

No. 15-1205

**In The
Supreme Court of the United States**

—◆—
CHRISTOPHER SHANAHAN, et al.,

Petitioners,

v.

ALEXANDER LORA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

—◆—
BRIEF IN OPPOSITION

—◆—
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QUESTIONS PRESENTED

Under 8 U.S.C. § 1226, the government may release noncitizens who are detained pending removal proceedings, except for a subset of noncitizens who are removable for certain offenses and are detained “when . . . released” from criminal custody as specified in Section 1226(c). The Courts of Appeals have uniformly held that Section 1226(c) must be read to include an implicit limit on prolonged detention without a bond hearing.

Alexander Lora is a lawful permanent resident who was detained under Section 1226(c) three years after a nonviolent drug offense for which he served no jail time. After nearly six months of civil immigration detention, a district court ordered that Mr. Lora receive a bond hearing. The Second Circuit affirmed, rejecting Mr. Lora’s statutory arguments that he was never subject to Section 1226(c), but holding that noncitizens detained under Section 1226(c) must be afforded constitutionally adequate bond hearings within six months of detention. The questions presented are:

1. Whether, to avoid the serious constitutional concerns raised by prolonged detention, Section 1226(c) should be construed to require individualized bond hearings within six months of detention.

2. Whether, in any such bond hearing, the government must demonstrate by clear and convincing evidence that the noncitizen presents a flight risk or danger to the community to justify continued detention.

3. Whether Section 1226(c) applies to noncitizens who were not detained “when . . . released” from criminal incarceration for a listed removable offense.

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STATEMENT

A. Legal Framework

8 U.S.C. § 1226 governs the apprehension and detention of noncitizens pending a decision on whether they are to be removed. Section 1226(a) states that the Attorney General may detain noncitizens pending their removal case and may release noncitizens on bond or parole except as provided in Section 1226(c). *See* 8 U.S.C. § 1226(a)(1)-(2).

Section 1226(c) is comprised of two paragraphs. Paragraph (1) of Section 1226(c) is a single sentence that provides that the Attorney General “shall take into custody” any noncitizen who “is inadmissible . . . or deportable” for a specifically listed offense “when the alien is released” for the same offense. 8 U.S.C. § 1226(c)(1). Paragraph (2) of Section 1226(c) provides that the Attorney General may not release “an alien described in paragraph (1),” except under certain circumstances relating to witness protection. 8 U.S.C. § 1226(c)(2). Paragraphs (1) and (2) together apply only to individuals released from criminal custody for one of the listed offenses. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009-586 (specifying that the statute applies to individuals who were “released after” the statute’s effective date, October 9, 1998); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (B.I.A. 1999) (holding that mandatory detention only applies to immigrants “released” from criminal custody).

Section 1226(c)(1) lists certain types of predicate removable offenses, including virtually all drug offenses. *See* 8 U.S.C. § 1226(c)(1)(A)-(C). While Section 1226(c)(1)(D) refers to terrorism-related offenses, Congress subsequently enacted a separate statutory provision that mandates the detention of noncitizens subject to terrorism-related grounds. *See* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (“USA PATRIOT ACT”), Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (codified at 8 U.S.C. § 1226a). Mandatory detention under Section 1226a includes (and extends beyond) the specific terrorism-related grounds listed in Section 1226(c)(1)(D).¹ The mandatory detention of noncitizens subject to terrorism-related grounds is therefore not presented in this case.²

¹ *Compare* Section 1226(c)(1)(D) (“The Attorney General shall take into custody any alien who . . . is inadmissible under section 1182(a)(3)(B) or this title or deportable under section 1227(a)(4)(B) of this title”) *with* Section 1226a(a) (“(1) . . . The Attorney General shall take into custody any alien [whom the Attorney General certifies] . . . (3) . . . (A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or (B) is engaged in any other activity that endangers the national security of the United States.”). Section 1226a(a)(2) further specifies that the Attorney General “shall maintain custody of such an alien until the alien is removed from the United States.”

² The application of 8 U.S.C. § 1226a demonstrates an error in Petitioners’ Questions Presented. Petitioners frame their Questions Presented as whether “criminal *and terrorist aliens*” subject to mandatory detention under Section 1226(c) “must be” afforded bond hearings and “must be” released absent the government’s showing of flight risk and dangerousness. Pet. I (emphasis added).

B. Facts and Procedural History

Alexander Lora entered the United States as a lawful permanent resident from the Dominican Republic in 1990 at the age of seven. Pet. App. 9a. He has resided in Brooklyn, New York, for twenty-six years. *Id.* His mother, father, brother, and sister also reside in the New York area as United States citizens or lawful permanent residents. *Id.* at 9a-10a. He is married to a U.S. citizen,³ and supports two children: a three-year-old son who is a U.S. citizen and lives in the United States and a ten-year-old son who lives in the Dominican Republic. *Id.* at 10a. For over two decades, Mr. Lora has been in this country, attending school and working to support himself and his family. *Id.*

While working at a grocery store in 2009, Mr. Lora was arrested with a co-worker on drug charges. *Id.* Mr. Lora was released on bail pending his criminal proceedings. *Id.* at 37a. On July 21, 2010, Mr. Lora pleaded guilty to two charges under New York Penal Law § 220.16, Criminal Possession of a Controlled Substance in the Third Degree, and one charge under New York Penal Law § 220.50, Criminally Using Drug Paraphernalia in the Second Degree. *Id.* at 10a. He was sentenced to five years of probation. *Id.* He was not

However, due to the operation of Section 1226a, an interpretation of Section 1226(c) favorable to Mr. Lora would not dictate the contours of the government’s mandatory detention authority of “terrorist aliens.”

