No. 15-1205

In the Supreme Court of the United States

CHRISTOPHER SHANAHAN, ET AL., PETITIONERS

v.

ALEXANDER LORA

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

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LEON FRESCO
Deputy Assistant Attorney General
ZACHARY D. TRIPP
Assistant to the Solicitor General
SARAH S. WILSON
KIMBERLY E. HELVEY
Attorneys

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

QUESTIONS PRESENTED

In 8 U.S.C. 1226(c), Congress mandated that the government "shall take into custody" certain criminal and terrorist aliens and "may release" such an alien during removal proceedings "only if" it is necessary for witness-protection purposes and "the alien satisfies the Attorney General" that he is not a flight risk or danger to the community. The questions presented are:

1. Whether criminal and terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

2. Whether, in any such bond hearing, the criminal or terrorist alien is entitled to release unless the government demonstrates by clear and convincing evidence that he is a flight risk or a danger to the community.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals and respondents to the petition for a writ for habeas corpus in the district court. They are: Christopher Shanahan, in his official capacity as the Field Office Director of the New York District of U.S. Immigration and Customs Enforcement (ICE); Diane McConnell, in her official capacity as the Assistant Field Office Director of the New York District of ICE; Sarah R. Saldaña, in her official capacity as Director of ICE;[1] Jeh Johnson, in his official capacity as the Secretary of Homeland Security; Loretta E. Lynch, in her official capacity as the Attorney General of the United States; and the U.S. Department of Homeland Security.

Respondent Alexander Lora was the habeas corpus petitioner in the district court and appellee in the court of appeals.

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[1] Sarah R. Saldaña is substituted for her predecessor, Thomas S. Winkowski. See S. Ct. Rule 35.3.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 804 F.3d 601. The order of the district court (App., *infra*, 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 jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1226(c) provides in relevant part:

> (c) Detention of criminal aliens
>
> (1) Custody
>
> The Attorney General shall take into custody any alien who —
>
> [is inadmissible or deportable by reason of having committed certain criminal offenses or terrorist acts]
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides 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 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.

Ibid.

STATEMENT

A. Legal Framework

Congress has mandated the detention of certain criminal and terrorist aliens during proceedings to remove them from this country. Section 1226(c) directs that the Attorney General (now the Secretary of Homeland Security) "shall take into custody" aliens who are convicted of certain crimes or have engaged in certain terrorist activities. 8 U.S.C. 1226(c)(1). An alien detained under Section 1226(c) is given notice of and an opportunity to challenge his classification as such. See 8 C.F.R. 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). If Section 1226(c) applies, an alien's detention is generally mandatory until his removal proceedings are complete. The Secretary "may release" such an alien from custody "only if" (1) it 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 (2) "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2).

In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court sustained Section 1226(c)'s mandatory detention requirement against a due process challenge.

B. Facts And Procedural History

1. Respondent is a native and citizen of the Dominican Republic and a lawful permanent resident of the United States. App., *infra*, 9a. In July 2010, Respondent 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, the Department of Homeland Security (DHS) took respondent into custody and initiated removal proceedings. App., *infra*, 10a. An immigration judge concluded that respondent was subject to mandatory detention under 8 U.S.C. 1226(c) based on his drug convictions. App., *infra*, 11a.

Respondent filed a motion in New York state court to set aside his criminal convictions. App., *infra*, 11a. The court vacated those convictions and retroactively permitted respondent to 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. *Ibid.* As a result, respondent is eligible to seek cancellation of removal, see 8 U.S.C. 1229b, but he remains subject to mandatory detention under Section 1226(c). App., *infra*, 11a-12a.

2. On March 26, 2014, respondent filed a petition for a writ of habeas corpus in federal district court. App., *infra*, 40a. He raised three challenges to his Section 1226(c) detention. First, he argued—contrary to *In re Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001)—that Section 1226(c) did not apply to him because DHS did not take him into immigration custody until three years after he was released from physical custody by state authorities, rather than immediately when released. App., *infra*, 40a. Second, he argued—contrary to *In re Kotliar*, 24 I. & N. Dec. 124 (B.I.A. 2007), and *In re West*, 22 I. & N. Dec. 1405 (B.I.A. 2000)—that Section 1226(c) did not apply to him because he was never imprisoned and thus, in his view,

was never "released." App., *infra*, 41a. Finally, he argued that his detention without a bond hearing under Section 1226(c) violated due process. *Ibid.* The parties consented to magistrate judge jurisdiction over the case under 28 U.S.C. 636(c). App., *infra*, 36a.

The magistrate judge granted the habeas petition. App., *infra*, 35a-70a. The magistrate held that Section 1226(c) did not apply to respondent both because there was a gap between his criminal custody and immigration detention, and because he was sentenced only to probation rather than a prison term. *Id.* at 69a. The magistrate judge did not address respondent's due process claim.

After a bond hearing, respondent was released on $5000 bond. App., *infra*, 8a.

3. The court of appeals affirmed, albeit on different grounds. App., *infra*, 1a-34a. The court rejected the magistrate judge's holdings that Section 1226(c) did not apply to respondent. Joining the Third, Fourth, and Tenth Circuits, the Second Circuit held that Section 1226(c) applies "even where DHS does not immediately detain the alien after release from criminal custody." *Id.* at 25a-26a; see *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382 (4th Cir. 2012); *Olmos* v. *Holder*, 780 F.3d 1313, 1324 (10th Cir. 2015). The court further held that Section 1226(c) applies equally to aliens "sentenced to a prison term or to probation." App., *infra*, 19a.

The court of appeals nonetheless affirmed, on the basis of respondent's challenge to the duration of his detention. The court explained that every circuit court to have considered the issue agreed that detention without bond under Section 1226(c) is limited to a

"reasonable" time, but acknowledged that the circuits are "divided on how to determine reasonableness." App., *infra*, 28a. The Third and Sixth Circuits, the court explained, follow a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." *Id.* at 29a (quoting *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011)). By contrast, the court explained, the Ninth Circuit applies a "bright-line rule" that bond hearings are required by the six-month mark. *Id.* at 29a; see *Rodriguez* v. *Robbins*, 715 F.3d 1127 (9th Cir. 2013); see also *Rodriguez* v. *Robbins*, 804 F.3d 1060 (9th Cir. 2015); The court "join[ed] the Ninth Circuit in holding that mandatory detention for longer than six months without a bond hearing affronts due process." App., *infra*, 9a; see *id.* at 29a.

The court of appeals also "[f]ollow[ed] the Ninth Circuit" in holding that, in these newly-required bond hearings, "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." App., *infra*, 34a. Applying those rules, the court affirmed. Although "the length of [respondent's] detention fell just shy of the six-month mark" before he was released on bond, the court saw "no reason to remand this case so as to implicate the six-month rule." *Id.* at 34a n.24.

REASONS FOR GRANTING THE PETITION

This Court should hold this petition for a writ of certiorari pending the outcome of the government's petition for a writ of certiorari in *Jennings* v. *Rodriguez*, No. 15-___ (filed Mar. 25, 2016), which seeks review of the Ninth Circuit's decision in *Rodriguez* v. *Robbins*, 804 F.3d 1060 (2015).

This case presents the questions (1) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be given bond hearings if detention lasts six months; and (2) whether, in any such bond hearing, the criminal or terrorist alien is entitled to be released unless the government demonstrates by clear and convincing evidence that he is a flight risk or a danger to the community. The government's petition in *Rodriguez* presents those same two questions.

For the reasons set forth in the *Rodriguez* petition, these questions warrant this Court's review. The court of appeals' rulings conflict with Section 1226(c)'s text and purpose; they conflict with this Court's decision in *Demore* v. *Kim*, 538 U.S. 510 (2003); they solidify an acknowledged circuit split as to whether criminal aliens detained under Section 1226(c) must be given bond hearings at the six-month mark, see App., *infra*, 28a-29a (collecting cases); they create perverse incentives for criminal aliens to obstruct and delay their removal proceedings and thereby obtain the possibility of release that would otherwise be foreclosed; and they ensure that criminal aliens who Congress believed posed unacceptable risks of flight and danger to the community will be released if the government cannot prove flight risk or danger in each individual case by clear and convincing evidence.

This petition should be held for *Rodriguez*. First, *Rodriguez* is naturally the lead case for deciding these questions about Section 1226(c). *Rodriguez* is a class action with a significant evidentiary record. See 804 F.3d at 1083 (mentioning "years of discovery"). By contrast, this is an individual habeas corpus case in which the district court did not conduct discovery on

or address any length-of-detention questions, see App., *infra*, 35a-70a, and the issue was not extensively briefed by the parties in the court of appeals. Second, *Rodriguez* presents additional issues that warrant this Court's review. Among others, *Rodriguez* presents the question whether aliens subject to mandatory detention under 8 U.S.C. 1225(b)—including inadmissible aliens who are arriving for the first time at our Nation's borders—must be afforded bond hearings by the six-month mark of detention, and with it the possibility of release into the Nation's interior over the objection of the Department of Homeland Security. Those additional issues warrant this Court's review, but are not presented here.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the government's petition for a writ of certiorari in *Jennings* v. *Rodriguez*, No. 15-___ (filed Mar. 25, 2016), and then disposed of accordingly.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LEON FRESCO
Deputy Assistant Attorney General
ZACHARY D. TRIPP
Assistant to the Solicitor General
SARAH S. WILSON
KIMBERLY E. HELVEY
Attorneys

APRIL 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014
No. 14-2343-pr

ALEXANDER LORA, PETITIONER-APPELLEE

v.

CHRISTOPHER SHANAHAN, IN HIS OFFICIAL CAPACITY AS NEW YORK FIELD OFFICER DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; DIANE MCCONNELL, IN HER OFFICIAL CAPACITY AS ASSISTANT FIELD OFFICE DIRECTOR FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; THOMAS S. WINKOWSKI, IN HIS OFFICIAL CAPACITY AS PRINCIPAL DEPUTY ASSISTANT DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; JEH JOHNSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY; LORETTA E. LYNCH, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES;[1] AND THE U.S. DEPARTMENT OF HOMELAND SECURITY,[2] RESPONDENTS-APPELLANTS

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Loretta E. Lynch is automatically substituted for former Attorney General Eric H. Holder, Jr.

[2] The Clerk of the Court is directed to amend the caption as set forth above.

Argued: Apr. 20, 2015
Decided: Oct. 28, 2015

Appeal from the United States District Court
for the Southern District of New York.

No. 14 Civ. 2140(AJP) — Andrew J. Peck,
Magistrate Judge.

Before: KEARSE, PARKER, and WESLEY, *Circuit Judges.*

The government appeals from a judgment of the United States District Court for the Southern District of New York (Peck, Andrew J., *M.J.*)[3] granting Alexander Lora's petition for a writ of habeas corpus. Lora was detained pursuant to section 1226(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which mandates detention, while their removal proceedings are pending, of non-citizens who have committed certain criminal offenses. Because section 1226(c) is ambiguous, we defer to the Board of Immigration Authority's ("BIA's") interpretation that detention need not be immediate in order to be mandatory. We also find that the statute applies even if the non-citizen is not released from a custodial sen-

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[3] The parties consented to Magistrate Judge Andrew Peck's jurisdiction over the case under 28 U.S.C. § 636(c). (Dkt. Entry No. 9.)

tence. However, we hold that reading section 1226(c) to permit indefinite detention raises significant constitutional concerns, and to avoid them, we construe the statute to contain an implicit temporal limitation on the length of time a detainee can be held before being afforded an opportunity to seek bail. Affirmed.

CHRISTOPHER CONNOLLY (Sarah S. Normand, *on the brief*), Assistant United States Attorneys *for* Preet Bharara, United States Attorney for the Southern District of New York *for Respondents-Appellants*.

