13-1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEITICIA CASTANEDA

Petitioner - Appellee

v.

STEVE SOUZA, Superintendent, Bristol County House of Corrections, 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; JOHN T. MORTON, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; 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

On Appeal from the United States District Court, District of Massachusetts

Brief of Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, each amici individually certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The government believes that Congress has commanded it to hold certain noncitizens—without the possibility of bond—regardless of whether immigration authorities detained them "when [they were] released" from criminal custody for the offenses that supposedly justify their mandatory detention. Acting on this belief, the government detains people like appellee Leiticia Castaneda throughout their removal proceedings, abruptly separating them from their families years after their last contacts with the criminal justice system. But the government's belief is mistaken. It misapprehends this Court's precedent, see *Saysana* v. *Gillen*, 590 F.3d 7 (1st Cir. 2009); it contradicts the plain text of the mandatory detention provision, see 8 U.S.C. § 1226(c); it yields absurd results; and it raises serious constitutional concerns.

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. § 1226(c). This instruction curtails the discretion that immigration authorities otherwise possess, under 8 U.S.C. § 1226(a), to decide whether to detain or release noncitizens during removal proceedings. This Court has

described mandatory detention as a "limited" exception to the executive branch's prerogative to decide whether a noncitizen's detention is warranted. *Saysana*, 590 F.3d at 17.

District courts in this Circuit have held, without exception, that mandatory detention does not apply to noncitizens taken into immigration custody well after being released from the predicate criminal custody. *Gordon* v. *Johnson*, --- F. Supp. 2d ---, 2013 WL 6905352, at *7 (D. Mass. Dec. 31, 2013), appeal docketed, No. 13-2509 (1st. Cir. Dec. 16, 2013); *Castaneda* v. *Souza*, 952 F. Supp. 2d 307, 321 (D. Mass. 2013); *Oscar* v. *Gillen*, 595 F. Supp. 2d 166, 169 (D. Mass. 2009). Their rulings, including the ruling below, 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." These courts have noted that the government's approach produces extreme results that Congress could not have intended.

This is a case in point. In 2008, Castaneda was arrested and then released from custody for a drug offense. Govt. Op. Br. 2. Some five years later, in March 2013, the Department of Homeland Security ("DHS")

detained her. *Id.* The court below held that Castaneda's detention was not mandatory, and DHS then released her without even holding a bond hearing—doubtless because officials concluded it was safe to do so.

Yet the government now argues that immigration authorities have *no choice* but to detain Castaneda. It contends, and the Board of Immigration Appeals ("BIA") has held, that mandatory detention applies to all noncitizens who committed the offenses listed in § 1226(c), no matter whether they were taken into immigration custody "when . . . released" from criminal custody for such an offense, or at *any time* thereafter. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). Two courts of appeals have accepted this interpretation. *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 deference to *Rojas* is warranted only if § 1226(c) is ambiguous. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In this case, the government's efforts to find ambiguity are misguided: it claims that the phrase "when . . . released" is untethered from other statutory language defining who is subject to mandatory detention, or else that it somehow conveys congressional indifference about the timing of

detention. Each claim is implausible.

First, § 1226(c) applies only to noncitizens detained "when . . . released" from criminal custody. Its 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 ordinary discretion to detain or release noncitizens under § 1226(a). The government's contrary position is foreclosed by *Saysana*, which determined that the phrase "when . . . released" helps define the application of mandatory detention. 590 F.3d at 11, 16. The government's reading would require the detention without bond of noncitizens who have long since returned to their communities—a result that Congress did not intend, and which would raise serious constitutional concerns.

Second, the phrase "when . . . released" requires prompt action by immigration authorities. Although the government argues that "when the alien is released" could mean "any time after" release, Govt. Op. Br. 28, statutory text and basic logic dictate otherwise. Congress used the phrase "when . . . released" to require immediate action, not to express indifference about when noncitizens should be detained.

