No. 15-1307

In the Supreme Court of the United States

ALEXANDER LORA, PETITIONER

v.

CHRISTOPHER SHANAHAN, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE TO CONDITIONAL CROSS-PETITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
JESSICA W. P. D'ARRIGO
KIMBERLY E. HELVEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a criminal alien in removal proceedings becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from state custody, the Department of Homeland Security does not take him into immigration custody immediately.

2. Whether a criminal alien in removal proceedings becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if he was not sentenced to imprisonment for the underlying offense.

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OPINIONS BELOW

The opinion of the court of appeals (15-1205 Pet. App. (Pet. App.) 1a-34a) is reported at 804 F.3d 601. The opinion and order of the district court (Pet. App. 35a-70a) is reported at 15 F. Supp. 3d 478.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 19, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Ginsburg further extended the time to March 26, 2016. The government's petition in No. 15-1205 was filed on March 25, 2016, and placed on this Court's docket on March 28, 2016. This conditional cross-petition was filed on April 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 8 U.S.C. 1226(c), Congress mandated that the Department of Homeland Security (DHS) detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003). This Court has upheld Section 1226(c)'s provision for mandatory detention against a due process challenge. *Id.* at 531.

Section 1226(c) consists of two paragraphs. The first directs the Secretary of DHS to assume custody over certain criminal and terrorist aliens:

> The [Secretary] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in [8 U.S.C. 1182(a)(2)],
>
> (B) is deportable by reason of having committed any offense covered in [8 U.S.C. 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],
>
> (C) is deportable under [8 U.S.C. 1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under [8 U.S.C. 1182(a)(3)(B)] or deportable under [8 U.S.C. 1227(a)(4)(B)],
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to wheth-

> er the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. 1226(c)(1). The referenced sections render aliens deportable or inadmissible by reason of being convicted of certain crimes or committing terrorist acts. 8 U.S.C. 1182(a)(2) and (3)(B), 1227(a)(2)(A)(i), (ii) and (iii), (B), (C), (D), and (4)(B).

Paragraph (2) is entitled "Release," and it generally prohibits the Secretary from releasing "an alien described in paragraph (1)" during removal proceedings. 8 U.S.C. 1226(c)(2). "The [Secretary] may release an alien described in paragraph (1) only if" a narrow witness-protection exception is satisfied. *Ibid.* That exception does not apply here. Cross-petitioner is therefore subject to mandatory detention, without bond, if he is an "alien described in paragraph (1)" of Section 1226(c). *Ibid.*

The Board of Immigration Appeals (BIA) has interpreted that phrase, concluding that a person is an "alien described in paragraph (1)" if he is deportable or inadmissible under any of the four lettered subparagraphs, and that the flush paragraph beginning "when the alien is released" does not limit Section 1226(c)(2)'s prohibition against release during removal proceedings. Specifically, in *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc), the BIA held that an alien who has been convicted of a predicate offense does not become exempt from the detention mandate if he "is not immediately taken into custody by [DHS]." *Ibid.* The BIA explained that the phrase "an alien described in paragraph (1)" is ambiguous, as it does not state "whether it encompasses the 'when the alien is released' clause" or "merely references the four categories of aliens described in subparagraphs (A) through

(D)." *Id.* at 120. After reviewing the statutory text, context, and history, as well as practical considerations, the BIA concluded that it would be "inconsistent with our understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by [DHS]." *Id.* at 124. The BIA instead concluded that the "when the alien is released" clause defines when DHS's duty to take a criminal alien into custody is triggered. *Ibid.*

The BIA has similarly concluded that the "when the alien is released" clause does not exempt a criminal alien from mandatory detention if he was sentenced to probation rather than imprisonment. See *In re Kotliar*, 24 I. & N. Dec. 124 (2007); *In re West,* 22 I. & N. Dec. 1405 (2000). The BIA explained that Section 1226(c) "expressly states that an alien is subject to mandatory detention and shall be taken into custody when the alien is released, without regard to whether he was released 'on parole, supervised release, or probation.'" *Kotliar,* 24 I. & N. Dec. at 125 (quoting 8 U.S.C. 1226(c)(1)).

