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 SALDAÑA, 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 SALDAÑA, Director of Immigration and Customs Enforcement; SEAN GALLAGHER, Acting Field Office Director; CHRISTOPHER J. DONELAN; MICHAEL G. BELLOTTI, Sheriff; JEH CHARLES JOHNSON, as Secretary of Homeland Security; STEVEN W. TOMPKINS, Sheriff; THOMAS M. HODGSON, Sheriff; JOSEPH D. MCDONALD, JR., Sheriff,

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 REPLY BRIEF FOR PETITIONER-APPELLEE CLAYTON RICHARD GORDON

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March 2, 2015

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INTRODUCTION AND SUMMARY OF ARGUMENT

The government's supplemental brief neglects the arguments that Gordon has made, the conclusions that the panel drew, and the text that Congress enacted. In fact, the brief confirms that Congress's basic design—and the language it used—aligned mandatory detention to the time of a noncitizen's release from criminal custody.

Gordon and the panel have shown that 8 U.S.C. § 1226 has two unambiguous features. First, § 1226(c) applies mandatory detention only if the government has met its obligation to "take . . . custody" of the alien "when the alien is released." See *Castaneda* v. *Souza*, 769 F.3d 32, 45 n.10 (1st Cir. 2014). Second, § 1226(c)(1)'s "when . . . released" clause is not satisfied when the government takes custody "any time after" release, including when months or years have passed since a noncitizen's release from criminal custody. *Id.* at 42-45. And both Gordon and the panel recognized that these conclusions are bolstered by a third point: the statute can and must be interpreted not to apply mandatory detention to people like Gordon, since such detention is so arbitrary that it would raise serious due process concerns. *Id.* at 46-48.

The government engages only superficially with these issues. On the first point, it rehashes its prior arguments without confronting the panel's conclusion that these arguments contradict both the plain text of § 1226(c) and this Court's

holding in *Saysana* v. *Gillen*, 590 F.3d 7 (1st Cir. 2009). Gov't Supp. Br. 3-7. On the second point, it insists that § 1226(c)(1) permits it to move as slowly as it wants, without squaring that view with the statute's text or purpose. *Id.* at 1, 5, 8. And on the third point, the government finally acknowledges that Congress was focused on detaining noncitizens at the time of their release, without explaining how applying § 1226(c) to noncitizens like Gordon could bear any reasonable relationship to that purpose. *Id.* at 18-19.

In short, the government's arguments confirm that the panel got it right: Gordon is not subject to mandatory detention.

ARGUMENT

I. Section 1226(c) cannot be read to apply mandatory detention to noncitizens who were not taken into custody "when . . . released."

The government claims that the panel "rightly rejected" Gordon's view that mandatory detention is limited to noncitizens detained "when . . . released." Gov't Supp. Br. 4. Actually, the panel accepted Gordon's view, *Castaneda*, 769 F.3d at 45 n.10, and rightly so.

A. The panel's holding, which the government does not cite, was that the limitation on release in § 1226(c)(2) applies only "to aliens taken into custody pursuant to paragraph (1)." *Id.* That view reflects Congress's judgment that immigration officials should have broad discretion to release noncitizens on bond "except as provided in [§ 1226(c)]." 8 U.S.C. § 1226(a). It also reflects Congress's decision

to limit that exception to "alien[s] described in paragraph (1)" of § 1226(c), and not "aliens described in subparagraphs (1)(A) to (1)(D)," or "aliens with offenses described in paragraph (1)." Accordingly, the panel handily rejected the government's view that Congress mismatched § 1226(c)'s two paragraphs by applying the release limitation of § 1226(c)(2) to noncitizens who are not taken into custody as commanded in § 1226(c)(1). *Castaneda*, 769 F.3d at 45 n.10; Gordon Br. 29-34.[1]

The government's various rejoinders—which emphasize "adverbial" clauses, "empowering" statutes, and hypotheses about how Congress could have legislated more clearly—have not changed since its opening briefs. Nor are they persuasive. Even if "when . . . released" is part of an adverbial clause, there is no room to wonder "whether Congress intended [it] to constitute *part of the mandatory detention provision*," or to think that it merely "empowers" action that the government "may" take. Gov't Supp. Br. 3, 5-6 (emphasis added). And, contrary to the government's suggestion, Congress could not have more clearly tied the "when . . . released" clause to the scope of mandatory detention by instructing the government to "take into custody any alien who [is subject to certain removability grounds] *and who was detained* when released." *Id.* at 5 (emphasis added). That instruction would tell the government, oxymoronically, to take into custody people it had *already* detained.

[1] "Gordon Br." refers to Gordon's initial brief filed on May 15, 2014; "Gordon Supp. Br." refers to Gordon's Supplemental Brief filed on February 23, 2015.