Finally, and apart from any attempt to interpret § 1226(c), the

government argues that the district court impermissibly "sanction[ed]" immigration officials by ruling that Castaneda is subject to § 1226(a) instead of § 1226(c). Govt. Op. Br. 9, 31-43. That is not so. The district court did not sanction immigration officials by removing their "authority to detain criminal aliens without bond," *id.* at 9, because § 1226(c) is not a grant of authority. It *curtails* the discretionary detention authority that is *conferred* upon the executive branch by § 1226(a). So rejecting the government's view of § 1226(c) would expand rather than contract its authority over custody decisions.

Accordingly, rather than defer to the flawed reasoning of *Rojas*, this Court should apply the ordinary tools of statutory construction and the straightforward reasoning of *Saysana*. Doing so requires upholding the district court's conclusion that Castaneda's mandatory detention contradicted the plain meaning and narrow purposes of § 1226(c).

INTERESTS OF *AMICI CURIAE*

Amici are immigrants' rights organizations whose members and clients are affected by the government's interpretation of mandatory detention laws. They share a profound interest in the proper, fair, and constitutional application of those laws. *Amici* submit this brief with the

consent of all parties.[1]

The American Civil Liberties Union Foundation ("ACLU") and the ACLU Foundation of Massachusetts have represented many people—including a class of roughly 50 noncitizens in Massachusetts—who, like Castaneda, challenge their mandatory immigration detention because they were not detained "when . . . released" from the relevant criminal custody. See *Gordon* v. *Johnson*, No. 13-30146 (D. Mass. Mar. 27, 2014) (order certifying class). The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Foundation of Massachusetts is the ACLU's Massachusetts affiliate.

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice

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[1] Counsel for the *amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici*, its members, or its counsel made a monetary contribution for its preparation or submission. Fed. R. App. Proc. 29(c)(5).

and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before DHS and before the Executive Office for Immigration Review (immigration courts and the BIA), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a nonprofit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides technical assistance to the bench and bar, litigates on behalf of noncitizens as *amicus curiae* in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories as well as

Immigration Law and Defense and three other treatises published by Thompson-West. Through its membership network and its litigation, the National Immigration Project is acutely aware of the problems faced by noncitizens subject to mandatory detention under § 1226(c).

BACKGROUND

I. Statutory framework

Section 1226 of Title 8 governs detention during removal proceedings. Section 1226(a) supplies discretionary authority to detain a noncitizen, or release him on bond or conditional parole, during removal proceedings. Noncitizens detained under § 1226(a) are entitled to bond hearings, at which immigration judges decide 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)." § 1226(a).

Section 1226(c), governing mandatory detention, is an 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. § 1226(c)(1). These

noncitizens may be released only in narrow circumstances not present here. § 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(c), entitled "Detention of criminal aliens," provides:

> (1) Custody
>
> The Attorney General[2] 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,

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[2] 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.

> 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].

II. *Chevron* and *Matter of Rojas*

Under *Chevron*, deference to the government's interpretation of a statute is warranted "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Succar* v. *Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005) (quoting *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004)). 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 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*, 394 F.3d at 22 (citation and internal quotation marks omitted).

Here, the government urges deference to the BIA's construction of

§ 1226(c) in *Rojas*. The BIA held that mandatory detention applies to individuals who are removable based on a ground listed in subparagraphs (A) through (D) of § 1226(c)(1), 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 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 simply does "not includ[e] the 'when released' clause," *id.* at 125, and mandatory detention can apply to noncitizens detained long after their releases from criminal custody.

Although the *Rojas* majority found ambiguity concerning what language the phrase "when . . . released" modifies, it did not find ambiguity concerning what the phrase itself means. That phrase, *Rojas* acknowledged, directs immigration authorities to detain noncitizens "immediately upon their release from criminal confinement." *Id.* at 122.

