:

> (a) Arrest, detention, and release
>
> On a warrant issued by the Attorney General,[3] an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization [except in the case of lawful permanent residents and certain others].
>
> * * *

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[3] The Secretary of Homeland Security now shares responsibilities originally assigned to the Attorney General in § 1226. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402, 441, 116 Stat. 2135 (Nov. 25, 2002); 6 U.S.C. § 557.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides [that the alien's release is necessary to protect a witness in a

major criminal investigation].

B. The BIA's Interpretation

The BIA has held that mandatory detention applies to noncitizens who are subject to one of the grounds of removability listed in § 1226(c)(1), so long as they were *in* physical custody in connection with that offense at some point, and were *released* from that custody after the 1998 effective date of the provision. *Matter of West*, 22 I&N Dec. 1405, 1409-10 (BIA 2000) (noting "released" in § 1226(c) refers to release from physical custody); see also *Matter of Kotliar*, 24 I&N Dec. 124, 125-26 (BIA 2007).

In *Rojas*, the BIA addressed the precise question at issue in this case. It held that mandatory detention applies to individuals who are removable based on a ground listed in § 1226(c)(1)(A) through (D), without regard to whether they were detained "when . . . released" from criminal custody. 23 I&N Dec. at 125. The BIA reasoned that the "when . . . released" clause was part of a "statutory command," not part of the "*description* of an alien who is subject to [mandatory] detention." *Id.* at 121-22. Under that holding, the determination whether a noncitizen is subject to mandatory detention does "not includ[e] the 'when released'

clause," *id.* at 125, and mandatory detention can apply to noncitizens months or years after their release from criminal custody.

Although the BIA found ambiguity concerning whether a noncitizen must be detained "when . . . released" in order to be subject to § 1226(c), it did *not* find the phrase itself to be ambiguous. That phrase, *Rojas* acknowledged, directs immigration authorities to detain noncitizens "immediately upon their release from criminal confinement." *Id.* at 122.

Most district courts—including every district court in this Circuit to have addressed the issue—have held that § 1226(c) unambiguously forecloses *Rojas*'s holding that mandatory detention applies to people not detained "when . . . released." *Castaneda*, 952 F. Supp. 2d at 321; *Oscar*, 595 F. Supp. 2d at 169; see *Baquera* v. *Longshore*, 948 F. Supp. 2d 1258, 1262-63 & n.3 (D. Colo. 2013) (collecting cases). Two courts, including the court below, have certified classes and, in one case, granted classwide relief. ECF No. 114; *Khoury* v. *Asher*, --- F. Supp. 2d ---, 2014 WL 954920, at *13-14 (W.D. Wash. Mar. 11, 2014) (certifying class and granting relief). Other courts—including the Third and Fourth Circuits—have upheld *Rojas*. See *Sylvain*, 714 F.3d 150; *Hosh*, 680 F.3d 375.

III. The District Court's Decision

The district court held that Gordon was not subject to mandatory detention because he was not detained "when [he was] released" from criminal custody in 2008. The court ruled that this holding was compelled by the unambiguous meaning of § 1226(c) and, in the alternative, by the unreasonableness of the government's view that § 1226(c) applies mandatory detention to Gordon and other noncitizens detained well after their release from predicate criminal custody. The court accordingly granted Gordon's petition for writ of habeas corpus and ordered that he receive an individualized bond hearing. A007-8.

Judge Ponsor began with the statute's text, observing that the "most natural construction of the phrase 'when the alien is released' is 'at the time of release.'" A017. While that interpretation "flows from the phrase's usual meaning," Judge Ponsor concluded that the government's view—that "when . . . released" could mean "'at any point after release'"—"wrench[es] the phrase out of its normal context." *Id.*

The district court also observed that the government's view renders the "when . . . released" language superfluous. A019. While the

government proposes that mandatory detention applies to every noncitizen falling into the categories of removability listed in § 1226(c)(1)(A) through (D), Judge Ponsor observed that removing the "when . . . released" clause from the statute "yields the same result." *Id.* He also noted that if Congress had intended the government's interpretation—that § 1226(c) applies at any time after release—then Congress could have used "a plethora of words and phrases," including the phrase "any time after." A018.[4]

The district court also reasoned that its plain-language interpretation found "powerful[] support[]" in "the purpose and structure of § 1226(c)." A020. With regard to the statutory structure, first, the court observed that § 1226(c) is "a limited exception in the broader detention scheme." A026 (citing *Saysana*). Thus, the statute creates "a strong presumption . . . in favor of discretionary detention and individualized bond hearings." *Id.* Second, the court focused on the relationship between

[4] While concluding that the "plain language of this statute sets forth an immediacy requirement," Judge Ponsor acknowledged that detention within a short time of release—such as one hour—might be consistent with Congress's requirement of immediate detention. A014, A020 n.6; see also A024 (§ 1226(c) calls for detention that is "*immediate*" or at least "reasonably prompt").

the two paragraphs of § 1226(c). It observed that the "when . . . released" clause is part of § 1226(c)'s first paragraph, where it "help[s] to define the group of non-citizens subjected to § 1226(c) as those who commit a crime in an enumerated category *and* are detained upon release." *Id.*

The district court also observed that, in light of the statute's purposes, mandatory detention of noncitizens like Gordon—"who has been in the community living a law-abiding life for five years"—"makes no sense whatsoever." A022-25 (citing *Saysana*, 590 F.3d at 17-18). Instead, after considering the Supreme Court's analysis of § 1226(c) in *Demore* v. *Kim*, 538 U.S. 510 (2003), the court concluded that "[t]he obvious goal" of § 1226(c) "was to ensure the *direct* transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities." A022. Congressional objectives, in other words, "rendered quick and mandatory detention critical." A024. And these objectives were *not* served by a "distorted interpretation" of mandatory detention that applies it to noncitizens who are detained years after their release from criminal custody. A022.

Consistent with that understanding of the government's approach,

the district court also ruled that even if the statute were ambiguous, the government's view would not warrant *Chevron* deference because it is "flatly unreasonable as a matter of ordinary usage and exhibits arbitrariness and caprice in its application." A028. The court remarked that, under the government's view, "[i]mmigration authorities could wait ten, twenty, or thirty years, if they wished, before detaining an alien without any right to a bail hearing, even where the alien had lived an exemplary life for all those decades." *Id.* In the court's view, that result was "patently unreasonable" and "create[d] precisely the discretion Congress sought to avoid." A028-30.

Finally, the district court rejected the government's reliance on what the court termed the "loss of authority cases." A031-34. Judge Ponsor observed that the loss-of-authority cases articulate a principle that applies "where judicial action would *remove* power from the executive." A033. He found that the "critical component, elimination of authority, is missing here" because "[g]iving § 1226(c) its plain meaning here does not limit or prevent the government from detaining individuals" under § 1226(a). A033-34.