REBECCA A. HUFSTADER, Legal Intern, LUIS ANGEL REYES SAVALZA, Legal Intern, (Alina Das and Nancy Morawetz, *on the brief*), Washington Square Legal Services, Inc., NYU Law School, New York, NY; Bridget Kessler, Brooklyn Defender Services, Brooklyn, NY, *on the brief, for Petitioner-Appellee.*

AHILAN ARULANANTHAM, ACLU Immigrants' Rights Project, Los Angeles, CA; Judy Rabinovitz and Anand Balakrishnan, ACLU Immigrants' Rights Project, New York, NY; Alexis Karteron and Jordan Wells, New York Civil Liberties Union Foundation, New York, NY, *on the brief, for Amici Curiae American Civil Liberties Union; New York Civil Liberties Union.*

Andrea Saenz, Immigration Justice Clinic, Benjamin N. Cardozo School of Law, New York, NY, *for Amici Curiae the Bronx Defenders; Detention Watch Network; Families for Freedom; Immigrant Defense Project; Immi-*

grant Legal Resource Center; Kathryn O. Greenberg Immigration Justice Clinic; Make the Road New York; National Immigrant Justice Center; National Immigration Project of the National Lawyers Guild; Neighborhood Defender Service of Harlem; New Sanctuary Coalition of New York City; Northern Manhattan Coalition for Immigrant Rights.

Farrin R. Anello, Immigrants' Rights/International Human Rights Clinic, Seton Hall University School of Law, Newark, NJ, *for Amici Curiae Professors of Immigration and Constitutional Law.*

BARRINGTON D. PARKER, *Circuit Judge*

In 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress significantly expanded the categories of noncitizens subject to mandatory detention pending their removal proceedings.[4] Under section 1226(c) of the revised INA, the Department of Homeland Security ("DHS") is required to detain aliens who have committed certain crimes "when [they are] released." The section contains no explicit provision for bail.[5]

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[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009-585, 3009-598 to 3009-599; 8 U.S.C. § 1226(c), 1231(a) (1994 ed., Supp. V).

[5] Congress adopted section 1226(c) in an effort to strengthen and streamline the process of removing deportable criminal aliens "against a backdrop of wholesale failure by the INS to deal with

When the constitutionality of section 1226(c) was challenged in *Demore v. Kim*, 538 U.S. 510 (2003), statistics showed that removal proceedings were completed within forty-seven days in eighty-five percent of cases in which aliens were mandatorily detained. *Id.* at 529. Emphasizing the relative brevity of detention in most cases, the Court concluded that detention during removal proceedings was "constitutionally permissible." *Id.* at 531.

However, the passage of the IIRIRA, which, among other things, expanded the definition of criminal aliens and required states to provide notice of aliens who violate state criminal laws, combined with a simultaneous rise in immigration to the United States, has resulted in an enormous increase in the number of aliens taken into custody pending removal.[6] By 2009, Immigration and Customs Enforcement ("ICE") was imprisoning close to four hundred thousand aliens every

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increasing rates of criminal activity by aliens" and "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their removal proceedings." *Demore v. Kim*, 538 U.S. 510, 518-19 (2003).

[6] *See* U.S. Department of Justice, Office of the Federal Detention Trustee, *Detention Needs Assessment and Baseline Report: A Compendium of Federal Detention Statistics* 14 (2001), http://www.justice.gov/archive/ofdt/compendium_final.pdf ("The number of aliens ordered detained and taken into the custody of the INS pending removal from the United States or other outcome of an immigration proceeding increased from 72,154 during FY 1994 to 188,547 during FY 2001.").

year, two-thirds of whom were subject to mandatory detention under section 1226(c).[7] Not surprisingly, the time that each immigrant spends in detention has also risen substantially. In 2001, the average time an alien was detained from the initiation of removal proceedings to release or entry of a final order of removal was approximately thirty-nine days.[8] In 2003, the average detention time for most section 1226(c) detainees was approximately forty-seven days. *See Demore*, 538 U.S. at 529. Since then, the situation has worsened considerably. ICE has not provided statistics regarding the length of time that mandatory detainees spend in detention. It is clear, however, that today, a non-citizen detained under section 1226(c) who contests his or her removal regularly spends many months and sometimes years in detention due to the enormous backlog in immigration proceedings.[9]

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[7] *See* Dora Schriro, U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations* 2 (2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (stating that, as of report's publication date, over 370,000 noncitizens had been detained in the preceding fiscal year and estimating that 66% of detained noncitizens are held pursuant to mandatory detention).

[8] *Detention Needs Assessment and Baseline Report: A Compendium of Federal Detention Statistics, supra* note 6, at 15 n.41.

[9] *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 80-82 (2012) (discussing how immigrants may face prolonged detention as average case processing times now exceed one year).

There are thousands of individuals in immigration detention within the jurisdiction of this Court who languish in county jails and in short-term and permanent ICE facilities.

No doubt an appreciable number of these detainees have criminal records that subject them to mandatory deportation. Many in this group are dangerous or have no ties to a community. Congress was quite clear that it wanted such individuals detained pending deportation. On the other hand, this group includes non-citizens who, for a variety of individualized reasons, are not dangerous, have strong family and community ties, are not flight risks and may have meritorious defenses to deportation at such time as they are able to present them.

One such detainee is Alexander Lora, a lawful permanent resident ("LPR") and citizen of the Dominican Republic, who was convicted of drug related offenses, sentenced to probation, and taken into custody by ICE agents pursuant to section 1226(c), over three years into his five-year probation term. After four months in immigration custody, Lora petitioned for a writ of habeas corpus. He contended, among other things, that he was eligible to apply for bail because the mandatory detention provision of section 1226(c) did not apply to him because he had not been taken into custody "when released" and that indefinite incarceration without an opportunity to apply for bail violated his right to due process.

His petition was granted by the District Court (Peck, *M.J.*). Magistrate Judge Peck agreed with Lora's statutory argument, did not reach his constitutional argument, and ordered that Lora be afforded a bail hearing. At that hearing, the government did not contest his eligibility for bail. Following the parties' stipulation that Lora, who was gainfully employed and had substantial family ties to his community, was not dangerous and posed no risk of flight, the immigration judge ("IJ") ordered Lora's release conditioned on his posting a $5000 bond. This appeal followed.

The main issue of statutory construction driving this appeal is whether, as Lora argues and the District Court ruled, the "when released" provision of section 1226(c) applies only if the government takes an alien into immigration custody immediately following his release from a custodial sentence or whether, as the government argues, an alien is subject to mandatory detention even if DHS does not detain him immediately upon release. On this issue we agree with the government and conclude that Lora was subject to mandatory detention under section 1226(c).

However, we agree with Lora's constitutional argument. While the Supreme Court has held "that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *Demore*, 538 U.S. at 526, it has made clear that the indefinite detention of a noncitizen "raise[s] serious constitutional concerns" in

that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas v. Davis*, 533 U.S. 678, 682, 690 (2001). Following this guidance, we hold that, in order to avoid significant constitutional concerns surrounding the application of section 1226(c), it must be read to contain an implicit temporal limitation. In reaching this result, we join every other circuit to have considered this issue.[10] Specifically, we join the Ninth Circuit in holding that mandatory detention for longer than six months without a bond hearing affronts due process. S*ee Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).[11] Accordingly, we affirm the District Court's decision to grant the petition.

BACKGROUND

Lora entered the United States as a lawful permanent resident ("LPR") from the Dominican Republic in 1990 when he was seven years old. For the next nineteen years, Lora lived continuously in Brooklyn, New York where he has a large family network, including his U.S. citizen fiancée, chronically-ill U.S. citizen mother, LPR father, and U.S. citizen brother and sis-

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[10] The government, too, agrees that aliens cannot be detained indefinitely. Gov't Reply Br. at 25.

[11] Lora was detained for five-and-a-half months, and it is certain that, were he to be returned to custody, his total period of detention would exceed six months.

ter. Lora has two sons whom he supports: a two-year-old son who is a U.S. citizen and lives in the United States and an eight-year-old son who lives in the Dominican Republic. During the nearly two decades that Lora has spent in this country, he attended school and worked in grocery stores to support himself and his family.

In July 2009, while working at a grocery store, Lora was arrested with one of his co-workers and charged with several New York state offenses relating to cocaine possession. In July 2010, Lora pled guilty to criminal possession of cocaine with intent to sell, criminal possession of cocaine with an aggregate weight of one ounce or more, and criminal use of drug paraphernalia in violation of New York Penal Law §§ 220.16, 220.50. Lora was sentenced to five years of probation. He was not sentenced to any period of incarceration and he did not violate any of the conditions of his probation.

On November 22, 2013, over three years into his probation term, ICE agents arrested Lora in an early morning raid in the Brooklyn neighborhood where he was living at the time. After the agents took Lora into custody, he was transferred to Hudson County Correctional Center in Kearny, New Jersey, where he was detained without bond. Lora was charged with removability under INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), for having been convicted of a crime involving a controlled substance, and INA

§ 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, namely, trafficking in a controlled substance as defined in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). DHS took the position that Lora's removal charges rendered him subject to mandatory detention under section 1226(c) and that he was not eligible for a bail hearing.

While his removal proceedings were pending, Lora moved in New York state court to set aside his conviction. His motion was granted on consent and in March 2014, his original plea and sentence were vacated. Lora was then permitted to plead to a minor offense—a single count of third degree possession of a controlled substance—and was re-sentenced to a conditional discharge imposed *nunc pro tunc* to July 21, 2010. With this new sentence, Lora now has a strong argument for cancellation of removal under 1226(c) because third degree possession is a Class B felony under N.Y. Penal Law § 220.16(12) and does not qualify as an aggravated felony for immigration purposes under 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1228b.[12] However,

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[12] *See* 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony."). Lora was admitted to the United States in 1990, has worked and resided in this country ever since, and has strong family ties and responsibilities including serving as the

he is still technically subject to mandatory detention under section 1226(c) because he had been convicted of a crime involving a controlled substance under 8 U.S.C. § 1227(a)(2)(B)(i). In March 2014, Lora requested that he be permitted to file an application for cancellation of removal and that he be afforded a bail hearing. The IJ granted Lora's request to file for cancellation of removal but denied Lora's request for a bail hearing.[13]

At the same time, Lora filed a petition for a writ of habeas corpus, challenging his continued detention. Lora argued that he was not subject to mandatory detention under section 1226(c), which requires an alien to be taken into DHS custody "when the alien is released" because DHS did not take him into custody at the precise time "when" he was released on his underlying convictions, but years later, and that he could not have been detained when he was "released" because he was never incarcerated or kept in physical custody following his triggering conviction. Lora also argued

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primary caretaker of his U.S. citizen son. *See* March 26, 2014, Declaration of Talia Peleg, Esq. ("Given Mr. Lora's residence in the United States as a green card holder, his strong family and community ties here, and other relevant factors, it is my opinion that he has a strong defense to his deportation.").

[13] Lora's cancellation of removal proceedings are still pending, but because he is no longer detained, his removal proceedings have been taken off of the expedited track. Due to a backlog in non-detained removal proceedings, his merits hearing on his application for cancellation of removal is currently scheduled for January 2018.

that his continued imprisonment without a bail hearing raised constitutional concerns under the Due Process Clause of the Fifth Amendment in light of his substantial defenses to removal and the strong possibility of his indefinitely prolonged detention. Finally, Lora raised the alternative argument that his continued detention was not in the public interest, and that he should be released on parole.