2. Cross-petitioner does not dispute that he is "an[] alien who * * * is deportable by reason of having committed an[] offense covered in" Section 1227(a)(2)(B). 8 U.S.C. 1226(c)(1)(B). Section 1227(a)(2)(B)(i) provides that "[a]ny alien" who is convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance," except a single offense for possession of 30 grams or less of marijuana for one's

own use, "is deportable." 8 U.S.C. 1227(a)(2)(B)(i). Cross-petitioner is a native and citizen of the Dominican Republic, and a lawful permanent resident of the United States. Pet. App. 9a. In July 2010, he pleaded guilty in New York state court to possession of cocaine with intent to sell, possession of more than one ounce of cocaine, and use of drug paraphernalia. *Id.* at 10a. He was sentenced to five years of probation. *Ibid.*

On November 22, 2013, DHS took cross-petitioner into custody and initiated removal proceedings. Pet. App. 10a. An immigration judge concluded that he was subject to mandatory detention under Section 1226(c) based on his drug convictions. *Id.* at 11a.

On March 14, 2014, a New York state court vacated his convictions and permitted him to retroactively plead guilty to a single count of possession of a controlled substance, resentencing him to a conditional discharge imposed *nunc pro tunc* to July 21, 2010. Pet. App. 11a. As a result, he is eligible to seek cancellation of removal, see 8 U.S.C. 1229b, but he remains "an[] alien who * * * is deportable by reason of having committed any offense covered in" Section 1227(a)(2)(B). 8 U.S.C. 1226(c)(1)(B). See Pet. App. 11a-12a.

3. On March 26, 2014, cross-petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking a bond hearing before an immigration judge. Pet. App. 40a. The parties consented to magistrate judge jurisdiction over the case. *Id.* at 36a.

The magistrate judge granted the habeas petition and ordered that cross-petitioner be given a bond hearing. Pet. App. 35a-70a. Contrary to the BIA's

interpretations of Section 1226(c) in *Rojas*, *Kotliar*, and *West*, the magistrate judge held that he is exempt from mandatory detention under Section 1226(c) because DHS did not take him into custody immediately when he was released from state custody, and was also exempt because he was sentenced to probation not imprisonment. *Id.* at 69a. After a bond hearing, he was released on $5000 bond. *Id.* at 8a.

4. The court of appeals affirmed, albeit on different grounds. Pet. App. 1a-34a. The court first squarely rejected the district court's interpretation of Section 1226(c). The court of appeals held that Section 1226(c) "unambiguously mandates detention" of an alien convicted of a qualifying crime, regardless of whether he is "sentenced to a prison term or to probation." *Id.* at 17a, 19a. The court explained that "released" means "not incarcerated, not imprisoned, not detained, i.e., not in physical custody," *id.* at 18a, and that Section 1226(c) "clearly contemplates non-carceral sentences," as it mandates detention "*without regard to whether the alien is released on parole, supervised release, or probation.*" *Ibid.* (quoting Section 1226(c)(1)).

The court of appeals also "join[ed] the Third, Fourth, and Tenth Circuits" in holding that Section 1226(c) applies "even where DHS does not immediately detain the alien after release from criminal custody." Pet. App. 25a; see *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015). Applying the two-step framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court had "little trouble" finding that Section

1226(c) is ambiguous as to whether the phrase "when the alien is released" defines when the Secretary's duty to detain is triggered (the "duty-triggering" construction), or whether it limits the scope of Section 1226(c)(2)'s prohibition against release (the "time-limiting" construction). Pet. App. 21a. The court then held that the BIA had reasonably adopted the duty-triggering interpretation. "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Id.* at 23a-24a (quoting *Rojas*, 23 I. & N. Dec. at 128).

