No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

—v.—

MONY PREAP, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The mandatory immigration detention statute, 8 U.S.C. § 1226(c), directs that the Secretary of Homeland Security "shall take into custody" a noncitizen removable on one of four enumerated grounds "when the alien is released" from criminal custody. *Id.* § 1226(c)(1). Such a person may then be released only if necessary for witness protection. *Id.* § 1226(c)(2).

The court of appeals interpreted this statute to impose mandatory detention, without any custody hearing to assess flight risk or danger, only when the Secretary promptly detains an individual upon his release from criminal custody. In other circumstances, as in class member Eduardo Vega Padilla's case where Immigration and Customs Enforcement ("ICE") agents arrested him 11 years after release from a brief jail term, the government retains authority to detain, but is governed by the ordinary detention regime in 8 U.S.C. § 1226(a). Under that statute, the individual remains detained unless he is able to prove to an immigration judge that he does not pose a flight risk or a danger to the community.

Congress designed Section 1226(c)'s structure and unambiguous textual directive to detain "when the alien is released" to instruct the Secretary to eliminate gaps in custody between the criminal and immigration systems. The court of appeals' interpretation faithfully furthers Congress's purpose by enforcing the statute's literal terms to require the Secretary to detain promptly "when the alien is released" from criminal custody.

The government's contrary interpretation turns the plain language, structure, and congressional purpose upside down. On its reading, the Secretary need not detain an individual promptly "when . . . released," but instead may elect to do so at any time after release. This transforms Congress's mandate that the Secretary shall detain specified individuals immediately into an open-ended option to detain them at some indefinite point in the future.

The doctrine of constitutional avoidance further supports the court of appeals' ruling, because the government's interpretation raises serious constitutional problems. Civil detention generally may be imposed only when it is not arbitrary or punitive and subject to an individualized process to ensure that it is justified. This Court has previously upheld Section 1226(c) as a "narrow" exception to the general requirement of an individualized custody hearing, but only as to an individual who conceded that the statute applied to him and was detained within a day of his release. *Demore v. Kim*, 538 U.S. 510, 513-14, 526 (2003). Imposing an irrebuttable categorical presumption of flight risk and danger "when the alien is released" is not justified once an individual has been at liberty for years in the community.

Under the government's reading, a statute whose plain terms require an immediate transition from criminal to immigration custody instead would permit delays in the imposition of mandatory detention on individuals who have long been at liberty and pose no risk whatsoever.

STATEMENT OF THE CASE

I. Legal Framework

Section 1226 governs the detention of noncitizens during removal proceedings and affords the government substantial detention authority in every case.

Section 1226(a) sets forth the government's general detention authority, providing that immigration officials may detain any individual pending a decision on her removal. It states that, "*[e]xcept as provided in subsection (c)*," immigration officials "may continue to detain" the individual or "may release" the individual on bond or conditional parole. 8 U.S.C. § 1226(a) (emphasis added). If the government detains a noncitizen under Section 1226(a), the noncitizen may seek review of the decision by an immigration judge at a custody hearing. *See* 8 C.F.R. §§ 1003.19(a), 1236.1(d) (2018); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). At such a hearing, the government enjoys a presumption in favor of detention, and the noncitizen bears the burden of proving she is neither a danger to the community nor a flight risk in order to secure release. *Id.* at 40.

Section 1226(c), the exception referenced in Section 1226(a), requires mandatory detention without an individualized hearing. It is a narrow exception, applying only to persons who are removable on certain enumerated grounds *and* who are detained by the immigration authorities "when . . . released" from criminal custody. Section 1226(c)(1) provides:

> (1) Custody
>
> The [Secretary of Homeland Security][1] 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 sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphasis added).

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[1] Although the statute refers to the "Attorney General," Congress has transferred the enforcement of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. §§ 1103(a)(1) & (g).

Section 1226(c)(2), in turn, authorizes release of "an alien described in paragraph (1) only if . . . necessary" for the limited purposes of the federal witness protection program:

> (2) Release
>
> The [Secretary of Homeland Security] may release an alien described in paragraph (1) only if the [Secretary] decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c)(2).

The two subsections of Section 1226(c) together establish the parameters of the mandatory detention regime. The statute requires the Secretary to detain individuals who are removable on enumerated grounds "when [they are] released" from criminal custody, and then authorizes release of

individuals "described in paragraph (1)" only if necessary for witness protection. In all other circumstances not described in Section 1226(c), the general detention rule set forth in Section 1226(a) applies, and an immigration judge may conduct an individualized custody hearing where the detainee bears the burden of proof.

The Board of Immigration Appeals ("BIA") and the Department of Homeland Security ("DHS") have interpreted Section 1226(c) to require the mandatory detention of noncitizens who: (1) are removable on a ground enumerated in subsections (1)(A)-(D); (2) have been in physical criminal custody for the offense that subjects them to the enumerated ground of removal; and (3) have been released from physical criminal custody for that offense. *See Matter of Garcia-Arreola*, 25 I. & N. Dec. 267, 270-71 (BIA 2010); *Matter of West*, 22 I. & N. Dec. 1405, 1410 (BIA 2000).

In *Matter of Rojas*, the BIA further held that the "when . . . released" language "direct[s] [the Secretary] to take custody of aliens immediately upon their release from criminal confinement," and that the respondent in that case—who was not taken into custody until two days after his release—was not detained "immediately." 23 I. & N. Dec. 117, 118, 119, 122 (BIA 2001). However, the BIA determined that Section 1226(c)(2) alone defines the scope of mandatory detention and that the provision is ambiguous as to whether it encompasses the "when . . . released" clause. *Id.* at 119-20. The BIA then read Section 1226(c)(2)'s reference to an "alien described under paragraph (1)" not to refer back to all of paragraph (1), but only to a portion, namely

subparagraphs (1)(A)-(D). *Id*. at 121. Accordingly, the BIA deemed immaterial the fact that the government had failed to detain Mr. Rojas "when . . . released," and affirmed that he was subject to mandatory detention. *Id*. at 127. Seven BIA members dissented from the decision, concluding that Congress intended for mandatory detention to apply only to individuals when they are released from criminal custody, and not after they have been living at large in the community. *See id*. at 139 (Rosenberg, dissenting).

II. Factual Background

This case concerns two decisions by the Ninth Circuit, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), and *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (unpublished memorandum disposition). Pet. App. 1a, 58a. In each case, the plaintiffs filed a class action complaint and habeas petition on behalf of themselves and similarly situated individuals.

The lead plaintiffs in these cases, Mony Preap and Bassam Yusuf Khoury, are lawful permanent residents whom the government charged with removal for a criminal offense enumerated under Section 1226(c). Plaintiffs served their criminal sentences and, upon release, returned to their families and communities. Years later, the immigration authorities took them into custody and detained them without bond hearings under Section 1226(c). Plaintiffs challenge the government's application of Section 1226(c) to individuals who

were not detained "when . . . released" from criminal custody. *See* Pet. App. 6a, 58a-59a, 110a-111a.[2]

The record reveals that there was no justification for application of an irrebuttable presumption of flight risk or dangerousness to the plaintiff class. For example, Eduardo Vega Padilla, a named plaintiff in *Preap*, has been a lawful permanent resident since he came to the United States as a toddler in 1966. He has five U.S.-citizen children and six U.S.-citizen grandchildren. Mr. Padilla was convicted of possession of a controlled substance in 1997 and 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was convicted of a firearm offense as a result and sentenced to six months in jail. He was released in 2002. Eleven years later, despite having lived peaceably with his family for more than a decade, ICE arrested Mr. Padilla at his home and held him in mandatory detention for the next six months. Ultimately, Mr. Padilla was

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[2] Although the government repeatedly asserts that the Ninth Circuit rulings apply to "terrorists," *see*, *e.g.*, Pet. Br. 2, the government has never identified an individual charged as a terrorist in the plaintiff classes, nor does it explain why its expansive interpretation of Section 1226(c) is necessary to protect national security. *See* Pet. App. 80a & n.6. In two other statutes not at issue here, Congress specifically authorized mandatory detention without bond hearings for national security detainees. *See* 8 U.S.C. § 1226a(a) (authorizing immigration detention with specialized review procedures in national security cases); 8 U.S.C. § 1537 (authorizing detention for noncitizens in proceedings before the Alien Terrorist Removal Court).

released on the minimum $1,500 bond after he received a custody hearing pursuant to a court order in a different case. *See* Responsive Brief of Plaintiffs.-Appellees at 9-11, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016) (Nos. 14-16326, 14-16779), 2015 WL 13699643 at *9-11.