The District Court granted Lora's petition, holding that section 1226(c)'s "clear language" requires that DHS detain aliens immediately upon their release from criminal custody, and because Lora was not detained until years after the criminal conviction that formed the basis of his removal charge, he was not subject to mandatory detention. In the alternative, the District Court also found that Lora was not subject to mandatory detention because he did not serve a post-conviction custodial sentence in connection with his criminal offense and so was never "released" from custody. The District Court directed the government to provide Lora with an individualized bail hearing by May 15, 2014, which was the date of his next hearing before the IJ. The government did not seriously dispute that Lora was neither a flight risk nor a danger to the community and the IJ ordered that Lora be released from custody after posting a $5000 bond. Insofar as the record reveals, since being admitted to bail, Lora remains gainfully employed, tied to his community and poised to contest his removability once

DHS clears its backlog sufficiently to afford him a hearing.

The government appeals, contesting the District Court's interpretation of section 1226(c). The government maintains that, even though Lora no longer stands convicted of an aggravated felony, he is still deportable and subject to mandatory detention as a result of his conviction under a law relating to a controlled substance. Notably, the government does not take the position that it should be permitted to hold immigrants indefinitely. Rather, it contends that due process requires a "fact-dependent inquiry" as to the allowable length of detention and there should be no bright-line rule for when detention becomes presumptively unreasonable. Gov't Reply Br. at 25.

DISCUSSION

When the government seeks removal of an alien, an IJ can ordinarily conduct a bail hearing to decide whether the alien should be released or imprisoned while proceedings are pending. However, 8 U.S.C. § 1226(c) requires the mandatory detention, for the duration of their removal proceedings, of aliens convicted of certain crimes. The portion of section 1226(c)(1) applicable to Lora provides:

> (1) Custody
>
> The Attorney General shall take into custody any alien who . . .

> (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 [*i.e.* specified offenses including controlled substance offenses]; . . . *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary [for certain witness protection purposes], and the alien 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. . . .

8 U.S.C. § 1226(c)(1)-(2) (emphasis added).

Thus, detention without a bail hearing under section 1226(c) is mandatory unless DHS determines that an alien falls within a narrow witness-protection exception not applicable here. *See* 8 U.S.C. § 1226(c)(2). However, the clause in paragraph (1), "when the alien is released," has been the source of persistent confusion and extensive litigation in this Circuit and elsewhere.

This case calls for us to decide: (1) whether an alien is subject to mandatory detention only if he or she

has been sentenced to and "released" from prison or some form of physical custody; and (2) whether an alien is subject to mandatory detention if there is a gap between the alien's being on post-conviction release and his or her confinement by DHS.[14] Although these are issues of first impression for this Court, other circuits as well as numerous district courts, both within and outside of this Circuit, have addressed the issue but remain divided on how to apply section 1226(c).[15]

Meaning of "Released"

The government argues that the Court should reject the District Court's holding that Lora is not sub-

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[14] Because this appeal raises questions of law as to the interpretation of 8 U.S.C. § 1226(c), we review the District Court's decision on how to interpret the statute *de novo*. *See Puello v. Bureau of Citizenship & Immigration Servs*., 511 F.3d 324, 327 (2d Cir. 2007).

[15] *Compare Olmos v. Holder*, 780 F.3d 1313, 1324 (10th Cir. 2015) (holding that even if there was a delay after alien was released before the alien was taken into immigration custody, mandatory detention still applies), *and Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 156-61 (3d Cir. 2013) (holding that immigration officials do not lose authority to impose mandatory detention if they fail to do so "when the alien is released"), *and Hosh v. Lucero*, 680 F.3d 375, 378-84 (4th Cir. 2012) (holding that a criminal alien who is not immediately taken into immigration custody after his release from criminal custody is not exempt from section 1226(c)'s mandatory detention provision), *with Castañeda v. Souza*, 769 F.3d 32 (1st Cir. 2014) (interpreting "when" as signifying that DHS can subject an alien to mandatory detention only if it detains the alien at or around the time the alien is released from criminal custody), *reh'g en banc granted, opinion withdrawn*, Jan. 23, 2015.

ject to mandatory detention because he was never "released" from a post-conviction sentence of incarceration. The government relies on two BIA cases in which the Board determined that the word "released" in section 1226(c) includes pre-conviction release from arrests.[16] *See In re Kotliar*, 24 I. & N. Dec. 124, 125 (2007) ("[W]e have held that an alien who is released from criminal custody[,] . . . including from an arrest preceding a conviction, . . . is subject to mandatory detention."); *In re West*, 22 I. & N. Dec. 1405, 1410 (2000). *West* and *Kotliar* also suggest that the alien must be released from some form of physical custody for § 1226(c)(1) to apply. *See, e.g.*, *West*, 22 I. & N. Dec. at 1410 ("[W]e construe the word 'released' . . . to refer to a release from physical custody."). The government urges that, consistent with these cases, "released" can refer to a release from pre-conviction confinement, such as an arrest.

Because we find that section 1226(c)(1) unambiguously mandates detention in this circumstance for other reasons, we need not confront the BIA decisions or the government's interpretation of them. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). "[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and

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[16] The Third Circuit has deferred to the BIA's interpretation and has held that a pre-conviction release following arrest satisfies section 1226(c)'s release requirement. *See Sylvain*, 714 F.3d at 161.

found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987)). A natural reading of the statute suggests that the term "released" in section 1226(c) means not incarcerated, not imprisoned, not detained, i.e., not in physical custody. *See Demore*, 538 U.S. at 513 ("Congress[was] justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings. . . . "). Thus, detention is mandated once an alien is convicted of a crime described in section 1226(c)(1) and is not incarcerated, imprisoned, or otherwise detained. This interpretation avoids nullifying the provision in section 1226(c)(1) that DHS "shall take into custody any alien who . . . is inadmissible [or] is deportable by reason of having committed [a certain type of crime] . . . when the alien is released, *without regard to whether the alien is released on parole, supervised release, or probation*" (emphasis added)—which clearly contemplates noncarceral sentences. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that statutes should be read to avoid making any provisions "superfluous, void, or insignificant" (internal quotation marks omitted)). Moreover, where Congress has intended to limit detention to aliens sentenced to a certain prison term, it has done so explicitly. *See, e.g.*, 8 U.S.C. § 1182(a)(2) (alien is not eligible for a visa or admission if the alien has committed a crime involving moral

turpitude for which a sentence of at least six months has been imposed). Accordingly, we conclude that an alien who has been convicted of a qualifying crime under section 1226(c) is subject to mandatory immigration detention, whether he is sentenced to a prison term or to probation.

"When" the Alien is Released

The government next argues that the District Court wrongly interpreted the word "when" in the "when the alien is released" clause of section 1226(c) as imposing a temporal limit on DHS's obligation to mandatorily detain non-citizens. Because Lora was not taken into immigration custody until more than three years after his July 2010 criminal conviction and sentencing, the District Court found that he was outside the reach of the statute and so was eligible for bail.

This single issue consists of two inquiries: (1) whether "when . . . released" contemplates detainment immediately upon release, or merely at some time after release, and (2) whether, notwithstanding the meaning of "when . . . released," the statute imposes a temporal restriction on the agency's authority and duty to detain an alien. Because we defer to the BIA's interpretation that "when . . . released" does not impose a temporal restriction on the agency's authority and duty to detain an alien, we need not decide the meaning of "when . . . released."

Over a decade ago, the BIA, the agency charged with administering this statute, considered a challenge

from a detainee to his mandatory detention. *See In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001). The detainee argued that because he had not been taken into custody "when . . . released," as directed by section 1226(c)(1), he was not subject to mandatory detention under section 1226(c)(2). *Id.* at 118. The BIA declined to consider whether "when . . . released" meant immediately upon release or merely sometime after the detainee was released, and instead agreed with the government that regardless of the proper interpretation of "when . . . released," the text, structure, history, and purpose of the statute all suggested that Congress did not intend the "when . . . released" clause to limit the authority of agents to detain an alien. *Id.* at 121-25. Under the BIA's interpretation, "when . . . released" refers to the time at which the duty to detain arises, and does not place a temporal limit on the agents' authority to detain an alien—thus, 1226(c)(2) mandates detainment even if DHS does not detain the alien immediately upon release. *Id.* at 123-24. This has been referred to in this Circuit as the "duty-triggering" construction, while Lora argues for what has been referred to as the "time-limiting" construction. *See Straker v. Jones*, 986 F. Supp. 2d 345, 352-53 (S.D.N.Y. 2013).

Because we are faced with an administrative agency's interpretation of a statute, we follow the two-step *Chevron* inquiry. *See Chevron*, 467 U.S. at 842-44. If we find, based on the plain language of the statute, that "the intent of Congress is clear, that is the end of

the matter." *Id.* at 842. However, if we find that the statute is silent or ambiguous with respect to the specific issue, we will proceed to the second step: determining "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We defer to the BIA's interpretation so long as it is "reasonable, and not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (quoting *Chevron*, 467 U.S. at 844). The government argues that, because the statute is ambiguous, the District Court should have followed the BIA's reasonable interpretation. We agree.

At the first step of the *Chevron* inquiry, we have little trouble concluding that it is ambiguous whether "when . . . released" should be given the "duty-triggering" construction or the "time-limiting" construction. The BIA agrees. *Rojas*, 23 I. & N. Dec. at 120. And the Supreme Court has long recognized that the word "when" may alternatively mean "the precise time when a particular act must be performed," or "the occurrence which shall render that particular act necessary." *United States v. Willings*, 8 U.S. 48, 55 (1807).

As the BIA recognized, it is unclear from the text of section 1226(c) whether the "when . . . released" clause is part of the definition of aliens subject to mandatory detention. *Rojas*, 23 I. & N. Dec. at 120. Section 1226(c) requires that DHS take custody of

aliens convicted of four categories of predicate criminal or terrorist acts and offenses ("A" through "D") when they are released and that DHS may not "release an alien described in paragraph (1)" unless that alien falls under an exception for protected witnesses. But it is not clear whether the phrase "an alien described in paragraph (1)" refers to the aliens described in categories "A" through "D," as the government argues, or to aliens who both qualify under these subcategories and were taken into immigration custody "when . . . released" from custody, as Lora argues. Noting this difficulty, the Tenth Circuit has described how the "when . . . released" phrase can be considered adverbial, modifying the opening verb phrase "the [DHS] shall," or it can be considered adjectival, modifying the noun phrases in categories (A) through (D). *See Olmos*, 780 F.3d at 1318-19.

Because we find that Congress has not directly spoken on the meaning or application of "when . . . released" in this statute, we must consider whether the BIA's interpretation of section 1226(c) is permissible and thus entitled to *Chevron* deference. *See Khouzam v. Ashcroft*, 361 F.3d 161, 164 (2d Cir. 2004). In *Rojas*, the alien argued that he was not subject to mandatory detention under section 1226(c) because immigration authorities did not take him into custody until two days after his release. To resolve the statute's ambiguity, the BIA used four separate approaches to analyze section 1226(c): (1) the ordinary meaning of the statute's language, although that language

was ambiguous;[17] (2) the overall statutory context and goals; (3) the statute's predecessor provisions; and (4) practical considerations. *Rojas*, I. & N. Dec. at 121-24. The BIA, while not deciding whether "when . . . released" meant immediately upon release or something else, concluded that "the duty to detain is not affected by the character of an alien's release from criminal incarceration," *id.* at 121, and "that [the alien was] subject to mandatory detention pursuant to section [1226(c)] of the Act, despite the fact that he was not taken into [immigration] custody immediately upon his release from state custody," *id.* at 127.[18] Consistent with *Chevron*, we are not convinced that the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Adams*, 692 F.3d at 95 (internal quotation marks and citation omitted). As the BIA explained in *Rojas*, "[i]t is difficult to conclude

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[17] *See Rojas*, 23 I. & N. Dec. at 120 ("We find the statutory provision, when read in isolation, to be susceptible to different readings.").

