Nos. 13-1994 & 13-2509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 13-1994

LEITICIA CASTANEDA,

Petitioner-Appellee,

v.

STEVE SOUZA, Superintendent, Bristol County House of Correction, in his official capacity and his successors and assigns,

Respondent-Appellant,

BRUCE E. CHADBOURNE, Field Office Director, Boston Field Office, Office of Detention and Removal, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security in his official capacity and his successors and assigns; SARAH SALDANA, Director of U.S. Immigration and Customs Enforcement; JEH JOHNSON, Secretary, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; ERIC H. HOLDER, JR., Attorney General, U.S. Department of Justice, in his official capacity and his successors and assigns,

Respondents.

Appeal from the Final Judgment of the United States District Court for the District of Massachusetts, No. 1:13-cv-10874-WGY

No. 13-2509

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; SARAH SALDANA, Director of Immigration and Customs Enforcement; 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.

(*Continued on inside cover*)

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

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLEE CLAYTON RICHARD GORDON

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INTRODUCTION AND SUMMARY OF ARGUMENT

The panel held that, because Clayton Gordon was taken into immigration detention years after his release from predicate criminal custody, he is not subject to mandatory detention under 8 U.S.C. § 1226(c). *Castaneda* v. *Souza*, 769 F.3d 32 (1st Cir. 2014). That holding is correct. Congress did not apply § 1226(c) to noncitizens like Gordon, and it could not constitutionally have done so.

Gordon was detained in June 2013 based on a 2008 drug offense. *Id.* at 40. Between his 2008 release and 2013 detention, Gordon got engaged, had a son, bought a house, built a business, and began a project to open a halfway house. *Id.* Yet, when he was taken into immigration custody, Gordon was denied a bond hearing. Relying on *Matter of Rojas*, 23 I & N Dec. 117 (BIA 2001), an immigration judge ruled that Gordon was subject to mandatory detention under § 1226(c). Section 1226(c) commands the government to "take into custody any alien who [is subject to certain crime-based grounds of removability] when the alien is released," and it generally bars the government from releasing those aliens. The provision is an exception to the government's discretion, under § 1226(a), to detain or release noncitizens in removal proceedings.

Gordon petitioned for habeas relief, arguing that he was not subject to § 1226(c) because he was not detained when released. The district court agreed, and Gordon was released on bond in November 2013.

In affirming the district court, the panel reached three core conclusions. First, it ruled that "[o]n its face," § 1226(c)(2) bars release only of noncitizens detained "when . . . released" as required in § 1226(c)(1). *Castaneda*, 769 F.3d at 45 n.10. *Rojas*'s contrary view, the panel noted, was "already rejected" in *Saysana* v. *Gillen*, 590 F.3d 7 (1st Cir. 2009). Second, the panel was "not persuaded" that, in enacting § 1226(c), Congress "was seeking to justify mandatory immigration custody many months or years after an alien had been released from state custody." *Id.* at 45 (quoting *Saysana*, 590 F.3d at 16). Instead, it ruled that "when . . . released" permits reasonable gaps between criminal and immigration custody, but clearly does *not* permit "a delay of several years." *Id.* at 44-45. Third, the panel held that a construction of § 1226 that would subject Gordon to mandatory detention—even though his post-release conduct demonstrates that he poses no danger or flight risk—must be rejected because it raises serious constitutional concerns. Such detention, it said, "appears arbitrary on its face." *Id.* at 47-48.

Gordon has briefed the panel's first two conclusions at length, Gordon Br. 23-47, and they are sufficient to resolve this case. But they are also bolstered by the panel's ruling on the canon of constitutional avoidance, which Gordon has addressed briefly, *id.* at 37-38, and which relates to this Court's supplemental briefing order. That order asks:

> Could Congress lawfully provide that, categorically, all aliens who have committed one of the crimes enumerated in 8 U.S.C. § 1226(c),

> regardless of when released from prior custody, should be detained without bail while their deportation proceedings proceed, provided that the proceeding moves apace and that there is a right to a prompt *Joseph* hearing challenging the individual's classification as an alien who has committed such a crime?