Many 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 who were not detained "when . . . released." *Gordon*, 2013 WL 6905352, at *7; *Castaneda*, 952 F. Supp. 2d at 321; *Oscar*, 595 F. Supp. 2d at 169; *Baquera* v. *Longshore*, 948 F. Supp. 2d 1258, 1262-63 & n.3 (D. Colo. 2013) (collecting cases). Two courts have certified a class. *Gordon*, No. 13-30146 (order of Mar. 27, 2014); *Khoury* v. *Asher*, --- F. Supp. 2d ---, 2014 WL 954920, at *13-14 (W.D. Wash. Mar. 11, 2014). Other courts—including the Third and Fourth Circuits—have upheld *Rojas*. See *Sylvain*, 714 F.3d 150; *Hosh*, 680 F.3d 375.

ARGUMENT

The government's interpretation of § 1226(c) does not warrant *Chevron* deference because the customary tools of statutory interpretation yield two clear and dispositive conclusions. First, mandatory detention applies only to noncitizens detained "when . . . released." Second, "when . . . released" does not mean "any time after" release; it means at the time of release. The government's contrary arguments are incorrect, and its complaint about being "sanctioned" is without merit.

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

The BIA's decision in *Rojas* does not warrant this Court's deference because it contradicts the plain language of § 1226(c) and is foreclosed by this Court's analysis in *Saysana*. In addition, the government's interpretation yields extreme results that Congress did not intend and that raise serious constitutional concerns.

A. *Saysana* contradicts the government's position.

This Court's analysis in *Saysana* cannot be reconciled with the result the government seeks here: a ruling that detention "when . . . released" is irrelevant to whether a noncitizen is subject to mandatory detention, and that, consequently, mandatory detention can occur years or even decades after a noncitizen's release from criminal custody. *Saysana* rejects these conclusions. In fact, the BIA itself has acknowledged that *Saysana* and *Rojas* are incompatible. *Matter of Garcia Arreola*, 25 I&N Dec. 267, 270-71 & n.4 (BIA 2010).

Saysana rejected the BIA's view that the "release" referenced in § 1226(c)(1) could be a release from custody for an offense *other than* those

listed in § 1226(c)(1)(A) to (D). 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. 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." 590 F.3d at 18. Because Saysana was detained following release from custody for an offense not associated with § 1226(c)(1), and because his release associated with § 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 10, 18.

Although the precise issues in *Saysana* and *Rojas* are not identical, the decisions are irreconcilable for two fundamental reasons.

First, if mandatory detention never hinges on whether a noncitizen was detained "when . . . released" from criminal custody—as *Rojas* holds and the government argues—then a noncitizen could never escape

mandatory detention on the ground that the "when . . . released" language referred to a *different offense* than the one from which he was released. Yet that was this Court's reason for affirming the district court's grant of a bond hearing in *Saysana*. Under that reasoning, and contrary to *Rojas*, noncitizens who are not taken into custody "when . . . released" from criminal custody for an enumerated offense are not subject to mandatory detention.

Second, the government's argument in this case requires the same result this Court found "counter-intuitive" in *Saysana*: mandatory detention of noncitizens detained years after their release from criminal custody. See 590 F.3d at 17. *Saysana* recognized § 1226(c) as a "focused" provision targeting those whom Congress regarded as most likely to recidivate, fail to appear for immigration proceedings, or fail to cooperate with removal orders. *Id.* at 17-18. This Court rejected the view that Congress would 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.* Whereas the government's view would require Castaneda's detention without bond whether she were detained by DHS in 2013 or instead 2053—as a senior citizen—*Saysana*

recognized that mandatory detention years after release from criminal custody defies both common sense and congressional intent.