In contrast, the government itself has shown that Congress could readily have written the statute to apply to Gordon. Congress could have omitted the "when . . . released" clause, as the government has done when summarizing § 1226(c). Gov't Gordon Op. Br. 3-4, 15; Gordon Br. 34 & n.7. Or Congress could have written § 1226(c)(2) to apply to all noncitizens who are removable based on the *offenses* in § 1226(c)(1), using language similar to a statute now cited by the government. Gov't Supp. Br. 6 (citing 8 U.S.C. § 1101(a)(43)(N) (referencing "an offense described in" 8 U.S.C. § 1324(a)(1)(A), which in turn lists offenses in inset clauses (i) to (v))). But Congress did neither of those things.

B. The government also fails to confront the panel's view that *Saysana* already resolved this question. *Saysana* held that a noncitizen was not subject to mandatory detention because he had not been detained consistent with the "when . . . released" clause of § 1226(c)(1). 590 F.3d at 14-15. As the panel explained, "there would have been no reason for *Saysana* to consider the 'when . . . released' language" if, as the Board of Immigration Appeals held in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), that clause had no bearing on the reach of mandatory detention. *Castaneda*, 769 F.3d at 45 n.10. "[T]he Court's rationale for its holding" in *Saysana* is, of course, "not dicta." *United States* v. *Pleau*, 680 F.3d 1, 5 (1st Cir. 2012) (en banc). Thus, despite repeated government assurances that *Saysana* involved a different question than *Rojas*, *e.g.*, Gov't Supp. Br. 7, what

matters is whether *Saysana*'s rationale for answering that question can be reconciled with *Rojas*. The government has never attempted such a reconciliation, and that is because none is possible.

C. The government nevertheless adheres to its view that this Court should defer to *Rojas*. But the government has barely defended *Rojas*'s reasoning, see *Castaneda*, 769 F.3d at 45 n.10, and no court of appeals has deferred to it, see Gordon Br. 48 & n.13. Instead, in concluding that the "when . . . released" clause is irrelevant to the application of mandatory detention, the Third and Fourth Circuits relied largely on an analysis of the loss-of-authority cases. *Sylvain* v. *Att'y Gen. of U.S.*, 714 F.3d 150, 157-61 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 381-83 (4th Cir. 2012). That analysis has been thoroughly dismantled—by the panel, by Gordon, and now by former government officials—and the government's latest brief adds nothing new. Compare *Castaneda*, 769 F.3d at 45-49; Gordon Br. 54-61; and Br. of Amici Curiae Former Immigration Judges and Dep't of Homeland Security Officials 12-20 (filed Feb. 23, 2015), with Gov't Supp. Br. 10-11.[2]

II. Section 1226(c)(1) cannot be read to use the phrase "when the alien is released" to mean "whenever the government wants."

The government also argues, in essence, that it is *impossible* for a noncitizen to establish that he was not taken into custody "when . . . released." In its view, a

[2] If there is a circuit split, see Gov't Supp. Br. 1, it arose because the Third and Fourth Circuits contradicted *Saysana*—not because the panel adhered to it.

noncitizen can never avoid mandatory detention based on a claim that the government did not "take [him] into custody . . . when [he was] released" from criminal confinement because "when" simply means "any time after." Gov't Gordon Op. Br. 18; Gov't Supp. Br. 1, 5, 8. As Gordon has argued, and the panel recognized, this argument amounts to an outright denial of the "custody" command of § 1226(c)(1), and it is incorrect. *Castaneda*, 769 F.3d at 42-43; Gordon Br. 38-47.

A. The government believes that § 1226(c)(1)—despite ostensibly commanding that the government "shall take into custody" certain noncitizens "when [they are] released"—is really no command at all. It does not, in the government's view, entail taking anyone into custody "the moment he is released, after some delay, or even after several years." Gov't Supp. Br. 1. Instead, the government reads § 1226(c)(1) to say, in effect, that the government "*can* take into custody" an alien subject to certain criminal grounds of removability "*at any time* after the alien is released." See *id.* at 1, 5, 12. This view reduces the "when . . . released" command to, at most, a limitation on the government's authority to impose detention *before* release from criminal custody—a limitation that would be oddly worded (Gordon Br. 46), redundant with other statutes (Gov't Supp. Br. 5), and a peculiar response to Congressional "alarm" about the government detaining noncitizens too late rather than too early (Gov't Supp. Br. 18). See *Castaneda*, 769 F.3d at 42-43.

By construing § 1226(c)(1) not to require the executive to take any action to detain noncitizens being released from jail, *the government's* account—not the panel's—risks "exempt[ing] criminal aliens from mandatory detention" because of the agency's failure to detain them. Gov't Supp. Br. 8. It should be rejected.