The answer is that this hypothetical statute would be unconstitutional as applied to Gordon and many other noncitizens. Although the Supreme Court upheld mandatory detention in the case of a noncitizen detained one day after his release from criminal custody, *Demore* v. *Kim*, 538 U.S. 510 (2003), it did not sanction the mandatory detention of noncitizens who have long since returned to their communities. And for good reason. Because detention must bear a reasonable relationship to legitimate statutory aims, *id.* at 527, categorical detention rules must rely on *reasonable* presumptions, *id.* at 526. Section 1226(c) aims to prevent certain noncitizens from recidivating or absconding by mandating their detention when they are released from criminal custody. But a statute mandating the detention of people who were released years ago, and who have *not* recidivated, would bear no relationship to those aims; quite often, it would just aggrieve people with strong community ties. The government's contrary view relies on speculation, *Castaneda*, 769 at 43 n.7, rather than the concrete record on which Congress relied in enacting § 1226(c), and on which the Supreme Court relied in upholding that provision. Thus, as applied to this case and many others, a hypothetical statute applying man-

datory detention years after noncitizens have been released from criminal custody would be unreasonable, unconstitutional, and "arbitrary in the extreme." *Id.* at 45.

Of course, the BIA believes that this hypothetical statute and § 1226(c) are one and the same. But the panel correctly held that, under the canon of constitutional avoidance, the BIA's view of § 1226(c) must be rejected in favor of a limiting construction that sidesteps serious due process concerns. Because such an interpretation is not clearly contrary to Congressional intent—even the government argues that the statute is ambiguous, not that the panel's interpretation is impermissible—§ 1226(c) should be interpreted to apply only to those detained "when . . . released." See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Moreover, even assuming that Congress could constitutionally enact the statute imagined by the supplemental briefing order, it manifestly has not done so. The statutory text, structure, and purposes confirm that, even if constitutional concerns were absent, the district court and the panel still got the core issue right: section 1226(c) does not impose mandatory detention on noncitizens detained years after their release.

For these reasons, this Court should hold that Gordon is not subject to mandatory detention and was properly afforded a bond hearing.

ARGUMENT

I. Imposing mandatory detention on all noncitizens who have committed § 1226(c) offenses, no matter when they were released from criminal custody, would violate due process.

If Congress were to mandate the detention without bond of all noncitizens who have committed offenses listed in § 1226(c)(1)(A) to (c)(1)(D), regardless of when those noncitizens were released from custody, that mandate would in many cases violate the Constitution. Denying noncitizens like Gordon even the possibility of bond, years after they have returned to their communities, violates due process because it is arbitrary and disconnected from legitimate Congressional aims.

A. Due process prohibits immigration detention that is disconnected from permissible statutory purposes.

Due process prohibits detention "unless ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) (internal quotation marks and citations omitted). The government must have a permissible purpose for taking away individual freedom. *Foucha* v. *Louisiana*, 504 U.S. 71, 79-80 (1992). And even if it does, due process requires that the detention of each individual must "bear some reasonable relation" to that permissible purpose. *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

The same due process principles apply to the immigration context. Immigration detention must "bear[] a reasonable relation to the purposes for which the individual was committed." *Demore*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690). As a result, the political branches may make categorical detention determinations involving noncitizens only if those determinations are based on "reasonable presumptions." *Id.* at 526 (quoting *Reno* v. *Flores*, 507 U.S. 292, 313 (1993)).

Some presumptions are not reasonable. In *Zadvydas*, the Court relied on due process concerns in adopting a limiting construction of 8 U.S.C. § 1231(a), which governs the detention of noncitizens with final orders of removal. Noting that detention bears no reasonable relation to goal of preventing flight before removal when the noncitizen cannot be removed, the Court construed § 1231(a) to authorize detention only for the period "reasonably necessary" to effect removal. 533 U.S. at 689.[1]

[1] Cases outside the immigration context follow these same principles. Because the Bail Reform Act "carefully limits the circumstances under which detention may be sought," and involves detention for limited time, the Supreme Court held that it is not "excessive in relation to the regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). But in *Foucha*, 504 U.S. 71 (1992), the Court held that due process did not tolerate the detention of an individual found not guilty on grounds of insanity when he was no longer mentally ill; unlike the "sharply focused" pretrial detention in *Salerno*, the scheme in *Foucha* was "not carefully limited." 504 U.S. at 81; see also *United States* v. *Jessup*, 757 F.2d 378, 385-86 (1st Cir. 1985) (upholding Bail Reform Act's presumption of flight risk for drug offenders as "reasonable response" to evidence before Congress), abrogated on other grounds by *United States* v. *O'Brien*, 895 F.2d 810 (1st Cir. 1990).