Mr. Khoury also was released on bond after he was given a hearing before an immigration judge pursuant to a court order. *See* Pet. App. 109a-10a. Both Mr. Khoury and Mr. Preap ultimately prevailed on the merits of their removal cases and remain lawful permanent residents of the United States. *See* Unopposed Motion for Judicial Notice at 2, *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (No. 14-35482), ECF No. 11; Pet. App. 6a-7a, 64a.

III. Procedural History

A. *Preap*

On December 12, 2013, Mr. Preap, along with two other lead plaintiffs, filed a petition for a writ of habeas corpus and class action complaint. Pet. App. 60a. On May 15, 2014, the district court granted class certification and issued a class-wide preliminary injunction, finding that plaintiffs were likely to succeed on their claim that they were not subject to mandatory detention under Section 1226(c) because "the plain language of the statute commands [DHS] to apprehend specified criminal aliens 'when [they are] released,' and no later." Pet. App. 77a, 105a.

A unanimous Ninth Circuit panel affirmed, holding that on its plain language, Section 1226(c) applies only to individuals whom DHS detains "promptly" upon release. Pet. App. 27a. The court

noted that this interpretation was consistent with Congress's purpose of ensuring that noncitizens who present "heightened risks" associated with certain crimes are promptly transferred from criminal to immigration custody, and that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." Pet. App. 22a. Because the named plaintiffs were not detained until many years after their release from criminal custody, and because the government had not challenged the scope of the class, the court of appeals found it unnecessary to determine at the preliminary injunction stage the outer limits of a "prompt" detention, leaving that issue to be resolved in district court. Pet. App. 27a-28a.

B. *Khoury*

On August 1, 2013, Mr. Khoury and two other plaintiffs filed a petition for a writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated individuals in the Western District of Washington. Pet. App. 107a, 132a. On March 11, 2014, the United States District Court for the Western District of Washington certified a class and entered a declaratory judgment for plaintiffs. Pet. App. 107a-08a. On August 4, 2016, the Ninth Circuit affirmed on the basis of *Preap*. Pet. App. 58a-59a.

The Ninth Circuit denied the government's petitions for rehearing en banc in both *Preap* and *Khoury*. Pet. App. 139a-40a.

SUMMARY OF ARGUMENT

This case concerns the scope of a statute directing that the Secretary of Homeland Security "shall take into custody" individuals removable for specified reasons "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c). The statute imposes mandatory detention without any individualized showing of flight risk or danger, and was designed to require an immediate transition from criminal to immigration custody. It mandates that the Secretary shall detain such aliens "when . . . released" from criminal custody, and may release them only for specified witness protection purposes. *Id*.

The court of appeals correctly concluded that the mandate to detain "when the alien is released" means what it says. Where the Secretary does not detain an individual "when . . . released," but instead takes him into custody at some later point, the individual may still be detained, but pursuant to the ordinary detention regime, 8 U.S.C. § 1226(a), that governs all removal proceedings. Under that scheme, noncitizens may be detained, but are entitled to a hearing before an immigration judge and to release on bond if they prove they are neither a flight risk nor a danger.

The plain language and structure of Section 1226(c) compel the court of appeals' reading. The directive to the Secretary contained in paragraph (1) is mandatory: the Secretary "shall take into custody." And it specifies a particular point in time to do so: "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Moreover, the limitation on release contained in Section 1226(c)(2) refers back to

an "alien described in paragraph (1)," incorporating the whole of paragraph (1), including the "when . . . released" language. *Id.* § 1226(c)(2). Thus, the only noncitizens subject to mandatory detention, and denied a hearing on flight risk or danger, are those who are detained "when . . . released" from criminal custody.

This interpretation is also supported by the purpose of the statute. Congress's concern was with noncitizens removable on enumerated grounds who were coming out of criminal custody. It sought to require the Secretary to maintain continuous custody, a result that obtains only if the statute's plain language, requiring detention "when the alien is released," is taken at face value. Under the government's reading, that text is negated and the immigration authorities would be able to defer detention until years after the individual is released from criminal custody—precisely the state of affairs Congress wanted to prevent.

The government's contrary interpretation either effectively reads "when . . . released" out of the statute, or reads it to mean merely "after" or "while" released. *See* Pet. Br. 13-18. Both moves are contrary to the statute's text: paragraph (c)(1) specifically directs the Secretary to detain "when the alien is released," and paragraph (c)(2) restricts release only of "alien[s] described in paragraph (1)," which includes the "when . . . released" clause. And the text and purpose of the statute make clear that the term "when" refers to the time of release, and not some undefined time after release.

Were there any doubt about the meaning of Section 1226(c), the constitutional concerns raised by the government's reading would counsel strongly against it. Mandatory detention without an individualized hearing or any opportunity to prove the absence of flight risk or danger is a rare and limited exception to the general due process principles governing civil detention. This Court has upheld it only in the "narrow" circumstances where the detention was closely tied to the purpose of effectuating removal, and the individual respondent conceded that the statute applied to him and was detained within a day of his release from criminal custody. *Demore v. Kim*, 538 U.S. 510, 513-14, 526 (2003); Brief for Petitioner at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. The government's interpretation would expand the statute from the "narrow" exception this Court upheld in *Demore* into an authorization to pick up individuals who have been living peaceably in the community for years or even decades, and subject them to an irrebuttable categorical presumption of flight risk or danger. To the extent such an irrebuttable presumption can hold "when the alien is released" from criminal custody, the justification for such a presumption evaporates once the person has been at liberty. The individual's time in the community permits an immigration judge to assess whether, in fact, the individual poses such a risk and requires detention.

The government invokes *Chevron* deference, but it is inappropriate here for three reasons: (1) the command to detain "when the alien is released" is unambiguous; (2) constitutional concerns trump deference; and (3) in habeas corpus review of

executive detention, there is no place for deferring to the executive's interpretation of its own detention authority. Moreover, even if *Chevron* deference were applicable, the BIA's interpretation of Section 1226(c) in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), which would impose mandatory detention on persons who have lived in the community for years and demonstrably pose no flight risk or danger, leads to arbitrary results and would not survive even deferential review.

The government cites practical concerns with complying with Section 1226(c)'s mandate if it is read to require immediate detention. But it offers no support for such practical problems, and the available evidence refutes the government's concerns. Moreover, as this Court reaffirmed last term, "practical considerations . . . do not justify departing from the statute's clear text." *Pereira v. Sessions,* 138 S. Ct. 2105, 2118 (2018).

Finally, the "loss of authority" cases do not support the government's interpretation. The interpretation adopted by the court of appeals does not deprive the government of its authority to detain noncitizens in removal proceedings. It simply directs them to the general detention regime.