SUMMARY OF THE ARGUMENT

I. The district court's ruling that Gordon's detention was unambiguously governed by § 1226(a), rather than by § 1226(c), is correct for two reasons.

I.A. First, the plain meaning of § 1226(c) applies mandatory detention only to noncitizens detained "when . . . released." This Court has already construed the "when . . . released" clause, in *Saysana*, to help define which noncitizens are subject to mandatory detention. Thus, *Saysana* alone resolves this case. But even without *Saysana*, the text and structure of § 1226(c) demonstrate that it applies only to noncitizens who were detained "when . . . released." The government's contrary view yields absurd results that are inconsistent with § 1226(c)'s limited purposes and raise serious constitutional concerns.

I.B. Second, Gordon was not in fact detained "when . . . released." The plain language, purposes, and history of § 1226(c) make clear that the command to take custody "when the alien is released" requires detention at the time of release. The government's view—that "when the alien is released" could mean any time "starting at the point when the alien has

been released," Gov't Op. Br. 16—has no point of contact with any plausible meaning of "when" and "is."

II. As the district court correctly concluded, the BIA's decision in *Rojas* would not warrant deference even if § 1226(c) were ambiguous. *Rojas* distorts the statutory text and yields extreme results that contravene Congress's purposes. Although the government seems to argue that *Rojas* is nevertheless entitled to deference simply because it applies mandatory detention more broadly, breadth is not a reason to defer to its strained statutory interpretation. See *Saysana*, 590 F.3d at 17-18.

III. Finally, the district court correctly concluded that, by holding that Gordon is subject to the detention authority of § 1226(a), it did not "sanction" the government. The government points to cases holding that courts should not invent "sanctions" that curtail the government's authority to act after a statutory deadline has passed, but the remedy here was not the district court's invention. The statute specifies that § 1226(a) governs when § 1226(c) does not. Nor was there any sanction. Instead, as the government concedes, applying § 1226(a) merely "reintroduc[ed] [its] discretion" to detain or release Gordon—discretion

that the government has now exercised by releasing Gordon on bond. See Gov't Op. Br. 32 (quoting *Sylvain*, 714 F.3d at 161).

ARGUMENT

Standard of Review

Under *Chevron*, a statute is "ambiguous"—and deference to a reasonable agency interpretation is warranted—only when a court cannot determine congressional intent using the ordinary tools of statutory construction, *Saysana*, 590 F.3d at 12-13, including "the most natural reading of the language and the consistency of the interpretive clues Congress provided," *Succar* v. *Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005) (citation and internal quotation marks omitted); see *id.* (deference to reasonable agency interpretation "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" (quoting *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004))). If a statute's meaning cannot be determined using the ordinary tools of statutory construction, then a court must defer to an agency interpretation "unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Saysana*, 590 F.3d at 13 (quoting *Chevron*, 467

U.S. at 844).

I. The district court correctly concluded that Gordon's detention was unambiguously governed by § 1226(a) rather than by § 1226(c).

The court below correctly held that Gordon's detention under § 1226(c) violated that statute's plain meaning, and that deference to *Rojas* is therefore unwarranted. First, § 1226(c) applies only to noncitizens detained "when . . . released." Second, that "when . . . released" requirement was plainly not satisfied when immigration authorities detained Gordon nearly five years after he was released from custody for his drug offense. The government's efforts to find ambiguity in this statute—a claim that the statutory command to take custody "when the alien is released" might not help "define which aliens qualify for detention under the statute," or that the phrase "when . . . released" might simply mean "any time after" release—lack merit. See Gov't Op. Br. 16-22.

A. Section 1226(c) unambiguously applies mandatory detention only to noncitizens detained "when . . . released" from the relevant custody.

The district court correctly held that § 1226(c) requires detention "when . . . released" from criminal custody for a predicate offense. As the

court properly concluded, the government's interpretation contradicts this Court's analysis in *Saysana* and the plain language of § 1226(c). It also yields extreme results that Congress did not intend, and that raise serious constitutional concerns.

1. The government's interpretation contradicts *Saysana*.

This Court's decision in *Saysana* contradicts the core holding of *Rojas*: that detention "when . . . released" is irrelevant to whether a noncitizen is subject to mandatory detention, and that, consequently, mandatory detention can occur years or decades after a noncitizen's release from criminal custody. While the government relegates *Saysana* to a footnote, Gov't Op. Br. 20 n.5, the BIA itself has acknowledged that *Saysana* and *Rojas* are incompatible. *Garcia Arreola*, 25 I&N Dec. at 270-71 & n.4.

Saysana held that the "release" referenced in the "when . . . released" language of § 1226(c)(1) cannot be a release from custody for an offense *other than* the offenses listed in § 1226(c)(1)(A) through (D). 590 F.3d at 18. The BIA had held that a noncitizen who had been released from custody for an offense described in subparagraphs (A) through (D)

before the effective date of § 1226(c) was nonetheless subject to mandatory detention because he had also been released from custody, *after* the statute's effective date, for an offense not listed in those subparagraphs. *Id.* at 9-10. But this Court held that "the statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute, not merely *any* release from *any* non-DHS custody." *Id.* at 18. Because Saysana was detained following release from custody for an offense not associated with § 1226(c)(1), and because his release for an offense designated under § 1226(c)(1) preceded the statute's effective date, this Court affirmed the district court's ruling that mandatory detention did not apply and that Saysana was entitled to a bond hearing. *Id.* at 9-10, 18.

While the precise issues in *Saysana* and *Rojas* are not identical, district courts in this Circuit have understood that *Saysana* bears directly on the issue here. A023-25; *Castaneda*, 952 F. Supp. 2d at 315-18. In fact, for two fundamental reasons, *Saysana* and *Rojas* are irreconcilable.

First, if the government can subject a noncitizen to mandatory detention even if he was not detained "when . . . released" from criminal

custody for a predicate criminal offense—as *Rojas* holds—then a noncitizen who committed a predicate criminal offense could never *avoid* mandatory detention on the ground that the government took him into custody "when [he was] released" for a *different offense*. Yet that is precisely what happened in *Saysana*; although *Rojas* would dictate that the "when . . . released" clause never bears on the application of mandatory detention, this Court relied on the "when . . . released" clause in holding that Saysana was not subject to mandatory detention. Under that reasoning, and contrary to *Rojas*, the "when . . . released" clause helps to define the class of persons subject to mandatory detention.

Second, *Saysana* rejects the "unsupported assumption[]"—on which *Rojas* relies—that § 1226(c) was designed to apply mandatory detention to substantially all criminal aliens. *Saysana*, 590 F.3d at 17. *Rojas* asserted, and the government now argues, that because § 1226(c) sprung from congressional concerns that certain noncitizens would recidivate or flee, Congress must have wanted the provision to apply to *every* noncitizen with an offense described in paragraphs (A) through (D). See *Rojas*, 23 I&N Dec. at 122; Gov't Op. Br. 3, 6, 11, 15, 28-34, 38, 48-53. But the

government advanced that same argument in *Saysana*, and this Court rejected it. See Gov't Op. Br. 2-3, 5, 9, 11, 13-14, 25-28, *Saysana*, No. 09-1179 (filed March 27, 2009).

