Nos. 13-1994 & 13-2509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 13-1994

LEITICIA CASTAÑEDA,

Petitioner-Appellee,

v.

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

Respondent-Appellant.

No. 13-2509

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

Petitioners-Appellees,

v.

ERIC H. HOLDER, JR., U.S. Attorney General, et al.,

Respondents-Appellants.

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INTRODUCTION

Nothing in the Supplemental Briefs filed by Petitioners or amici establishes that removable aliens who have committed serious crimes are exempt from mandatory immigration detention simply because the Government did not locate and detain them immediately upon their release from criminal custody or within a "reasonable time" thereafter. Rather, the Court should defer to the Board of Immigration Appeals' ("BIA") conclusion that a criminal alien is subject to mandatory detention under Section 1226(c)(2), without regard to the fortuity of a gap in detention.

Petitioners' claim that the BIA's interpretation violates due process misstates the law involving the constitutionality of immigration statutes. Petitioners also cite data on recidivism that is either irrelevant to Congress's purposes for the statute or that actually support the BIA's interpretation. Finally, Petitioners mistake a tool of statutory construction as a means to stymie long-standing Supreme Court precedent involving the Government's ability to act even after it misses a deadline.

ARGUMENT

I. Section 1226(c)(2) contains no "reasonable time" exception.

In their Supplemental Briefs, Petitioners have retreated from their initial position that Section 1226(c) unambiguously requires the immigration detention of aliens *immediately* upon their release from criminal custody for mandatory

immigration custody to apply. Petitioners now adopt the position of the withdrawn *Castañeda* panel opinion that the "when . . . released" clause of Section 1226(c) does not unambiguously require immediate immigration detention but only requires detention to begin within a "reasonable period" after release from criminal custody. (Gordon Suppl. Br. 18-19.) But their reliance on *Castañeda* is misplaced, as are their other reasons for denying the ambiguity of Section 1226(c).

First, the *Castañeda* panel failed to recognize the critical ambiguity in Section 1226(c) arising from the structure of the statute. The command that a detained criminal alien not be released on bond comes from Section 1226(c)(2), which requires detention of every "alien described in paragraph (1)," except in one narrow circumstance that is inapplicable here. The interpretative question is whether the "when . . . released" clause in Section 1226(c)(1) "describ[es]" an alien subject to mandatory detention, or instead simply indicates when DHS first has a duty to take a criminal alien into custody. The fact that the "when . . . released" clause in paragraph (1) may or may not constitute the definition of an alien referenced in paragraph (2) does not mean that "paragraph (2) works independently of paragraph (1)," as the *Castañeda* panel held. *Castañeda v. Souza*, 769 F.3d 32, 45 n.10 (1st Cir. 2014). The ambiguity, instead, arises from the interplay of paragraphs (1) and (2). An "alien described in paragraph (1)" might include the "when . . . released" clause as part of the definition of an alien,

along with clauses at paragraph (1)(A)-(D). Or it might not, and might instead modify the Government's mandate to take aliens into detention. *See Matter of Rojas*, 23 I. & N. Dec. 117, 120, 121, 126 (BIA 2001). Courts across the country have recognized that ambiguity. *See Sidorov v. Sabol*, No. 09-cv-1868, 2009 WL 8626352, at *5 (M.D. Pa. Dec. 18, 2009); *Sulayao v. Shanahan*, No. 09-cv-7347, 2009 WL 3003188, at *4-5 (S.D.N.Y. Sept. 15, 2009); *Saucedo-Tellez v. Perryman*, 55 F. Supp. 2d 882, 884-85 (N.D. Ill. 1999). The fact that other courts have disagreed simply underscores the statute's ambiguity. *See Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004).