Section 1226(c) directs that the Secretary "shall take into custody" certain noncitizens "when the alien is released" from criminal custody, requiring DHS to take immediate action. It does not, as the government would have it, grant the Secretary unfettered discretion to impose mandatory detention on individuals at any time, even decades, after they have been released from criminal custody.

ARGUMENT

I. THE TEXT AND STRUCTURE OF SECTION 1226(c) COMMAND DHS TO APPLY MANDATORY DETENTION "WHEN THE ALIEN IS RELEASED" FROM CRIMINAL CUSTODY, NOT AT WHATEVER TIME THE AGENCY DECIDES AFTER RELEASE.

The text, structure, and purpose of Section 1226 make clear that mandatory detention under Section 1226(c) applies only to noncitizens who are both removable on specified grounds and detained by immigration authorities "when . . . released" from criminal custody for a related offense. The government retains the authority to detain a noncitizen after she is released, but subject to the default detention framework in Section 1226(a).

A. The Text Imposes Mandatory Detention Only on Noncitizens Detained "When . . . Released" From Criminal Custody.

Section 1226(a) is the general detention rule for noncitizens pending removal proceedings. It provides that a noncitizen generally "may be arrested and detained pending a decision on whether the alien is to be removed from the United States" and that the government "may continue" that detention, 8 U.S.C. § 1226(a)(1), or "may release" the noncitizen on bond or conditional parole. *Id.* § 1226(a)(2). The implementing regulations instruct that the noncitizen may seek release from DHS, and if denied release, may obtain a custody hearing before an immigration judge. 8 C.F.R. §§ 1236.1(c)(8) & (d),

1003.19(a) (2018). At the hearing, the noncitizen bears the burden of proving that she is neither a flight risk nor a danger. Absent such a showing, the noncitizen remains detained pending removal proceedings. *Guerra*, 24 I. & N. Dec. at 39-40.

Section 1226(a) governs detention of persons in removal proceedings "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(a). As such, "Section 1226(a) sets out the default rule" for detention pending removal proceedings, while "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

Section 1226(c)(1) directs that immigration officials "shall take into custody any alien who" is deportable or inadmissible on one of four enumerated grounds, 8 U.S.C. §§ 1226(c)(1)(A)-(D), "when the alien is released" from criminal custody. *Id.* § 1226(c)(1). Section 1226(c)(2) provides that an "alien described in paragraph (1)" may be released only for witness protection.

The two paragraphs of Section 1226(c) operate together to define the exception to the default detention framework in Section 1226(a). The only noncitizens subject to mandatory detention are those who are removable on one of the grounds in paragraph (1)(A)-(D), and whom the Secretary detains "when . . . released" from criminal custody for related offenses. This conclusion flows directly from the text, which states that the government "shall take into custody" not *all* noncitizens removable on the grounds enumerated in paragraph (1)(A)-(D), but those who are taken into immigration detention "when . . . released" from criminal custody.

Neither paragraph (1) nor paragraph (2) standing alone effectuates mandatory detention. They must be read together because paragraph (2)—titled "Release"—specifies who may be released, while paragraph (1)—which is titled "Custody"—identifies who gets detained. As the court of appeals explained:

> This structure suggests only one logical conclusion: the release provisions of § 1226(c)(2) come into effect only after the government takes a criminal alien into custody according to § 1226(c)(1). And, correspondingly, if the government fails to take an alien into custody according to § 1226(c)(1), then it necessarily may do so only under the general detention provision of § 1226(a), and we never reach the release restrictions in § 1226(c)(2).

Pet. App. 17a.

The textual requirement that noncitizens be detained "when . . . released" limits mandatory detention to those whom the Secretary detains "at the time of" or "immediately" upon their release. The BIA in *Rojas* recognized that "[t]he statute does direct the [Secretary] to take custody of aliens *immediately* upon their release from criminal confinement," *Rojas*, 23 I. & N. Dec. at 122 (emphasis added), and that the respondent, who was detained on "the second day of his release on criminal parole," was "not *immediately* taken into custody by the Service when he was released from his criminal custody." *Id.* at 118, 119 (emphasis added). *Accord* Pet. App. 20a; *Sylvain v. Attorney Gen. of the United*

States, 714 F.3d 150, 157 n.9 (3d Cir. 2013) (noting that "[i]f anything, [*Rojas*] suggested that 'when' denotes immediacy").[3]

"Congress chose a word, 'when,' that naturally conveys some degree of immediacy, as opposed to a purely conditional word, such as 'if.'" *Castañeda v. Souza*, 810 F.3d 15, 38 (1st Cir. 2015) (Barron, J.) (citing Webster's Third New Int'l Dictionary 2602 (2002) (defining "when" as "just after the moment that")) (internal citations omitted). *Accord* Pet. App. 20a-21a. If Congress had intended to require mandatory detention at any time after a person is released from a triggering criminal sentence, it could have used the phrase "if the alien is released" or "after the alien is released," rather than "when the alien is released."

Congress "spoke with just such directness elsewhere in the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), § 303(b)(2), Div. C, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586]," where it authorized the government to act "at any time after" a condition is met. Pet. App. 21a-22a (quoting *Castañeda*, 810 F.3d

[3] The BIA did not define precisely what an "immediate" detention requires, but did conclude that a detention two days after release from criminal custody was not "immediate." *See Rojas*, 23 I. & N. Dec. at 118, 119, 122. The Ninth Circuit used the term "prompt," and also left the precise contours to be developed in further proceedings. Pet. App. 27a-28a. The "when . . . released" mandate requires immigration authorities to detain noncitizens immediately at the point of release, but does not specify a precise time period. Respondents concur with the BIA that 48 hours is not immediate.

at 38 (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added) (alteration in original))). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citing *INS v. Cardozo-Fonseca,* 480 U.S. 421, 432 (1987)).

The conclusion that "when" means "when" and not "if" or "after" or "while" also accords with the well-established canon that exceptions to general rules should be narrowly construed. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). As the Court has recognized, Section 1226(c) is explicitly framed as an exception to Section 1226(a)'s general detention provision. *Jennings*, 138 S. Ct. at 837. Thus, the statute should be read narrowly to require mandatory detention only "when . . . released" and not expansively to invite mandatory detention "at any time after release" from criminal custody.

The plain meaning of Section 1226(c)(1) is reinforced when read in context with Section 1226(c)(2), which refers back to paragraph (1): "The [Secretary] may release an alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary [for witness protection]." As the court of appeals correctly concluded, "Congress selected its language deliberately" when it enacted Section 1226(c)(2), "thus intending that 'an alien described in paragraph

(1)' is just that—*i.e.* an alien who committed a covered offense and who was taken into immigration custody 'when . . . released.'" Pet. App. 14a (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see also Castañeda*, 810 F.3d at 36 ("Congress clearly intended for the cross-reference in (c)(2) to refer to aliens who have committed (A)-(D) offenses *and* who have been taken into immigration custody 'when . . . released' from criminal custody, in accordance with the [Secretary's] duty under (c)(1)." (emphasis added)); *Saysana v. Gillen*, 590 F.3d 7, 14-16 (1st Cir. 2009) (holding that the "when . . . released" clause cannot be excised from the definition of individuals subject to mandatory detention).

B. The Government's Contrary Reading Turns a Specific Mandate into a General Invitation, and Cannot Be Squared With the Statute's Text and Structure.

The government's contrary reading of Section 1226(c) would impose mandatory detention on individuals removable on the enumerated grounds not "when [they are] released," but *at any time after* they have been released from criminal custody—even if they have lived peaceably in the community for months, years, or decades. Its interpretation thus transforms a mandate to take custody at a particular point in time into a discretionary invitation to take custody at whatever time the Secretary decides after release from criminal custody.