This conflict between *Saysana* and *Rojas* has not gone unnoticed. In 2010, while adopting the *holding* of *Saysana*, the BIA carefully "depart[ed] from the First Circuit's analysis." *Garcia Arreola*, 25 I&N Dec. at 271. On that basis, the BIA did not "recede from *Matter of Rojas*." *Id.* at 270-71 & n.4. But courts in this Circuit, including the court below, have expressly relied on *Saysana* in rejecting *Rojas*. See *Castaneda*, 952 F. Supp. 2d at 315-18; *Gordon*, 2013 WL 6905352, at *6-7. This Court should now make explicit what those courts have observed: *Saysana* contradicts *Rojas*.

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

Interpreting § 1226(c) from scratch, without relying on *Saysana*, would still demonstrate that § 1226(c) unambiguously applies only to noncitizens detained "when . . . released." The text and structure of § 1226(c) foreclose the government's contrary view.

For starters, the text of § 1226(c) is naturally read to apply 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 of them. *Sherwin-Williams Co.* v. *Comm'r*, 330 F.3d 449, 454 n.4 (6th Cir. 2003). Thus, when the limitation on release appearing in § 1226(c)(2) mentions noncitizens "described in paragraph (1)," it means noncitizens who have committed offenses listed in subparagraphs (A) through (D) *and* who were detained when released.

The government nevertheless insists that when § 1226(c)(2) refers to noncitizens "described in paragraph (1)," it actually means noncitizens described in *subparagraphs* (A) through (D) of that paragraph. But other immigration provisions demonstrate that Congress knows how to refer to subparagraphs when it wants to do so.[3] That it did *not* do so here reinforces Judge Young's plain reading of the "when . . . released" clause.

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[3] See, *e.g.*, 8 U.S.C. § 1160 (referring to "the work described in subsection (a)(1)(B)(ii)" rather than to Section 1160(a) as a whole); *id.* § 1187(a)(1) (referring to "a nonimmigrant visitor . . . described in section 1101(a)(15)(B)").

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. *Saysana*, 590 F.3d at 17; see *Gordon*, 2013 WL 6905352, at *7 (noting the statute's "strong presumption . . . in favor of discretionary detention and individualized bond hearings"). 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. *Demore* v. *Kim*, 538 U.S. 510, 520-21 (2003) (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, does not grant detention authority. Instead, it is "a limited

exception" to § 1226(a). *Gordon*, 2013 WL 6905352, at *6, *7; *Castaneda*, 952 F. Supp. 2d at 315. It therefore applies only narrowly, and only to the people actually described in its text: noncitizens detained "when . . . released."

Second, the two numbered paragraphs of § 1226(c) are a matched set; section 1226(c)(2) restricts the discretion of immigration officials for, but *only* for, noncitizens detained as provided in § 1226(c)(1). The "Custody" paragraph, § 1226(c)(1), instructs federal authorities to "take into custody any alien who . . . is deportable by reason of having committed [certain offenses] . . . when the alien is released." See *Rojas*, 23 I&N Dec. at 122. The "Release" paragraph, § 1226(c)(2), describes the limited circumstances in which the Secretary can release noncitizens detained as provided in § 1226(c)(1), including the "when . . . released" clause. The descriptions of "Custody" and "Release" correspond to the same subset of people. A noncitizen who has not been detained "when . . . released" is not "an alien described in paragraph (1)," and the Secretary's release of that noncitizen is not restricted by paragraph (2).

Third, the conclusion that mandatory detention applies only to noncitizens detained "when . . . released" is bolstered by *other* statutory

language focusing on release dates: 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 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, § 303(b)(2), 110 Stat. 3009 (Sept. 30, 1996) (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 "release" from criminal custody supports the conclusion yielded by § 1226's plain text and basic structure: that detention "when . . . released" is a prerequisite of mandatory detention.

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

In addition to contradicting statutory text and structure, the government's interpretation yields extreme results by subjecting noncitizens to mandatory detention based upon criminal custody that

occurred far in the past. Such detention contradicts the narrow purposes of § 1226(c), see *Saysana*, 590 F.3d at 16-18, and raises serious due process concerns. Accordingly, § 1226(c) must be interpreted to apply only to those detained "when . . . released" from the predicate custody.