The Supreme Court has yet to apply those principles to the question posed by this Court's supplemental briefing order: whether mandatory detention is constitutional as applied to noncitizens who were not detained "when . . . released." Although the Court held in *Demore* that mandatory detention under § 1226(c) for "a limited class of deportable aliens" does not violate due process, 538 U.S. at 518, the Court had no occasion to decide—and did not decide—whether mandatory detention would be constitutional if applied to noncitizens who have long since returned to their communities.

Demore involved a constitutional challenge to mandatory detention that began *the day after* the noncitizen's release from criminal custody. Br. for the Petitioners at 3, *Demore*, 538 U.S. 510, 2002 WL 31016560 (filed Aug. 29, 2002). In defending that challenge, the government conceded that "[t]he Attorney General is required to take aliens subject to mandatory detention under Section 1226(c) into detention when they are released from penal custody." *Id.* at 28-29 & n.10. Consistent with that understanding of § 1226(c), the government's constitutional analysis focused on the application of mandatory detention to noncitizens who, like Kim himself, were detained when released from criminal custody. It stressed that Congress sought "to help ensure that aliens convicted of serious crimes are promptly removed from our society after serving their [criminal] sentence.'" *Id.* at 16-18

(quoting H.R. Rep. No. 22 at 6, 104th Cong., 1st Sess. (1995)).[2] The government also emphasized that Congress had evidence that "nearly half of deportable aliens were rearrested within a year of being released from prison." *Id.* at 8. It made no effort to justify the mandatory detention of noncitizens who have long since returned to their communities, and who have not recidivated.

On that record, the Supreme Court upheld Kim's mandatory detention. The Court held that § 1226(c) was a reasonable and "narrow" response to the problems that Congress sought to address. *Demore*, 538 U.S. at 513, 526, 528, 529 n.12.

Consistent with the record in *Demore*—where the government pointed to Congressional efforts to prevent recidivism and flight by detaining noncitizens being released from jail—two panels of this Court have rejected the government's more recent claim that Congress "was seeking to justify mandatory immigration custody many months or even years after an alien had been released from state custody." *Castaneda*, 769 F.3d at 45 (quoting *Saysana*, 590 F.3d at 16); see *Saysana*, 590 F.3d at 17 & n.6 (describing the "focused" purposes of § 1226(c)). As those panels understood, the Supreme Court has never said that mandatory detention could constitutionally be applied to noncitizens who are not promptly detained after their release from criminal custody, and who do not categorically pose the flight or recidivism risks that confronted Congress.

[2] See also *id.* at 9 ("Congress imposed rules that make the removal of those aliens more certain and more speedy.").

The panel in this case also recognized that Justice Kennedy's *Demore* concurrence confirms this limitation: while mandatory detention is facially constitutional due to the government's interest in preventing recidivism and flight, such detention can violate due process when the relevant circumstances imply that the detention operates "to incarcerate for other reasons." *Castaneda*, 769 F.3d at 39 (quoting *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring)); see also *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) (detention is punitive where "excessive in relation to" regulatory goal).[3]

B. Applying § 1226(c) to all noncitizens with predicate crimes, no matter when released from criminal custody, would yield arbitrary and unconstitutional detention.