B. The government's misapprehension of § 1226(c)(1) explains its claim that the panel's holding raised practical problems. *Id.* at 8-9. By holding that § 1226(c)(1) requires the government to take noncitizens reasonably promptly into custody, the panel permitted the BIA ample latitude to define the precise content of § 1226(c)(1)'s "when . . . released" requirement. *Castaneda*, 769 F.3d at 45. Although the government perceives this holding as saddling it with the task of figuring out how quickly to take noncitizens into custody, that perception is due to the government's remarkable view that § 1226(c)(1) never requires it to move quickly. But even the BIA has recognized that Congress, through § 1226(c)(1), commanded prompt action. *Rojas*, 23 I&N Dec. at 122.

It is thus difficult to accept the government's insistence that the *panel* required it to decide how quickly it must meet its obligation to take custody "when . . . released," or its worry that the BIA would be hard-pressed to perform this basic interpretive task. See *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (considering "reasonable period" for filing asylum application after changed circumstances). The BIA and immigration judges could, under the panel's

interpretation, account for various practical concerns with identifying and taking custody of noncitizens being released from criminal custody.[3] What the government cannot do is go on as if the command to take custody "when the alien is released" means that it is not required to do anything at all.

III. The government does not resolve the serious constitutional questions that would arise from detaining Gordon without the possibility of bond.

The government's submission confirms that applying § 1226(c) to all noncitizens with predicate convictions, including those long ago released from criminal custody, is unsupported by Congressional purposes and thus raises serious constitutional concerns. Because a narrower interpretation is not plainly contrary to Congressional intent, those constitutional concerns require construing § 1226(c) to apply only to those detained "when . . . released." See Gordon Supp. Br. 14-18.

A. The government all but concedes that the constitutionality of § 1226(c), as applied to noncitizens like Gordon, was not resolved in *Demore* v. *Kim*, 538 U.S. 510 (2003). It does not claim, for example, that *Demore* upholds applications of § 1226(c) that would be arbitrary or unreasonable. See Gov't Supp.

[3] Though the government implies otherwise, Gov't Supp. Br. 8-9, the Connecticut "Trust Act" does not bar—and actually *requires*—local authorities to communicate with federal authorities about a noncitizen's release from custody, and it does not restrict the use of detainers against people with felony convictions. Public Act No. 13-155 (Conn. 2013). Its priorities resemble those of the Secretary of Homeland Security, who has narrowed the use of detainers and has replaced detention requests with requests for notification of a noncitizen's release. Jeh Johnson, Secure Communities 2-3 (Nov. 20, 2014), available at www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (last visited Mar. 2, 2015).

Br. 17; see also Br. for the Petitioners 42-49, *Demore*, 538 U.S. 510, 2002 WL 31016560 (filed Aug. 29, 2002) (arguing facial challenge to § 1226(c) should be denied despite possibility of valid as-applied challenges).

The government does claim that "a delay in *initiating* detention" can never strengthen a due process challenge to mandatory detention, Gov't Supp. Br. 12, but that claim finds no support in the statute or *Demore*. The constitutional concerns in this case do not stem from the mere delay in initiating removal proceedings against Gordon, but from imposing *detention without the possibility of bond* following that delay. And in upholding a "narrow" detention scheme that was "support[ed]" by "[t]he evidence Congress had before it," *Demore* did not sanction mandatory detention that is applied arbitrarily and without legitimate purpose. *Demore*, 538 U.S. at 526, 528. Thus, no matter the precedential weight of Justice Kennedy's concurrence, Gordon Supp. Br. 9 n.3, *Demore* does not hold that § 1226(c) would be constitutional as applied to Gordon five—or fifty—years after his release from criminal custody. Its reasoning suggests the opposite is true. Gordon Supp. Br. 7-13.[4]

[4] The government insists that *Demore* applied "rational basis" review, Gov't Supp. Br. 15, but that is not so. Though the Court did not require the government to "employ the least burdensome means," neither did it suggest that Congress may detain noncitizens as readily as it can regulate optometrists. 538 U.S. at 528 (citing intermediate scrutiny case, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 443 (2002)); *cf. Williamson* v. *Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955); but see *U.S. Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 535-37 (1973) (striking down classification under rational basis standard). Presumably, if the Court had applied rational basis review, it would not have undertaken to examine

B. The government nowhere says that applying mandatory detention to Gordon—a permanent resident who rebuilt his life and served his community after a drug offense—serves any permissible purpose. Gov't Supp. Br. 11-24. In response to the panel's conclusion that detaining Gordon without the possibility of bond "appears arbitrary on its face," *Castaneda*, 769 F.3d at 47-48, the government stands mute.