³ At the time of his Second Circuit briefing, Mr. Lora and his wife were engaged. They married on March 24, 2015, in New York (their marriage certificate is on file with counsel).

sentenced to any term of incarceration, and he did not violate any conditions of his probation. *Id.*

On November 22, 2013, over four years after his criminal arrest and three years after his conviction, Immigration and Customs Enforcement (ICE) officers arrested Mr. Lora in an early morning raid in his neighborhood. *Id.* ICE transferred Mr. Lora to Hudson County Correctional Facility in New Jersey, where he was detained pending his removal case, without the opportunity for a bond hearing. *Id.*

Within weeks, this sudden detention upended not only Mr. Lora's life, but the lives of his family members – including his younger son for whom Mr. Lora was the primary caretaker. Mr. Lora's son was placed in foster care after Mr. Lora was detained. *Id.* at 32a.

Mr. Lora was charged with removability under 8 U.S.C. § 1227(a)(2)(B) and 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of a controlled substance offense and an aggravated felony, respectively. *Id.* at 10a-11a. Mr. Lora moved in New York state court to set aside his conviction based on legal and constitutional defect, and his motion was granted on consent by the state. *Id.* at 11a. Mr. Lora was permitted to submit a new plea to a single count under New York Penal Law § 220.16(12), Criminal Possession of a Controlled Substance in the Third Degree, and was resentenced to a conditional discharge imposed *nunc pro tunc* to July 21, 2010. *Id.*

In March 2014, Mr. Lora requested that he be permitted to file an application for cancellation of removal

under 8 U.S.C. § 1229b(a) and that he be afforded a bond hearing under 8 U.S.C. § 1226(a). *Id.* at 12a. The Immigration Judge agreed that Mr. Lora was eligible for cancellation of removal under 8 U.S.C. § 1229b(a) because he was not convicted of an aggravated felony.⁴ However, the Immigration Judge ruled that under Board of Immigration Appeals (“BIA”) precedent, Mr. Lora was subject to mandatory detention based on his drug possession conviction, and was therefore ineligible for a bond hearing. *Id.* at 12a, 40a.

On March 26, 2014, Mr. Lora filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of New York challenging his detention without a bond hearing on statutory and constitutional grounds. *Id.* at 12a-13a.

On April 29, 2014, the district court held that Mr. Lora was not properly subject to mandatory detention under Section 1226(c) on two of the grounds raised in Mr. Lora’s petition: first, because he was not detained at the time of his release from criminal custody, and second, because he was never “released” from criminal incarceration within the meaning of the statute. *Id.* at 13a. The district court thus ordered the government to provide Mr. Lora with a bond hearing. *Id.* at 13a, 70a. The district court did not reach Mr. Lora’s other arguments, including his prolonged detention claim and his

⁴ Mr. Lora’s cancellation of removal proceedings are pending. Pet. App. 12a n.13. His merits hearing on his cancellation application is scheduled for January 2018. *Id.*

argument that he was not subject to mandatory detention because he had a substantial challenge to his removability. *Id.* at 26a.

On May 8, 2014, the Immigration Court held a bond hearing pursuant to the district court's order. At the hearing, the government stipulated to Mr. Lora's release on a \$5,000 bond based on his lack of flight risk or dangerousness to the community. *Id.* at 13a.

Despite stipulating to Mr. Lora's release on bond, the government appealed the district court's decision to the Second Circuit, arguing that Section 1226(c), as interpreted by the BIA, applies to noncitizens any time after their release from a listed removable offense, and that release from a pre-conviction arrest qualifies as a release under the statute. *Id.* at 17a, 19a. The government also contested Mr. Lora's constitutional claims, although it took the position that due process requires a "fact-dependent inquiry" into whether mandatory detention has become unreasonably prolonged. *Id.* at 14a.

The Second Circuit affirmed the lower court's decision on alternative grounds. It rejected both of the statutory grounds that served as the basis of the district court's order, and concluded that Mr. Lora was subject to Section 1226(c). *Id.* at 8a. Departing from both the district court's analysis and the BIA's reading of the "released" requirement in Section 1226(c), the Second Circuit concluded that the statute applies regardless of whether a noncitizen has ever been in criminal custody for a listed removable offense. *Id.* at 18a. On the timing implications of the "when . . . released"

clause, the Second Circuit concluded that the statute was ambiguous and ultimately deferred to the BIA's interpretation that mandatory detention applies at any time after a person becomes removable for a listed offense.⁵ *Id.* at 22a-25a.

Having rejected Mr. Lora's first two statutory claims, the Second Circuit then turned to Mr. Lora's prolonged detention claim. On this alternative basis, the Second Circuit affirmed the judgment of the district court, holding that a noncitizen detained under Section 1226(c) must be afforded an individualized bond hearing within six months of detention to avoid constitutional concerns. *Id.* at 33a. Additionally, the court determined that the government bears the burden of proving, by clear and convincing evidence, that the noncitizen is a flight risk or a danger to the community in order to deny bond. *Id.* at 33a-34a.

The Second Circuit anchored its analysis in the Due Process Clause, recognizing the concerns that this Court has expressed regarding the length of civil immigration detention. *Id.* at 26a-28a. The Second Circuit recognized that Section 1226(c) is facially constitutional, but held that procedural safeguards must be put in place to avoid due process concerns when detention becomes prolonged. *Id.* at 27a. It therefore joined "every other circuit that has considered the issue, as

⁵ See *Matter of Rojas*, 23 I. & N. Dec. 117, 125 (B.I.A. 2001) (interpreting Section 1226(c) to apply to noncitizens any time after their release from criminal custody for an enumerated offense).

well as the government” to read Section 1226(c) “as including an implicit temporal limitation” in order to “avoid serious constitutional concerns.” *Id.* at 27a-28a.

In addressing how to effectuate this temporal limit, the Second Circuit concluded that reliance on federal court habeas adjudication of individual prolonged detention claims was inadequate. The court noted that there is “pervasive inconsistency and confusion” when district courts consider the reasonableness of detention on a case-by-case basis. *Id.* at 30a-31a (noting disparities in outcome in district court cases within the Second Circuit). The court further emphasized that habeas petitioners may be pro se and that habeas petitions may take months or even years to adjudicate. *Id.* at 31a. In light of the disparities and the five- to six-month time period referenced by this Court in discussing the reasonableness of civil immigration detention, the Second Circuit concluded that “[a]dopting a six-month rule ensures that similarly situated detainees receive similar treatment.” *Id.* Thus, the court interpreted the statute to include a temporal limit at six months in order to guarantee fundamental fairness and uniformity in the application of procedural safeguards necessary to avoid the constitutional concerns arising from prolonged detention under Section 1226(c).