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.[4] And the gap permitted under *Rojas* will only increase, as the statute's effective date recedes into the past. Indeed, the government's approach will eventually threaten noncitizens with the prospect of being placed into mandatory immigration detention 20 or even 50 years after their last contacts with the criminal justice system.

That is an absurd result. Although the statute was intended to mandate detention for a category of noncitizens "deemed most dangerous

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[4] The imposition of mandatory detention a decade or more after a noncitizen's release from criminal custody is not hypothetical. See Pet. for Writ of Habeas Corpus 2, *Forero-Caicedo* v. *Tompkins*, No. 13-11677 (D. Mass. filed July 11, 2013), petition granted, ECF No. 24 (D. Mass. July 17, 2013); Amended Class Action Complaint and Petition for Writ of Habeas Corpus 3-4, *Gordon*, No. 13-30146 (D. Mass. filed Dec. 20, 2013), petition granted, ECF No. 88 (D. Mass. Feb. 7, 2014).

and likely to abscond," Govt. Op. Br. 15, 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 refutes the bare assumption—advanced by the BIA and by the Third and Fourth Circuits—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. This Court correctly 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. After the district court ruled that Castaneda was not subject to mandatory detention, the government released her without even holding a bond hearing; it apparently understood that she does not pose public safety or flight risks. Yet the government has asked this Court to rule that it must lock up Castaneda and other noncitizens who were released years ago.

"At the risk of understatement," as one district court recently put it, a mandate to "lock[] people up without bond hearings presents substantial Due Process concerns." *Khoury*, 2014 WL 954920, at *2. Section 1226 is a civil detention scheme, so its application must be reasonably related to its purposes and accompanied by strong procedural protections. *Zadvydas* v. *Davis*, 533 U.S. 678, 690-91 (2001). 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.[5] The

[5] See *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."); *Singh* v. *Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) ("[A] conviction could have occurred years ago, and the alien could well have led

statute must be construed to avoid that constitutionally perilous result, and to instead require detention "when . . . released." See *Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) (applying avoidance canon).[6]

II. The government's understanding of "when . . . released" is unambiguously incorrect.

The remaining question is this: if mandatory detention applies only to noncitizens detained "when . . . released," what constitutes detention "when . . . released"? The government's view is that the phrase "when the alien is released" is endlessly broad; it argues that the phrase can accommodate detention "any time after" release. Govt. Op. Br. 28. This litigation position, which contradicts the BIA's view that "when . . . released" entails immediate detention, *Rojas*, 23 I&N Dec. 122, does not warrant deference. And although that position persuaded the Fourth Circuit, *Hosh*, 680 F.3d at 379-80, it cannot be right. As explained below, it is not plausible that, in requiring immigration authorities to detain certain noncitizens "when [they are] released" from criminal custody,

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an entirely law-abiding life since then.").

[6] Particularly given these absurd results, the BIA's interpretation would be "capricious in substance," and thus undeserving of deference, even if § 1226(c) were ambiguous. *Judulang* v. *Holder*, 132 S. Ct. 476, 483 n.7 (2011) (citation and internal quotation marks omitted).

Congress meant to say that time was *not* of the essence. To the contrary, the statute requires detention *at the time* of a noncitizen's release.

A. "[W]hen . . . released" cannot mean "any time after" release.

The government's interpretation—that "when . . . released" could mean "any time after" release—is flatly incorrect. The government correctly notes that Congress designed § 1226(c) to ensure that certain noncitizens would be kept "off the streets." Govt. Op. Br. 30 (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 grants the government "the very unsupervised freedom that the mandate was designed to eliminate," and thus "defies logic." *Khoury*, 2014 WL 954920, at *10.