[18] As the Supreme Court explained in *Demore*, 538 U.S. at 518, Congress adopted section 1226(c) in response to its frustration with criminal aliens' ability to avoid deportation if they were not already in DHS custody when removal proceedings were completed and its concern that criminal aliens who are not detained continue to commit crimes. *See* S. Rep. No. 104-48, 1995 WL 170285, at *14, *23 (1995). The BIA relied on this history and concluded, "we discern that the statute as a whole is focused on the removal of criminal aliens in general, not just those coming into [INS] custody 'when . . . released' from criminal incarceration." *Rojas*, 23 I. & N. Dec. at 122 (second alteration in original).

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." 23 I. & N. Dec. at 128.

Moreover, the BIA's interpretation of section 1226(c) follows Supreme Court precedent establishing that statutes providing "that the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003). "[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); *see also United States v. Montalvo-Murillo*, 495 U.S. 711 (1990) (holding that the government may detain criminal defendants leading up to trial even if they do not comply with the relevant statute's command that a judicial officer "shall" hold a bail hearing "immediately upon the person's first appearance" before the officer); *Sylvain*, 714 F.3d at 157-59 (applying *Barnhart* and *Montalvo-Murillo* to section 1226(c) and concluding that "the government retains authority under [section 1226(c)] despite any delay").

Finally, the BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute. Particularly for

criminal aliens in state custody, it is unrealistic to assume that DHS will be aware of the exact timing of an alien's release from custody, nor does it have the resources to appear at every location where a qualifying alien is being released. State and local law enforcement may also have difficulty determining citizenship, since records of arrests and convictions may be incomplete in this regard. Accordingly, we join the Third, Fourth, and Tenth Circuits in holding that DHS retains its authority and duty to detain an alien even if not exercised immediately upon the alien's release.[19] Regardless of whether "when . . . released" contemplates detainment immediately upon release or merely sometime after release, we adopt the "duty-triggering" construction, and hold that an alien may be subject to mandatory detention even where DHS does not immediately detain the alien after release from criminal custody.[20]

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[19] *See, e.g., Sylvain*, 714 F.3d at 161 ("[E]ven if the statute calls for detention 'when the alien is released,' . . . nothing in the statute suggests that officials lose authority if they delay."); *Hosh*, 680 F.3d at 382 ("The negligence of officers, agents, or other administrators, or any other natural circumstance or human error that would prevent federal authorities from complying with § 1226(c), cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate.").

[20] Lora also argues that the BIA's analysis is unreasonable in light of the constitutional concerns it raises by giving the government limitless authority to deny bond hearings. However, in making this argument, Lora misconstrues Justice Kennedy's concurrence in *Demore*, which observed that due process concerns could

Whether 8 U.S.C. § 1226(c) Authorizes Mandatory Detention Beyond Six Months Without a Bail Hearing

Because the District Court decided in Lora's favor on statutory grounds, it did not reach his constitutional argument.[21] As noted, Lora also argued below and argues to this Court that his indefinite detention without being afforded a bond hearing would violate his right to due process. We agree. Significantly, the distance between Lora and the government on this issue is not large: the government does not advocate for indefinite detention nor does it contest the view that, in order to avoid serious constitutional concerns, an implicit time limitation must be read into section 1226(c).

It is well-settled that the Fifth Amendment entitles aliens to due process in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). "[T]he Due Process Clause applies to all 'persons' within the

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arise if there was an unreasonable delay by ICE in deportation proceedings. 538 U.S. at 532 (Kennedy, J., concurring). Justice Kennedy's observations were relevant to how long an alien is kept in custody, not when the custody must start or whether there may be a gap between release from criminal custody and commencement of immigration custody. *Id.* at 532-33.

[21] The issue was briefed by the parties below, and we may affirm a district court's decision "on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *See Mauro v. S. New England Telecomms., Inc.*, 208 F.3d 384, 387 n.2 (2d Cir. 2000) (per curiam) (internal quotation marks omitted).

United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (considering a challenge to post-removal detention). As noted, more than a decade ago, in *Zadvydas*, the Supreme Court signaled its concerns about the constitutionality of a statutory scheme that ostensibly authorized indefinite detention of non-citizens. *Id.* Two years later, when the court upheld the constitutionality of section 1226(c) in *Demore v. Kim*, it emphasized that, for detention under the statute to be reasonable, it must be for a brief period of time. *See, e.g.*, 538 U.S. at 528 (detention permissible because, as compared to *Zadvydas*, "the detention here is of a much shorter duration"). Justice Kennedy explained in his concurrence that "[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532-33 (Kennedy, J., concurring).

These cases clearly establish that mandatory detention under section 1226(c) is permissible, but that there must be some procedural safeguard in place for immigrants detained for months without a hearing. Accordingly, we join every other circuit that has considered this issue, as well as the government, in concluding that in order to avoid serious constitutional concerns, section 1226(c) must be read as including an

implicit temporal limitation. *See, e.g.*, *Rodriguez*, 715 F.3d at 1137 ("[I]n several decisions over the past decade . . . we have consistently held that *Demore's* holding is limited to detentions of brief duration."); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011) (applying canon of constitutional avoidance to "conclude that the statute implicitly authorizes detention for a reasonable amount of time"); *Ly v. Hansen*, 351 F.3d 263, 267-68, 271 (6th Cir. 2003) (noting that *Demore* "is undergirded by reasoning relying on the fact that [the alien in the case], and persons like him, will normally have their proceedings completed within a short period of time" and the case must be understood as only authorizing detention for brief periods of time).

However, while all circuits agree that section 1226(c) includes some "reasonable" limit on the amount of time that an individual can be detained without a bail hearing, courts remain divided on how to determine reasonableness. This Court has not yet had the opportunity to decide which approach to follow. The first approach, employed by the Third and Sixth Circuits and favored by the government, calls for a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case," to determine whether detention without an individualized hearing is unreasonable. *Diop*, 656 F.3d at 234; *see also Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 475 n.7 (3d Cir. 2015) (explaining "the highly fact-specific nature" of the balancing framework). Under this

approach, every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the "reasonableness" threshold, thus entitling him to a bail hearing.

In contrast, the second approach, adopted by the Ninth Circuit, is to apply a bright-line rule to cases of mandatory detention where the government's "statutory mandatory detention authority under Section 1226(c) . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness." *Rodriguez*, 715 F.3d at 1133. We believe that, considering the relevant Supreme Court precedent, the pervasive confusion over what constitutes a "reasonable" length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous, the interests at stake in this Circuit are best served by the bright-line approach.

First, *Zadvydas* and *Demore*, taken together, suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention. In *Zadvydas*, the Court held that six months was a "presumptively reasonable period of detention" in a related context, namely post-removal-determination detention. 533 U.S. at 700-01 (finding that there was "reason to believe . . . that Congress previously doubted the

constitutionality of detention for more than six months"). After that point, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* In *Demore*, the Court held that section 1226(c) authorized mandatory detention only for the "limited period of [the alien's] removal proceedings." 538 U.S. at 531. At that time (2003), the "limited period" referred to "last[ed] roughly a month and a half in the vast majority of cases in which [section 1226(c) was] invoked, and about five months in the minority of cases in which the alien cho[se] to appeal." *Id.* at 529-30; *see Rodriguez*, 715 F.3d at 1138 ("As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months.").

Secondly, the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis weighs, in our view, in favor of adopting an approach that affords more certainty and predictability. Notably, the Supreme Court has recognized that bright-line rules provide clear guidance and ease of administration to government officials. *See, e.g., Zadvydas*, 533 U.S. at 700-01 (adopting six-month rule "for the sake of uniform administration," while also noting that it would limit the need for lower courts to make "difficult judgments"). C*ompare, e.g., Martin v. Aviles*, No. 15

Civ. 1080 (AT) (AJP), 2015 WL 3929598, at *2-3 (S.D.N.Y. June 15, 2015) (holding an alien for over a year without a bond hearing violated his due process rights), *and Minto v. Decker*, No. 14 Civ. 07764 (LGS) (KNF), 2015 WL 3555803, at *7 (S.D.N.Y. June 5, 2015) ("Because Petitioner's detention has exceeded twelve months—in the absence of any evidence that Petitioner might be a flight risk or a danger to the community—he is entitled to an individualized bond hearing."), *and Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (ordering bond hearing after eight months detention), *and Scarlett v. DHS*, 632 F. Supp. 2d 214, 223 (W.D.N.Y. 2009) (five years detention unreasonable), *with Johnson v. Orsino*, 942 F. Supp. 2d 396 (S.D.N.Y. 2013) (fifteen month detention not unreasonable), *and Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y. 2010) (nearly three years of detention not unreasonable). Adopting a six-month rule ensures that similarly situated detainees receive similar treatment. Such a rule avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years.

Moreover, while a case-by-case approach might be workable in circuits with comparatively small immigration dockets, the Second and Ninth Circuits have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes

of their immigration dockets.[22] With such large dockets, predictability and certainty are considerations of enhanced importance and we believe that the interests of the detainees and the district courts, as well as the government, are best served by this approach.

Finally, without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families. Lora is one such example. As noted, he is a LPR who has resided in and been extensively tied to his community for twenty-five years. During his years in this country, Lora has remained gainfully employed and has attended school. He is in jeopardy of removal as a consequence of what now stands as a conviction in 2009 for third degree possession of a controlled substance for which he received a conditional discharge. No principled argument has been mounted for the notion that he is either a risk of flight or is dangerous. Instead, the record suggests that Lora is an excellent candidate for cancellation of removal pursuant to 8 U.S.C. § 1229b(a). He is the primary caretaker of a two-year-old U.S. citizen son who was placed in foster care while Lora was in detention; he has no arrest record aside from this nonviolent drug offense conviction; he has been gainfully

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[22] *See* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. Sch. L. Rev. 13, 14 (2006).

employed for over two decades while he has resided in the United States.[23]

For these reasons, we hold that, in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention. Following the Ninth Circuit, we also hold that the detainee must be admitted to bail unless the gov-

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[23] Amici in this case cite multiple other examples of immigrants whose lives and whose families' lives have been upended by DHS's enforcement of section 1226(c) without judicially imposed procedural safeguards. There is the case of a LPR who was arrested by ICE, without warning, nearly nine years after the most recent conviction for which ICE charged him as deportable, and five days before his girlfriend gave birth to their second child. He was detained for eleven months without a bond hearing before his habeas petition was finally decided while his companion struggled to raise his three children in a homeless shelter. *See Baker v. Johnson*, No. 14 Civ. 9500 (LAP), 2015 WL 2359251 (S.D.N.Y. May 15, 2015). Amici also cite the example of an immigrant from Trinidad and Tobago who was detained by ICE without bond following his arrest on a dismissed criminal charge for seven months before the district court ordered that he be provided with a bond hearing. *See Straker*, 986 F. Supp. 2d 345. During those seven months, his daughter was left without a primary caretaker. The fact that there are over 30,000 immigrants in ICE custody in the United States on an average day and many of those individuals are parents and primary caregivers of U.S. citizen children gives some indication of section 1226(c)'s scope and potential impact. We are confident that the government also does not wish for the type of outcomes described above and does not favor a regime that perpetuates them.

ernment establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community. *Rodriguez*, 715 F.3d at 1131.[24]

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the District Court.

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[24] In the present case, the length of Lora's detention fell just shy of the six-month mark: he was detained by ICE on November 22, 2013, and granted bond on May 8, 2014. Because of the length of Lora's appeal, this Court sees no reason to remand this case so as to implicate the six-month rule.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 14 Civ. 2140 (AJP)

ALEXANDER LORA, PETITIONER

v.