In adopting this interpretation, the Second Circuit observed that immigration detention has “real-life consequences for immigrants and their families” such as Mr. Lora. *Id.* at 32a. The Second Circuit recognized

that for Mr. Lora – a longtime lawful permanent resident who has remained gainfully employed and who has extensive family and community ties in the United States – “[n]o principled argument has been mounted for the notion that he is either a risk of flight or is dangerous.” *Id.* Recognizing the serious due process concerns in detaining noncitizens like Mr. Lora for a prolonged period, the Second Circuit affirmed the order of the district court.



REASONS FOR DENYING THE PETITION

The petition should be denied because it does not meet this Court’s traditional standards for review. The decision of the court of appeals in this case recognizes that mandatory, no-bond civil immigration detention under 8 U.S.C. § 1226(c) should be read to include a six-month temporal limitation in order to avoid serious due process concerns. Pet. App. 9a. In seeking a writ of certiorari to review this decision, the government suggests that the Second Circuit has deepened a vast area of disagreement among the courts of appeals and issued a decision that conflicts with this Court’s precedent.⁶ On the contrary, the decision below builds upon an area of significant agreement among the courts of

⁶ The government’s petition in this case refers to and heavily relies upon the arguments made in the petition for certiorari in *Jennings v. Rodriguez*, No. 15-1204 (filed Mar. 25, 2016). As a result, this Brief in Opposition responds to arguments made in both petitions.

appeals, where courts continue to consider the appropriateness of varying safeguards against prolonged detention. The Second Circuit's decision not only advances this area of the law, it faithfully applies this Court's precedent and reaches the correct result.

Mr. Lora therefore respectfully submits that this Court should deny the petition for three reasons. First, this area of law is marked by considerable agreement among the courts of appeals. The courts of appeals uniformly agree that Section 1226(c) must be read to include an implicit limit on prolonged detention without a bond hearing. The main area of disagreement involves the process by which to safeguard this limit, a question that involves a changing area of the law. Given the vast agreement among the lower courts and significant developments in the law, review of the Second Circuit's decision would be inappropriate.

Second, the decision of the court of appeals to adopt a six-month limitation is correct. Recognizing the arbitrary results that stem from a remedy that requires detained immigrants, often unrepresented, to litigate their prolonged detention claims through individual habeas petitions, the Second Circuit properly interpreted Section 1226(c) to require bond hearings within six months of detention. This reasoning aligns with the holdings of this Court, and presents no issue meriting review.

Third and finally, the decision of the court of appeals in this case may be affirmed on alternative grounds that demonstrate that individuals like Mr.

Lora – a longtime lawful permanent resident who was detained years after a nonviolent drug offense for which he served no jail time – fall outside the scope of Section 1226(c).

I. This Case Does Not Present A Question That Warrants This Court’s Review.

A. The Courts of Appeals Agree That Section 1226(c) Must Be Read To Include An Implicit Limit on Prolonged Detention Without A Bond Hearing.

The government’s petition underplays the significant agreement among lower courts regarding the existence of an implicit limitation to the length of mandatory detention under Section 1226(c) and the importance of individualized hearings as a means of avoiding serious constitutional concerns when detention without bond becomes unreasonable. The central question in this case, therefore, is not whether individualized hearings are an appropriate remedy for noncitizens subject to unreasonably prolonged detention under Section 1226(c). The courts of appeals are in agreement on this point. Indeed, even the government agrees that mandatory detention under Section 1226(c) is subject to due process limitations.⁷ The central question in this case – and one not worthy of certiorari for

⁷ In its petition for certiorari in *Jennings v. Rodriguez*, the government conceded that if a noncitizen’s detention under Section 1226(c) becomes “potentially unreasonable and arbitrary,” that individual may bring “an as-applied due process challenge.” *Jennings v. Rodriguez*, No. 15-1204 (filed Mar. 25, 2016), Pet. 25.

the reasons described in Part I.B., *infra* – is when detention becomes unreasonably prolonged and how that determination should be made. The landscape of the law on prolonged detention is otherwise one of vast agreement.

First, the courts of appeals uniformly agree that Section 1226(c) must be read to include an implicit limit to prolonged detention without a bond hearing. *See, e.g., Reid v. Donelan*, No. 14-1270, ___ F.3d ___, 2016 WL 1458915, at *9 n.3 (1st Cir. Apr. 13, 2016) (“Because we read an implicit reasonableness limitation into [Section 1226(c)], the statute authorizes a bond hearing as soon as continued, mandatory detention has reached the point of being constitutionally unreasonable.”); *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015) (holding that “in order to avoid serious constitutional concerns, section 1226(c) must be read as including an implicit temporal limitation” requiring a bond hearing); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011) (“[Section 1226(c)] implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute’s purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community.”); *Rodriguez v. Hayes*

In *Lora*, the Second Circuit noted that “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).” Pet App. 26a.

(*Rodriguez I*), 591 F.3d 1105, 1116 (9th Cir. 2010) (“[I]n order to avoid the serious constitutional questions raised by indefinite mandatory detention, detention of an alien beyond an expedited period ceases to be mandatory under Section 1226(c.”); *Ly v. Hansen*, 351 F.3d 263, 269 (6th Cir. 2003) (affirming the release of noncitizen following the district court’s order that the government must hold a bond hearing, and holding that “although criminal aliens may be incarcerated pending removal, the time of incarceration is limited by constitutional considerations, and must bear a reasonable relation to removal”).