While the government continues to view the mere existence of mandatory detention as proof of the provision's intended breadth, *Saysana* recognized § 1226(c) as a "focused" provision targeting those whom Congress regarded as most likely to recidivate, fail to appear for their immigration proceedings, or fail to cooperate with a removal order. *Id.* at 17-18. This Court stated that it would have been "counter-intuitive" for Congress to have categorically imputed those same risks to noncitizens who had been released years earlier; after all, they were likely to have strong arguments for release on bond. *Id.* The Court therefore concluded that the goals of § 1226(c) are not served by applying it to noncitizens who—like Gordon—were detained years after their release from criminal custody for a relevant offense. *Id.* at 15, 18.

The conflict between *Saysana* and *Rojas* has not gone unnoticed. In 2010, while adopting the *holding* of *Saysana*, the BIA was careful to "depart from the First Circuit's analysis." *Garcia Arreola*, 25 I&N Dec. at

271. In particular, the BIA adopted *Saysana*'s holding by relying on the effective date provision rather than the "when . . . released" language that this Court had interpreted. *Id.* (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, § 303(b), 110 Stat. 3009 (Sept. 30, 1996)). For that reason, the BIA stated that it did not "recede from *Matter of Rojas*." *Id.* at 270-71 & n.4. This Court should now confirm what the BIA recognized: *Saysana* contradicts *Rojas*.

2. The text and structure of § 1226 apply mandatory detention only to noncitizens detained "when . . . released."

Interpreting § 1226(c) on a clean slate, without relying on *Saysana*, would still demonstrate that § 1226(c) unambiguously applies only to noncitizens detained "when . . . released." The district court correctly concluded that the text and structure of § 1226(c) answer the question raised by this case.

For starters, the text of § 1226(c) straightforwardly applies mandatory detention only to noncitizens detained when released from the relevant criminal custody. The phrase "when . . . released" in § 1226(c)(1) is part of a *single sentence*—starting with "The Attorney General shall"

and ending with "the same offense"—commanding immigration authorities to detain certain removable noncitizens "when [they are] released" from custody for a relevant offense. The phrase appears in "flush language" directly following subparagraphs (A) through (D), indicating that it modifies each one of them. *Sherwin-Williams Co.* v. *Comm'r*, 330 F.3d 449, 454 n.4 (6th Cir. 2003).

A provision's "plain meaning," moreover, is "made clear not only by the words of the statute but by its structure as well." *Saysana*, 590 F.3d at 13 (citation and internal quotation marks omitted). Here, three structural elements confirm that § 1226(c) applies only to noncitizens detained "when . . . released" from the predicate custody.

First, § 1226(c) defines a narrow exception to the discretionary authority that immigration officials otherwise have under § 1226 to detain or release noncitizens during their immigration proceedings. See *Saysana*, 590 F.3d at 17. Section 1226(a) gives immigration authorities discretion to detain or release noncitizens, "[e]xcept as provided in subsection (c)." Section 1226(c), in turn, prescribes when immigration authorities are barred from making this choice. See *Demore*, 538 U.S. at 520-21

(mandatory detention limits immigration officials' "discretion over custody determinations"); 8 C.F.R. § 1003.19(h)(2)(i) ("an immigration judge may not redetermine conditions of custody" for noncitizens subject to § 1226(c)(1)). Section 1226(c), therefore, is not a standalone detention statute and does not grant any new authority. Instead, as the district court correctly observed, it is "a limited exception" to § 1226(a). A024, A026; see also *Saysana*, 590 F.3d at 17; *Castaneda*, 952 F. Supp. 2d at 315. Section 1226(c) therefore applies only narrowly, and only in the circumstances actually described in its text: noncitizens detained "when . . . released" from custody for a relevant offense.

Second, the conclusion that mandatory detention applies only to noncitizens detained "when . . . released" follows from the structure of the two paragraphs—§ 1226(c)(1) and § 1226(c)(2)—that together effectuate mandatory detention. The "Custody" paragraph, § 1226(c)(1), instructs federal authorities to "take into custody any alien who [is deportable or inadmissible based on certain criminal or terrorism grounds] when the alien is released." The "Release" paragraph, § 1226(c)(2), describes the limited circumstances in which the Secretary can release noncitizens

"described in paragraph (1)." Because the two paragraphs operate in tandem, they necessarily refer to the same subset of people. That is, when the limitation on release in § 1226(c)(2) mentions noncitizens "described in paragraph (1)," it means noncitizens who were taken into custody as commanded by the *entirety* of paragraph (1)—*i.e.*, noncitizens who have committed offenses listed in subparagraphs (A) through (D) *and* who were detained "when . . . released."

Third, the conclusion that mandatory detention applies only to noncitizens detained "when . . . released" is bolstered by the language that phased in mandatory detention. When § 1226(c) was enacted in 1996, Congress did not apply it to all noncitizens who had committed offenses listed in § 1226(c)(1)(A) through (D). Instead, even after providing the Attorney General with a two-year transition period to prepare for § 1226(c)'s implementation, Congress applied mandatory detention only to noncitizens "*released after*" the 1998 expiration of that period. See IIRIRA, Pub. L. 104-208, § 303(b)(2), 110 Stat. 3009 (emphasis added); *Matter of Adeniji*, 22 I&N Dec. 1102, 1103 (BIA 1999). Congress's decision to define the effective date in terms of a noncitizen's "release" from

criminal custody supports the conclusion yielded by the plain text and basic structure of § 1226: that mandatory detention applies only to noncitizens detained "when . . . released."

Nevertheless, the government asserts that the structure of § 1226(c) renders it ambiguous. It states that even if the "when . . . released" clause helps *direct* the detention of certain noncitizens upon their release, it might not help *describe* the noncitizens who are subject to mandatory detention. Gov't Op. Br. 22, 26; see Gov't Op. Br. 21, *Castaneda*, No. 13-1994 (filed Feb. 4, 2014) (arguing § 1226(c)(1) consequently has separate "empowering" and "definitional" facets). On this account, when § 1226(c)(2) refers to noncitizens "described in paragraph (1)," it could mean noncitizens described only in *subparagraphs* (A) through (D) of that paragraph, without the "when . . . released" clause. Gov't Op. Br. 21-22, 26. This ambiguity exists, the government argues, because the "when . . . released" clause is placed "outside" the enumerated categories of removability in subparagraphs (A) through (D). *Id.* at 21.[5]

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[5] The Third Circuit, far from articulating this point, see Gov't Op. Br. 21, declined to address the government's claims of statutory ambiguity. See *Sylvain*, 714 F.3d at 156-57.