CHRISTOPHER SHANAHAN, ET AL., RESPONDENTS

Signed: Apr. 29, 2014

OPINION & ORDER

ANDREW J. PECK, United States Magistrate Judge:

Petitioner Alexander Lora seeks a writ of habeas corpus from his November 22, 2013 detention by the United States Department of Homeland Security ("DHS"), Bureau of Immigration and Customs Enforcement ("ICE"). (*See* Dkt. No. 2: Pet. ¶¶ 2-5.) Lora is being detained pursuant to Section 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which requires mandatory detention of certain criminal aliens for the duration of their removal proceedings. 8 U.S.C. § 1226(c)(1). Lora argues that his detention is not authorized by § 1226(c) and

seeks an order directing the government to provide him with an individualized bond hearing. (*See* Pet. ¶¶ 6-11, Wherefore ¶ 3.) This case requires the Court to interpret the meaning of the phrase "when the alien is released," an issue that has split the courts. The parties have consented to my decision of this case pursuant to 28 U.S.C. § 636(c). (Dkt. No. 9: 4/10/14 Consent to Magistrate Judge Jurisdiction.)

For the reasons set forth below, Lora's petition is *GRANTED* and the government is directed to provide Lora with an individualized bond hearing by May 15, 2014 (when he already is scheduled for a conference before an Immigration Judge).

FACTS

Lora came to the United States from the Dominican Republic in May 1990 at the age of seven, and has been a lawful permanent resident since that time. (Dkt. No. 2: Pet. ¶¶ 1-2, 24-25; Pet. Ex. A: Peleg 3/26/14 Aff. ¶ 2; Pet. Ex. B: Lora Aff. ¶¶ 2-3.) Lora grew up in New York City and has worked steadily as an adult. (Pet. ¶¶ 25-26, 36; Lora Aff. ¶¶ 11, 15.) Lora has a large network of family in the New York area, including his fiancé, chronically-ill mother and two-year-old son. (Pet. ¶¶ 27-33; Lora Aff. ¶¶ 3-8, 10; Pet. Ex. C: Ramirez Aff. ¶¶ 3-10; Pet. Ex. D: Rankl Aff. ¶¶ 1, 3-7.) Since Lora's detention, his sister takes care of his two-year-old. (Pet. ¶ 32; Lora Aff. ¶¶ 8-9; Ramirez Aff. ¶ 7; Rankl Aff. ¶¶ 14-15.)

Lora's Criminal History

On July 10, 2009, Lora was arrested on drug related charges while at work. (Dkt. No. 2: Pet. ¶ 34 & Ex. B: Lora Aff. ¶¶ 13-14.) Lora posted bail and was released on July 12, 2009. (Lora Aff. ¶ 14; Dkt. No. 6: Peleg 4/7/14 Aff. ¶ 3 & Ex. A: Bail Receipt.)

On July 21, 2010, Lora pleaded guilty and was convicted of third degree possession of a controlled substance, third degree possession of a controlled substance with intent to distribute, and third degree use of paraphernalia suitable for packing controlled substances. (Pet. ¶ 35; Lora Aff. ¶ 14.) Lora was sentenced to probation; he was not sentenced to any period of incarceration, was never taken into custody and never violated any terms of his probation. (Pet. ¶¶ 35-36; Lora Aff. ¶¶ 14-15.)[1]

Lora's motion for post-conviction relief based on violations of his state and federal constitutional rights was granted on consent. (Pet. ¶¶ 43-44; Pet. Ex. A: Peleg 3/26/14 Aff. ¶ 5; Pet. Ex. I: 3/14/14 Stip. & Waiver.) Lora's July 2010 conviction was vacated and, on March 14, 2014, Lora pleaded guilty and was convicted of third degree possession of a controlled substance. (Pet. ¶ 44; Peleg 3/26/14 Aff. ¶ 5; Lora Aff.

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[1] Lora was sentenced to three years probation on the paraphernalia conviction and five years probation on each of the two possession convictions. (Pet. ¶ 35; Lora Aff. ¶ 14.)

¶ 21; Pet. Ex. I: 3/14/14 Stip. & Waiver.)[2] Lora was sentenced to a conditional discharge imposed *nunc pro tunc* to July 21, 2010. (Pet. ¶ 44; Peleg 3/26/14 Aff. ¶ 5; Pet. Ex. I: 3/14/14 Stip. & Waiver.)

Lora's ICE Detention and Removal Proceedings

On November 22, 2013, over three years into his probation term, ICE agents took Lora into custody on the street corner in front of his girlfriend's house. (Dkt. No. 2: Pet. ¶¶ 37-39; Pet. Ex. B: Lora Aff. ¶¶ 15-20; Pet. Ex. D: Rankl Aff. ¶¶ 8-11.) ICE charged Lora with being deportable under 8 U.S.C. § 1227(a)(2)(B)(i) for his conviction of any law relating to a controlled substance, and preliminarily determined that he was subject to mandatory detention. (Pet. ¶¶ 40-41; Pet. Ex. F: Notice to Appear; Pet. Ex. G: 11/22/13 Notice of Custody Determination.)[3]

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[2] "A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses . . . one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more. . . . Criminal possession of a controlled substance in the third degree is a class B felony." Penal Law § 220.16(12).

[3] DHS originally charged Lora with being deportable on a second basis, namely, his possession with intent to distribute conviction, an aggravated felony under INA § 237(a)(2)(A)(iii). (Pet. ¶ 40 & Ex. F: Notice to Appear at 3.) ICE later amended Lora's deportation grounds to eliminate the aggravated felony charge as a result

Lora appeared with counsel at his initial immigration court hearing on December 3, 2013, during which ICE took the position that Lora was subject to mandatory detention and was not eligible for a bond hearing. (Pet. ¶ 42 & Ex. A: Peleg 3/26/14 Aff. ¶ 4.) After the initial hearing, Lora's counsel successfully moved to vacate Lora's prior convictions in state court, as described above. (*See* pages 2-3 above.)

Based on the vacatur of his prior convictions, Lora's counsel contends that Lora is now eligible for discretionary relief in the form of cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a). (Peleg 3/26/14 Aff. ¶ 6; Peleg 4/7/14 Aff. ¶ 5.)[4] On March 18, 2014, Lora's counsel wrote to ICE describing the changed circumstances and requesting prosecutorial discretion, which was denied on April 4, 2014. (Pet. ¶ 45; Peleg 3/26/14 Aff. ¶ 7; Pet. Ex. E: 3/18/14 Letter Request; Peleg 4/7/14 Aff. ¶ 7 & Ex. C: 4/4/14 ICE Letter.)

At an immigration court hearing on March 26, 2014, Lora's counsel argued that Lora was not subject to mandatory detention because he was not taken into custody "when" he was "released," as required under 8 U.S.C. § 1226(c)(1). (Pet. ¶ 46; Peleg 3/26/14 Aff.

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of the vacatur of that conviction. (Dkt. No. 6: Peleg 4/7/14 Aff. ¶ 5.)

[4] Under INA § 240A(a), DHS has the discretion to cancel an alien's removal if, *inter alia*, he "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

¶ 10.) ICE maintained that Lora was subject to mandatory detention based on his possession conviction. (Pet. ¶ 46; Peleg 3/26/14 Aff. ¶ 10.) Relying on Board of Immigration Appeals ("BIA") binding precedent, Immigration Judge ("IJ") Alan Page ruled that Lora is subject to mandatory detention and ineligible for a bond hearing. (Pet. ¶ 46; Peleg 3/26/14 Aff. ¶ 10; Peleg 4/7/14 Aff. ¶ 4 & Ex. B: IJ Page's Custody Order.) IJ Page agreed that Lora is now eligible to apply for cancellation of removal under 8 U.S.C. § 1229b(a), but has not yet scheduled a hearing to consider the merits of Lora's application. (Peleg 4/7/14 Aff. ¶¶ 5-6.)

To date, Lora remains in ICE custody. (Pet. ¶ 47.) His next immigration court status hearing is scheduled for May 15, 2014. (Peleg 4/7/14 Aff. ¶ 6.)

Lora's Federal Habeas Corpus Petition

Lora, represented by counsel, filed this federal habeas corpus petition on March 26, 2014, the same day IJ Page ruled in immigration court that Lora was subject to mandatory detention. (*See* Dkt. No. 2: Pet.; *see also* page 4 above.) Lora seeks an order directing ICE to, *inter alia*, provide him with an individualized bond hearing pursuant to 8 U.S.C. § 1226(a). (Pet. Wherefore ¶ 3.) Lora argues that his detention is not authorized under 8 U.S.C. § 1226(c)(1), which requires an alien to be taken into ICE custody "when the alien is released" in order to be mandatorily detained. (Pet. ¶¶ 48, 50-51.) Specifically, Lora argues he was

not detained "when" he was released since he was not taken into ICE custody until over three years after his conviction (Pet. ¶¶ 52-57), and that he could not have been detained when he was "released" since he was never imprisoned following the possession conviction that rendered him deportable (Pet. ¶¶ 58-68). Additionally, Lora asserts that he is entitled to relief based on various constitutional violations resulting from his detention. (Pet. ¶¶ 69-82.)

On April 7, 2014, Lora's counsel filed an Order to Show Cause and supporting brief. (Dkt. No. 5: Application for Order to Show Cause; Dkt. No. 7: Lora Br.) On April 9, 2014, I held a telephone conference with counsel and ordered the government to submit its opposition by April 28, 2014, and Lora to submit any reply within five days of the government's filing. (Dkt. No. 8: 4/9/14 Order.) The government's opposition was received and has been considered. (Dkt. No. 12: Gov't Opp. Br.)

ANALYSIS

I. *JURISDICTION*

This Court has subject matter jurisdiction over Lora's habeas corpus petition under 28 U.S.C. § 2241(c)(3). *See, e.g., Louisaire v. Muller*, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010) (collecting cases in which courts "exercised jurisdiction to decide similar questions of statutory interpretation under the . . . mandatory detention statute"). While the alien detention statute prohibits judicial review of the govern-

ment's "discretionary judgment regarding the application of this section," 8 U.S.C. § 1226(e), "the Supreme Court has held that this provision does not deprive district courts of jurisdiction to hear petitions where, as here, the petitioner challenges the interpretation of 'the statutory framework that permits his detention without bail.'" *Debel v. Dubois,* 13 Civ. 6028, 2014 WL 708556 at *3 (S.D.N.Y. Feb. 25, 2014) (quoting *Demore v. Kim*, 538 U.S. 510, 517, 123 S. Ct. 1708, 1714, 155 L. Ed. 2d 724 (2003)), *rev'd*, Dkt. No. 27: Opinion & Order (S.D.N.Y. Apr. 24, 2014).[5] The government does not dispute this Court's jurisdiction over Lora's petition. (*See generally* Dkt. No. 12: Gov't Opp. Br.)[6]

II. *STANDARDS GOVERNING INTERPRETATION OF THE MANDATORY ALIEN DETENTION STATUTE*

This case requires the Court to determine the meaning of "when the alien is released" as used in the provision governing mandatory detention of "criminal

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[5] *Accord, e.g., Straker v. Jones*, 13 Civ. 6915, 986 F. Supp. 2d 345, 349-50, 2013 WL 6476889 at *3 (S.D.N.Y. Dec. 10, 2013) (citing cases); *Louisaire v. Muller*, 758 F. Supp. 2d at 234; *Monestime v. Reilly*, 704 F. Supp. 2d 453, 456 (S.D.N.Y. 2010); *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 179 (S.D.N.Y. 2009).

[6] The government also does not dispute that this case was properly brought in New York since "jurisdiction over a habeas petition is established at the time the petition is filed" and Lora filed his petition while "present at the Varick Detention Center in Manhattan." (Gov't Opp. Br. at 5 & n.6.)

aliens," 8 U.S.C. § 1226(c)(1). Whether Lora is being detained in violation of the statute—and, thus, whether Lora is entitled to habeas relief—is a question of statutory interpretation.