Second, Gordon claims Congress's purposes behind Section 1226(c) eliminate any ambiguity. (Gordon Suppl. Br. 20.) But Congress intended mandatory detention to "prevent[] deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the alien will be successfully removed." *Demore v. Kim*, 538 U.S. 510, 528 (2003). That purpose applies both to those aliens who are detained upon release from criminal custody and to those who are detained at some later time. Congress made clear why it would want to use mandatory detention to facilitate the removal of both groups of criminal aliens. (*See* Appellants' Suppl. Br. at Section III.D.2.) The Senate Report addressing Section 1226(c) also expressed concern

about aliens who committed further crimes during gaps between criminal and immigration custody. *See* S. Rep. 104-48, at 15, 16, 21. It is therefore implausible that "Congress would, on one hand, be so concerned with criminal aliens committing further crimes, or failing to appear for their removal proceedings, or both, that Congress would draft and pass the mandatory detention provision, but on the other hand, decide that if, for whatever reason, federal authorities did not detain the alien immediately upon release, then mandatory detention no longer applies." *Hosh v. Lucero*, 680 F.3d 375, 380 n.6 (4th Cir. 2012).

Finally, Gordon claims that deferring to the BIA would lead to absurd results in which nearly 80-year-old criminal aliens would be subject to mandatory detention. (Gordon Suppl. Br. 20.) Neither Gordon nor Castañeda is 80 years old; they allege no pattern or practice of such detentions; and if an 80-year-old were detained under Section 1226(c), that alien could bring an as-applied Due Process challenge. Moreover, it is not absurd to apply mandatory detention to every alien who commits a predicate criminal offense or terrorist act, without regard to the alien's age. Congress created only one exception to mandatory detention under Section 1226(c)(2), and it is for witness-protection purposes, not age. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

II. The BIA's interpretation of Section 1226(c) is permissible and consistent with due process.

Because Section 1226(c) is ambiguous, *Chevron* requires the Court to defer to the BIA's permissible interpretation of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11, 844 (1984). In *Matter of Rojas*, the BIA interpreted Section 1226(c) to conclude that criminal aliens do not become exempt from mandatory detention simply because DHS does not take them into immigration custody the moment they are released from criminal custody. The BIA interpreted the "when … released" clause as indicating when the Government's duty to take an alien into custody arises under Section 1226(c)(1), rather than creating an additional exemption from mandatory detention required by Section 1226(c)(2). *See Matter of Rojas*, 23 I & N Dec. at 125.

In their supplemental briefs, Petitioners and amici argue that the Court must reject that interpretation because it violates the due process rights of aliens who were not detained immediately after, or within a "reasonable period" after, their release from criminal custody. But in *Demore*, the Supreme Court already squarely rejected a due process challenge to mandatory detention under Section 1226(c), and petitioners offer no basis for reaching a different result here.[1]

[1] Section 1226(c) is subject to rational basis review as an immigration detention statute. *See Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014). Therefore, the cases cited by Petitioners involving detention in other contexts, such as *Foucha v. Louisiana*, 504 U.S. 71 (1992), *United States v. Salerno*, 481 U.S. 739 (1987), and

A. Due process does not require Congress to articulate its reasons for applying mandatory detention to aliens with gaps in custody.

Petitioners argue that applying mandatory detention to criminal aliens with gaps in detention cannot serve Congress's goals for Section 1226(c) because Congress never rationalized such an application. (Gordon Suppl. Br. 12-13.) But that is little more than an argument that there must be an individualized finding of dangerousness or flight risk—which the Supreme Court squarely rejected in *Demore*. *See* 538 U.S. at 525-526. The Supreme Court instead held that Congress could require mandatory detention based on "reasonable presumptions and generic rules," and the Court identified the presumptions and generic rules here: Aliens who commit serious crimes are categorically presumed to be more dangerous and a greater risk of flight than aliens who do not have such criminal histories, and such criminal aliens therefore can be constitutionally detained without bond during their removal proceedings. *See id*. at 518-520. Indeed, the Senate Report expressed concern about aliens who committed crimes, absconded, or both, during periods between criminal and immigration custody. *E.g.*, Sen. Rep. at 15-18.