The court of appeals nonetheless affirmed. The court joined the Ninth Circuit in holding that mandatory detention under Section 1226(c) without a bond hearing can only last for six months. Pet. App. 9a; see *Rodriguez* v. *Robbins*, 804 F.3d 1060 (9th Cir. 2015), cert. pending, No. 15-1204 (filed Mar. 25, 2016). The court also "[f]ollow[ed] the Ninth Circuit" in holding that "the detainee must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." Pet. App. 33a-34a; see *Rodriguez*, 804 F.3d at 1074, 1087.

ARGUMENT

In its petition for a writ of certiorari in *Jennings* v. *Rodriguez*, No. 15-1204 (filed Mar. 25, 2016), the government seeks review of the Ninth Circuit's rulings in *Rodriguez* v. *Robbins*, 804 F.3d 1060 (2015), on several issues concerning detention of aliens under the immigration laws during removal proceedings. Two of the issues are (1) whether mandatory detention under 8 U.S.C. 1226(c) after an alien has been taken into cus-

tody may last for more than six months, and, (2) if not, whether the detainee must be released on bond unless the government establishes by clear and convincing evidence that the alien poses a flight risk or a danger to the community. In its petition for a writ of certiorari in this case (No. 15-1205), the government challenges the Second Circuit's parallel rulings regarding the length of detention under Section 1226(c) and the burden of proof. The government has suggested (No. 15-1205 Pet. 6) that its petition be held pending the Court's disposition of *Rodriguez*. This cross-petition should be held for *Rodriguez* as well, and then should be denied or otherwise disposed of as appropriate.

1. If this Court grants certiorari in *Rodriguez*, the Court should hold the government's petition (No. 15-1205) seeking review of the Second Circuit's decision in this case, pending the Court's decision in *Rodriguez*. The Court should then dispose of the government's petition in No. 15-1205 as appropriate in light of its decision in *Rodriguez*. In the meantime, the conditional cross-petition should be held pending disposition of the government's petition.

Contrary to cross-petitioner's suggestion (Cross-Pet. 20), the questions presented here are not "inextricably intertwined" with the questions presented in *Rodriguez*. Both cases involve Section 1226(c), but the issues raised in the conditional cross-petition are distinct and are not presented in *Rodriguez*. The questions in the conditional cross-petition concern whether the mandatory-detention requirement is triggered in the first place. Those questions depend on the meaning of "an alien described in paragraph (1)," 8 U.S.C. 1226(c)(2), and in turn the meaning of the "when the alien is released" clause in paragraph

(1). The proper interpretation of those phrases has no bearing on the length-of-detention and burden-of-proof issues in *Rodriguez*, which arise only after mandatory detention has begun.

2. The cross-petition does not warrant certiorari. Cross-petitioner contends (Cross-Pet. 1) that a criminal alien becomes exempt from mandatory detention under Section 1226(c) if (1) there was a delay between his release from criminal custody and the onset of his immigration custody; or (2) he was not sentenced to incarceration on the underlying offense. The court of appeals correctly rejected both arguments, deferring to the BIA's decision in *In re Rojas*, 23 I. & N. Dec. 117 (2001), that Section 1226(c)'s mandate applies regardless of any gap in detention; and holding that Section 1226(c) unambiguously applies to criminal aliens "without regard to whether the alien is released on parole, supervised release, or probation." 8 U.S.C. 1226(c)(1). There is no conflict among the circuit courts on either issue. Further review is unwarranted.

a. The court of appeals correctly held that a criminal alien does not become exempt from mandatory detention under Section 1226(c) merely because there is a gap in time between his release from criminal custody and the onset of his immigration custody. Paragraph (2) prohibits the Secretary from releasing "an alien described in paragraph (1)" from detention during his removal proceedings, with one narrow exception that is inapplicable here. 8 U.S.C. 1226(c)(2). Cross-petitioner does not dispute that he is an alien who is deportable for having committing one of the crimes listed in paragraph (1). Specifically, he is an alien described in subparagraph (1)(B): He is "an[] alien who * * * is deportable by reason of

having committed an[] offense covered in" Section 1227(a)(2)(B). 8 U.S.C. 1226(c)(1)(B). And "[o]ver a decade ago, the BIA, the agency charged with administering this statute," held that the "when the alien is released" clause that follows in paragraph (1) does not "describe" a covered alien for purposes of the bar to release in paragraph (2). Pet. App. 19a; see *Rojas*, 23 I. & N. Dec. at 120-127. Instead, the "when the alien is released" clause defines when DHS's duty to take a criminal alien into custody arises. *Ibid.* Accordingly, the BIA concluded, if an alien has committed a qualifying offense, he cannot be released from immigration custody during his removal proceedings, regardless of when he was first taken into immigration custody. *Ibid.*