As Judges Tauro and Ponsor have concluded, the government's interpretation also "perverts the plain language of the statute," *Oscar*, 595 F. Supp. 2d at 169, and "wrench[es] the phrase out of its normal context," *Gordon*, 2013 WL 6905352, at *4. Indeed, if "when the alien is released"

actually meant "any time after the alien is released," then the phrase would be entirely superfluous. See *id.* at *5 (removing the "when . . . released" clause would achieve the government's interpretation of the statute). As the government concedes, Govt. Op. Br. 22 & n.4, 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 phrase "when . . . released" would have been a strange way to deliver it. After all, the customary way to say "not before" is to use the word "after." See *Castaneda*, 952 F. Supp. 2d at 314; *Gordon*, 2013 WL 6905352, at *4.

Similarly, the very fact 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, Div. C, § 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.

Thus, as was true in *Saysana*, the government's view "transforms an otherwise straightforward statutory command . . . into a mere temporal triggering mechanism." 590 F.3d at 15. That view should again be rejected.

B. "[W]hen . . . released" means "at the time of release."

Contrary to the government's strained interpretation, district courts in this Circuit have observed that "the most natural reading of 'when . . . released' is 'at the time of release' or 'immediately upon release.'" *Castaneda*, 952 F. Supp. 2d at 313; see *Gordon*, 2013 WL 6905352, at *4; *Oscar*, 595 F. Supp. 2d at 169. That is true. The phrase "when the alien is released" refers to the time when a noncitizen "is released" from criminal 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).

Congress's core purposes confirm that straightforward reading of the statutory text. The "obvious goal" of mandatory detention "was to ensure the *direct* transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities." *Gordon*, 2013 WL 6905352, at *6. 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 Sent. D'Amato). Although Congress has rewritten the provision several times, *each iteration* required detention to begin upon a noncitizen's completion of criminal custody.[7] As Senator Simpson explained in 1996, the current mandatory detention provision—like its predecessors—is designed to "ensure that aliens who commit serious crimes are detained upon their release from prison until they can be deported." 142 Cong. Rec. S10572-01,

[7] 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"); 8 U.S.C. § 1226(c) (current provision).

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 provision required taking an aggravated felon into custody "upon completion of his sentence").

The 1996 House Conference Report, on which the government relies, does not suggest otherwise. Govt. Op. Br. 28. The report explains that the detention mandate of § 1226(c) "applies *whenever* such 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. Govt. Op. Br. 28. 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.

Indeed, although the BIA has *incorrectly* concluded that mandatory detention applies to noncitizens who were not detained "when . . .

released," it *correctly* understands that the phrase "when . . . released" denotes an immediate transfer. That language, according to the BIA, "direct[s] the Attorney General to take custody of aliens immediately upon their release from criminal confinement." *Rojas*, 23 I&N Dec. at 122.[8]

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

The government next argues that—no matter what § 1226(c) actually says—the rule of *Rojas* can be rescued by a canon of construction stating that the government usually does not lose its authority to act when it misses a statutory deadline. See *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 259-60 (1986); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990)). The government reasons that, by holding that Castaneda 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 Castaneda "when [she was] released." Govt. Op. Br. 9, 31-

[8] Because the BIA understands that "when . . .released" connotes immediacy, the government's "litigating position" would not deserve deference even if the phrase were ambiguous. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); see *Sylvain*, 714 F.3d at 157 & n.9 (recognizing any ambiguity in the word "when" would not warrant deference to *Rojas*).

43. That argument persuaded the Third and Fourth Circuits; in fact, the Third Circuit relied so heavily on the loss-of-authority cases that it declined to "take a stand" on the BIA's interpretation of § 1226(c). *Sylvain*, 714 F.3d at 157; see also *Hosh*, 680 F.3d at 381-83.[9]

The loss-of-authority cases, however, have nothing to do with this case. Even assuming that a canon of construction could replace the basic process of statutory interpretation—which it cannot, see *Goncalves* v. *Reno*, 144 F.3d 110, 127 (1st Cir. 1998)—the loss-of-authority cases are "completely inapposite" because affirming the ruling below would not strip the government of authority to detain any noncitizen. *Gomez-Ramirez* v. *Asher*, C13-196-RAJ, 2013 WL 2458756, at *6 (W.D. Wash. June 5, 2013).