The problem for the government is that its claimed ambiguity is manufactured. Nothing in § 1226(c)(1) suggests that if it is viewed in just the right way—like the familiar optical illusion of the "young girl / old woman"—it will reveal one facet that commands detention of noncitizens "when . . . released," and a *different* facet that uses only § 1226(c)(1)(A) through (D) to describe the noncitizens subject to mandatory detention. See Gov't Op. Br. 21-22, 26. Moreover, Congress clearly could have specified that the limitations on release in paragraph (2) applied to all noncitizens "described in *subparagraphs* (A) through (D)," as the government assumes it intended.[6] But it is *not* clear how Congress could have more closely tied the "when . . . released" clause to the subparagraphs listing removability categories in order to make it more obvious that the "when . . . released" clause is part of the "description" of noncitizens subject to mandatory detention. The "when . . . released" clause and the subparagraphs are, after all, adjacent and in the same sentence.

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[6] Cf. 8 U.S.C. § 1160(b)(3)(B)(iii) (referring to "the work described in subsection (a)(1)(B)(ii)" rather than § 1160(a) or even § 1160(a)(1)(B)); *id.* § 1187(a)(1) (referring to "a nonimmigrant visitor . . . described in section 1101(a)(15)(B)").

Rather than confront the actual text and structure of § 1226(c), the government's own summaries of § 1226(c) simply omit the "when . . . released" clause.[7] The government not only fails to present a "more plausible" interpretation of § 1226(c), Gov't Op. Br. 21, but its proffered ambiguity bears little connection to the statutory text and structure.

3. The government's interpretation yields absurd results that undermine congressional intent and raise serious constitutional questions.

The district court also correctly concluded that the narrow purposes of § 1226(c), as articulated by this Court in *Saysana*, support its interpretation of the text and structure. Because a contrary view would yield absurd results and raise serious constitutional questions—by subjecting noncitizens to mandatory detention based on crimes for which they were released long ago—§ 1226(c) must be interpreted to apply only to those detained "when . . . released" from the predicate custody. See *L.S.*

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[7] See Gov't Op. Br. at 15 (asserting that § 1226(c)(1) "provides that the Government 'shall take into custody' any aliens who qualify for detention under this provision because of their criminal activities, and paragraph (2) provides that the Government may only 'release an alien described in paragraph (1)' under certain specified circumstances"); *id.* at 3-4 (§ 1226(c)(1) "provides that the Government 'shall take into custody any alien who' is deportable or inadmissible because he committed certain crimes").

Starrett Co. v. *F.E.R.C.*, 650 F.3d 19, 25 (1st Cir. 2011) (determining whether statute is ambiguous requires employing "traditional tools of statutory construction, including a consideration of the language, structure, purpose, and history of the statute" (citation and internal quotation marks omitted)); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) ("[C]ourts are bound to interpret statutes whenever possible in ways that avoid absurd results."); *Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) (applying constitutional avoidance canon).

Under the government's view, noncitizens can be locked away in mandatory detention so long as their relevant release from custody occurred after the statute's effective date, which was more than 15 years ago.[8] And the gap permitted under *Rojas* will only increase over time, as the statute's effective date recedes into the past. Indeed, the government's approach will eventually threaten noncitizens with the prospect of being seized and placed into mandatory immigration detention 20 or even 50 years after their last contacts with the criminal justice system.

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[8] See, *e.g.*, ECF Nos. 72, 88 (granting habeas relief to named plaintiff with gap of approximately ten years); ECF Nos. 1, 24, *Forero-Caicedo* v. *Tompkins*, No. 13-11677 (D. Mass. July 17, 2013) (granting habeas relief to plaintiff with a ten-year gap).

The district court rightly recognized that as an absurd result that was inconsistent with Congress's goals. A019. Although § 1226(c) was intended to mandate detention for a category of noncitizens who were deemed most dangerous and likely to abscond, the government's interpretation severs any rational link between mandatory detention and bail risk. This Court has already recognized this problem:

> [I]t is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks. . . . By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.

Saysana, 590 F.3d at 17-18.

That sound reasoning contrasts with the bare assumption—advanced by the BIA and by the Third and Fourth Circuits, and repeated by the government here—that Congress intended mandatory detention to apply to "*all* criminal aliens." *Rojas*, 23 I&N Dec. at 122; see *Sylvain*, 714 F.3d at 159-61; *Hosh*, 680 F.3d at 380-82; Gov't Op. Br. 29. This Court recognized that § 1226(c) "does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the

immigration judge should not apply." *Saysana*, 590 F.3d at 17. Indeed, noncitizens released many years ago are not only unlikely to pose the risks that concerned Congress, but they are actually *likely* to have strong arguments for release on bond. *Id.* at 17-18.

This case confirms that observation. When he was detained by ICE, Gordon was a homeowner, business owner, primary provider for his fiancee and son, and productive member of his community. A011-12. At the bond hearing mandated by the district court, Gordon satisfied the immigration judge that he did not pose a danger or flight risk warranting the denial of bond. Yet the government asks this Court to rule that it *must* lock up Gordon and others who left criminal custody years ago.

Rojas not only yields results that are absurd; they are also constitutionally suspect. Section 1226 is a civil detention scheme, so it cannot survive constitutional scrutiny unless its application is reasonably related to its purposes and accompanied by strong procedural protections. *Zadvydas* v. *Davis*, 533 U.S. 678, 690-91 (2001); see also *Khoury*, 2014 WL 954920, at *2. But, as this Court has explained, the indiscriminate detention of noncitizens who were released from criminal custody as long

as 15 years ago—and counting—is *not* reasonably related to the purposes of mandatory detention. *Saysana*, 590 F.3d at 17-18; see also *Ngo* v. *INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("The fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption."). The statute must be construed to avoid such a broad and constitutionally perilous application of mandatory detention, and to instead require detention "when . . . released." See *Clark*, 543 U.S. at 380-81.

B. Gordon was manifestly not detained "when . . . released."

The remaining question is this: if mandatory detention applies only to noncitizens detained "when . . . released," what constitutes detention "when . . . released"? The court below ruled that, in detaining Gordon nearly five years after his release from custody, the government plainly failed to satisfy the statutory command to take custody "when the alien is released." Parting ways with *Rojas*, the government now argues that this statutory command is actually ambiguous, and that it can be construed to permit detention five years after release because "when . . .

released" could denote "the earliest point" at which § 1226(c) could apply. Gov't Op. Br. 16-18, 24. "When," on this account, could simply mean "after." *Id.* at 18, 24.

The government's view is both irrelevant and wrong. It is irrelevant because any ambiguity in the word "when" would provide no reason to defer to the government's interpretation. The BIA has indicated that the "when . . . released" clause "direct[s] the Attorney General to take custody of aliens *immediately* upon their release from criminal confinement." *Rojas*, 23 I&N Dec. at 122 (emphasis added). The government's contrary litigation position—that "when . . . released" might *not* connote immediacy—is not entitled to deference and does not seek deference to the BIA. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *Succar*, 394 F.3d at 36; see also *Sylvain*, 714 F.3d at 157 & n.9 (recognizing that any ambiguity in the word "when" would not warrant deference to *Rojas*).