Here, removal proceedings can begin at any point after a criminal alien's release from custody for a removable offense; criminal aliens face a greater

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Jackson v. Indiana, 406 U.S. 715 (1972), are inapplicable to this case, as are any due process principles derived from those cases. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 788 (9th Cir. 2014) (distinguishing rational basis review of Section 1226(c) in *Demore* from heightened scrutiny in *Salerno*).

likelihood of removal and less likelihood of winning relief from removal; and their likelihood of flight rises with their likelihood of removal. Thus, once removal proceedings begin, criminal aliens have a greater incentive than other aliens to abscond from their proceedings. (*See* Appellees' Suppl. Br. 19-20.)

Amicus claims that criminal aliens who have returned to the community have demonstrated that they are not flight risks because they have not absconded. (IRC Amicus Br. 18.) But until removal proceedings begin, criminal aliens have no removal proceedings to abscond from. Gordon and his amicus also claim that time in the community improves criminal aliens' chances for discretionary relief from removal. (Gordon Supp. Br. 11-12; Br. for Immigrant Rights Clinic of Washington Square Legal Services, Inc. as Amicus Curiae Supporting Petitioners-Appellees ("IRC Amicus Br.") 19.) But that is not true as a categorical matter. Aggravated felonies, no matter when committed, disqualify criminal aliens from cancellation of removal. 8 U.S.C. § 1229b(a). Crimes involving moral turpitude may prevent lawful permanent residents from obtaining cancellation of removal because their commission tolls the accrual of residency required for cancellation of removal. 8 U.S.C. § 1229b(d)(1). For non-lawful permanent resident aliens, crimes involving moral turpitude disqualify them entirely from cancellation of removal. 8 U.S.C. § 1229b(b)(1)(C). In any event, Congress's categorical judgment is rational as to all criminal aliens under *Demore*, and there is no basis

for requiring consideration of these additional case-specific factors when interpreting Section 1226(c).

B. Petitioners' recidivism statistics do not challenge, and actually support, applying mandatory detention to Petitioners.

Petitioners and amici also argue that because the risks of recidivism "rapidly diminish" once an alien is released into the community, the BIA's application of mandatory detention to those aliens is arbitrary and raises due process concerns. (Gordon Suppl. Br. 10-11 & n.4, n.5.) This argument suffers from multiple flaws. First, even if time in the community could lessen the recidivism risks of individual criminal aliens, *Demore* holds that no such individualized inquiry is required: *Demore* squarely established Congress's use of a predicate criminal conviction established criminal history as the sole and sufficient trigger for mandatory detention. *See Demore*, 538 U.S. at 513, 514 n.2, 525 n.9. If the Court permitted Petitioners to exclude themselves from mandatory detention because of their time in the community, the door would open for other groups of criminal aliens to do the same based on their own mitigating factors. Criminal aliens over a certain age, those with spouses and children, those with any characteristic that a criminology study has identified as mitigating the risk of recidivism: under Petitioners' view, all of those aliens would be exempt from mandatory detention. That view, however, would vitiate Congress's purpose in treating criminal alien as a class based on the risk factor they share as a class: their criminal history. *See id*;

Carlson v. Landon, 342 U.S. 524, 543 (1952) (permitting INS to deny bail to immigration detainees "by reference to the legislative scheme" without any finding of flight risk). *Demore* prevents such a reading of Section 1226(c).

Second, the studies that Gordon cites only address the risk of recidivism. (*See* Gordon Suppl. Br. 10-11 & n.4, n.5.) They do not address the effect of time in the community on flight risk. Thus, the studies do not discredit treating criminal aliens, no matter their time in the community, as greater flight risks once removal proceedings begin, due to their greater chances of removal. In any event, Congress had different studies before it when it enacted Section 1226(c), and Congress rationally relied upon those studies when it required mandatory detention. *See Demore*, 538 U.S. at 517-520; *see also id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.").