Requiring the detention of noncitizens like Gordon—who were *not* detained "when . . . released" from criminal custody and then lived in the community for years *without* recidivating—detaches mandatory detention from its permissible goals. By definition, these noncitizens have not been jailed for new § 1226(c) offenses. Many of them have developed community and family ties. Thus, many can

[3] The panel correctly noted that Justice Kennedy's concurrence is binding on this Court. *Castaneda*, 769 F.3d at 39 & n.4 (citing *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 594-95 (1st Cir. 1980)); see also *B.H. ex rel. Hawk* v. *Easton Area Sch. Dist.*, 725 F.3d 293, 310 (3d Cir. 2013) ("Because the votes of Justices Alito and Kennedy were necessary to the majority opinion and were expressly conditioned on their narrower understanding . . . that limitation is a binding part of *Morse*."), cert. denied, 134 S. Ct. 1515 (2014). But even if it were not binding, Justice Kennedy's concurrence would still reinforce what *Demore* and basic due process principles make clear: *Demore* did not sanction mandatory detention that is disconnected from the legitimate aims of § 1226(c).

show, to the satisfaction of immigration judges, that they are not likely to flee or commit crimes during removal proceedings. For three reasons, categorically detaining all of those noncitizens would not represent a *reasonable* presumption bearing a *reasonable* relation to the purposes of § 1226(c). See *Demore*, 538 U.S. at 526-27. It would instead yield detentions that violate due process and are "arbitrary in the extreme." *Castaneda*, 769 F.3d at 45.

First, as a noncitizen's criminal custody recedes into the past, the benefits of mandatory detention rapidly diminish. When a noncitizen has a track record of *not* recidivating, any "presumption of dangerousness and flight risk is eroded by the years in which [an] alien lived peaceably in the community." *Id.* at 43 (citing *Saysana*, 590 F.3d at 17). In fact, studies suggest that this erosion gains speed over time; recidivism rates appear to peak in the first year after an offense, and they decrease with age.[4] Offenders eventually pose no greater risk of recidivism than individuals with no criminal record.[5] So when years pass before immigration officials

[4] See Bureau of Justice Statistics (BJS), U.S. Dep't of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986 (last visited Feb. 10, 2015) (in five-year study, most who recidivate do so within first year of release). BJS, U.S. Dep't of Justice, *Prisoner Recidivism Analysis Tool*, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2392 (last visited Feb. 10, 2015) (same, in three-year study); see also Introduction, USSG Ch. 4 (noting age correlates with recidivism).

[5] See Kurlychek, Brame, & Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, Vol. 53 No. 1 Crime & Delinquency

pursue a noncitizen who was released from custody for a § 1226(c) offense—as happened with Gordon—it is too late for mandatory detention to target highest-risk populations. See *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring) (unreasonable delay in "pursuing and completing deportation proceedings" could imply that detention has been imposed for impermissible reasons). Accordingly, "as a constitutional matter, mandatory detention can only be justified by the presumption of dangerousness and flight risk posed by newly released criminal defendants." *Castaneda*, 769 F.3d at 47. And by the time Gordon was plucked off the street and locked away in mandatory detention, the reasons for that detention had utterly evaporated.

Second, just as time between criminal custody and immigration detention diminishes the benefits of mandatory detention to the government, it amplifies the harms to the noncitizen. *Id.* at 45, 47-48. Community ties, especially for lawful permanent residents like Gordon, can strengthen a noncitizen's "constitutional status." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).[6] They can also strengthen a

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64, 73-76 & Figs. 1-5 (by mid-to-late 20s, risk of re-offense for people who last offended at age 20 or earlier approximates the risk for people who never offended).

[6] Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (stating that "the people" protected by the Fourth Amendment includes "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); *Woodby* v. *INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.").

noncitizen's bid for discretionary relief, such as cancellation of removal. See 8 U.S.C. § 1229b(a); Br. of Amici Curiae Detention Watch Network et al. 19-20 (filed Feb. 23, 2015). Accordingly, even when immigration proceedings move "apace" once they are initiated, as this Court's briefing order posits, noncitizens who have spent *years* rebuilding their lives have a powerful interest in avoiding abrupt mandatory detention. Gordon's case is harsh enough; he was detained five years after his arrest for a non-violent drug offense, despite his permanent resident status and U.S. military service, and notwithstanding his efforts to rebuild his family and serve his community. And others face similar fates.[7]

Third, even if Congress could rationalize detention delivering such speculative benefits to the government and such certain harm to noncitizens, it has not done so. Unlike in *Demore*, where the government could (and did) say that Congress saw evidence of the particular risks posed by noncitizens recently released from criminal custody, here there is no evidence that Congress considered, let alone justified the mandatory detention of, noncitizens who have been released and reintegrated into the community. So the government is constrained to guess that these noncitizens will change course once "the threat of removal becomes real."