The BIA's interpretation in *Rojas* warrants *Chevron* deference, and is correct even without it. First, the phrase "an alien described in paragraph (1)" is most naturally read to refer "to an alien described by one of four subparagraphs, (A) through (D)." *Rojas*, 23 I. & N. Dec. at 121. Those paragraphs describe characteristics that sensibly warrant mandatory detention during removal proceedings: commission of qualifying criminal offenses or terrorist acts. And as a matter of grammar, they naturally describe who such an alien is: "any alien who * * * *is* inadmissible" or "*is* deportable" for one of the enumerated reasons. 8 U.S.C. 1226(c)(1) (emphases added). By contrast, the clause that follows—"when *the alien* is released"—takes as a given that "the alien" has already been described. *Ibid.* (emphasis added). That clause instead thus defines *when* an action should occur, and paragraph (1) provides what that action is: DHS "shall

take into custody" such an alien "when the alien is released." *Ibid.*[1]

A practical example illustrates the structural point. If somebody gave you a two-paragraph shopping list saying (1) "You shall pick up any groceries that are milk, eggs, or cheese, when the groceries are made available for sale at the store"; and (2) "you shall refrigerate the groceries described in paragraph (1)," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store opened, you could leave them out on the counter rather than put them in the refrigerator. Here, Congress's use of the lettered subparagraphs to enumerate the kinds of criminals and terrorists who should be taken into custody makes the statute somewhat denser, but does not alter this basic structural point. And although Congress could have referred to aliens "described in subparagraphs (A) through (D) of paragraph (1)" instead of aliens "described in paragraph (1)," "Congress has not always been consistent in how it refers to other subsections in the same statute." *Olmos* v. *Holder*, 780 F.3d 1313, 1320 (10th Cir. 2015). "For example, in 8 U.S.C. § 1153(b)(5)(B)(i), Congress referred broadly to 'subparagraph (A)' even though the context showed that Congress was referring to

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[1] Paragraph (1) is also ambiguous with respect to whether "when the alien is released" means "at or around the same time," or "in the event that." See *United States* v. *Willings*, 8 U.S. 48, 55 (1807) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses."); *Hosh* v. *Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012) (finding "when" in Section 1226(c) to be ambiguous); *e.g.*, *Webster's Third New International Dictionary* 2602 (1993) (defining "when" as "at or during the time that," "just after the moment that," "at any and every time that," and "in the event that").

only two subparts of 'subparagraph (A)': (i) and (ii)." *Ibid.*

Second, interpreting "when the alien is released" as triggering DHS's duty to take a qualifying alien into immigration custody, rather than circumscribing the class of qualifying aliens, is consistent with the statutory context and purpose. Congress enacted Section 1226(c)'s mandate of detention "against a backdrop of wholesale failure by the [government] to deal with increasing rates of criminal activity by aliens" and to ensure that aliens would appear at their removal proceedings and that the government would be able to remove them once a final removal order was entered. *Demore* v. *Kim*, 538 U.S. 510, 513, 518-520 (2003) (discussing evidence of recidivism and flight). "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122. Many provisions of the immigration laws in turn are "aimed at expediting the removal of aliens, and that is especially true for criminal aliens such as those who fall within subparagraphs (A) through (D)." *Id.* at 121. By contrast, cross-petitioner's interpretation would undermine Congress's overarching purpose by exempting serious criminals or terrorists from mandatory detention, and it would do so based on a factor that "is irrelevant for all other immigration purposes": whether there is a gap in custody. *Id.* at 122.