A. *The Mandatory Alien Detention Statute, 8 U.S.C. § 1226(c)*

"[F]ederal law contains two distinct provisions governing an alien's detention while removal proceedings are pending." *Straker v. Jones*, 13 Civ. 6915, 986 F. Supp. 2d 345, 351, 2013 WL 6476889 at *4 (S.D.N.Y. Dec. 10, 2013); *see* 8 U.S.C. § 1226(a), (c). The first provision provides for detention during removal proceedings subject to an individualized bond hearing. 8 U.S.C. § 1226(a).[7] Under the second provision, entitled "Detention of criminal aliens," aliens falling within certain enumerated categories "shall" be mandatorily detained without a hearing. 8 U.S.C. § 1226(c).[8]

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[7] *See, e.g., Debel v. Dubois*, 13 Civ. 6028, 2014 WL 708556 at *4 (S.D.N.Y. Feb. 25, 2014) ("Aliens not subject to mandatory detention pursuant to § 1226(c) fall under § 1226(a), which entitles them to individual bond determinations."), *rev'd*, Dkt. No. 27: Opinion & Order, 2014 WL 1689042 (S.D.N.Y. Apr. 24, 2014); *Straker v. Jones*, 986 F. Supp. 2d at 351, 2013 WL 6476889 at *4 ("Section 1226(a) allows federal immigration authorities to detain an alien during removal proceedings, subject to a bond hearing.").

[8] *See, e.g., Straker v. Jones*, 986 F. Supp. 2d at 351, 2013 WL 6476889 at *4 ("Section 1226(c), entitled 'Detention of criminal aliens,' however, provides for mandatory detention of certain criminal aliens. Immigration authorities may not provide such aliens with a bond hearing.").

"The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009); *accord, e.g.*, *Castaneda v. Souza*, 952 F. Supp. 2d 307, 316 (D. Mass. 2013) ("[I]ndividualized bond hearings are the norm and mandatory detention is the exception in section 1226."). In relevant part, the mandatory detention provision of § 1226(c) provides:

> The Attorney General[9] 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[d] to a term of imprisonment of at least 1 year, or

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[9] "Originally, the authority and duties imposed by § 1226(c) were those of the Attorney General; today, they belong to DHS." *Straker v. Jones*, 986 F. Supp. 2d at 351, 2013 WL 6476889 at *4.

> (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) (fn. & emphasis added).[10]

Congress enacted the mandatory detention provision to advance the goals of facilitating removal of those aliens who were most likely to flee, and reducing the high recidivism rate among released criminal aliens. *See Demore v. Kim*, 538 U.S. 510, 518-19, 123 S. Ct. 1708, 1715, 155 L. Ed. 2d 724 (2003) ("Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens. . . . Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings. The Attorney General at

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[10] The government has discretion to release mandatorily detained criminal aliens "only in limited circumstances, not applicable here, upon a determination that release is necessary to protect a witness in a criminal matter." *Louisaire v. Muller*, 758 F. Supp. 2d 229, 235 (S.D.N.Y. 2010); *see* 8 U.S.C. § 1226(c)(2) (setting forth circumstances under which DHS "may release an alien described in paragraph (1)").

the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society. . . . Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." (citations omitted)).[11]

B. *Legal Standards Governing Statutory Interpretation*

"'Statutory interpretation always begins with the plain language of the statute,' which [the court] consider[s] in 'the specific context in which that language is used, and the broader context of the statute as a

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[11] *See also, e.g., Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012); *Debel v. Dubois*, 2014 WL 708556 at *9 ("Congress authorized mandatory detention to 'serve[ ] the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.' Additionally, Congress sought to reduce the high rates of recidivism for released criminal aliens." (citation omitted)); *Louisaire v. Muller*, 758 F. Supp. 2d at 235 ("Congress enacted this provision . . . in response to evidence that the INS (now ICE) was unable to remove the majority of criminal aliens, in large part because of their failure to appear for removal hearings, and that such aliens displayed a high rate of recidivism."); *In re Rojas*, 23 I. & N. Dec. 117, 122, 2001 WL 537957 (B.I.A. 2001) ("Congress was frustrated with the ability of aliens, and particularly criminal aliens, to avoid deportation if they were not actually in Service custody when their proceedings were completed.").

whole.'" *In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 427 (2d Cir. 2009) (citations omitted), *cert. denied*, 559 U.S. 962, 130 S. Ct. 1527, 176 L. Ed. 2d 151 (2010).[12] "'To ascertain Congress's intent, we begin with the statutory text because if its language is unambiguous, no further inquiry is necessary.'" *Clark v. Astrue*, 602 F.3d 140, 147 (2d Cir. 2010).[13]

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[12] *See, e.g., United States v. Robinson*, 702 F.3d 22, 31 (2d Cir. 2012) ("'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'"), *cert. denied*, __ U.S. __, 133 S. Ct. 1481, 185 L. Ed. 2d 381 (2013); *In re N.Y. Times Co.*, 577 F.3d 401, 406 (2d Cir. 2009) (in construing statutes, a court should "examine the text of the statute itself, interpreting provisions in light of their ordinary meaning and their contextual setting").

[13] *See also, e.g., In re Barnet*, 737 F.3d 238, 246 (2d Cir. 2013) ("Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." (quotations omitted)); *Hedges v. Obama*, 724 F.3d 170, 189 (2d Cir. 2013) ("'When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'"), *petition for cert. filed*, 82 U.S.L.W. 3385 (Dec. 16, 2013); *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("[S]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." (quotations omitted)); *United States v. Hasan*, 586 F.3d 161, 167 (2d Cir. 2009) ("'Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'"), *cert. denied*, __ U.S. __, 131 S. Ct. 317, 178 L. Ed. 2d 253 (2010); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) ("'When a statute's language is clear, our only role is to enforce that language "according to its terms."'").

"At the same time, we must interpret [a] specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part. We give effect, if possible, to every clause and word of a statute." *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469, 471 (2d Cir. 2006) (quotations & citations omitted); *accord, e.g.*, *In re Barnet*, 737 F.3d at 250 ("A properly limited contextual analysis of statutory language is encompassed within the ambit of a textual analysis."); *United States v. Vargas-Cordon*, 733 F.3d 366, 381 (2d Cir. 2013) ("'[P]lain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.'").[14]

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[14] *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 237 (2d Cir. 2011), *cert. denied*, __ U.S. __, 133 S. Ct. 24, 25, 183 L. Ed. 2d 675 (2012); *United States v. Gayle*, 342 F.3d 89, 92-93 (2d Cir. 2003) ("Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well. Most of the courts that have found 'in any court' to include foreign courts have stressed the unambiguously expansive nature of the phrase. . . . Our textual analysis of what constitutes a predicate offense under § 922(g)(1), however, does not end with the words 'in any court.' 'The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.'" (citations omitted)), *cert. denied*, 544 U.S. 1026, 125 S. Ct. 1968, 161 L. Ed. 2d 872 (2005); *Auburn Housing Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002) ("'Statutory construction . . . is a holistic endeavor.' The meaning of a particular section in a statute can be understood

When faced with an administrative agency's interpretation of a statute, the Supreme Court has provided a two-step process for reviewing the agency's construction of the statute. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984). The first step is to determine whether congressional intent is clear. *Id.* at 842, 104 S. Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. at 2781. If congressional intent is ambiguous, the second step is to determine if the agency's statutory construction is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782. While the Court must defer to an agency's reasonable interpretation of an ambiguous statute, it "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9, 104 S. Ct. at 2781 n.9.

III. *LORA'S MANDATORY DETENTION IS NOT AUTHORIZED BY § 1226(c)*

The meaning of the mandatory detention statute's "when the alien is released" clause has been the sub-

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in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another. In other words, the preferred meaning of a statutory provision is one that is consonant with the rest of the statute." (citations omitted)).

ject of recent debate among federal courts.[15] This case raises two issues regarding the meaning of the clause: (1) whether the word "when" imposes a temporal limit on DHS's power to mandatorily detain criminal aliens; and (2) whether the word "released" includes a pre-conviction release from arrest or post-conviction release from non-physical custody, *i.e.*, court supervision. Neither the Supreme Court nor Second Circuit have opined on the precise questions presented here, and the circuit and district courts (both inside and outside the Second Circuit) that have addressed these issues are not in agreement.[16]

A. *Interpretation of "When" and Application to Lora's Detention*

Lora argues that the word "when" in the "when the alien is released" clause requires DHS to detain the alien at or around the time of his release from criminal custody in order to fall within the ambit of the mandatory detention provision, *i.e.*, the statutory authority

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[15] *See, e.g., Debel v. Dubois*, 13 Civ. 6028, 2014 WL 708556 at *4 (S.D.N.Y. Feb. 25, 2014) (§ 1226(c) "has recently become the subject of much debate among the federal courts"), *rev'd*, Dkt. No. 27: Opinion & Order (S.D.N.Y. Apr. 24, 2014); *Straker v. Jones*, 13 Civ. 6915, 986 F. Supp. 2d 345, 351, 2013 WL 6476889 at *4 (S.D.N.Y. Dec. 10, 2013) (noting that "issues about the meaning of this clause" have "been the subject of extensive litigation in the federal courts").

[16] *See, e.g., Debel v. Dubois*, 2014 WL 708556 at *4 ("The Second Circuit has not yet opined on the issue and courts are divided as to its meaning."); *see also* pages 12-23 below.

created by this provision is limited; only aliens who are picked up *when* they are released may be mandatorily detained; thereafter, detention must occur under Section 1226(a), entitling the alien to an individualized bond hearing. (Dkt. No. 7: Lora Br. at 8-18.) The government argues that the clause identifies the moment at which DHS's duty to detain arises, but does not limit the duty's exercise to that specific moment in time. (Dkt. No. 12: Gov't Opp. Br. at 11-18.)

The courts that have addressed the meaning of the word "when" as used in this clause generally have adopted one of the interpretations advanced by the parties: (1) "the 'time-limiting' construction," under which courts interpret it "to mean that DHS can subject an alien to mandatory detention only if it detains him at, or around, the time he is released from criminal custody for the removable offense"; and (2) "the 'duty-triggering' construction," under which courts interpret it "as creating a pre-condition for DHS to exercise its mandatory detention authority, but not as setting a deadline for its use." *Straker v. Jones*, 13 Civ. 6915, 986 F. Supp. 2d 345, 352, 2013 WL 6476889 at *5-6 (S.D.N.Y. Dec. 10, 2013) (labeling competing constructions and collecting cases).

The Board of Immigration Appeals ("BIA") appears to have adopted the duty-triggering construction in a 2001 decision in which it held that a criminal alien detained on "the second day of his release on criminal parole" was "subject to mandatory detention pursuant

to section 236(c) of the Act, despite the fact that he was not taken into Service custody immediately upon his release from state custody." *In re Rojas*, 23 I. & N. Dec. 117, 118, 127, 2001 WL 537957 (B.I.A. 2001)[17]; *see Sylvain v. Attorney Gen.*, 714 F.3d 150, 156 (3d Cir. 2013) ("Over a decade ago, the Board of Immigration Appeals concluded that mandatory detention does not require immediate detention."). Most courts that have adopted the duty-triggering construction have found the "when . . . released" clause ambiguous, and held that the BIA's *Rojas* decision is a reasonable interpretation entitled to *Chevron* deference. *See, e.g., Hosh v. Lucero*, 680 F.3d 375, 379-80 & n.2 (4th Cir. 2012) (collecting cases); *Straker v. Jones*, 986 F. Supp. 2d at 353-56, 2013 WL 6476889 at *6-9 (collecting cases); *see also, e.g.*, *Sylvain v. Attorney Gen.*, 714 F.3d at 156 & n.5 (collecting cases).[18]

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[17] It is important to note that "[a]lthough not explicitly identified as [a] consideration[ ], the BIA's [*Rojas*] decision appears to be motivated by the fact[ ] that Rojas had only been at liberty for two days." *Debel v. Dubois*, 13 Civ. 6028, 2014 WL 708556 at *8 (S.D.N.Y. Feb. 25, 2014) ("Indeed, what is missing from *Rojas* is any consideration whatsoever as to whether Congress intended some outer temporal boundary that would curtail ICE's authority under § 1226(c) in order to ensure the statute did not run afoul of due process."), *rev'd*, Dkt. No. 27: Opinion & Order (S.D.N.Y. Apr. 24, 2014). "It does not follow from" *Rojas*' allowance of a two-day gap "that a four-year delay would be similarly permissible." *Debel v. Dubois*, 2014 WL 708556 at *9.