[7] See, *e.g.*, Petition (ECF No. 1) and Order (ECF No. 24), *Forero-Caicedo* v. *Tompkins*, No. 13-cv-11677 (D. Mass. July 10, 2013, and July 17, 2013) (granting habeas relief, and ordering bond hearing for a lawful permanent resident eligible for cancellation of removal whom immigration authorities had detained and subjected to mandatory detention a decade after his release from custody).

Castaneda, 769 F.3d at 43 n.7 (quoting Gov't Gordon Reply Br. 10). Meanwhile, in the class action underlying this case, there is data; immigration judges have granted bond for *54 of 108* noncitizens who were not detained when released. See Status Report (ECF No. 140-2), *Gordon* v. *Johnson*, No. 3:13-cv-30146 (D. Mass. Jan. 16, 2015).[8] Thus, while Congress has expressed no discernible interest in imposing mandatory detention on noncitizens like Gordon, immigration officials have permitted their release on bond. That record cannot justify subjecting these noncitizens to mandatory detention. See Br. of Amici Curiae Former Immigration Judges and Dep't of Homeland Security Officials 10-20 (filed Feb. 23, 2015).

In short, imposing mandatory detention on noncitizens like Gordon delivers marginal benefits to the government and enormous pain to noncitizens, for reasons that Congress has never articulated and which immigration officials evidently do not perceive. In those cases, mandatory detention is unconstitutional.[9]

[8] This orderly implementation of class-wide relief tends to undermine the government's claim that the panel's decision presents "myriad operational challenges." Gov't Pet. for Reh'g 14.

[9] This problem is not mitigated by hearings under *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). *Joseph* hearings permit noncitizens to avoid mandatory detention only by demonstrating that they are not aliens or that the government is "substantially unlikely" to prove a § 1226(c) predicate. *Demore*, 538 U.S. at 514 n.3. They do not permit claims that, in a particular case, mandatory detention is unconstitutional because it is not reasonably related to the government's legitimate interests.

II. Constitutional concerns require construing § 1226(c) to apply only to noncitizens detained "when . . . released."

While this Court has asked whether Congress *could provide* for the detention without bond of all noncitizens who have committed crimes enumerated in § 1226(c), regardless of when released from prior custody, this case also asks whether Congress *has provided* for such detention. The government's answer is, in effect, maybe. It argues that § 1226(c) is ambiguous and that this Court should defer to the BIA's view that § 1226(c) mandates detention even when noncitizens are not detained "when . . . released."[10]

The panel correctly held that the canon of constitutional avoidance precludes the government's approach. *Castaneda*, 769 F.3d at 46-48. Under that canon, an "otherwise acceptable" statutory interpretation must be rejected if it raises serious constitutional concerns and an alternative interpretation is not "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575; see *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (requiring an alternative interpretation if one is "'fairly possible'"); *Sony BMG Music Entm't* v. *Tenenbaum*, 660 F.3d 487, 511 (1st Cir. 2011) (explaining that "judicial restraint" requires courts to "avoid reaching constitutional questions in advance of the necessity of deciding them."). Here, the BIA's interpretation raises constitutional concerns, and this Court should allay them by inter-

[10] The government's support for the BIA is intermittent; it rejects the BIA's view that "when . . . released" connotes immediacy. See *Castaneda*, 769 at 44 n.8.

preting § 1226(c) to apply mandatory detention only to noncitizens detained "when . . . released."

A. Interpreting § 1226(c) to apply to all noncitizens with § 1226(c) offenses would raise serious constitutional concerns.

Interpreting § 1226(c) to apply to all noncitizens with § 1226(c) offenses, regardless of when they were released from custody, would raise serious constitutional concerns. As explained above, that interpretation yields arbitrary detention bearing no connection to § 1226(c)'s purposes.