Third, the BIA's construction is further supported by this Court's precedent "establishing that statutes providing that the Government 'shall' act within a specified time, without more," are not "jurisdictional limits precluding action later." Pet. App. 24a (quot-

ing *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003)). For example, in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), this Court held that, even if 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 in court, the government may still detain that person before trial. *Id.* at 717-718. Otherwise, "every time some deviation from the strictures" of the statute occurs, it would "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Id.* at 720. So too here, as cross-petitioner's interpretation "would lead to an outcome contrary to the statute's design: A dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous criminals." *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013); see *Hosh* v. *Lucero*, 680 F.3d 375, 382 (4th Cir. 2012).

"Finally, the BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute." Pet. App. 24a. "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of DHS to appear at the jailhouse door to take custody of an alien at the precise moment of release" from criminal custody. *Id.* at 23a-24a (quoting *Rojas*, 23 I. &. N. Dec. at 128) (brackets omitted). DHS often lacks the resources or information to take criminal aliens into custody. *Id.* at 24a-25a. Indeed, a gap in custody may be caused by reasons outside

DHS's control. For example, "an increasing number of state and local jurisdictions" are refusing to honor requests, known as "detainers," from Immigration and Customs Enforcement (ICE) to notify it before releasing a criminal alien so that ICE can take that person into immigration custody. *ICE Enforcement and Removal Operations Report Fiscal Year 2014*, at 4 (Dec. 19, 2014).[2] In 2014 alone, state and local law enforcement agencies refused to honor 10,182 detainers. *Id.* at 4-5.

Cross-petitioner asserts (Cross-Pet. 19 n.15) that the court of appeals' holding "raise[s] serious constitutional concerns." But courts "do not abandon *Chevron* deference at the mere mention of a possible constitutional problem." *National Mining Ass'n* v. *Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008).[3] In *Demore*, this Court rejected a due process challenge to Section 1226(c) brought by a lawful permanent resident who had lived in the United States virtually his entire life before committing a qualifying criminal offense. 538 U.S. at 531; see *id.* at 513 (noting that the alien had lived in the United States since "the age of six"). And cross-petitioner does not explain why an alien would have materially greater due process rights if a span of time passed after (rather than before) his qualifying criminal detention. Cross-petitioner also "misconstrues Justice Kennedy's concurrence in *Demore*." Pet. App. 25a n.20. Those observations are not relevant to "when the custody must start or

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[2] https://ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

[3] The BIA interpreted Section 1226(c) cognizant of constitutional concerns about mandatory detention. See *Rojas*, 23 I. & N. Dec. at 138-139 (Rosenberg, Board Member, dissenting).

whether there may be a gap between release from criminal custody and commencement of immigration custody." *Ibid.*

b. The court of appeals also correctly held that cross-petitioner did not become exempt from mandatory detention under Section 1226(c) merely because he was sentenced to probation rather than incarceration. He argues that the "when the alien is released" clause in paragraph (1) limits the scope of paragraph (2)'s prohibition against releasing a criminal or terrorist alien from immigration detention, and that an alien is not "released" for those purposes unless he was previously sentenced to imprisonment.

The BIA has rejected that argument, and again its interpretation is correct and warrants *Chevron* deference. See *In re Kotliar*, 24 I. & N. Dec. 124 (2007); *In re West*, 22 I. & N. Dec. 1405 (2000). First, for the reasons set forth above, the premise of the argument is wrong. The "when the alien is released" clause does not "describe" an alien, but instead defines when DHS must take "the alien" into custody. Second, the natural reading of "released" "means not incarcerated, not imprisoned, not detained, i.e., not in physical custody." Pet. App. 18a. Accordingly, DHS must take an alien into custody once he is "convicted of a crime described in section 1226(c)(1) and is not incarcerated, imprisoned, or otherwise detained." *Ibid.* An alien accordingly can be released from custody (following arrest, for example), even if he is never sentenced to incarceration. Moreover, Congress plainly contemplated the mandatory detention of aliens who committed qualifying offenses and received sentences other than imprisonment: Section 1226(c)(1) provides that DHS shall take a criminal alien into custody when he is

released, "*without regard to whether the alien is released on parole, supervised release, or probation*." 8 U.S.C. 1226(c)(1) (emphasis added).