The government advances two arguments in support of its interpretation, both of which are inconsistent with the text and structure of the Act. First, the government argues that Section 1226(c)(2)

affirmatively authorizes mandatory detention of all noncitizens removable for the grounds specified in subparagraphs (1)(A)-(D), because it refers to "alien[s] described in paragraph (1)." On the government's view, the "when . . . released" clause does not "describe" the noncitizens subject to detention in Section 1226(c)(1). Instead, it merely defines when an action of the Secretary should occur. Pet. Br. 9. *Accord Rojas*, 23 I. & N. Dec. at 121. Second, the government argues that even if the "when . . . released" clause does impose a duty, "the term "when" is best understood not to mean at the time of release, but "while" or effectively "any time after" release. Pet. Br. 17. Neither argument can be squared with the text.

i. "An Alien Described in Paragraph (1)" Means All of Paragraph (1).

The government's first argument would impermissibly rewrite Section 1226(c)(2)'s reference to "an alien described in *paragraph (1)*" to "an alien described in *subparagraphs (1)(A)-(D)*." Its reading effectively excises the rest of paragraph (1), and in particular the "when . . . released" clause. *See* Pet. Br. 14-15. But the plain text of paragraph (2) refers to *all* of paragraph (1), which includes the "when . . . released" clause.

On the government's reading, the "when . . . released" clause does no work, violating the basic rule that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *See TRW Inc., v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). As several courts have noted:

> To read the statute in a manner that allows [DHS] to take a criminal alien into custody without regard to the timing of the alien's release from custody would render the 'when the alien is released' clause redundant and therefore null.

Khodr v. Adduci, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010) (citation omitted) (citing cases).

The government argues that the "when . . . released" language only clarifies that the Secretary should not seek to detain noncitizens *before* they are released from state or federal criminal custody. Pet. Br. 18. But had Congress merely wished to prohibit mandatory detention *before* release, it would have said so. Indeed, Congress demonstrated just how it would do this at 8 U.S.C. § 1231(a)(4)(A), which directs that the government "not remove an alien who is sentenced to imprisonment *until the alien is released* from imprisonment." *Id*. (emphasis added).

The government's interpretation also eviscerates the very duty that Congress sought to impose: that the Secretary "shall take into custody" certain noncitizens "when [they are] released" and not at some later date of her choosing. On the government's reading, the statute requires no urgency at all. If "when . . . released" means only "at any time after" release, the Secretary's detention mandate becomes, in effect, discretionary, eliminating the continuous chain of custody that Congress sought to implement. *See infra* Part II.

The government argues that "adverbial" phrases cannot "describe" a noun ("an alien"), and therefore only the "adjectival" phrases of subparagraphs (1)(A)-(D) "describe" those who are subject to the statute. Pet. Br. 14-15. But the plain language of Section 1226(c)(2) refers to "paragraph (1)" without limitation, and as a grammatical matter, both "adjectival" and "adverbial" phrases can describe a noun. *See Castañeda*, 810 F.3d at 25. Consider, for example, a directive that says: "(1) Approach a man who is (A) a redhead and (B) wearing a blue jacket, when he arrives on the 3:00 train from New York. (2) Hand the man described in (1) this package." Even though the phrase "when he arrives on the 3:00 train from New York" is "adverbial" in the government's view, it plainly "describes" who should be given the package. It would violate the direction if one handed the package to a redheaded man with a blue jacket who arrives on the 4:50 train from Richmond. There is simply no rule of grammar, much less statutory construction, to support the view that only "adjectival phrases" can describe a noun.[4]

The government's interpretation also produces a statute that is "oddly misaligned." *Id.* at 26; *accord* Pet. App. 16a. If subparagraphs (1)(A)-(D) alone defined the detention mandate, it would erase the

[4] The government's inapposite grocery store hypothetical (*see* Pet. Br. 16) proves nothing, as it simply writes out the meaning of "when" by choosing a context in which the timing (whether you buy the groceries when the store opens or later) is immaterial. But in Section 1226(c), as in the hypothetical in the text above, timing is of the essence.

plain language referring to a "release[ ]." *See Saysana*, 590 F.3d at 14-16. Subparagraphs (1)(A)-(D) include individuals who are never subject to criminal custody in the first place. For example, subparagraph (A) includes noncitizens who "admit" to committing certain drug offenses, even if they are never arrested or convicted. *See* 8 U.S.C. § 1182(a)(2)(A)(i).[5] By definition, such individuals could never be subject to Congress's directive in paragraph (1) that the Secretary detain them "when . . . released."

By reading the "when . . . released" clause out of the definition of noncitizens covered by Section 1226(c), the government assumes that Congress gave the Secretary complete discretion over whether to detain individuals subject to subparagraphs (1)(A)-(D) in the first instance, but at the same time decided that, if the Secretary happened to detain them, she would be required to keep them detained. As the First Circuit explained, the government's interpretation

> incongruously . . . requires one to believe that Congress was so concerned about certain aliens who had never been in criminal custody, as the "when . . . released" clause contemplates, being out and about that it directed the [Secretary] to hold them without bond even though Congress left her complete

[5] Similarly, subsection (1)(D) includes spouses and children of accused terrorists, even though neither status is or could be a crime. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(IX).

> discretion to decide not to take them into immigration custody at all.

Castañeda, 810 F.3d at 27. The Ninth Circuit similarly noted the "incongruous consequences" of the government's interpretation. Pet. App. 17a-18a.

All of these problems are avoided if the reference to "an alien described in (1)" is read, consistently with its literal terms, to cover *all* of paragraph (1). The statute means what it says. The Secretary "shall take into custody" individuals removable on certain grounds "when . . . released" from criminal custody, and may not release them unless necessary for witness protection.

ii. "When the Alien Is Released" Does Not Mean "While" or "After" She Is Released.

The government's second attempt to turn the statute from a mandate on the Secretary to act promptly into an open-ended invitation to impose mandatory detention whenever she pleases is equally unpersuasive. The government argues that the phrase "when the alien is released" simply means "*while* the alien is released." Pet. Br. 17. This interpretation, rejected by the BIA itself, *see Rojas*, 23 I. & N. Dec. at 122, cannot be squared with Congress's language or purpose.[6]

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[6] Indeed, because the BIA rejected it, the government's interpretation is contrary to the principle of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The government invokes *Chevron* deference to the BIA's decision. Pet. Br. 39-41. But in defending the agency's decision, the government must rely upon the rationale used by the agency. *See Chenery*, 332 U.S. at 196 ("a

As noted in *Castañeda*, 810 F.3d at 37, the primary dictionary definition of "when" emphasizes immediacy. *See* Webster's Third New Int'l Dictionary (2002) (defining "when" to mean "at or during the time that" or "just after the moment that" and "at any and every time that"). Although "when" can also mean "on the condition that," *id.*, that secondary definition is inconsistent with the remainder of Section 1226(c) and Congress's purpose. *Cf. Pereira*, 138 S.Ct. at 2117 (selecting among multiple definitions of "under" based on common sense and context); *see also Deal v. United States,* 508 U.S. 129, 131-32 (1993). If Congress had intended that secondary meaning of "when," it would have said "when the alien *has been* released," rather than "when the alien *is* released," which indicates a moment in time.

The government's interpretation also ignores the "cardinal rule" that "a phrase gathers meaning from the words around it." *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 596 (2004) (internal citation and quotation marks ommitted); *see also United States v. Willings*, 8 U.S. 48, 55 (1807) (explaining that "the context must decide in which sense ['when'] is used in the law under consideration."). The "when . . . released" language is part of a single, continuous sentence in paragraph (1). The words following the term "when"

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reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"). The BIA squarely rejected the government's reading of "when."

demonstrate that mandatory detention must occur at the time of release, "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." 8 U.S.C. § 1226(c)(1). Congress was focused on the time of release from criminal custody, and did not intend for the Government to invoke mandatory detention at "any time after."