Third, the studies that Gordon cites provide further support for extending mandatory detention to criminal aliens with gaps in custody. The risk of recidivism among 20-year-old offenders remains elevated for nine years, according to the study that Gordon cites. *See* Megan C. Kurlychek, et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime & Delinq. 64, 73 (Jan. 2007). For 18- to 20-year old offenders, "there is some indication of an elevated risk of new offenses throughout the entire period" of

study, which ended at age 32, even if the risk is small. *Id.* at 74. That extended period of elevated risk justifies the mandatory detention of criminal aliens and disproves the statement in the *Castañeda* panel opinion that the presumption of dangerousness applies only to "newly released criminal defendants." *Castañeda*, 769 F.3d at 47. The approximate decade of elevated risk justifies mandatory detention for Gordon and Castañeda, who had both committed their crimes five years prior to the commencement of their immigration proceedings. (Gordon Pet. ¶¶ 23, 24 & Ex. A; Castañeda Pet. ¶¶ 15, 17.) And, as discussed above, the period of increased risk for recidivism runs independently of the risk of flight, which has no relationship to the time since an alien's last offense or release from custody but that relates, instead, to the fear of removal particular to criminal aliens that emerges once removal proceedings begin.

Finally, the declining risk of recidivism applies only to criminal aliens who have not reoffended. (*See* Gordon Suppl. Br. 10.) But a criminal alien could re-offend without being detected, arrested, or charged with a crime, particularly if she uses an alias, as Castañeda did. *See* S. Rep. 104-48, at 14-15.[2] Moreover, a criminal alien could be convicted and even imprisoned, albeit on an offense that

[2] Appellants ask the Court to take judicial notice of Castañeda's record of conviction, attached hereto as Exhibit A, that establishes her alias. *See United States v. Mercado*, 412 F.3d 243, 247 (1st Cir. 2005) ("We agree that we can take judicial notice of the state court records.").

does not qualify as a predicate for mandatory detention. The alien could also have absconded from custody on other offenses during the interim. A focus only on the original predicate conviction and the start of immigration detention is thus myopic and cannot in itself establish a reliable "track record" that facilitates evaluation of flight risk and dangerousness. (Br. of Former Immigration Judges as Amicus Curiae Supporting Petitioners-Appellees ("IJ Amicus Br.") 6.)

C. Mandatory detention does not violate due process merely because it is imposed on a criminal alien with ties to the community.

Finally, Petitioners argue that applying mandatory detention to them would be arbitrary because it would "amplify the harms to the noncitizen." (Gordon Suppl. Br. 11.) Again, this argument provides no basis for distinguishing *Demore*, as the only cognizable liberty interest a criminal alien has here is his interest in avoiding the deprivation of physical liberty that occurs when an alien is detained without bond. That loss of liberty is identical irrespective of how long after release from criminal custody it begins. Regardless of when the alien is detained, the length of detention and duration of removal proceedings should be virtually the same. Thus, there is no difference between the alleged deprivation of the liberty interest invoked by an individual asserting a *Matter of Rojas* claim and the interest raised by individuals without gaps in custody.

D. The BIA's interpretation of Section 1226(c) is permissible.

Because the mandatory detention of Petitioners is consistent with due process, *Chevron* principles require the Court to defer to the BIA's interpretation of Section 1226(c). *Chevron U.S.A. Inc.*, 467 U.S. at 843 n.11. This Court should, therefore, reject challenges to the BIA's interpretation that merely propose another resolution of competing policy interests. *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1873 (2013). Amici, for example, argue that the BIA's interpretation limits executive discretion and increases burdens on immigration enforcement. (IJ Amicus Br. 15-20.). In deciding *Matter of Rojas*, however, the BIA considered the practical effects the various interpretations of Section 1226(c) would have on public safety and on the Government's ability to remove criminal aliens. *Matter of Rojas*, 23 I. & N. Dec. at 124. *Chevron* deference requires the Court to reject amici's challenge to the BIA's interpretation as mere competing policy and budgetary resolutions the BIA rejected. *See City of Arlington*, 133 S. Ct. at 1873; *see also Harrington v. Chao*, 280 F.3d 50, 59 (1st Cir. 2002) (*Chevron* deference permits agency the "flexibility to deal with changing economic and social realities").