The avoidance canon does not hinge on whether constitutional concerns would arise from *all* applications of § 1226(c) to noncitizens whom the government fails to detain when released. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005) (holding *Zadvydas*'s limiting construction of § 1231(a), adopted in light of constitutional concerns posed by the indefinite detention of admitted noncitizens, applied equally to noncitizens who had never been admitted); see *United States* v. *Nascimento*, 491 F.3d 25, 38 (1st Cir. 2007) ("the doctrine of constitutional avoidance operates at 'the lowest common denominator'" (quoting *Clark*, 543 U.S. at 380)).

Here, the BIA's interpretation of the "when . . . released" clause raises "a multitude of constitutional" problems, including in Gordon's own case. *Clark*, 543

U.S. at 380-81. Accordingly, an alternative interpretation must be adopted unless it contradicts clear Congressional intent. *Id.*

B. The panel's construction of § 1226(c) is not plainly contrary to Congressional intent.

Construing § 1226(c) to apply only to noncitizens detained when released from predicate criminal custody is not "plainly contrary" to Congressional intent. *DeBartolo*, 485 U.S. at 575. As Gordon has argued and many courts have held—including the panel in this case—that limiting construction of § 1226(c) is its *only* plausible construction. *Castaneda*, 769 F.3d at 42-43, 49 n.15; Gordon Br. 23-47.[11] And, by arguing that § 1226(c) is ambiguous, the government concedes that the panel's construction does not plainly contradict Congressional intent. See Gov't Gordon Op. Br. 14-20.

To be sure, the government insists that the BIA's contrary construction derives special force from principles of administrative deference, and from cases stating that courts should not invent sanctions that strip the executive branch of authority when executive officials miss a statutory deadline. See *id.* at 13-39 (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *id.* at 39-53 (citing, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149 (2003); *United*

[11] See also *Araujo-Cortes* v. *Shanahan*, No. 14-cv-4231, 2014 WL 3843862, at *5 & n.6 (S.D.N.Y. Aug. 5, 2014); *Baquera* v. *Longshore*, 948 F. Supp. 2d 1258, 1262-63 & n.3 (D. Colo. 2013); Br. of Amici Curiae Detention Watch Network et al., Appx. B (filed May 19, 2014).

States v. *Montalvo-Murillo*, 495 U.S. 711 (1990)). But those lines of argument cannot overcome the canon of constitutional avoidance.

The constitutional avoidance canon takes precedence over *Chevron* deference. *DeBartolo*, 485 U.S. at 574-75. When a statute has more than one permissible interpretation, and the agency chooses one that raises serious constitutional concerns, the agency's interpretation receives no deference. That is because courts "assum[e] that Congress does not casually authorize administrative agencies" to adopt interpretations that push against constitutional limits. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); see also *Goncalves* v. *Reno*, 144 F.3d 110, 127 (1st Cir. 1998) (courts defer to administrative interpretations only when the "traditional tools of statutory construction" fail to resolve ambiguity).

For similar reasons, the panel correctly concluded that the constitutional avoidance canon also takes precedence over the loss-of-authority principle. *Castaneda*, 769 F.3d at 46-49. While the government portrays that line of cases as a trump card—*i.e.*, capable of favoring the BIA's interpretation "[e]ven if" *Chevron* deference is unwarranted, see Gov't Gordon Op. Br. 39—that cannot be right. Those cases merely supply a presumption about Congressional intent; when Congress does not specify the consequence for the executive branch's failure to meet a statutory deadline, Congress can be presumed not to have intended courts to "in-

vent" a drastic remedy that is not specified in the statute. *Montalvo-Murillo*, 495 U.S. at 721. But where a constitutional question is raised by a particular statutory construction, *that* interpretation is the drastic result that Congress presumably wanted to avoid, and adopting an alternative construction required to avoid it invents nothing. Thus, even assuming the loss-of-authority cases are otherwise on point—though they are not, see Gordon Br. 54-61—the canon of constitutional avoidance nevertheless compels the conclusion that Gordon is not properly subject to mandatory detention.

III. Even assuming that mandating detention for all noncitizens with § 1226(c) offenses presents no constitutional concerns, the statute's plain meaning confirms that it contains no such mandate.