The government contends that because Section 1226(c) "does not specify a limitations period," Congress must have meant to authorize mandatory detention at any point after an individual's release. *See* Pet. Br. 20-21. But the mandate to take individuals into custody "when . . . released" is itself a limitations period. It directs the Secretary to detain "when the alien is released" from criminal custody—not twenty days, three months, or six years later.

The government objects that the lower court's reading of "when . . . released" "gives rise to grave line-drawing problems" regarding the meaning of "when." Pet. Br. 21. But the BIA itself had no difficulty finding that the "when . . . released" clause requires "immediate" action, and concluding that a delay of two days was not "immediate." *See Rojas*, 23 I. & N. Dec. at 118, 119, 122. *See also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Whether the "when . . . released" mandate requires detention at the point the person leaves confines of criminal custody or at some other point that day can be resolved in future litigation. All this Court need decide is that Congress did not mean to allow the Secretary unfettered discretion to detain an individual without a bond hearing months or years

after release. That is precisely the reading the government seeks here and applied to Respondents like Mr. Padilla, who was detained without a hearing *11 years* after he was released from a brief jail term. And in any event, as this Court reaffirmed only last Term, practical difficulties "do not justify departing from the statute's clear text." *Pereira*, 138 S. Ct. at 2118; *see also Burrage v. United States*, 571 U.S. 204, 218 (2014) ("[I]n the last analysis, . . . [t]he role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (citations omitted).

Moreover, the government's practical concerns are overstated. Discovery in parallel litigation in the First Circuit has shown that, where DHS does not immediately detain an individual upon release, the gap in custody is typically months or years in length, not weeks, hours, or minutes.[7]

The government's remaining textual arguments lack merit. The government suggests that Section 1226(c)(2) precludes the court of appeals' interpretation because it specifies that the sole exception to mandatory detention is for witness protection. *See* Pet. Br. 4. But that begs the question. Section 1226(c)(2) limits release only of those noncitizens, "described in paragraph (1)," who have been properly subjected to mandatory detention in the first place. Respondents do not ask the Court to

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[7] *See* Adriana Lafaille & Anant Saraswat, *Supreme Court case has echoes in Massachusetts*, https://www.aclum.org/en/publications/supreme-court-case-has-echoes-massachusetts (last visited Aug. 5, 2018) (discussing *Gordon v. Napolitano*, No. 3:13-cv-30146-PBS (D. Mass.)).

expand the witness protection exception. Rather, they argue that they are not subject to mandatory detention in the first place because they were not detained "when . . . released" from criminal custody.

In sum, the statute instructs that the Secretary shall detain noncitizens removable on enumerated grounds "when . . . released" from criminal custody, and subjects only those noncitizens detained "when . . . released" to mandatory detention. The government's contrary reading should be rejected.

II. THE COURT OF APPEALS' INTERPRETATION ACCORDS WITH CONGRESS'S PURPOSE OF REQUIRING THE SECRETARY TO ENSURE AN IMMEDIATE TRANSFER OF NONCITIZENS FROM CRIMINAL TO IMMIGRATION CUSTODY.

As set out above, the plain language of Section 1226(c) is unambiguous. It requires the government to detain a noncitizen "when . . . released" from underlying criminal custody. There is therefore no need to look beyond the statute's terms. However, the legislative history bolsters that plain language, showing that Congress enacted Section 1226(c) with a "limited but focused purpose[ ]:" to ensure an immediate transition from criminal to immigration custody until the noncitizens' removal. *Saysana*, 590 F.3d at 17. Only Respondents' reading accords with that purpose; the government's does not.

A. The Legislative History Shows That Congress's Purpose Was to Ensure the Immediate Transfer to Immigration Custody of Noncitizens When Released from Criminal Custody.

From its earliest iterations, the mandatory detention statute that culminated in Section 1226(c) required the immigration authorities to detain noncitizens with certain criminal histories when they are released from their sentences, eliminating any gap between criminal and immigration custody. Congress enacted the first mandatory detention statute in the Anti-Drug Abuse Act of 1988, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 8 U.S.C. § 1252(a)(2) (1989)). That statute specified that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion* of the alien's sentence for such conviction" and "the Attorney General shall not release such felon from custody." *Id.* (emphasis added).

Subsequent amendments maintained the focus on an immediate transfer to immigration custody upon release from criminal custody. When some noncitizens argued that the statute could not apply to individuals released from incarceration through parole or other forms of supervised release, because their "sentence" had not yet been completed, Congress amended the statute to clarify that it required mandatory detention of individuals upon release from criminal custody "regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of

rearrest or further confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (Nov. 29, 1990) (codified at 8 U.S.C. § 1252(a)(2) (1991)); H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554, 1990 WL 188857, 158. *See also Matter of Eden*, 20 I. & N. Dec. 209, 212 (BIA 1990) (discussing the dispute over the meaning of "sentence" in mandatory detention cases).

In 1996, Congress twice more amended the mandatory detention statute, expanding the types of enumerated offenses that triggered mandatory detention. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (Apr. 24, 1996); IIRIRA § 303(b) (codified at 8 U.S.C. § 1226(c)). In AEDPA Congress continued to focus on maintaining custody without a gap, requiring that immigration authorities "shall take into custody . . . upon release . . . from incarceration." AEDPA § 440(c). AEDPA omitted the language directing that a period of parole or other supervision would not affect the requirement of mandatory detention upon release, but IIRIRA restored it, directing that immigration authorities "shall detain . . . when the alien is released, without regard to whether the alien is released on parole . . . ." IIRIRA § 303(b). Thus, at every point, Congress's concern was to require immediate transfer of immigrants in criminal custody to immigration detention. *See, e.g.*, House Conf. Rep. 104-828, at 210-11 (1996) (seeking to mandate detention when

noncitizens are "released from imprisonment" for a predicate offense).[8]

Reading Section 1226(c) to impose mandatory detention "any time after" release is also implausible in light of the Transition Period Custody Rules ("TPCR"), which were enacted at the same time as Section 1226(c) in the IIRIRA.[9] The TPCR permitted

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[8] Proponents of the government's view have repeatedly sought to amend Section 1226(c), and Congress has repeatedly declined to do so. For example, in 2011, legislation was introduced in the House of Representatives that would have replaced the "when . . . released" clause with the following: "The [Secretary] shall take into custody any alien who [is inadmissible or deportable for a predicate crime] *any time after* the alien is released . . . ." See H.R. 1932, 112th Cong. § 2(b)(5) (2011) (emphasis added); *see also* Grassley Amendment 53 to S. 744, 113th Cong. (2013); H.R. 1901, 113th Cong. § 2(b)(3) (2013); H.R. 3003, 115th Cong. § 4(a)(3) (2017). Congress understood that such bills would "greatly expand[ ] the number of people subject to mandatory detention [under Section 1226(c)] by eliminating the requirement that the release from criminal custody be tied to the offense triggering mandatory detention" and apply "mandatory detention . . . to individuals who have long since been released from criminal custody for any offense listed in the statute and who are now leading productive lives in the community." H.R. Rep. 112-255, at 52 (Oct. 18, 2011).