[9] Unlike the Third Circuit, the Fourth Circuit did purport to interpret § 1226(c). 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. The court below found that 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 understands that "when" connotes immediacy. *Sylvain*, 714 F.3d at 157 & n.9; see *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.").

A. The government's position, not Castaneda's, seeks to curtail executive branch authority.

Applying the loss-of-authority cases here would be a mistake. They instruct courts not to invent sanctions that would tie the hands of government officials who miss statutory deadlines.[10] But the government is *asking* this Court to tie its hands. It seeks a ruling that would eliminate its default discretionary authority, under § 1226(a), to determine Castaneda's custody status.

By the same token, the district court did not "sanction" the government by ruling that Castaneda's detention falls outside the reach of § 1226(c). That provision 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

[10] See, *e.g.*, *Brock*, 476 U.S. at 256, 264-66 (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*, 537 U.S. at 158-63 (even after a statutory deadline 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 717-20 (district court retained authority to order pre-trial detention even though, contrary to a deadline in the Bail Reform Act, detention hearing was not held until after defendant's "first appearance").

except in narrow circumstances. The government acknowledges that, when § 1226(c) does not apply, it retains authority under § 1226(a) "to *detain any alien* pending a decision in that alien's removal proceedings." Govt. Op. Br. 12 (emphasis added).[11]

Consequently, the government's present complaint—which it has described as a concern about losing the "authority to mandatorily detain"[12]—is simply mistaken. Just as mandatory minimum sentencing provisions do not give judges the "authority" to sentence defendants only within specified ranges, the commands of § 1226(c) do 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 by DHS at the time of his release from criminal custody, "because it is now within his discretion either to hold the alien or to release the alien on bond." *Castaneda*, 952 F. Supp. 2d at 319 n.12 (emphasis added); see *Gordon*, 2013 WL 6905352, at *3, *9-10.

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[11] Nor is the phrase "when . . . released" truly a "deadline." Rather, it "describe[s] [the] class of aliens subject to mandatory detention." *Castaneda*, 952 F. Supp. 2d at 320 n.13.

[12] Resp. Memo. in Support of Motion to Dismiss 3, *Gordon*, No. 13-30146 (D. Mass. filed Aug. 30, 2013).

B. The district court merely found that Castaneda was subject to the default detention authority of § 1226(a).

The loss-of-authority cases are also inapplicable for another reason: their presumption against sanctioning the government applies only when a statute is silent about what happens when the government misses a deadline, and the courts are asked to "invent a remedy." *Montalvo-Murillo*, 495 U.S. at 721. Section 1226, however, is *not* silent about noncitizens whose detention falls outside the reach of § 1226(c). Because their detention is not "provided [for] in subsection (c)," it is expressly governed by subsection (a). § 1226(a).

Partly for that reason, the possibility of bond under § 1226(a) does not resemble the drastic remedies sought in the loss-of-authority cases. Those cases are "merely a specific application of the mandate to construe a statute consistent with its design and purpose." *Khoury*, 2014 WL 954920, at *11. Thus, in *Montalvo-Murillo*, the Supreme Court held that the government's failure to hold a timely detention hearing did not entitle a defendant to outright release. 495 U.S. at 716, 720; see also *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 65 (1993) (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").

Here, Castaneda asked only to be *considered* for release under § 1226(a). She did not argue that, by failing to detain her upon her release from criminal custody, the government forfeited its ability to detain her. To the contrary, she *asked* the government to exercise its discretionary authority. That request sought neither a "windfall" for Castaneda nor a "penalty" for public officials. *Montalvo-Murillo*, 495 U.S. at 720.

CONCLUSION

Amici respectfully request that this Court affirm the ruling below.

Respectfully submitted,

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