In any event, as explained below, the instruction to take custody "when the alien is released" is not ambiguous. The government hypothesizes that the instruction might boil down to a notification that

"DHS may detain the alien starting at the point when the alien has been released." Gov't Op. Br. 16, 24-25. Although that view persuaded the Fourth Circuit, *Hosh*, 680 F.3d at 379-80, it cannot possibly be right. In requiring immigration authorities to detain certain noncitizens "when [they are] released" from criminal custody, Congress could not plausibly have meant to say that time was *not* of the essence.

1. "[W]hen the alien is released" means "at the time the alien is released."

The court below interpreted "when the alien is released" to mean "at the time of release." A014, A017; see also *Castaneda*, 952 F. Supp. 2d at 313. That is correct. The phrase "when the alien is released" unambiguously refers to the time "when" a noncitizen "is released" from criminal custody.

This conclusion arises equally from the word "when" and from the words "is released." Put together, those words refer to the *discrete* time when someone is released from non-immigration custody; no one "is released" from custody over the course of weeks, months, or years. As Judge Arguello put it, "if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command—as many a tardy husband

will know—is the expectation that the husband is waiting at the moment the event in question occurs." *Sanchez-Penunuri* v. *Longshore*, --- F. Supp. 2d ---, 2013 WL 6881287, at *17 (D. Colo. Dec. 31, 2013).

Moreover, as the district court observed, the "obvious goal" of mandatory detention "was to ensure the *direct* transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities." A022. Since its inception in 1988, the provision was designed to "require[] the Federal Government to put aggravated alien felons in detention immediately after they serve their criminal sentence." 134 Cong. Rec. S17301-01, 1988 WL 178508 (1988) (statement of Sen. D'Amato). Although Congress has rewritten the mandatory detention provision several times, *each iteration* has required detention to begin at the time of a noncitizen's completion of criminal custody.[9] As Senator Simpson explained in 1996, the mandatory detention provision is designed to

[9] See 8 U.S.C. § 1252(a)(2) (1988) (requiring Attorney General to "take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence"); 8 U.S.C. § 1252(a)(2) (1990) (requiring detention "upon release of the alien"); 8 U.S.C. § 1252(a)(2) (1991) (same); 8 U.S.C. § 1252(a)(2) (1996) (requiring detention "upon release of the alien from incarceration" and providing that Attorney General "shall deport the alien as expeditiously as possible"); 8 U.S.C. § 1226(c) (current provision).

"ensure that aliens who commit serious crimes are detained upon their release from prison until they can be deported." 142 Cong. Rec. S10572-01, 1996 WL 522794 (1996); see also 136 Cong. Rec. S17106-01, 1990 WL 165401 (1990) (statement of Sen. Graham) (noting Congress intended that noncitizens would "be taken into immediate custody by [immigration authorities]" after serving their sentences); S. Rep. 104-48, 1995 WL 170285 (1995) (mandatory detention requires that an aggravated felon "be taken into [immigration] custody upon completion of his sentence").

The 1996 House Conference Report, on which the government relies, does not suggest otherwise. Gov't Op. Br. 25. The report explains that the detention mandate of § 1226(c) "applies *whenever* . . . an alien *is released* from imprisonment, regardless of the circumstances of the release." H. Conf. Rep. 104-828, 142 Cong. Rec. H10841-02, 1996 WL 539315 (emphases added). The government points to the word "whenever" as support for the notion that "when . . . released" means at *any* time after release. Gov't Op. Br. 25. But the word "whenever" simply refers to a requirement that immigration authorities take custody *every time* an eligible noncitizen "is released"; the words "is released" refer to the

obligation to take custody at the time of that release.

2. "[W]hen the alien is released" cannot mean "any time after the alien has been released."

The district court properly rejected the government's view that the command to take an alien into custody "when the alien is released" is ambiguous because it could be read to permit detention "at any time after" release. Gov't Op. Br. 18, 24. The government's view defies common sense and, as the district court concluded, "wrench[es] the phrase out of its normal context." A017; see also *Oscar*, 595 F. Supp. 2d at 169 (finding the government's interpretation "perverts the plain language of the statute").

Most important, the text does not support the view that a delay of several years—like the nearly five-year gap between Gordon's criminal custody and immigration custody—can constitute taking custody "when the alien is released." The government's contrary claim posits that "when" could mean "any time after," and that "is" could mean "has been." It relies, that is, on words that are not in the statute.[10]

[10] Congress has used the phrase "any time after" where it intends that meaning. See, *e.g.*, 8 U.S.C. § 1231(a)(5) (allowing reinstatement of a prior removal order "any time after" a noncitizen's illegal reentry). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

The government's sole support for its claimed statutory ambiguity is that the word "when" has multiple *possible* meanings. Gov't Op. Br. 17-19. But if the existence of multiple dictionary entries could create ambiguity, "essentially every non-technical word in every statute would have the potential of being ambiguous," and "the agency's choice of definition would trump Congress' word usage every time." *Mississippi Poultry Ass'n, Inc.* v. *Madigan*, 31 F.3d 293, 307 (5th Cir. 1994). In any event, the government's dictionaries do it no favors. They merely confirm that "when" *ordinarily* means "at the time that" or "as soon as,"[11] and that the *alternate* definitions that the government proposes are accompanied by examples that do not resemble the usage of "when" in § 1226(c).[12]

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (citation and internal quotation marks omitted).

[11] See, *e.g.*, American Heritage Dictionary of the English Language (4th ed. 2000) (definitions 1 and 2).

[12] See American Heritage Dictionary (*whenever*: "When the wind blows, all the doors rattle."); Oxford English Dictionary (2d ed. 1989) (*in the, or any, case or circumstances in which; sometimes nearly = if*: "When great national interests are at stake, . . . the party system breaks down."); Webster's Third New International Dictionary (1981) (*in the event that; on condition that*: "the batter is out [when] he bunts foul with two strikes on him").

What is more, dictionaries cannot alter a court's basic duty to see whether "the traditional tools of statutory construction" elucidate the meaning of "when" in a particular context. *Lagandaon* v. *Ashcroft*, 383 F.3d 983, 990 (9th Cir. 2004), cited in Gov't Op. Br. at 18-19. Here, the government's proffered ambiguity defies not only the text of § 1226(c), but also its purposes. The government correctly notes that Congress designed § 1226(c) to ensure that certain noncitizens presenting risks of violence or flight would be kept "off the streets." Gov't Op. Br. 31 (quoting *Sylvain*, 714 F.3d at 160); see *Saysana*, 590 F.3d at 13. Yet the government presumes congressional *indifference* as to whether these noncitizens would be kept off the streets immediately upon release from criminal custody, or instead at any time thereafter. That approach "defies logic" and grants the government "the very unsupervised freedom that the mandate was designed to eliminate." *Khoury*, 2014 WL 954920, at *10.