III. This Court should follow its sister circuits.

Petitioners make a final push for constitutional avoidance when they claim that it prevents application in this case of the no-loss-of-authority cases, such as

Barnhart v. Peabody Coal Co., 537 U.S. 149, 161 (2003) and *United States v. Montalvo-Murillo*, 495 U.S. 711, 720 (1990). As set forth above, the canon of constitutional avoidance has no role to play in this case: *Demore* upheld mandatory detention under Section 1226(c), Petitioners cannot distinguish *Demore* here, and the BIA conclusively resolved any statutory ambiguity here. Moreover, both the Third and Fourth Circuits have held that the no-loss-of-authority principle controls on materially identical facts—fully aware of the arguments about "when . . . released," *Chevron* deference, and constitutional concerns. See *Hosh*, 680 F.3d at 384 (any failure by DHS to detain an alien immediately when released would "not bestow a windfall upon criminal aliens"); *Sylvain v. Att'y Gen. of the U.S.*, 714 F.3d 150, 157-158 (3d. Cir. 2013) ("[A] dangerous alien [does not become] eligible for a hearing—which could lead to his release—merely because an official missed the deadline."). Petitioners provide no basis for distinguishing *Hosh* and *Sylvain*. This Court should accordingly follow its sister circuits.

CONCLUSION

For the reasons stated above, this Court should reverse the opinion and order of the District Court and permit the continued mandatory detention of Petitioners and similarly situated removable criminal aliens pursuant to 8 U.S.C. § 1226(c).

Dated: March 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I filed the foregoing document and any exhibits and attachments thereto with the Clerk of the Court through the Court's ECF system and that the foregoing document will be served electronically upon registered participants identified on the Notice of Electronic Filing.

Dated: March 2, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, I certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

I also certify that the text of the electronic brief is identical to the text of the paper copies filed with the Court. The electronic brief has been scanned for viruses and no virus was detected.

Dated: March 2, 2015

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Castañeda v. Souza, No. 13-1994 (1st Cir.);
Gordon v. Holder, No. 13-2509 (1st Cir.)

Appellants' Reply Supplemental Brief

EXHIBIT A

CRIMINAL COMPLAINT ORIGINAL	DOCKET NUMBER 0811CR000340	NO. OF COUNTS 1	Trial Court of Massachusetts District Court Department

DEFENDANT NAME & ADDRESS
Alicia Laus
[redacted]
AKA CASTANEDA LICIA

COURT NAME & ADDRESS
Lowell District Court
41 Hurd Street
Lowell, MA 01852
(978)459-4101

DEFENDANT DOB	COMPLAINT ISSUED	DATE OF OFFENSE	ARREST DATE
[redacted]1983	01/15/2008	01/14/2008	01/14/2008

OFFENSE CITY / TOWN	OFFENSE ADDRESS	NEXT EVENT DATE & TIME
Lowell		01/15/2008 9:00 AM

POLICE DEPARTMENT	POLICE INCIDENT NUMBER	NEXT SCHEDULED EVENT
Lowell PD	08-785	Arraignment

OBTN		ROOM / SESSION
TLOW200800159		Arraignment Session

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.

COUNT	CODE	DESCRIPTION
1	94C/34/C	DRUG, POSSESS CLASS B c94C §34

On 01/14/2008, not being authorized by law, did knowingly or intentionally possess a controlled substance in Class B of G.L. c.94C, §31, to wit: Cocaine, in violation of G.L. c.94C, §34.

PENALTY: imprisonment not more than 1 year; or not more than $1000; or both.

SIGNATURE OF COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK	DATE
X	X	1/15/08
NAME OF COMPLAINANT	A TRUE COPY ATTEST	CLERK-MAGISTRATE/ ASST. CLERK	DATE
		X	

Date/Time Printed: 01-15-2008 08:44:25

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