[18] The Third Circuit's rejection of the time-limiting construction was not based on *Chevron* deference to *Rojas*, but rather its finding

The majority of district courts to address the issue, however, have adopted the time-limiting construction, rejecting the BIA's interpretation and holding "that the statute unambiguously provides that ICE may only subject an alien to mandatory detention if it detains him *immediately at or around* the time he is released from criminal custody for the underlying offense." *Debel v. Dubois*, 2014 WL 708556 at *4 (collecting cases); *accord, e.g., Valdez v. Terry*, 874 F. Supp. 2d 1262, 1274-75 (D.N.M. 2012) ("[M]ost federal district courts that have ruled on this issue have agreed that 'when the alien is released' unambiguously means immediately after release from custody and have rejected the BIA's interpretation of § 1226(c). The Court finds the reasoning of these decisions to be persuasive." (citations omitted & collecting cases)); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) ("*Rojas* . . . is wrong as a matter of law and contrary to the plain language of the statute. The clear purpose of § 1226(c)(1) is to authorize the mandatory detention of immigrants who have committed

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that "nothing in the statute suggests that immigration officials lose authority if they delay," *Sylvain v. Attorney Gen.*, 714 F.3d at 157, *i.e.*, that "even if we assume that the statute commands federal authorities to detain criminal aliens at their exact moment of release from other custody, we still conclude that a criminal alien who is detained *after* that exact moment is not exempt from mandatory detention." *Hosh v. Lucero*, 680 F.3d at 381-83 (explaining this reasoning as an alternative basis for its adoption of duty-triggering construction in deference to *Rojas*).

offenses enumerated within § 1226(c)(1)(A)-(D) *immediately* upon their release from criminal sentences for those *same offenses*, even if they are still serving part of their sentence out in the community. . . . A majority of courts that have examined this issue have held that the mandatory statute is unambiguous on this point." (collecting cases)); *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 180-2 & n.2 (S.D.N.Y. 2009) ("For over a decade, courts analyzing Section 1226(c) have consistently interpreted the statute to authorize the government to take an alien into custody on or about the time he is released from custody for the offense that renders him removable. . . . The Court finds that the plain language of the statute is unambiguous and manifests Congress' clear intent that there must be a nexus between the date of release and the removable offense." (collecting cases)).[19]

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[19] *See, e.g., Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219-20 (W.D.N.Y. 2009) (discussing "persuasive" cases holding "the statute does not apply when the alien was not taken into immigration custody at the time of his release from incarceration on the underlying criminal charges"); *Bromfield v. Clark*, No. C06-757, 2007 WL 527511 at *4 (W.D. Wash. Feb. 14, 2007); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1229-30 (W.D. Wash. 2004); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417-18 (W.D. Wash. 1997) ("The plain meaning of this language is that it applies immediately after release from incarceration, not to aliens released many year[s] earlier. In this context, it was arbitrary and capricious for respondents to interpret the language . . . to include aliens . . . who were released from incarceration many

The Court is persuaded by the analyses of these district courts and agrees that "the clear language of the statute indicates that the mandatory detention of aliens 'when' they are released requires that they be detained at [or near] the time of release." *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999).

As several courts have explained, "'[t]he term "when" includes the characteristic of "immediacy," referring in its primary conjunctive sense, to action or activity occurring "at the time that" or "as soon as" other action has ceased or begun.'" *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d at 219; *accord, e.g., Castaneda v. Souza*, 952 F. Supp. 2d 307, 313 (D. Mass. 2013) ("'When' typically means 'at the time.' Thus, this Court holds that the most natural reading of 'when . . . released' is 'at the time of release' or 'immediately upon release.'"); *Alikhani v. Fasano*, 70 F. Supp. 2d at 1130 ("Webster's Third New International Dictionary defines 'when' as 'just after the moment that.'"). It therefore would pervert the statute's plain meaning to interpret the command to mandatorily detain "'certain criminal aliens "when" those aliens are released from state custody to include those aliens who had "already" been released from state

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years before coming into the custody of the INS for deportation proceedings." (citations omitted)); *see also, e.g., Sylvain v. Attorney Gen.*, 714 F.3d at 156 n.6 (collecting cases rejecting argument that statute is ambiguous and requires deference); *Straker v. Jones*, 2013 WL 6476889 at *5 (collecting cases adopting time-limiting construction).

custody.'" *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d at 219; *accord, e.g., Oscar v. Gillen*, 595 F. Supp. 2d 166, 169 (D. Mass. 2009) ("While § 1226(c) authorizes detention 'when the alien is released,' Respondent apparently read this provision to mean 'any time after the alien is released.' But this interpretation perverts the plain language of the statute.").

"Thus, if Congress had intended for mandatory detention to apply to aliens at any time after they were released, it easily could have used the language '*after* the alien is released,' 'regardless of when the alien is released,' or other words to that effect. Instead, Congress chose the word 'when,' which connotes a much different meaning." *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d at 1230; *accord, e.g., Castaneda v. Souza*, 952 F. Supp. 2d at 314 ("This Court rejects [the government's] contention because the word 'after' rather than 'when' would communicate such a meaning much more clearly. . . . The context within which 'when' is situated strongly suggests that it is intended as a timing element that means at 'a specific time,' rather than 'after'. . . . "); *Bromfield v. Clark*, 2007 WL 527511 at *4; *Alikhani v. Fasano*, 70 F. Supp. 2d at 1130. Indeed, the statute's language has evolved from prior versions, suggesting that the current word choice is a precise reflection of Congress's intent. *See, e.g., Saysana v. Gillen*, 590 F.3d 7, 15 (1st Cir. 2009) ("[O]ne prior version of the mandatory detention provision required the Attorney General to take the alien into custody 'upon completion of the alien's sen-

tence for such conviction.'"); *In re Rojas*, 23 I. & N. Dec. at 124 ("In sum, the statute has contained different phrases over the years, from 'upon completion of the alien's sentence' to 'upon release of the alien' to 'when the alien is released.'").

The government's interpretation of the "when . . . released" phrase would render it "surplusage." *Valdez v. Terry*, 874 F. Supp. 2d at 1265 ("[I]f the term 'when the alien is released' means that the Attorney General shall take into custody any aliens who have committed offenses enumerated within § 1226(c)(1)(A)-(D) without regard to the timing of that alien's release from custody, then the phrase 'when the alien is released' becomes meaningless surplusage.").

The structure of § 1226(c) further "suggest[s] to this Court that Congress intended the 'when . . . released' language to mean immediately upon release." *Castaneda v. Souza*, 952 F. Supp. 2d at 314. As the *Castaneda* court stated:

> First, the statute begins, not with provisions for mandatory detention, but rather with those for arrest and detention subject to an individualized bond hearing and potential release. . . . Section 1226(c), the exception for certain aliens, identifies those aliens in 1226(c)(1). Congress requires the Attorney General to take these specific criminal aliens into custody "when the alien is released."
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> Congress's structuring of section 1226 in this way is no accident. Congress intended that aliens

> taken into custody typically receive a bond hearing; it then provided an exception in certain cases—certain criminal aliens who have been picked up by ICE immediately upon release from their custodial sentence should not be bonded out or paroled into our communities no matter the circumstances. The mandatory detention provision is, thus, a limited exception.

Castaneda v. Souza, 952 F. Supp. 2d at 314-15 (citation omitted).

This interpretation is consistent with the purposes underlying the enactment of the mandatory detention provision, *i.e.*, facilitating removals and reducing recidivism. (*See* pages 8-9 & n.11 above.) As prior decisions have explained:

> This Court can find no support for the idea that Congress intended to subject criminal aliens already released to mandatory detention. After all, Congress chose not to make the provisions retroactive and require mandatory detention of those criminal aliens who had completed their custodial sentence before the effective date of the provision. These criminal aliens, already in the community, could be detained by ICE, but would receive individualized detention hearings.
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> . . . .
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> [Petitioner] has already returned to her community. The congressional "purpose of preventing the return to the community of those released in

> connection with the enumerated offenses," does not apply to [petitioner] as she has lived in the community for three years. Given that mandatory detention would not satisfy the congressional purpose of this provision, . . . this Court is at a loss as to what other purpose mandatory detention could serve. This Court simply sees no reason why Congress would have intended for her to be picked up years after she has reintegrated back into her community and to be held without presentment before an immigration judge for a bond determination.

Castaneda v. Souza, 952 F. Supp. 2d at 317 (citations & fn. omitted).[20]

Finally, and perhaps most importantly, interpreting § 1226(c) to require immediate detention does not extinguish ICE's detention authority where there is a delay, it merely restores the alien's right to an individualized bond hearing:

> [R]eading the "when . . . released" language to mean immediately upon release or within a reasonable period of time does not mean [petitioner] goes free. Instead, she is entitled merely to a bond hearing. Her likelihood of complying with a de-

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[20] *See also, e.g., Saysana v. Gillen*, 590 F.3d at 17-18 ("[I]t is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks. . . . By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.").

> portation order is a factor in whether she is to be granted bond and released by an immigration hearing officer. . . . [F]ailure to take an alien into custody at the moment of release or within a reasonable period of time does not result in a loss of power or authority. The Attorney General must grant the alien an individualized bond hearing, but can still deny bond and hold the alien. No power or authority has been lost.

Castaneda v. Souza, 952 F. Supp. 2d at 317 n.8, 319; *see also, e.g., Valdez v. Terry*, 874 F. Supp. 2d at 1276; *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d at 1231.[21]

Applying the statute as construed above to Lora's case, it is clear that his mandatory detention is not authorized by § 1226(c) because he was not taken into custody until November 22, 2013—more than four years after his July 2009 arrest and release on bail, and more than three years after his July 2010 conviction and sentencing. (*See* pages 2-3 above.)[22] Lora

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[21] Because ICE does not lose its ability to detain altogether when it delays in taking custody of a deportable alien, the Court disagrees with the Third Circuit's contrary interpretation, which was based on its refusal to find "that immigration officials lose authority if they delay" (*see* page 13 n.18 above). *See, e.g., Castaneda v. Souza*, 952 F. Supp. 2d at 318-20.