That Congress permitted a two-year phasing in of § 1226(c) confirms that it could not have intended "when . . . released" to mean "at any time after release." Recognizing that there might be "insufficient detention space and . . . personnel available" to carry out the newly-expanded

mandatory detention provision, Congress permitted the Attorney General to suspend § 1226(c) for up to two years. See IIRIRA, Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009. But if the Attorney General was obliged only to take certain citizens into custody "at any time after release," then the *Attorney General* could have decided how long to wait before detaining people under § 1226(c), and Congress's procedures for suspending that provision would have been superfluous.

As the government admits, Gov't Op. Br. 24-25, the sole conceivable purpose the "when . . . released" clause could serve if it meant "any time after release" would be to prevent immigration authorities from detaining noncitizens *before* their release from criminal custody. But if Congress had intended that message, the "when . . released" clause would have been a strange way to deliver it. First, Congress required detention when a noncitizen "*is* released," not when he "*has been* released." And second, as the district court observed and the government seems to concede, the customary way to say "not before" is to use the word "after." A018; see Gov't Op. Br. 24 (arguing that "when" in § 1226(c) means "after").

As was true in *Saysana*, the government's view—that "when . . .

released" describes merely "a starting point," Gov't Op. Br. 25—"transforms an otherwise straightforward statutory command . . . into a mere temporal triggering mechanism." 590 F.3d at 15. That view is implausible and was properly rejected by the court below.

II. In the alternative, *Rojas* does not warrant deference because it is unreasonable.

The district court correctly concluded that even if the text, structure, and purposes of § 1226(c) did not yield a clear answer to the question presented here—though they do—the BIA's interpretation would be unreasonable and not entitled to deference. *Chevron*, 467 U.S. at 844. In addition to distorting the statute's plain meaning, *Rojas* yields absurd results. The government's arguments in support of deference all assume that *Rojas* is right simply because it interprets § 1226(c) to apply more broadly. But breadth does not make *Rojas* reasonable; instead, deference to its strained interpretation is inappropriate.

A. The BIA's approach distorts the plain text and yields extreme results.

The district court observed that *Rojas* is "flatly unreasonable" both "as a matter of ordinary usage" and due to "arbitrariness and caprice in

its application." A028. Both observations are correct.

Rojas's distortion of ordinary usage has been addressed above and need not be reexamined here. But *Rojas* did get one thing right: it suggested that "when . . . released" connotes immediacy. 23 I&N Dec. at 122. Yet this is the one aspect of *Rojas* for which the government does not advocate deference. Instead, it adopts the litigation position that "when" is ambiguous and can be interpreted to mean "after." Gov't Op. Br. 17-19, 24. Although the government contends that this litigation position takes its cue from *Rojas*, that is not so. The government barely defends *Rojas*'s statutory analysis, and neither the Third nor Fourth Circuits actually deferred to it. *Sylvain*, 714 F.3d at 157; *Hosh*, 680 F.3d at 379-83.[13]

Similarly, the extreme results that arise from *Rojas* have been addressed above, but they too warrant an additional observation. "[T]he

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[13] Unlike the Third Circuit, the Fourth Circuit purported to defer to *Rojas*. But its holding that § 1226(c) is ambiguous rests solely on the view that "when" has multiple meanings. *Hosh*, 680 F.3d at 379-80; see also *Khoury*, 2014 WL 954920, at *6 ("[T]he Fourth Circuit purported to defer to the BIA's interpretation of § 1226 in *Rojas*. But it did not."). Judge Young found that truncated analysis "startling," *Castaneda*, 952 F. Supp. 2d at 316 & n.6, and the Third Circuit recognized that *Hosh*'s deference to the BIA is "flaw[ed]" because the BIA has acknowledged that "when" connotes immediacy. *Sylvain*, 714 F.3d at 157 & n.9.

most glaring problem" with the government's interpretation, as the district court observed, is the "complete absence of *any* temporal limitation" on the commencement of mandatory detention, even where "the alien ha[s] lived an exemplary life for . . . decades." A028. Undoubtedly, the government's view would require Gordon's detention without bond whether he were detained by DHS in 2013 or in 2053, at the age of 78. As *Saysana* recognized, that scenario defies both common sense and congressional intent. 590 F.3d at 16-18.

The government proffers "the conclusion of removal proceedings" as a "temporal limitation." Gov't Op. Br. 36. But that is only a limitation on the duration of detention; Judge Ponsor was referring to the possibility that a noncitizen released from criminal custody might be taken into mandatory immigration detention at *any* point during his life.

B. The government's contrary arguments are unpersuasive.

Notwithstanding the implausibility of *Rojas*'s statutory analysis and the extreme results it produces, the government advances scattershot arguments designed to suggest that *Rojas* is reasonable after all. It asserts that the BIA's approach reasonably interprets the statutory text

and context, Gov't Op. Br. 23-27, is consistent with Congressional intent and purposes, *id.* at 28-34, and takes into account practical and logistical difficulties, *id.* at 34-39. Each of these claims is incorrect.

First, not only does the government's interpretation lack textual grounding—by arguing that a noncitizen's release from criminal custody is merely the "earliest point" at which a noncitizen can be detained—but it is also not "reasonable in context of the [Immigration and Nationality Act] as a whole." Gov't Op. Br. at 24, 26-27. To this end, the government argues that no other provision of immigration law hinges on release dates. *Id.* at 26-27. But refuting that argument requires looking no further than the effective date of the mandatory detention provision itself. IIRIRA, Pub. L. 104-208, § 303(b)(2), 110 Stat. 3009 (rendering § 1226(c) applicable to noncitizens "released after" a transitional period). More importantly, it is *Rojas* that makes the operation of § 1226(c) unique. Under *Rojas*, a noncitizen's custody status is frozen as of the time of his release from the relevant criminal custody—regardless of anything that occurs and any amount of time that passes before he is detained—whereas his eligibility to remain in the United States by obtaining relief from removal is *not*

frozen, and may be determined by events that occur in the months or years after his release from criminal custody. See, *e.g.*, 8 U.S.C. § 1182(h); 8 C.F.R. § 208.18.[14]

Second, the government's suggestion that the district court's interpretation would "thwart Congress's purposes," Gov't Op. Br. 28, repeats "speculative conclusions" that this Court addressed in *Saysana*, 590 F.3d at 17. The government continues to assume that "Congress rejected the view that the more time an individual spends in a community, the lower his bail risk is likely to be." Gov't Op. Br. 34. But this Court determined that the opposite is true. *Saysana*, 590 F.3d at 17-18.