Second, on the question of the burden of proof necessary to justify continued detention, there is uniform agreement among the courts of appeals. Among the five courts of appeals that have recognized the need for individualized hearings when detention becomes unreasonably prolonged, three courts of appeals have resolved the question of which party bears the burden at those hearings, and two courts of appeals have resolved the question of what standard of proof applies. The Second, Third, and Ninth Circuits have addressed the burden allocation and agree that the government must bear the burden of proof. *See Lora*, 804 F.3d at 616; *Diop*, 656 F.3d at 235; *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). The Second and Ninth Circuits have addressed the standard of proof in bond hearings and agree that the government bears the burden of establishing clear and convincing evidence of flight risk and dangerousness. *See Lora*, 804 F.3d at 616; *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir.

2011). No court of appeals has adopted a contrary view on either question.

In light of the agreement among the courts of appeals on several of the core issues underlying the government's Questions Presented, the petition should be denied. The only area of disagreement among the lower courts is about when detention becomes unreasonably prolonged and how that determination should be made. As discussed below, this area of law is developing and does not merit review.

B. The Decisions of the Courts of Appeals Are Developing as to How and When Bond Hearings Are Constitutionally Required.

While the courts of appeals agree that Section 1226(c) must be read to include an implicit limit in order to avoid unreasonably prolonged detention, courts have taken different approaches in safeguarding this constitutional concern. The circuits with the largest immigration dockets – the Second and the Ninth – have interpreted the statute to include a six-month limitation, after observing disparate outcomes in prolonged detention habeas cases. While the First, Third, and Sixth Circuits have opted instead to require individual litigation by detained noncitizens regarding the unreasonableness of their detention, the case law is still developing on these issues among and within the circuits. This Court should therefore deny certiorari in order to allow circuits to assess the effectiveness of

their rulings, to allow the remaining circuits to consider the issue, and to permit the government to identify other mechanisms that may ensure greater uniformity and fairness for noncitizens facing prolonged detention.

The development of the main approaches to addressing prolonged detention demonstrates why this Court should not grant the government's petition in this case. First, the courts that have interpreted the statute to include a six-month limitation on mandatory detention have not done so in a vacuum. Rather, they have reached this ruling after observing the due process implications of the alternative interpretation. While the government suggests that a six-month limitation will create "perverse incentives" for noncitizens to delay their cases and will result in the high rates of absconding or recidivism that Congress sought to avoid by enacting mandatory detention, *see* Pet. 7, there is no evidence that such fears have come to fruition, and the courts should have the opportunity to assess their rulings in light of the harms that have been alleged.

In the case below, for example, the Second Circuit held that noncitizens detained under Section 1226(c) are entitled to a bond hearing within six months, following a long history of habeas decisions at the district court level. *See, e.g.*, Pet. App. 30a-31a (comparing multiple district court decisions showing vastly different outcomes when courts make individual reasonableness determinations). Noting that individual habeas petitions were granted in some cases where detention

exceeded eight months, while denied in other cases where detention reached nearly three years, the Second Circuit expressed concerns about the ability of a litigation-based process to ensure due process for non-citizens who may be unrepresented. *Id.* at 31a. The Second Circuit concluded that “[a]dopting a six-month rule ensures that similarly situated detainees receive similar treatment.” *Id.*

The basis of the six-month limitation is also clear in the Ninth Circuit, where the most recent *Rodriguez* decision was borne of a long history of carefully considered cases. *See Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060, 1068-1069 (9th Cir. 2015); *see also* Pet. 7 (listing cases). Over a decade ago, the Ninth Circuit first recognized that Section 1226(c) does not permit unreasonably prolonged detention. *See Tijani*, 430 F.3d at 1242 (holding that the government must provide a bond hearing to a noncitizen detained for 32 months under Section 1226(c) and finding the constitutionality of the detention to be “doubtful”); *see also Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008) (holding that a lawful permanent resident cannot be detained for a prolonged period without the opportunity to contest the necessity of his continued detention in a neutral forum). Subsequent decisions explained that “[a]s a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months.” *Diouf v. Napolitano*, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011). During this period, noncitizens also pursued class action litigation seeking bond hearings,

resulting in discovery and data collection on the implications of prolonged detention on noncitizens. See *Rodriguez III*, 804 F.3d at 1071. Over the course of multiple decisions in this class action case, the Ninth Circuit held that individuals detained for over six months under Section 1226(c) are entitled to bond hearings where the government must prove by clear and convincing evidence that the individual is a flight risk or danger to the community to deny bond. *Rodriguez III*, 804 F.3d at 1080; *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1138 (9th Cir. 2013); *Rodriguez I*, 591 F.3d at 1116.

Continued, careful monitoring of the impact of a six-month limit will allow courts to assess the relative merits of this approach. Similarly, the evolution of case law within the three courts of appeals that have rejected a six-month limit demonstrates the importance of allowing the courts (and the government) to refine and reconsider the appropriateness of their alternative approach. The first circuit court decision recognizing a constitutional limit to Section 1226(c) came thirteen years ago in the Sixth Circuit, followed by a string of cases in the Third Circuit, and more recently by a decision in the First Circuit this year. While the law in the Sixth Circuit has remained relatively static,⁸ the

⁸ In *Ly*, the Sixth Circuit considered a prolonged detention claim under Section 1226(c) shortly after *Demore v. Kim*, 538 U.S. 510 (2003) was decided. *Ly*, 351 F.3d at 263. A district court granted Mr. Ly's habeas petition and ordered that he receive a bond hearing. *Id.* at 266. On appeal, the Sixth Circuit held that "incarceration for one and one-half years as part of a civil, nonpunitive proceeding

law in the First and Third Circuits demonstrates that the position of these circuits is still in flux. The potential for further development and refinement of the six-month limitation in these circuits thus strongly counsels in favor of denying the government’s petition in this case.