[22] While Lora withdrew and reentered his plea and was resentenced in March 2014, the plea and sentence were imposed *nunc pro tunc* to July 2010. (*See* page 3 above.) In any event, even if the March 2014 date were considered a release date for purposes of this analysis, it would not remedy ICE's noncompliance with

has been a lawful permanent resident of the United States since 1990, has strong family ties in New York, and has remained law-abiding since the time of his 2009 arrest. (*See* page 2 above.) "While the exact point at which ICE loses its authority to detain without affording an alien an individualized bail hearing under § 1226(c) may be unclear, the Court is confident that a [three—or] four-year gap between criminal release and assumption of immigration custody is an unreasonable delay for an alien such as" Lora. *Debel v. Dubois*, 2014 WL 708556 at *10 (Petitioner "has lived in the United States since 1990, has a wife and two children, and has remained law-abiding since the time of his release more than four years ago. As a result, he should not be subject to mandatory detention under § 1226(c) and instead should be entitled to a hearing to determine whether, in these circumstances, he poses a risk of danger or flight." (citation omitted)); *e.g.*, *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d at 219-20 ("[P]etitioner's detention was not authorized by 8 U.S.C. § 1226(c) because petitioner was released from incarceration nearly eighteen months prior to his immigration detention. Instead, petitioner's detention was authorized by 8 U.S.C. § 1226(a), which

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§ 1226(c), since Lora was not detained "when" his *nunc pro tunc* sentence was imposed in March 2014, but rather was detained several months before in November 2013. (*See* page 3 above.)

affords petitioner the opportunity for an individualized bond hearing before an immigration judge.").[23]

B. *Interpretation of "Released" and Application to Lora's Detention*

Even if the Court were to accept the government's interpretation of the word "when" as triggering a duty that never expires, Lora argues that he nevertheless would not be subject to mandatory detention since he "was never 'released' from a post-conviction sentence

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[23] *See, e.g., Castaneda v. Souza*, 952 F. Supp. 2d at 321 ("This Court rules that section 1226(c) applies only to those criminal aliens detained immediately upon release from criminal custody or within a reasonable period of time thereafter. While it has no occasion in this case to determine what constitutes a reasonable period of time, this Court would suggest that any alien who has reintegrated back into his community has not been detained within such a reasonable period of time. [Petitioner], having lived in her community for three years after even her probationary period was complete, must certainly receive an individualized bond hearing."); *Monestime v. Reilly*, 704 F. Supp. 2d at 458 ("[G]iven that eight years have passed since [petitioner] was convicted of his second misdemeanor, there appear to be no public safety factors justifying his prolonged detention. After all, the reasons that justify § 1226(c) detention are 'based upon the Government's concerns over the risks of flight and danger to the community . . . and the ultimate purpose behind the detention is premised upon the alien's deportability.' DHS can only determine whether [petitioner] poses a risk of flight or danger to the community through an individualized bond hearing. Such a hearing is particularly important when, as here, an alien is being deported for an offense committed many years prior to his detention and removal charges." (citations omitted)); *see also* cases cited on page 14 & n.19 above.

of incarceration, because he was never sentenced to any time in jail." (Dkt. No. 7: Lora Br. at 20.) Lora argues that the word "released" in the "when the alien is released" clause, means "a release from a *post-conviction* sentence of incarceration for an enumerated offense, regardless of whether a noncustodial portion of the sentence has yet to be served." (Lora Br. at 19.) In opposition, the government argues that the word "released" as used in § 1226(c) has a broader meaning, namely that Lora's pre-conviction release from arrest in July 2009 and his post-conviction release from his bail conditions into probation in July 2010 constitute qualifying releases for purposes of the mandatory detention statute. (*See* Dkt. No. 12: Gov't Opp. Br. at 18-22.)

Though the meaning of the word "when" has been litigated extensively in federal courts (*see* pages 11-14 above), the meaning of the word "released" has received less attention. *See Straker v. Jones*, 13 Civ. 6915, 986 F. Supp. 2d 345, 351, 2013 WL 6476889 at *4 (S.D.N.Y. Dec. 10, 2013) ("[P]etition[er] raises two issues about the meaning of this clause: what the word 'when' means, and what the word 'released' means. The first issue has been the subject of extensive litigation in the federal courts; the second, less so."). While the few courts that have considered what constitutes a qualifying release are not in agreement, this Court is persuaded by Judge Engelmayer's recent analysis of this question in *Straker v. Jones*, 986 F. Supp. 2d at 355-63, 2013 WL 6476889 at *9-15.

As to the government's first contention, although the BIA has twice held that the word "released" includes pre-conviction releases from arrests, *see In re Kotliar*, 24 I. & N. Dec. 124, 125, 2007 WL 858345 (B.I.A. 2007); *In re West*, 22 I. & N. Dec. 1405, 1410, 2000 WL 1612317 (B.I.A. 2000), the decisions provide "little reasoning in support of its conclusion on this point." *Straker v. Jones*, 986 F. Supp. 2d at 358, 2013 WL 6476889 at *12.[24] Judge Engelmayer, on the other hand, conducted a thorough and well-reasoned statutory analysis, and concluded that a pre-conviction release from arrest cannot constitute a qualifying release under § 1226(c). *See Straker v. Jones*, 986 F. Supp. 2d at 356-61, 2013 WL 6476889 at *10-13. As Judge Engelmayer explained, the BIA's interpretation cannot be squared with the statute's plain language:

> DHS argues that an alien's release after an arrest made as part of the process that later leads to a qualifying conviction under § 1226(c)(1)(B) is a "re-

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[24] The Third Circuit has agreed with the BIA's interpretation, also without analysis. *See Desrosiers v. Hendricks*, 532 Fed. Appx. 283, 285-86 (3d Cir. 2013); *Gonzalez-Ramirez v. Sec'y of U.S. Dep't of Homeland Sec.*, 529 Fed. Appx. 177, 180-81 (3d Cir. 2013), *cert. denied*, __ U.S. __, 134 S. Ct. 956, 187 L. Ed. 2d 818 (2014); *Sylvain v. Attorney Gen.*, 714 F.3d 150, 161 (3d Cir. 2013); *see also Straker v. Jones*, 986 F. Supp. 2d at 359 n.9, 2013 WL 6476889 at *12 n.9 ("The Third Circuit has three times followed *West* and *Kotliar*, but without substantive analysis of the proposition that a pre-conviction release following an arrest is a 'release' under § 1226(c).").

lease" within the meaning of the statute. But the statute's plain language makes that construction unsustainable. In mandatory terms, the statute requires that DHS "shall take into custody any alien who . . . is deportable by reason of having committed any [covered] offense . . . *when the alien is released*." And the four categories of aliens listed in § 1226(c)(1)(B) all refer to aliens who have been convicted of covered offenses.

The statute's text thus naturally fits the paradigm in which the alien (1) is convicted of an offense enumerated in § 1226(c)(1)(B), (2) serves a prison sentence for such a conviction, and thereafter (3) is released to DHS. But, by definition, an alien who is (1) arrested, (2) released, and only later (3) convicted of and sentenced for a covered offense, is not and cannot be eligible to be taken into DHS custody pursuant to the mandatory detention statute at the moment of his release. That is because, at that point, the alien's guilt or innocence as to the qualifying offense remains *sub judice*. The same analysis holds under § 1226(c)(1)(C). An alien who is arrested and released prior to his conviction cannot come within that provision, which provides for mandatory detention upon release "on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year," because, at that point, no sentence has been imposed.

DHS's thesis that pre-conviction release satisfies the statute thus cannot be squared with the stat-

> ute's command that detention becomes mandatory "when the alien is released." For such an alien, the word "released" cannot mean a "release" from pre-conviction arrest.

Straker v. Jones, 986 F. Supp. 2d at 356-57, 2013 WL 6476889 at *10-11 (citations & fn. omitted); *accord, e.g., Valdez v. Terry*, 874 F. Supp. 2d 1262, 1273 (D.N.M. 2012) ("Petitioner contends that his detention prior to his convictions does not satisfy the 'when released' requirement of § 1226(c) because that provision is not triggered until there is a conviction. The Court agrees that § 1226(c) did not apply to Petitioner until his second conviction because § 1226(c) applies to Petitioner by virtue of § 1227(a)(2)(A)(ii), which requires that an alien be '*convicted* of two or more crimes involving moral turpitude.'"). The Court is persuaded by this analysis and agrees that an alien's pre-conviction release from arrest does not constitute a qualifying release under § 1226(c).

As to the government's second contention, the BIA has held that a qualifying release under § 1226(c)(1) is a release from physical custody, not merely the termination of some type of court supervision, such as the release from bail conditions. *See In re West*, 22 I. & N. Dec. at 1409-10 ("Congress is referring to the release of an alien from a restrictive form of criminal custody involving physical restraint to a less restrictive form of criminal custody without physical restraint."). The Court again is persuaded by Judge

Engelmayer's analysis, finding the statute ambiguous on this issue, and deferring to the BIA's reasonable interpretation:

> Here, the BIA has determined that "released" in § 1226(c)(1) "refer[s] to the release of an alien from a restrictive form of criminal custody involving physical restraint." The BIA noted that the "'when released' language of [§ 1226(c)] . . . is modified by the subsequent clause[ ]: '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.'" It reasoned: "The natural reading of the words 'released on' within the context of these clauses of [§ 1226(c)(1)] suggests that Congress is referring to the release of an alien from a restrictive form of criminal custody involving physical restraint to a less restrictive form of criminal custody without physical restraint." The BIA stated that its reading of "released" to connote termination of a physical restraint was further supported by "[t]he reference in the last clause of the sentence to the possibility that the alien may be returned to a criminal custody status involving physical restraint."
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> Further supporting this construction, the BIA noted that, throughout § 1226, "the use of the words 'release' or 'released' . . . consistently appears to refer to a form of physical restraint." In addition to its usage in § 1226(c), the BIA examined the

> "[t]he use of the term 'release' in the provisions relating to the release of an alien on an immigration bond," including § 1226(a). In these contexts, too, the BIA concluded, "release" "obviously refers to release of the alien from the physical custody of the Service."
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> . . . .
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> The Court, accordingly, holds, in deference to the BIA's reasonable interpretation in *West*, that an alien's release from non-physical restraints such as court supervision, probation, parole, or supervised release does not qualify as a release that triggers DHS's duty to detain an alien under any part of § 1226(c). Under the statute, an alien's release *to* probation or supervised release, from a period of imprisonment, assuredly counts as a "release" within the meaning of the statute. However, the cessation of such forms of supervision, where there has been no antecedent term of imprisonment from which the alien has been released, does not qualify as a "release."

Straker v. Jones, 986 F. Supp. 2d at 360-62, 2013 WL 6476889 at *13-15 (citations & fn. omitted). The Court agrees and concludes that when an alien is released into probation, not from a period of imprisonment but from another form of court supervision or non-physical custody, the alien has not been "released" within the meaning of § 1226(c).

Based on the foregoing interpretation, Lora was never "released" within the meaning of § 1226(c). First, his 2009 pre-conviction release from his arrest did not constitute a qualifying release since Lora had not yet been convicted of the offense which later rendered him deportable. (*See* pages 2, 21-22 above.)[25] Second, Lora's post-conviction release from his bail conditions into probation likewise did not constitute a qualifying release under § 1226(c)(1) since Lora was not released into probation from a period of imprisonment, but rather was released from one form of non-physical court supervision to another. (*See* pages 2, 22-23 above.) Thus, even if the word "when" did not impose a temporal limit, Lora's mandatory detention still would not be authorized because there has been no qualifying "release" under § 1226(c).

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[25] Lora is charged with being deportable under 8 U.S.C. § 1227(a)(2)(B)(i) because he was convicted of a violation relating to a controlled substance. (*See* page 3 above.) Thus, Lora only became deportable under subsection (B) of the mandatory detention statute when he was convicted. *See* 8 U.S.C. § 1226(c)(1)(B) (ICE "shall take into custody any alien who . . . 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, . . . when the alien is released. . . . "); 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission *has been convicted* of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable." (emphasis added)).

CONCLUSION

For the reasons set forth above, Lora's habeas corpus petition (Dkt. No. 2) is *GRANTED*. The government is directed to provide Lora with an individualized bond hearing by May 15, 2014 (when he already is scheduled for a conference before an Immigration Judge).

SO ORDERED.