[9] The TPCR mirrored the structure and mandate of Section 1226(c), directing that the Attorney General "shall take into custody" noncitizens with certain enumerated offenses, but permitted release in much broader circumstances. *See* IIRIRA § 303(b)(3)(B) (permitting the release of certain noncitizens who are "lawfully admitted to the United States" and "satisfy[] the Attorney General" that they pose no danger or flight risk, and the release of certain noncitizens who are "not lawfully admitted," "cannot be removed because the designated country of removal will not accept the alien, and satisf[y] the Attorney

the Attorney General to delay the effective date of Section 1226(c) for up to two years. *See* IIRIRA § 303(b)(2). Concerned that "the Attorney General did not have sufficient resources" to implement mandatory detention, the TPCR were "designed to give the Attorney General a . . . grace period . . . during which mandatory detention of criminal aliens would not be the general rule." *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). The need for a "transition period" makes sense only if Congress understood Section 1226(c) to require immediate detention at the time of release. Had Congress intended "when" to authorize detention "at any time after" release, there would have been no need to provide a two-year delay in its effective date to account for resource constraints. Immigration authorities could have simply taken their resource constraints into consideration in deciding when to detain individuals.[10]

General" that they pose no danger or flight risk). The text of the TPCR is set forth in the Appendix.

[10] Moreover, as explained in *Castañeda*, 810 F.3d at 29, the government's open-ended reading of Section 1226(c), if applied to the similar language in the TPCR, would leave many *more* individuals subject to mandatory detention during the transition period than thereafter. This would make the TPCR *broader*, not narrower, than Section 1226(c). But Congress "clearly intended [the TPCR] to be less encompassing" than the permanent rule in order to allow the agency flexibility while it built up its detention capacity. *Id.* If the government's reading is correct, it was actually required to subject even *more* people to mandatory detention under the transitional rules, thereby defeating Congress's goal of avoiding burdens on agency resources during the grace period prior to the new mandatory detention regime. *Id.*

B. The Government's Legislative History Arguments Lack Merit.

The government makes three unavailing arguments based on the statute's history. First, it relies heavily on a regulation implementing the 1988 Act that prohibited the release of "'a respondent . . . convicted of an aggravated felony'" from immigration detention. Pet. Br. 31-35 (quoting 55 Fed. Reg. 24,858, 24859 (June 19, 1990) (8 C.F.R. § 242.2(c)(1)). The government asserts this regulation applied mandatory detention to noncitizens regardless of any gap in custody, and that Congress implicitly adopted this interpretation when it enacted the 1990 Immigration Act.

This argument fails because there is no indication that Congress actually considered the regulation, which was promulgated only six months before Congress modified the mandatory detention provision. *See United States v. Calamaro*, 354 U.S. 351, 358-59 (1957) (refusing to afford any significance to a regulation that "had been in effect for only three years"). And even if Congress were aware of the regulation, the government has it wrong. The Immigration and Naturalization Service repeatedly acknowledged in issuing the regulation that the 1988 Act "requir[ed] the Attorney General to take custody of aliens convicted of aggravated felonies *upon completion of the alien's sentence*, and to retain such aliens in custody . . . ." 55 Fed. Reg. at 24,858 (emphasis added); *see also* 55 Fed. Reg. 43,326, 43,327 (Oct. 29, 1990) ("Section 242(a)(2) of the Act mandates that any alien convicted of an aggravated felony . . . be held without bond *upon completion of his or her sentence* pending deportation

proceedings and removal from the United States.") (emphasis added); *id.* (explaining that "[a]liens who are criminals generally *will be taken into Service custody to face exclusion or deportation from the United States rather than be allowed back into the community after release from a correctional institution*" and that "[t]his rule is necessary in order to ensure that aliens who are subject to exclusion or deportation from the United States *are released from correctional institutions to the custody of the Service*") (emphasis added).[11]

Second, the government cites the fact that the 1990 Immigration Act briefly restored discretion to release "any lawfully admitted alien" whom the Attorney General otherwise detained upon his or her release from criminal custody for an aggravated felony conviction. *See* Immigration Act of 1990, § 504, (codified at 8 U.S.C. § 1252(a)(2) (1991)). The government argues that because Congress did not refer to a previous release from criminal custody in *lifting* the mandatory detention requirement for this group in the 1990 Act, Congress was no longer concerned about whether immigration detention immediately followed release. *See* Pet. Br. 32 (citing *Rojas*, 22 I. & N. Dec. at 123). But this makes no sense, since the operative mandatory detention

[11] The government also cites an interim rule issued *following* the Immigration Act of 1990. Pet. Br. 33 (citing 57 Fed. Reg. 11,568, 11, 572 (Apr. 6, 1992) (8 C.F.R. § 3.19(h)). Because this regulation was promulgated *after* the 1990 Act, and there is no indication that Congress at any point considered, much less approved, this rule, it is "without significance." *Calamaro*, 354 U.S. at 358-59.

provision continued to include the requirement that an individual be detained "upon release of the alien." 8 U.S.C. § 1252(a)(2)(A) (1991).

Third, the government suggests that by amending the predecessor language in the 1990 Act—"upon release of the alien"—to the new clause, "when the alien is released," Congress intended to provide for mandatory detention "while" the noncitizen is released, rather than "immediately" or "at the time of" release. Pet. Br. 34-35. But nothing in the text or legislative history suggests that Congress intended to make any substantive change merely by changing "upon" to "when." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes"). Had Congress intended to authorize detention at any time after release, thereby dramatically expanding the population subject to mandatory detention, it would have said so directly.

The immediate predecessor to Section 1226(c), enacted in AEDPA, provided that mandatory detention applied "upon release of the alien from incarceration, [and that the Attorney General] shall deport the alien as expeditiously as possible." AEDPA § 440(c). IIRIRA changed this language to provide for mandatory detention "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation . . . ." IIRIRA § 303(b). The thrust of Congress's amendment from AEDPA to IIRIRA was thus to restore the provision for immediate detention "without regard to whether the alien is released on parole, supervised released, or probation." This clause had been inserted in the 1990 Act, but then

inexplicably dropped in AEDPA. However, there is no indication that the change from "upon" to "when" was intended to effectuate any substantive change to the statute.[12]

In sum, Congress's consistent focus has been on mandating continuous custody at the point that certain noncitizens are released from criminal custody, and not on granting the Secretary an open invitation to detain such individuals whenever she chooses.

III. CONSTITUTIONAL AVOIDANCE REQUIRES READING SECTION 1226(c) NARROWLY.

As set forth in Part I, the plain language and structure of Section 1226(c) unambiguously provide that mandatory detention applies only "when the alien is released" from criminal custody. But to the extent that the Court finds that Section 1226(c) is

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[12] The government cites legislative history this Court relied on in *Demore v. Kim*, 538 U.S. 510, 518-19 (2003). *See* Pet. Br. 22. But at best that history shows that Congress considered a variety of ways to facilitate the removal of noncitizens with criminal offenses, including increasing detention bed space, expediting the removal process for noncitizens who are still in criminal custody, and subjecting noncitizens who were serving "underlying sentences" to continued immigration detention. *See, e.g.*, S. Rep. No. 104-48 (1995), 1995 WL 170285, at *3-4, *21, *23, *31-32. In any event, the cited Senate report was not associated with any particular bill. *Castañeda*, 810 F.3d at 34-35. Thus, it does not shed light on the question here, and there is no indication that Congress chose to "expand the role of mandatory detention haphazardly" rather than focus on ensuring the continuous detention of noncitizens leaving criminal custody. *Id.*

ambiguous, it should construe it narrowly to avoid the serious constitutional question presented by the government's expansive reading. This Court has never approved the categorical mandatory detention of individuals who are taken into custody after living peaceably in the community for years. Doing so would raise serious due process concerns. *See Jennings*, 138 S. Ct. at 842 ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Section 1226(c) is an exception to the general due process principle that civil detention requires an individualized showing of flight risk or danger at a fair hearing. This Court's cases establish that civil detention must not be punitive or arbitrary, and generally must rest on an individualized determination of the necessity for detention accompanied by fair procedural safeguards.