The Third Circuit, for example, is progressing towards a more defined temporal limitation to detention under Section 1226(c). The court first articulated its test for prolonged detention in *Diop*, holding that “when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary. . . .” 656 F.3d at 233. Declining to adopt a bright-line rule, the Third Circuit determined that reasonableness is a fact-specific inquiry requiring individualized habeas litigation. *Id.* at 234. Less than one year later, the Third Circuit refined the factors used in its test and reversed a habeas denial for an individual who had been in immigration detention for four years, rejecting the government’s argument that the detainee’s pursuit of challenges to removability rendered his prolonged detention reasonable. *Leslie v. Att’y Gen. of U.S.*, 678 F.3d 265, 271 (3d Cir. 2012). In

when there was no chance of actual, final removal, was unreasonable.” *Id.* at 271. Mr. Ly raised an as-applied due process challenge to his detention; thus, even though the Sixth Circuit declined to adopt a bright-line rule, Mr. Ly never argued that due process requires a six-month limit. *Id.*; Brief for Appellee, *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (No. 01-3016), 2001 WL 35991274. The Sixth Circuit has not revisited this issue since *Ly* was decided in 2003, and there is little indication of significant litigation regarding this issue in the Sixth Circuit since that time.

its most recent published case on the issue, the Third Circuit held that a noncitizen detained for nearly three years under Section 1226(c) was entitled to a bond hearing, stating that, “beginning sometime after the six-month timeframe . . . and certainly by the time Chavez-Alvarez had been detained for one year, the burdens to Chavez-Alvarez’s liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute.” *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015). The Third Circuit’s reasoning in *Chavez-Alvarez* indicates that detention at one year is presumptively unreasonable and may become unreasonable after the six-month mark. *Id.* Moreover, the progression from *Diop* to *Chavez-Alvarez* shows that while the Third Circuit still conducts a fact-specific reasonableness inquiry, the circuit is moving towards a view that detention beyond six months is presumptively unreasonable.

The First Circuit’s recent decision also highlights the potential for further development in the law. In *Reid*, the First Circuit recently addressed the constitutionality of Section 1226(c) detention in a class action case, affirming the grant of a bond hearing to the petitioner but rejecting a six-month temporal limit as applied to the class. 2016 WL 1458915, at *12. Despite its rejection of a six-month limitation, the First Circuit recognized the merits of the Second and Ninth Circuits’ interpretation and the shortcomings of the alternative approach requiring individual habeas litigation to determine the reasonableness of detention. *Id.* at *8

(acknowledging that requiring noncitizens to bring individual habeas cases “results in wildly inconsistent determinations” and increases detention times for noncitizens who are the least likely to be removed). In light of these shortcomings, the First Circuit suggested that the government consider crafting a process to safeguard noncitizens’ due process rights more effectively and uniformly. *Id.* at *12 n.5. In addition, the First Circuit remanded the class action back to the district court for reconsideration of the certification order, providing space for the district court to refine the class in light of these concerns. *Id.* at *12. Thus, the issue in the First Circuit is far from settled.

Despite the differences in the approaches of the courts of appeals, the courts are evolving as they interpret Section 1226(c) to establish appropriate remedies to avoid due process violations. As several courts have recognized, circuits that require individual habeas litigation may find that such an approach results in a lack of uniformity and fairness. This Court would benefit from a more developed record of the courts of appeals’ rulings. Such a record would also assist the Executive Branch should it decide to implement constitutionally adequate procedural protections nationwide. As the courts of appeals are largely in agreement as to the constitutional problem with prolonged detention, and are still developing the appropriate remedies, the petition should be denied.

II. The Second Circuit's Decision on Prolonged Detention Is Correct.

This Court's review is also unwarranted because the Second Circuit reached the correct finding with respect to Mr. Lora's prolonged detention claim. The Second Circuit held that the statute should be construed to require that noncitizens detained under Section 1226(c) receive a bond hearing within six months of detention, absent a prior opportunity for an individualized determination of their flight risk and dangerousness. In so holding, the court correctly applied Supreme Court precedent and the reasoning of other circuit courts in finding that mandatory detention under Section 1226(c) is subject to a temporal limitation. Pet. App. 9a.

A. Providing Bond Hearings to Noncitizens Within Six Months of Detention Ensures Due Process.

The interpretation of the statute as requiring bond hearings within six months of mandatory detention under Section 1226(c) is proper, constitutionally sound, and the best interpretation for avoiding due process violations under the statute. It is the natural outgrowth of this Court's precedent and provides clarity, efficiency and fairness in the adjudication of immigration removal proceedings in the Circuit.

As noted above in Part I.A., *supra*, every court of appeals to consider the issue has agreed that mandatory detention without the opportunity for a bond hearing

under Section 1226(c) raises serious due process concerns when detention becomes prolonged. *See* Pet. 7. Therefore, contrary to the government’s arguments about the unambiguousness of the text and purpose of the statute, constitutional avoidance must be applied to prevent the statute from giving rise to due process violations: “[T]o avoid significant constitutional concerns surrounding the application of section 1226(c), . . . an implicit temporal limitation” must be read into the statute. Pet. App. 9a.

The six-month limitation is proper and legally sound under this Court’s jurisprudence in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003). Addressing the holdings in these two cases, the Second Circuit acknowledged the facial constitutionality of Section 1226(c). Pet. App. 27a. However, the court correctly reasoned that mandatory detention beyond the “brief” and “reasonable” period of time necessary to complete removal proceedings raises serious constitutional concerns. *Id.*

As the Second Circuit noted, the Supreme Court in *Zadvydas* first contemplated that the detention of noncitizens in the post-removal period was no longer presumptively constitutional after six months. *Id.* at 29a. While the *Zadvydas* decision distinctively rested on the notion that post-removal-period detention risked being indefinite if a detainee’s removal was not reasonably foreseeable, the Supreme Court nevertheless found reason to believe that “Congress . . . doubted the constitutionality of detention for more than six

months.” *Id.* at 29a-30a (quoting *Zadvydas*, 533 U.S. at 701).