Third, the government's various "practical and logistical" arguments boil down to a misplaced claim that *Rojas* has the virtue of applying § 1226(c) more broadly. For example, the government complains about

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[14] Nor does the government's view find any support in the 1990 and 1991 revisions of the mandatory detention provision, which briefly allowed those who had been lawfully admitted into the United States to obtain release from detention if they were found not to present a flight risk or danger. Gov't Op. Br. 27 & n.7; see 8 U.S.C. § 1252(a)(2)(B) (1990); 8 U.S.C. § 1252(a)(2)(B) (1991). Such legislative history arguments, "[w]ithout citation to any relevant explanation for the change in the legislative language," shed no meaningful light on the statute. *Saysana*, 590 F.3d at 16.

challenges in finding and detaining noncitizens at the time of their release from a correctional institution. Gov't Op. Br. 34. But any such challenges cannot explain why Congress would provide mandatory detention, as opposed to discretionary detention, for noncitizens who are not located until long after any possible rationale for mandatory detention has lapsed. *Saysana*, 590 F.3d at 17-18. Likewise, even if the district court's decision and local initiatives like the Connecticut "Trust Act" presented significant barriers to mandatory detention—a proposition that the government has not tried to prove[15]—that fact could not change the words in the statute. Indeed, while the government correctly notes that a 1995 Senate report discussed the noncooperation policies of some localities, Gov't Op. Br. 31, the report recommended sanctions against the localities, *not* a change to

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[15] See 12/19/13 Tr. at 27 (reporting government had identified 46 individuals detained under *Rojas*, among hundreds of Massachusetts detainees); ECF No. 17-2 at 8. The Connecticut "Trust Act," which the government cites, Gov't Op. Br. 54 n.16, does not stop the use of detainers, prevent DHS from receiving automatic notice through the Secure Communities program of all individuals who are arrested in Connecticut, or block information about the timing of any noncitizen's release. Public Act No. 13-155 (effective Jan. 1, 2014); see 8 C.F.R. § 287.7(d) (authorizing federal officials to request that state and local authorities hold a noncitizen for up to 48 hours "in order to permit assumption of custody by [DHS]"). In fact, § 1(c) of that Trust Act *requires* communication with ICE about noncitizens' releases. Public Act No. 13-155.

the mandatory detention provision's requirement of detention at the time of a noncitizen's release. See S. Rep. 104-48 at 2, 32.

The government also claims that *Rojas*'s broader application of § 1226(c) has the virtue of "consistency." Gov't Op. Br. 36, 38. Although *Rojas* allows mandatory detention to hang over noncitizens like the Sword of Damocles—threatening them indefinitely, and possibly for the rest of their lives—the government contends that it is at least consistent in "allow[ing] for *all* noncitizens identified within subsections 1226(c)(1)(A) through (D) to be mandatorily detained," rather than only those who have been in some form of prior custody. Gov't Op. Br. 35-36. That is not so. While the government suggests that the district court's ruling places certain terrorists and other offenders outside the reach of § 1226(c) if they did not spend time in jail, Gov't Op. Br. 35-36,[16] those noncitizens are *already* excluded from mandatory detention under the BIA's precedent. The BIA does *not* in fact apply § 1226(c) to every noncitizen with a predicate offense listed in § 1226(c)(1)(A) through (D); it requires physical

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[16] Correctly, the government does not argue that the district court's interpretation prevents it from detaining suspected terrorists. See 8 U.S.C. §§ 1226a, 1535-1537; *Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006).

custody—and "release" from that custody—as a predicate for applying § 1226(c). *West*, 22 I&N Dec. at 1409-10; *Kotliar*, 24 I&N Dec. at 125-26.[17] So deferring to *Rojas*'s broad application of mandatory detention would not create the consistency that the government claims.

III. The "loss-of-authority" cases are irrelevant.

The government next argues that even if it loses, it still wins. Specifically, it insists that even if Judge Ponsor's view of § 1226(c) is correct—*i.e.*, it unambiguously applies mandatory detention only to noncitizens detained at the time of release—the statute's plain meaning must yield to a canon of construction stating that the government should usually not be "sanction[ed]" with a loss of authority when it misses a statutory deadline. Gov't Op. Br. 12, 39-53.[18] The Third and Fourth

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[17] For example, Gordon was held under § 1226(c) because the immigration judge found that he had been convicted of an aggravated felony and had been in custody for that offense (and therefore "released" from that custody) in 2008. Gordon Add. 1.

[18] See, *e.g.*, *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 259-66 (1986) (government did not lose power to recover misused funds even though Secretary of Labor did not verify misuse within 120 days specified by statute); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-63 (2003) (holding that, even after a statutory deadline had passed, the Commissioner of Social Security could assign eligible Coal Act retirees to companies that would be responsible for funding their benefits); *Montalvo-Murillo*, 495 U.S. at

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Circuits accepted that argument; in fact, the Third Circuit relied on it so heavily that the court declined to "take a stand" on the BIA's interpretation of § 1226(c). *Sylvain*, 714 F.3d at 157; *Hosh*, 680 F.3d at 381-83.

This argument, however, has two fatal and independent flaws. First, it misapprehends the role of this, and other, canons of construction. Although canons can guide a court's interpretation of a statute that is open to more than one view, they cannot do what the government seeks to do here: replace the unambiguous meaning of § 1226(c) with an altogether different meaning. Second, the canon supplied by the loss-of-authority cases cannot possibly aid in the interpretation of § 1226(c) because its purpose is to prevent courts from improperly stripping the government of authority to act after a statutory deadline. As the court below explained, that principle does not apply here because affirming the ruling below would not strip the government of authority to detain any

717-20 (district court retained authority to order pre-trial detention even though, contrary to deadline in the Bail Reform Act, detention hearing was not held until after defendant's "first appearance").

noncitizen. A033-34.[19]

A. Gordon's detention was defined by statute to fall within the default detention authority of § 1226(a).

As a threshold matter, the interpretive canon supplied by the loss-of-authority cases cannot help a court decide Gordon's case because its only role is to prevent courts from inventing remedies not specified by statute. See *Brock*, 476 U.S. at 260. In this case, § 1226 is clear that when § 1226(c) is not satisfied; detention is indisputably governed by § 1226(a).

A canon of construction does not replace the basic process of statutory interpretation. See *Goncalves* v. *Reno*, 144 F.3d 110, 127 (1st Cir. 1998). Instead, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *United States* v. *Lewis*, 554 F.3d 208, 214 (1st Cir. 2009) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992)). Consistent with those basic principles, the loss-of-authority cases create a presumption that applies in cases of statutory silence: they instruct courts that if a statute does not

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[19] See also *Gomez-Ramirez* v. *Asher*, C13-196-RAJ, 2013 WL 2458756, at *6 (W.D. Wash. June 5, 2013) (loss-of-authority cases are "completely inapposite" to interpretation of § 1226(c)); *Castaneda*, 952 F. Supp. 2d at 319; *Baquera*, 948 F. Supp. 2d at 1264-65; *Nabi* v. *Terry*, 934 F. Supp. 2d 1245, 1250 (D.N.M. 2012).

provide a consequence for the government's failure to meet a deadline, courts should not simply "invent a remedy." *Montalvo-Murillo*, 495 U.S. at 721.