For example, in the criminal pretrial setting, the Court has upheld the denial of bail only where Congress provided stringent procedural safeguards, including a requirement that the government demonstrate probable cause to believe the detainee has committed the charged crime and "a full-blown adversary hearing" on dangerousness, at which the government bears the burden of proof by clear and

convincing evidence. *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Court has similarly upheld preventive detention pending a juvenile delinquency determination only where the government proves a risk of future dangerousness in a fair adversarial hearing with notice and counsel. *Schall v. Martin*, 467 U.S. 253, 277, 280-81 (1984). Civil commitment is constitutional only when there are "proper procedures and evidentiary standards," including individualized findings of dangerousness. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997); *see also Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement").

In the immigration setting, civil detention is justified only where it is necessary to effectuate removal, and the noncitizen poses a flight risk or danger pending removal. *Zadvydas*, 533 U.S. at 690-91. In *Zadvydas*, the Court interpreted the statute governing detention after a final order of removal to require release of a noncitizen if the government is unable to effectuate removal within six months and removal is not "reasonably foreseeable." *Id.* at 699-701. *Zadvydas* thus reaffirmed the due process requirement that civil detention must be closely tied to a legitimate purpose, and that it can only be imposed with adequate procedural safeguards. *Id.* at 690-91.

In the key instance where the Court has approved detention without an individualized hearing, *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld Section 1226(c) in a facial challenge to the statute, in a case where the noncitizen was

detained within a day of his release, and conceded that the statute applied to him. *See id*. at 513-14; *see also* Brief for Petitioner at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. As such, the Court did not consider the problems raised by the government's attempt in this case to excise the "when . . . released" requirement from the statute.

The Court in *Demore* emphasized that the mandatory detention regime is "narrow" and closely linked to the purpose of effectuating removal and protecting public safety, pointing to the expected brevity of the detention and the individual's concession of deportability for an enumerated crime. *See Demore*, 538 U.S. at 513-14, 526, 528, 529 n.12.

As interpreted by the government here, however, Section 1226(c) would authorize categorical mandatory detention, not only "when the alien is released" but years later. At that point—when an individual has lived peaceably in the community for years, and may well have strong family ties and a high likelihood of prevailing in her removal hearing—mandatory detention is no longer adequately linked to the government's interest in preventing flight risk and danger. As the court of appeals explained, "without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justified mandatory detention are still present." Pet. App. 22a-23a. Indeed,

> it 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. *See also Castañeda v. Souza*, 769 F.3d 32, 43 (1st Cir. 2014), *rehr'g en banc granted*, *opinion withdrawn* (Jan 23, 2015) (concluding that any "presumption of dangerousness and flight risk is eroded by the years in which [an] alien lived peaceably in the community."). Indeed, in the *Khoury* case, immigration judges granted release on bond in 86 percent of cases involving individuals not detained "when . . . released" from criminal custody, but detained at some later point. *Supra* n.7. Similarly, in *Gordon v. Napolitano*, No. 3:13-cv-30146-PBS (D. Mass.), 51 percent of class members were granted bond. *Id.*[13]

Moreover, the passage of time after the individual is released from criminal custody also affects her chances of prevailing on the merits of her removal case. Individuals who have been living in the community may have increased their eligibility for relief from deportation, such as cancellation of removal, by strengthening their ties to the community, and so as a group have less incentive to

[13] The government argues that its reading is justified because Congress did not trust immigration judges to make bond decisions in some category of cases. *See* Pet. Br. 10. But this argument begs the question as to whom the statute applies. The fact that *some* noncitizens with criminal histories should be subject to Section 1226(c) does not shed light on how to read the statute.

flee. *See* 8 U.S.C. § 1229b(a)-(b). When the government violates the mandate to detain "when the alien is released" from criminal custody, the justification for applying an irrebuttable categorical presumption of mandatory detention thus erodes in two respects: the presumption that the individual will flee does not hold, and the likelihood that removal will actually occur diminishes.

Thus, if there is any doubt as to what its text compels, Section 1226(c) should be construed narrowly to impose mandatory detention only on individuals who are detained "when . . . released" from criminal custody. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that courts should reject an "otherwise acceptable" statutory interpretation if it raises serious constitutional concerns and an alternative interpretation is not "plainly contrary to the intent of Congress.").

Moreover, constitutional avoidance requires construing the statute consistently whether the deviation from the "when . . . released" requirement is a matter of days or years. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Section 1226(c) must be construed in a consistent way, whether it is applied to Respondent Juan Lozano Magdaleno, who was arrested and subjected to mandatory detention five years after finishing his criminal sentence, *see* Pet. App. 8a, 67a-

68a, or to any class member not detained promptly "when . . . released" from her criminal sentence.

IV. THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT.

A. *Chevron* Deference Does Not Apply to the BIA's Interpretation of Section 1226(c).

The government's bid for *Chevron* deference to the BIA's decision in *Rojas* should fail, both because deference is inappropriate here, and because the government's interpretation fails even deferential review.

This Court considers two questions when reviewing an agency interpretation of a statute under the *Chevron* framework. First, if Congress has "directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Second, "if the statute is silent or ambiguous with respect to the specific issue," the Court determines if the agency has adopted "a permissible construction of the statute," *id*. at 843, or one that is arbitrary and capricious, and therefore impermissible. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

Matter of Rojas does not deserve deference for three reasons. First, as set forth in Part I, the BIA's

interpretation in *Rojas* contravenes the statute's unambiguous demand of immediate detention.[14]

Second, as set forth in Part III, the BIA's interpretation raises serious constitutional concerns, and therefore does not warrant deference. *DeBartolo*, 485 U.S. at 574-75. Courts "assum[e] that Congress does not casually authorize administrative agencies" to adopt interpretations that push against constitutional limits. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

Third, deferring to the BIA's definition of the scope of the Executive's detention authority would be at odds with the federal courts' traditional exercise of *de novo* habeas corpus review of executive detention. "[T]he writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). Deferring to the Executive's interpretation of its own detention authority would undermine this core function of habeas review. "While the executive branch may administer detention statutes, a serious separation of powers issue arises when the executive may define the scope of detention power as well." Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L.

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[14] Moreover, the government urges the Court to defer to part of *Rojas's* statutory analysis—i.e., that the "when . . . released" language does not define who is subject to mandatory detention—while advancing an argument directly contrary to *Rojas's* conclusion that the statute "direct[s] [DHS] to take custody . . . *immediately* upon [an individual's] release from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). The government cannot have it both ways.

Rev 143, 186 (2015); *see also* Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 157 (2004) (arguing that the Constitution vests detention power exclusively with Congress). Separation of powers counsels that the judiciary should not engage in "reflexive deference" to the Executive branch, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)—and particularly when the deprivation of liberty is at stake. *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Chevron* deference for permitting individual "liberties [to be] impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible . . . but by an avowedly politicized administrative agent").

Citing this very concern, the Court in *Zadvydas* refused to defer to the Executive with respect to immigration detention. As the Court explained, the habeas corpus statute grants the federal courts "authority to answer" whether "detention is, or is not, pursuant to statutory authority." 533 U.S. at 699. Thus, although habeas courts must "take appropriate account of the greater immigration-related expertise of the Executive Branch," they cannot "abdicat[e] their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700.[15]

[15] Although the government cites cases where the Court has applied *Chevron* deference in the immigration context, none of those cases involve the canon of constitutional avoidance or habeas review of executive detention. *See* Pet. Br. 39 (citing, *inter alia*, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999)).

In any event, even if the Court were to apply step two of *Chevron*, the BIA's interpretation should be rejected because it leads to arbitrary and capricious results that are "unmoored from the purposes and concerns" of the statute. *Judulang*, 565 U.S. at 64. *Rojas* simultaneously transforms a mandate to the Secretary to act at a particular time into an open-ended invitation, and would arbitrarily deny bond hearings to individuals who have returned to their families and communities, and lived peaceably and openly there for years.