Implicit in this Court’s subsequent holding in *Demore* is an adherence to the Court’s determination in *Zadvydas* that mandatory detention without an individualized assessment raises constitutional concerns after six months. In *Demore*, this Court upheld the constitutionality of Section 1226(c), while emphasizing that detention under this provision is only lawful for a brief period.⁹ In focusing on this time period, this Court stressed the brevity of pre-final order detention, noting that it lasts an average of 47 days, with a minority of cases lasting up to five months if appealed. *Demore*, 538 U.S. at 529. On that premise, this Court upheld the constitutionality of Section 1226(c) for “the brief period necessary” to complete removal proceedings.¹⁰ *Id.* at 513; *see also* Pet. App. 27a.

In light of this Court’s decisions in *Demore* and *Zadvydas*, the government’s arguments about a six-month limitation being improper are untenable. As

⁹ Respondent Mr. Kim in *Demore* did not challenge his prolonged detention under Section 1226(c) but rather filed a facial challenge to the constitutionality of the statute itself. 538 U.S. at 511.

¹⁰ Both the majority opinion and Justice Kennedy’s concurrence considered mandatory detention under Section 1226(c) to be relatively brief. Justice Kennedy stated that because “the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as [Mr. Kim] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.” 538 U.S. at 532 (Kennedy, J., concurring).

the Second Circuit acknowledged, contrary to the averages cited in *Demore*, today a noncitizen “regularly spends many months and sometimes years in detention,” pending adjudication of their removal proceedings in an “enormous backlog.” Pet. App. 6a; *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 *Hastings L.J.* 363, 385 n.123 (2014). *Demore* itself emphasized the brevity of detention without a bond hearing in upholding its constitutionality. The increasing length of removal proceedings since *Demore* therefore underscores the need for a standardized remedy – *i.e.*, a six-month limitation – in order to avoid a reading of the statute that would regularly permit due process violations.

The Second Circuit’s interpretation of a six-month limitation to Section 1226(c) is also critical to avoiding the problems that stem from the government’s favored approach. First, the six-month limitation avoids the unfairness that results from requiring individuals to engage in complex and time consuming litigation to seek a fact-dependent reasonableness inquiry as a threshold obstacle to an individualized bond hearing. Pet. App. 28a-29a. This approach apportioned access to justice based on a detained noncitizen’s ability to gather the resources to file and defend a federal habeas action while seeking redress for the possible violation of her rights. A detained noncitizen must acquire these means despite having no right to government-appointed counsel in immigration court or federal district court, possible language barriers, and barriers inherent in detention itself.

These factors and others help explain the wide variation in outcomes from the individual federal court litigation approach within and across district courts. In contrast, the Second Circuit noted that the six-month limitation would “ensure[] that similarly situated detainees receive similar treatment,” as well as prevent “random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not. . . .” *Id.* at 31a.

Second, inconsistencies in the adjudication of individual habeas petitions are not only demonstrated in the outcomes of individual cases, but also in timing and subsequent delays attributable to the federal courts, leading to further prolonged detention. *Id.* (“[S]ome habeas petitions are adjudicated in months and others are not adjudicated for years.”). The approach advanced by the government therefore presents a constitutionally problematic solution because the process inherently takes time – which is the very harm the petitions are supposed to redress.¹¹ While habeas petitions are being litigated for months and years after

¹¹ This problem is vividly illustrated in *Chavez-Alvarez*, a Third Circuit case involving a noncitizen’s detention under Section 1226(c). *See* 783 F.3d 469. Mr. Chavez-Alvarez was held in mandatory detention for nearly three years while challenging his removal. *Id.* at 470. The Third Circuit ultimately held that after the first six months of detention and “certainly” by the one-year mark, the presumption of flight risk and dangerousness, as well as the argument that continued detention remained reasonable in light of the purposes of Section 1226(c), were no longer tenable. *Id.* at 477-478. Therefore, Mr. Chavez-Alvarez suffered the harms of unlawful detention for more than two years after the point at

their initial filing, the irreparable harm caused by unlawful detention is continuously augmented, as the noncitizen challenging her possibly unconstitutional detention remains detained.

Under the government's approach, even those who do seek and obtain a remedy will receive the remedy months or years after the due process violation already occurred. Thus, the government advocates for a process that is designed to fail the very individuals who are ultimately found to have legitimate due process challenges.

Third, the government's rule would place a particularly significant burden on noncitizens who, like Mr. Lora, have substantial defenses to their removal.¹² While the government suggests that a six-month limitation would create perverse incentives for noncitizens to delay their proceedings, it provides no evidence to support that claim. By contrast, there is ample evidence that, without bond hearings, noncitizens who

which the court found his detention became unreasonably prolonged.

¹² Mr. Lora pursued various meritorious defenses to removal, including a challenge to his grounds of removal and the submission of an application for cancellation of removal. Pet. App. 11a. None of these steps taken by Mr. Lora, who was represented by pro bono counsel from the start of his proceedings, was based on dilatory tactics. See Batya Ungar-Sargon, *Heavy Burdens and Unfair Fights in Immigration Courts*, CityLimits (Dec. 17, 2015), <http://citylimits.org/2015/12/17/heavy-burdens-and-unfair-fights-in-immigration-courts/> (link to five-part series describing in part the role that the New York Immigrant Family Unity Project, a city-funded public defender system for detained immigrants, has played, including in Mr. Lora's case).

pursue legitimate defenses to removal – including cancellation of removal and asylum – may languish in mandatory detention for years before a habeas court may intervene. *See, e.g., Chavez-Alvarez*, 738 F.3d at 475-476, 478; *Tijani*, 430 F.3d at 1247-1249 (Tashima, J., concurring).