If anything, the government has finally confirmed that the purposes of § 1226(c) have nothing to do with noncitizens like Gordon. It concedes that Congress enacted § 1226(c) because it was "alarm[ed]" about criminal noncitizens who were *not* "immediately detain[ed]" upon their release from incarceration, and were instead returned to communities where they might recidivate and become difficult for immigration authorities to locate. Gov't Supp. Br. 18. That alarm is precisely why Congress mandated detention "when . . . released," see Gordon Br. 41-42, and why the government is mistaken when it argues that § 1226(c)(1) does not require prompt action, see Gov't Supp. Br. 1, 5, 8, 12. Requiring detention without bond of noncitizens who have neither disappeared nor recidivated during their gap in cus-

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whether § 1226(c) was supported by the evidence before Congress. *Demore*, 538 U.S. at 528; see *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772, 778 (9th Cir. 2014) (en banc) (noting *Demore* involved "extensive evidence and findings establishing the need for the policy"). Thus, *Demore* is in line with other cases emphasizing the fundamental liberty interest triggered by civil detention and the need for such detention to bear a reasonable relationship to Congressional purposes. See Gordon Supp. Br. 5-6 & n.1.

tody has little to do with those goals, and thus raises serious constitutional concerns. Gordon Supp. Br. 9-13.

Because the mandatory detention of noncitizens like Gordon does not advance the specific purposes of § 1226(c), the government is constrained to make two general points that apply equally to *all* noncitizens in removal proceedings. It argues that "aliens have little reason to become fugitives until they are placed into removal proceedings," and that, even if they have not been arrested for § 1226(c) offenses, noncitizens might have been arrested for other offenses or committed crimes for which they were not caught. Gov't Supp. Br. 23-24. These are merely arguments in favor of detention generally. See *Castaneda*, 769 F.3d at 43 n.7. They say nothing about why Congress would have had good reason to preclude Gordon from demonstrating to an immigration judge that he did not pose a danger or flight risk warranting detention. See Br. of Amici Curiae Former Immigration Judges and Dep't of Homeland Security Officials 10-12.[5]

C. Finally, the government makes several assertions that do not withstand scrutiny. For example, it discusses rates of failures to appear among noncitizens released on bond or their own recognizance. Gov't Supp. Br. 22. That discussion sheds no meaningful light on the risks presented by noncitizens with § 1226(c)

[5] Despite barely mentioning the facts of Gordon's case, the government flavors its brief with references to "terrorist" aliens. Gov't Supp. Br. 1-2, 14, 23. Those aliens face mandatory detention under 8 U.S.C. § 1226a, and, in any event, would be unlikely to have strong due process challenges to mandatory detention.

offenses, because they are held in mandatory detention.[6] And it says nothing about individuals like Gordon, who have lived in the community without incident for years after their release from criminal custody. The government also states, without citing any data, that noncitizens with criminal convictions are less likely to be awarded relief. *Id.* at 20. But noncitizens with criminal convictions may be eligible for several forms of relief from removal, see, *e.g.*, 8 U.S.C. §§ 1158, 1231(b)(3), 1255(a), including some that are available exclusively or primarily to those with criminal convictions and that are closely linked to the equities that individuals long since released from criminal custody will have built over the passage of time. See 8 U.S.C. §§ 1182(h), 1229b(a); 8 U.S.C. § 1182(c), repealed by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Title III, § 304(b), 110 Stat. 3009 (Sept. 30, 1996) (former Immigration and Nationality Act § 212(c), retroactively available in some cases).

[6] Though the government states that its statistics coincide with "a dramatic rise in the number of criminal aliens made eligible for bond hearings by federal court order," it does not claim—much less document—*any* connection between rising *in abstentia* orders and noncitizens released after court-ordered bond hearings in "when . . . released" cases, or other cases. Gov't Supp. Br. 22. The statistics more likely reflect releases caused by resource constraints at the border. See, *e.g.*, U.S. Dep't of Homeland Security, Office of Inspector General, Detention and Removal of Illegal Aliens 1, 4 (OIG-06-33) (Apr. 2006), available at www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf (last visited Mar. 2, 2015); U.S. Dep't of Homeland Security, Office of Inspector General, ICE's Release of Immigration Detainees 8 (OIG-14-116) (Aug. 2014), available at www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf (last visited Mar. 2, 2015).

Neither these statistics nor the record before Congress divulge a reasonable relationship between the purposes of mandatory detention and the imposition of mandatory detention on noncitizens detained years after their release from custody. Instead, that broad interpretation of § 1226(c) raises serious constitutional concerns that require interpreting the provision to apply only to noncitizens detained "when . . . released" from custody for a predicate offense. Gordon Supp. Br. 14-18.

CONCLUSION

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

Dated: March 2, 2015

Respectfully submitted,

/s/ Matthew R. Segal

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CERTIFICATE OF COMPLIANCE

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: March 2, 2015

/s/ Matthew R. Segal
Matthew R. Segal

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 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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