c. Contrary to cross-petitioner's assertion (Cross-Pet. 18 n.14), the courts of appeals are not divided on either issue he identifies. No court of appeals has adopted either of cross-petitioner's interpretations of the "when the alien is released" clause. The Second Circuit expressly "join[ed] the Third, Fourth, and Tenth Circuits" in holding that Section 1226(c) applies "even where DHS does not immediately detain the alien after release from criminal custody." Pet. App. 25a; see *Sylvain*, 714 F.3d at 161; *Hosh*, 680 F.3d at 382; *Olmos*, 780 F.3d at 1324.[4] The Second and Third Circuits are also in agreement that a criminal alien does not become exempt from mandatory detention if he is not sentenced to imprisonment. See Pet. App. 19a; *Sylvain*, 714 F.3d at 161 (no exemption for an alien sentenced to a conditional discharge); see also *Desrosiers* v. *Hendricks*, 532 Fed. Appx. 283, 285 (3d Cir. 2013) (following *Sylvain* for an alien sentenced to probation); *Gonzalez-Ramirez* v. *Secretary of U.S. Dep't of Homeland Sec.*, 529 Fed. Appx. 177, 181 (3d Cir. 2013) (same), cert. denied, 134 S. Ct. 956 (2014).

Cross-petitioner contends (Cross-Pet. 18 n.14) that the First Circuit created a circuit split on the *Rojas* timing issue in *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (per curiam). Not so. *Castañeda* affirmed by vote of "an equally divided en banc court."

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[4] The *Rojas* timing issue is currently pending before the Ninth Circuit. See *Preap* v. *Johnson*, 303 F.R.D. 566 (N.D. Cal. 2014), appeal pending, No. 14-16326 (argued July 8, 2015); *Khoury* v. *Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014), appeal pending, No. 14-35482 (argued July 8, 2015).

Id. at 18. Three of the court's six judges concluded that a criminal alien is exempt from mandatory detention unless he is taken into custody "within a reasonable time frame" and that a multiple-year delay is unreasonable; the remaining three judges concluded that the gap was irrelevant to the lawfulness of mandatory detention. Compare *id.* at 38, 42 (opinion of Barron, J.), with *id.* at 47, 58 (opinion of Kayatta, J.). The affirmance by an equally divided court in *Castañeda* is not precedential, and thus does not create a circuit split of the sort that would warrant this Court's review. *Id.* at 18; see *Savard* v. *Rhode Island*, 338 F.3d 23, 25 (1st Cir. 2003) (en banc), cert. denied, 540 U.S. 1109 (2004).

A Massachusetts district court has issued an injunction in a state-wide class action generally forbidding DHS from detaining criminal aliens under Section 1226(c) unless it takes them into custody within 48 hours of their release from state criminal custody. *Gordon* v. *Johnson*, 300 F.R.D. 31 (D. Mass. 2014), appeal pending, No. 14-1559. The government has appealed that decision, however, and the First Circuit should once again be given the opportunity to resolve the *Rojas* timing issue following its equally divided ruling in *Castañeda*. Indeed, the district court's strict "immediacy" requirement in *Gordon* is contrary to the reasoning of both Judge Barron for three judges (that detention is mandatory if it begins within a reasonable time) and Judge Kayatta for three judges (that detention is mandatory regardless of when it starts). There is accordingly no cause for this Court's intervention at this time.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be held pending the disposition of the government's petition for a writ of certiorari in this case (No. 15-1205), and in turn pending the final disposition of *Jennings* v. *Rodriguez*, No. 15-1204 (filed Mar. 25, 2016). The conditional cross-petition should then be denied or otherwise disposed of as appropriate in light of the Court's disposition of the government's petition in this case.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
JESSICA W. P. D'ARRIGO
KIMBERLY E. HELVEY
Attorneys

MAY 2016