Fourth, the Second Circuit’s six-month limitation is critical to remedying the “pervasive inconsistency” and “confusion” in the federal district courts, providing more “certainty and predictability” – which the Supreme Court has recognized is preferable for its “clear guidance and ease of administration to government officials.” Pet. App. 30a (citing *Zadvydas*, 533 U.S. at 700-701).¹³

Finally, the court’s interpretation best safeguards the fundamental rights of noncitizens subject to mandatory detention while also conserving judicial resources. A six-month limitation facilitates the proper administration of justice, particularly in the Second and Ninth Circuits, which have exceptionally large immigration dockets. *Id.* at 32a (“With such large dockets, predictability and certainty are considerations of enhanced importance and we believe that the interests of

¹³ *But see Reid*, 2016 WL 1458915, at *7 (holding that the bright-line rule as adopted in *Zadvydas* did not apply to detention under Section 1226(c) because it was not “potentially permanent,” and an “individualized reasonableness review remain[ed] feasible”) (internal quotation marks omitted). However, the First Circuit also recognized the inconsistent results of its own approach. *Id.* at *8.

the detainees and the district courts, as well as the government, are best served by this approach.”). Both Circuits have concluded that a six-month limit is the best choice in light of the need for judicial enforcement of due process limits on prolonged mandatory detention. *Id.* at 29a.

From the perspective of noncitizen detainees, the Second Circuit’s interpretation provides a determinate endpoint to endless detention without a hearing. As the court acknowledged, “*endless* months of detention” have “real-life consequences” for noncitizens and their families. *Id.* at 32a (emphasis added). For Mr. Lora, he not only lost his steady employment and the ability to support his family financially, but his younger son also went into foster care. *Id.* As the Second Circuit noted, serious consequences like these ripple throughout many immigrant families and communities. *Id.* at 33a n.23.

While the real-life consequences counsel in favor of a six-month limitation, the government’s countervailing concerns mischaracterize the implications of the rule. In criticizing the court’s interpretation, the government essentially equates the granting of a bond hearing with release of “criminal and terrorist aliens.” Pet. I, 7. Granting noncitizens detained under Section 1226(c) a bond hearing within six months does not, in any way, frustrate Congress’s intent in creating the statute or the government’s purposes of detaining and removing noncitizens who have been convicted of

certain crimes – nor does it jeopardize national security.¹⁴ The Second Circuit’s interpretation of a temporal limit retains immigration officials’ authority to detain noncitizens who fall under Section 1226(c) without bond for six months, and it retains the authority of the immigration judges to deny bond to those individuals who are in fact flight risks or dangers to the community beyond six months.

In the instant case, Mr. Lora’s successful habeas petition granted him a bond hearing before an immigration judge, at which the government agreed Mr. Lora was not a danger or a flight risk and stipulated to a \$5,000 bond. Pet. App. 13a. As the Second Circuit noted, the government “did not seriously dispute that [Mr.] Lora was neither a flight risk nor a danger to the community. . . .” *Id.* Therefore, the six-month limitation adopted in the Second Circuit does not frustrate the government’s detention authority, as the government can continue to detain noncitizens under Section 1226(c) and will still have the opportunity to show at a bond hearing why the detainee is a danger or flight risk and therefore warrants continued detention.

¹⁴ Further, as noted in n.2, *supra*, a separate statutory provision, 8 U.S.C. § 1226a, expressly covers the detention of “terrorist aliens.”

B. The Evidentiary Burden Is Correct Given the Weight of Due Process Concerns Implicated By Prolonged Detention.

As noted above, there is no disagreement among the courts of appeals on the proper allocation of burden and standard of proof for constitutionally adequate bond hearings in prolonged detention cases. *See* Part I.A., *supra*. The Second Circuit correctly determined that at a bond hearing, the government bears the evidentiary burden of proving by clear and convincing evidence that the noncitizen detained under Section 1226(c) is a danger or flight risk.

The courts of appeals that have considered the burden of proof at bond hearings that are ordered when mandatory detention becomes unconstitutionally prolonged have determined that “the Due Process Clause demands a hearing” where the government must bear the burden of proof. *See, e.g., Diop*, 656 F.3d at 233, 235; *see also Casas-Castrillon*, 535 F.3d at 951. The allocation of burden to the government stems from the recognition that prolonged detention is “constitutionally doubtful” and thus the government must be the party to justify continued detention. *Id.* (quoting *Tijani*, 430 F.3d at 1242).

In addition, the clear and convincing evidentiary standard that the government must meet is appropriate considering the due process concerns implicated by prolonged detention under Section 1226(c). The procedural protections necessary to justify the physical

restraint of an individual – particularly in the civil detention context – require a higher standard of proof than simply preponderance of the evidence. *See Singh*, 638 F.3d at 1203-1204. The “deprivation of liberty [] is so significant, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection.” *Id.* at 1204 (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)). Further, Section 1226(c) implicates civil, *non-penal* detention. In the jurisprudence involving civil detention, this Court has consistently found that due process necessitates a higher standard of proof in order to deprive a person of their liberty in the civil context. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (holding that a clear and convincing evidentiary standard is required in order for the State to confine a mentally ill person because “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”).

Given the profound liberty interest at stake in the civil detention context that this Court has recognized, the Second Circuit’s decision with respect to prolonged detention under Section 1226(c) is correct in establishing that a noncitizen detainee should be granted bond unless the government can prove by clear and convincing evidence that the individual is a danger or flight risk.

III. The Second Circuit’s Decision May Be Affirmed on Alternative Grounds.

In addition to his prolonged detention claim, Mr. Lora raised additional claims to support his argument that he was not properly subject to mandatory detention under Section 1226(c). The district court ruled in favor of Mr. Lora’s two statutory arguments: that he was not detained “when . . . released” from criminal custody and that he was never “released” from post-conviction incarceration, as required by the statute.¹⁵ Each of these claims provides an alternative basis by which to affirm the Second Circuit’s decision. *See generally Lora v. Shanahan*, No. 15-1307, Conditional Cross-Pet. for a Writ of Cert. (filed Apr. 21, 2016).