Even if the panel's reliance on the canon of constitutional avoidance were completely misplaced, the remainder of its statutory analysis would still be correct. Wholly apart from that canon, the text, structure, and purposes of § 1226 unambiguously demonstrate that it does not mandate detention of those taken into immigration custody years after their release from predicate criminal custody. Because Gordon addressed these features of § 1226(c) in his opening brief, they will be revisited here only to make four brief points.

First, the panel correctly held that the text and structure of § 1226 apply mandatory detention only to noncitizens detained "when . . . released." *Castaneda*, 769 at 45 n.10. "On its face," the text of § 1226(c)(2) restricts release only in the

case of a noncitizen detained under § 1226(c)(1), including the "when . . . released" clause. *Id.* The panel observed that, because Congress easily could have written a statute applying mandatory detention to any noncitizen who had committed an offense in § 1226(c)(1)(A) to (c)(1)(D), the fact that § 1226 does not do so suggests that Congress had "another purpose." *Id.* And indeed it did. In every iteration of the mandatory detention provision, Congress sought to prevent recidivism and flight of those *leaving jail* by requiring their detention at the time of release. Gordon Br. 41 & n.9. That preoccupation with recently-released noncitizens explains why Congress did not target noncitizens who have returned to their communities and established law-abiding lives.

Second, the panel correctly held that detention years after a release from predicate criminal custody cannot be detention "when the alien is released." See *Castaneda*, 769 F.3d at 45. Interpreting that phrase to mean "any time after the alien is released," as the government proposed, "is simply inconsistent with the plain meaning of the term 'when'" within the statutory context. *Id.* at 42. In fact, the BIA concluded in *Rojas* that detention beginning *two days* after a noncitizen's release from criminal custody was not detention "when . . . released." *Rojas*, 23 I&N Dec. at 122.[12] The government's view also defies logic. Under any construction of

[12] Given the BIA's view that "when . . . released" denotes immediacy, the panel's view that "when . . . released" accommodates a "reasonable" time period is, if anything, too generous to the government. In any event, the opinion suggests that, if

§ 1226(c)(1), immigration authorities are commanded to take custody "when the alien is released." It is hard to imagine that Congress—the same Congress that was concerned with recidivism by recently-released noncitizens—meant for immigration officials to take custody at *any time* after release. Gordon Br. 38-47; *Castaneda*, 769 F.3d at 45.

Third, even if the arbitrary results that concerned the panel did not raise constitutional concerns, they would still be sufficient to trigger the statutory canon that instructs courts to avoid absurd results. See Gordon Br. 34-37. For example, the BIA's interpretation of mandatory detention would permit the government to commence removal proceedings and subject Gordon to mandatory detention in 2013, 2033, or 2053. It is unclear why Congress would deem Gordon a hopeless risk of flight or recidivism when he is nearly 80 years old. See *Castaneda*, 769 F.3d at 45.

Fourth, the "loss-of-authority" cases shed no light on the question whether Congress intended to apply mandatory detention to noncitizens taken into immigration custody long after they were released from predicate criminal custody. At most, those cases suggest that courts should construe a statute to preserve executive authority when the statute does not specify a consequence for failing to meet a statutory deadline. Here, the consequence for a failure to detain a noncitizen

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the BIA were to broaden its conception of detention "when . . . released," that view might be entitled to *Chevron* deference. See 769 F.3d at 45.

"when . . . released" is specified in the statute—§ 1226(a) applies—and that consequence presents neither a drastic result nor a loss of the government's authority to detain any noncitizen. Gordon Br. 54-61; *Castaneda*, 769 F.3d at 48-49.

Because § 1226(c) unambiguously applies only to noncitizens detained "when . . . released," and Gordon was not detained until five years after his release from predicate custody, the panel correctly concluded that he is not subject to mandatory detention.

CONCLUSION

Gordon respectfully asks this Court to affirm the district court's ruling that he is not subject to § 1226(c).

Dated: February 23, 2015

Respectfully submitted,

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1. This brief complies with the page limits imposed by the Court's supplemental briefing order of February 2, 2015.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 23, 2015

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I hereby certify that on February 23, 2015, using the Appellate CM/ECF system, I electronically caused the foregoing brief to be filed with the Clerk of Court for the U.S. Court of Appeals for the First Circuit. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

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