B. The Government's Arguments Regarding State and Local Compliance with Detainer Requests Are Unavailing.

The government cites decisions by state and local governments to decline detainer requests as an additional reason for adopting its construction of the statute. *See* Pet. Br. 26-27. But as the Court recently noted in rejecting the government's similar arguments in a case involving interpretation of another immigration statute, such "practical considerations . . . do not justify departing from the statute's clear text." *Pereira,* 138 S. Ct. at 2118.

Even assuming that practical considerations were relevant, the government has not established that any serious problems actually pertain here. First, the record contains no evidence showing that declined detainer requests actually prevent DHS from taking prompt custody, much less whether or how often detainers are declined for individuals who fall within Section 1226(c). The government's own data suggest that its concerns are overstated: between fiscal years 2015 and 2017, law enforcement

agencies complied with *more than 94%* of detainer requests—more than 300,000 requests in total.[16] And in cases where law enforcement officials decline to do so, DHS has recourse to an array of other enforcement tools that enable it to detain individuals upon their release from criminal custody. These include arrangements with the overwhelming majority of counties nationwide to notify DHS of individuals' release dates,[17] and the deployment of DHS officers[18] and deputized local law enforcement

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[16] *See* ICE, *Fiscal Year 2017 Enforcement and Removal Operations Report* 8-9, *available at* https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf (last visited Aug. 5, 2018) (reporting that DHS made 325,274 detainer requests in this period, with law enforcement agencies complying in 306,112 cases).

[17] *See, e.g.*, Immigrant Legal Resource Ctr., *The Rise of Sanctuary* 9 (Jan. 2018), *available at* https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf (last visited Aug. 5, 2018) (reporting based on DHS data that 94% of approximately 3,000 counties nationwide notify DHS when noncitizens are released from criminal custody). Indeed, in parallel litigation in the First Circuit, the government conceded that where DHS receives notice of an individual's release date, it can detain the individual "99 percent of the time" within the 48 hour period after release that the district court in that case permitted the government to take custody of an individual under Section 1226(c). Hrg. Tr. at 28:22-23, *Gordon v. Napolitano*, No. 13-cv-30146-MAP (D. Mass. Apr. 11, 2017), ECF No. 197.

[18] *See* ICE, Criminal Alien Program, https://www.ice.gov/criminal-alien-program (last visited Aug. 5, 2018).

officers at jails and prisons to apprehend individuals upon their release. *See* 8 U.S.C. § 1357(g).[19]

Second, Congress has directed the immigration authorities "to identify and track deportable criminal aliens while they are still in the criminal justice system, and to complete removal proceedings against them as promptly as possible" by way of the Institutional Hearing Program. *Demore*, 538 U.S. at 530 n.13 (citing 8 U.S.C. § 1228). These removal proceedings are completed while the noncitizens are in criminal custody, eliminating the need for ICE to seek to detain them at the time of release.

In sum, the government's practical arguments cannot justify a departure from the plain meaning of Section 1226(c).

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c).

Finally, the government contends that its interpretation is consistent with this Court's case law holding that where a statutory deadline does not

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[19] The government argues that Congress was aware of policies limiting local assistance to immigration authorities at the time Section 1226(c) was enacted and thus could not have intended to require mandatory detention at the time of the person's release from criminal custody. *See* Pet. Br. 27. Whether or not Congress had any such awareness, the plain language Congress chose to enact discloses no intent to deal with such policies, but instead focuses on ensuring that DHS detain individuals without a gap in custody.

specify otherwise, the government does not lose authority to detain when it fails to do so within the required time. *See* Pet. Br. 27-30 (citing, *inter alia*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18, 720 (1990) (holding that even where the government fails to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance, the government may still detain that person before trial, as holding otherwise would "bestow upon the defendant a windfall" and impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants")).[20]

The "loss of authority" principle does not apply to this case for several reasons. First, the government does not in fact lose its authority to detain under the court of appeals' interpretation. The government still enjoys a presumption of detention, and the noncitizen will be released only if he can prove that he poses neither a flight risk nor a danger under Section 1226(a). Neither the government nor the public suffers the "severe penalty" of the release of dangerous persons, because the only individuals who will be released are those an immigration judge determines do *not* pose a flight risk or danger. *See Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) (explaining that bond must be denied if a person is a danger to the community); *Guerra*, 24 I. & N. Dec. at 38 (describing danger and flight risk test for bond). Indeed, because Section 1226(c) curtails rather than expands the government's discretion over detention,

[20] *See also Regions Hosp. v. Shalala*, 522 U.S. 448, 459 n.3 (1998); *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986).

the effect of the Ninth Circuit's ruling is simply to reinstate the government's general authority under Section 1226(a) to detain or release individuals who are not timely detained under Section 1226(c). *See* Pet. App. 25a.

For the same reason, this is not a case where Congress neglected to "'specify a consequence for noncompliance with [a] statutory timing provision[],'" as the government claims. *Cf.* Pet. Br. 29 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003)). Because Section 1226(c) is constructed as an express exception to the general grant of detention authority, the law specifies that the failure to meet Section 1226(c)'s timing requirement renders that exception inapplicable and results in a reversion to the government's general detention authority. Thus, unlike the statutes in this Court's "loss of authority" cases, enforcement of the "when . . . released" time limit here does not involve the judiciary imposing a sanction of its own invention, but merely requires the agency to apply the detention scheme as Congress intended. *See* Pet. App. 25-26a; *see also Castañeda*, 810 F.3d at 40-43. Congress, not the courts, has made clear that the consequence of failing to detain promptly "when . . . released" is to revert to the ordinary detention authority.

Second, the "loss of authority" principle does not apply, as the court of appeals recognized, because it would lead to an outcome that is contrary to the detention framework Congress sought to implement. Pet. App. 26a-27a. Congress enacted the "when . . . released" clause in order to ensure a prompt transfer from criminal to immigration custody for noncitizens with certain crimes, to avoid the release of people

who present a danger to the community or a risk of absconding. Permitting the government to delay apprehension and instead detain people years after their return to their communities, without affording them any opportunity to show that they are not a flight risk or a danger, contravenes the purposes and design of the statute. *Accord Castañeda*, 810 F.3d at 41-42; *Saysana*, 590 F.3d at 17-18.

CONCLUSION

The judgments of the court of appeals should be affirmed.

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APPENDIX

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), § 303(b), Div. C, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586 provides:

(b) EFFECTIVE DATE.-

(1) IN GENERAL.-The amendment made by subsection (a) shall become effective on the title III-A effective date.

(2) NOTIFICATION REGARDING CUSTODY.-If the Attorney General, not later than 10 days after the date of the enactment of this Act, notifies in writing the Committees on the Judiciary of the House of Representatives and the Senate that there is insufficient detention space and Immigration and Naturalization Service personnel available to carry out section 236(c) of the Immigration and Nationality Act, as amended by subsection (a), or the amendments made by section 440(c) of Public Law 104-132, the provisions in paragraph (3) shall be in effect for a 1-year period beginning on the date of such notification, instead of such section or such amendments. The Attorney General may extend such 1-year period for an additional year if the Attorney General provides the same notice not later than 10 days before the end of the first 1-year period. After the end of such 1-year or 2-year periods, the provisions of such section 236(c) shall apply to individuals released after such periods.

(3) TRANSITION PERIOD CUSTODY RULES.-

(A) IN GENERAL.-During the period in which this paragraph is in effect pursuant to

paragraph (2), the Attorney General shall take into custody any alien who-

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle),

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.

(B) RELEASE.-The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and-

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not

accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.