The first statutory basis for affirming the judgment below is that Mr. Lora is not subject to detention under Section 1226(c) because the “when” in “when . . . released” conveys immediacy. Pet. App. 55a. Congress had a specific set of noncitizens in mind when it enacted mandatory detention – those who were incarcerated for certain types of removable offenses. *Id.* at

¹⁵ Mr. Lora also argued that he was not subject to detention under Section 1226(c) because he has a substantial defense to his removability and therefore is not ultimately deportable. Pet. App. 26a; *see Gonzalez v. O’Connell*, 355 F.3d 1010, 1019-1020 (7th Cir. 2004) (“[*Demore*] left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable.”). However, this claim was not resolved by either the district court or the Second Circuit as both ruled in Mr. Lora’s favor on other grounds. If certiorari were granted in Mr. Lora’s case, he would seek to defend the decision below on this additional, alternative basis.

57a-59a. Rather than reach back in time to require the mandatory detention of all noncitizens who have criminal convictions that render them deportable, Congress chose to focus on noncitizens who were about to be released from criminal incarceration. *Id.*; *Castañeda v. Souza*, 810 F.3d 15, 28-34 (1st Cir. 2015) (en banc); see also *Lora v. Shanahan*, No. 15-1307, Conditional Cross-Pet. for a Writ of Cert. 17-18 n.13. Presuming such individuals were unacceptable risks of flight and dangers to the community, Congress justified the denial of bond hearings so that such individuals would remain confined. Pet. App. 57a-59a. Any such presumption of flight risk and dangerousness, however, fails to hold true for individuals who, like Mr. Lora, were neither incarcerated for their offenses nor detained by immigration officials at the time of their release. *Id.* at 51a, 55a, 60a.

The Second Circuit erred in rejecting the district court’s analysis in favor of the government’s interpretation of the statute, relying on the *Chevron* doctrine and improperly deferring to the BIA’s interpretation of the “when . . . released” clause in *Matter of Rojas*, which held that the statute did not impose a time limit on the government’s authority to detain a noncitizen. *Id.* at 20a. As discussed in *Casteñeda*, “much precedent cautions us” against the application of the *Chevron* doctrine at the “first sign” of some ambiguity. 810 F.3d at 23. “Rather . . . we must be mindful that ‘a statute may foreclose an agency’s preferred interpretation despite such textual ambiguities if the structure, legislative history, or purpose makes clear what its text

leaves opaque.’” *Id.* (citations omitted).¹⁶ The text, structure, legislative history, and purpose of Section 1226(c) confirm Congress’s intent to link the start of mandatory detention to the end of criminal incarceration, rather than permit the denial of bond hearings years after the noncitizen has already returned to the community. Pet. App. 57a-60a; *see also Castañeda*, 810 F.3d at 38-39.

The government’s boundless reading of the statute – that “when” may mean “any time after” with no limit – also raises serious constitutional concerns, since a noncitizen with a decades-old predicate conviction would be irrebuttably deemed a flight risk and danger to society, with no opportunity for a bond hearing to challenge that presumption. To avoid such concerns, the canon of constitutional avoidance would require that the Court “first ascertain whether a construction

¹⁶ This is particularly salient when considering the constitutional avoidance canon, which trumps any exercise of *Chevron* deference. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-575, 577 (2001) (an agency’s interpretation of a statute does not receive *Chevron* deference if an alternate reading avoids serious constitutional problems). Further, *Chevron* deference to an administrative agency on the scope of executive detention is inapplicable in the habeas context. *See Alina Das, Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143 (2015). Deferring to an administrative agency’s view of a federal detention statute would force a habeas court to “abdicat[e] [its] legal responsibility to review the detention’s lawfulness.” *Zadvydas*, 533 U.S. at 680; *Das, supra*, at 173-191 (describing how Congress did not and could not delegate its authority to define the scope of detention to executive administrative actors).

of the statute is *fairly possible* by which the question may be avoided.” *Zadvydas*, 533 U.S. at 689 (internal quotations omitted) (emphasis added). The district court’s interpretation of the statute avoids the serious constitutional concerns that arise from the government’s interpretation of the language in Section 1226(c).

Mr. Lora’s habeas petition was also initially granted by the district court based on his second statutory argument that he is not subject to detention under Section 1226(c) because he does not have a qualifying “release.” Pet. App. 66a, 68a. Mr. Lora was sentenced to conditional discharge for his single predicate offense and never served a sentence of incarceration. *Id.* at 10a.

The district court agreed with Mr. Lora’s argument, holding that Mr. Lora was not subject to Section 1226(c) because he had never been “released” within the meaning of Section 1226(c). *Id.* at 69a. The district court explained that in order to be subject to mandatory detention under Section 1226(c), a noncitizen must have been released from a custodial sentence on a predicate offense. *Id.* at 68a (“[W]hen 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).”).

As the district court correctly observed, the language of the statute and BIA case law make clear that “released” requires a term of custodial incarceration post-conviction from a predicate offense. *Id.* at 64a-68a.

Because the deportability grounds in the mandatory detention statute require a conviction, reliance on a pre-conviction release would run counter to the purpose of the statute, which commands immigration officials to detain incarcerated noncitizens at the time of their release from criminal custody for a removable offense. *Id.* at 65a-66a.

On appeal, however, the Second Circuit rejected the district court's finding and held that a noncitizen is "released" under the meaning of the statute when the noncitizen is convicted of a predicate offense and is not in physical custody. *Id.* at 18a. The Second Circuit's analysis is incorrect because it conflicts with the plain meaning of "released" and would render the term superfluous. *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)).

Furthermore, mandatory detention is only constitutional to the extent that such detention justifies the twin purposes of the statute – to prevent risk of flight and dangerousness. The "released" requirement serves as a limitation on the scope of the provision because it limits mandatory detention to those deemed by a sentencing court to warrant a term of imprisonment. *See Zadvydas*, 533 U.S. at 689 (limiting an immigration detention statute in order to avoid constitutional concerns). Constitutional avoidance thus bolsters the conclusion that "released" in Section 1226(c) refers to release from post-conviction custody.

In conclusion, if certiorari is granted, these questions should be considered as part of the various expansive interpretations and applications of Section 1226(c).



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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