But § 1226 is *not* silent about what happens if someone is not detained "when . . . released." Instead, because that person's detention is not "provided [for] in subsection (c)," it is expressly governed by § 1226(a). In this way, when the phrase "when . . . released" operates to exclude someone like Gordon from the reach of mandatory detention, it does not operate as a procedural "deadline." *Castaneda*, 952 F. Supp. 2d at 320 n.13. Rather, the statute unambiguously makes that clause part of the *definition* of who is subject to mandatory detention. Section 1226(c) is therefore unlike the statutory schemes at issue in the loss-of-authority cases cited by the government, which involved procedural deadlines rather than substantive defining and effectuating provisions.[20]

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[20] See, *e.g.*, *Montalvo-Murillo*, 495 U.S. at 714 (procedural requirement in 18 U.S.C. § 3142(f) of detention hearing by detainee's "first appearance" was distinct from substantive provision that allowed detention, § 3142(e)); *Brock*, 476 U.S. at 255-56 (fraud recovery statute did not define authority to recover misused funds with reference to the 120-day deadline to verify misuse); *Barnhart*, 537 U.S. at 164 (Coal Act did not define eligible retirees in terms of the October 1, 1993 deadline for assignments); *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 62-63 (1993)

Thus, the statute is not silent about what happens when § 1226(c) does not apply, and it is *also* not silent about *whether* § 1226(c) applies to noncitizens detained long after their release from predicate custody. The presumption created by the loss-of-authority cases has no bearing here.

B. The government's position, not Gordon's, seeks to curtail executive branch authority.

Even if the loss-of-authority cases could somehow be applied here—though they cannot—they would not undermine the district court's ruling because, by applying § 1226(a), the district court did not strip the government of any authority. The loss-of-authority cases instruct courts not to invent sanctions that would tie the hands of government officials who miss statutory deadlines. The government reasons that, by holding that Gordon is subject to discretionary detention under § 1226(a) instead of mandatory detention under § 1226(c), the district court impermissibly "sanction[ed]" immigration authorities for failing to detain Gordon "when [he was] released" from criminal custody. Gov't Op. Br. 12, 39-53.

But applying § 1226(a), and ruling that Gordon's detention falls

(forfeiture statute did not define property subject to forfeiture in terms of timing and reporting requirements).

outside the reach of § 1226(c), is no sanction at all. Section 1226(c) limits, rather than grants, government authority. It *commands* the Secretary of Homeland Security to take custody of particular noncitizens "when [they are] released" from criminal custody, and it *prohibits* the Secretary from releasing those noncitizens except in narrow circumstances. The government acknowledges that, when § 1226(c) does not apply, it still retains authority under § 1226(a) to detain any noncitizen pending a resolution of his removal proceedings. Gov't Op. Br. 3.

Thus, instead of complaining about having its hands tied, the government is *asking* this Court to tie them. Nothing in the loss-of-authority cases supports that approach.

Indeed, the government's complaint—which it described below as a concern about losing the "authority to mandatorily detain," ECF No. 21 at 3—makes no sense. Just as mandatory minimum sentencing provisions do not give judges the "authority" to sentence defendants only within specified ranges, the detention command of § 1226(c) does not grant immigration officials the "authority" to be required to detain certain noncitizens. "If anything, the Attorney General *gains power*" when a

noncitizen is not detained at the time of his release from criminal custody. *Castaneda*, 952 F. Supp. 2d at 319 n.12 (emphasis added).

Partly for that reason, the possibility of bond under § 1226(a) does not resemble the drastic remedies sought in the loss-of-authority cases. In *Montalvo-Murillo*, the Supreme Court rejected a defendant's argument that the government's failure to hold a timely detention hearing entitled him to be released outright. 495 U.S. at 716, 720; see also *James Daniel Good*, 510 U.S. at 65 (construing a statute to preclude the government from obtaining revenues "would make little sense" where directives were "designed to ensure the expeditious collection of revenues"); *United States* v. *Shields*, 649 F.3d 78, 87 (1st Cir. 2011) (holding that requiring release of individual found to be sexually dangerous on the basis of timing mistake would be "manifestly inconsistent" with legislation designed to "safeguard society from persons in federal custody who would pose a serious danger if released"). In contrast, a bond hearing under § 1226(a) never threatens such a disproportionate remedy, because a noncitizen who poses a risk of flight or violence will be detained anyway. Nor, contrary to the government's suggestion, does applying § 1226(a) to noncitizens not

detained "when . . . released" thwart Congressional intent. See Gov't Op. Br. 51-53. As this Court has already explained, there is no reason to suppose that Congress intended to apply mandatory detention indiscriminately to noncitizens like Gordon five years—or even 50 years—after their release from criminal custody. See *Saysana*, 590 F.3d at 17-18.

Thus, Gordon's request to be considered for release under § 1226(a) sought neither a "windfall" for him nor a "penalty" for public officials. *Montalvo-Murillo*, 495 U.S. at 720. Gordon has never argued that, by failing to detain him upon release from criminal custody, the government forfeited its ability to detain him. To the contrary, he *asked* the government to exercise its discretionary authority, and the government has now exercised that discretion by releasing him. If the government feels sanctioned by that result, it is mistaken.

CONCLUSION

Appellee respectfully requests that this Court affirm the ruling below.

Respectfully submitted,

/s/ Matthew R. Segal

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,142 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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/s/ Matthew R. Segal
Matthew R. Segal

Dated: May 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that this document will be filed electronically on May 15, 2014 through the ECF system, and will be sent electronically on this date to the following registered participants in this matter:

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ADDENDUM
TABLE OF CONTENTS

Immigration Judge Michael Straus' Order
With Respect to Custody Dated July 17, 2013 1

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HARTFORD, CT

FILE: A037-749-187

IN THE MATTER OF:

GORDON, CLAYTON RICHARD

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of respondent pursuant to 8 CFR 236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

X ORDERED that the request for a change in custody status be denied.

____ ORDERED that the request be granted and that respondent be:

____ released from custody on his own recognizance

____ released from custody under bond of $____________

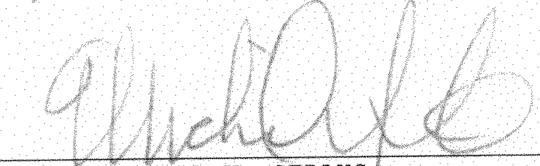
X OTHER Since respondent was released in October of 2008 after an arrest, He was convicted on possession of narcotics with intent to sell an aggravated felony.

Copy of this decision has been served on the respondent and the Department of Homeland Security.

APPEAL: waived -- reserved by respondent

HARTFORD -- HARTFORD, CONNECTICUT

Date: Jul 17, 2013



MICHAEL W. STRAUS
Immigration Judge

XS

Appeal due by 08 Aug 16 2013

He is subject to 236(c) mandatory detention