No. 15-1307

In The

Supreme Court of the United States

ALEXANDER LORA,

Cross-Petitioner,

v.

CHRISTOPHER SHANAHAN, et al.,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONER

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REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONER

I. This Court Should Grant the Conditional Cross-Petition If It Grants The Government's Petition In This Case.

The government does not argue that the Court should deny Alexander Lora's cross-petition. Rather, the government argues that this Court should grant its petition in *Jennings v. Rodriguez*, No. 15-1204 (filed Mar. 25, 2016) and hold both its petition in *Shanahan v. Lora*, No. 15-1205 (filed Mar. 25, 2016) and Mr. Lora's cross-petition for disposition. Resp. 8. On that point, Mr. Lora urges this Court to deny the government's petitions in both *Jennings* and *Shanahan* for the reasons expressed in the briefs in opposition in those cases. If, instead, the Court grants the government's petition in *Shanahan*, Mr. Lora respectfully requests that the Court also grant Mr. Lora's cross-petition for the reasons expressed in his cross-petition.[1] However, if the Court grants the government's petition in *Jennings* and holds the petition in *Shanahan* as the government requests, Mr. Lora agrees with the government that the Court should also hold Mr. Lora's cross-petition for disposition as appropriate.[2] Resp. 8.

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[1] Mr. Lora does not agree that the Court should hold Mr. Lora's case if it grants the petition in *Jennings*. If the Court reviews the interpretation of Section 1226(c) at all, it should consider all of the related issues, including those raised in Mr. Lora's case.

[2] If the Court holds *Shanahan*, grants *Jennings*, and ultimately remands *Jennings*, the petition and cross-petition in Mr.

At bottom, however, Mr. Lora respectfully asserts that all of the questions raised in his case should be considered together if his case must be considered at all.[3] This would allow the Court to consider the scope of mandatory detention under 8 U.S.C. § 1226(c) and the people affected by the outcome of these cases.

Mr. Lora's case illustrates the interconnectedness of these issues. A longtime lawful permanent resident who has lived in the United States since he was seven years old, Mr. Lora was arrested by immigration officials three years after his conviction for an allegedly removable nonviolent drug offense for which he served no jail time. Pet. App. 9a-10a. Despite the passage of time and his continuous, law-abiding presence in the community, the government deemed Mr. Lora to be subject to Section 1226(c) and denied him the right to seek a bond hearing where evidence of his strong community ties and lack of recidivism in the years following his conviction could be considered. *Id*. The government held him in a county jail for nearly six months before a federal district court ordered a bond hearing, at which the government agreed to his release on bond in light of his lack of flight risk or dangerousness to the community. *Id.* at 12a-13a.

Lora's case also should be granted and remanded for further proceedings.

[3] Contrary to the government's assertion, Resp. 9, Mr. Lora disputes that he "is deportable" for purposes of Section 1226(c), because he has substantial defenses to his deportation. *See* Cross-Pet'n 15 n.12. This issue was briefed but not addressed by the Second Circuit. Pet. App. 11a, 26a.

While the Second Circuit ultimately upheld the district court's order because of the serious constitutional concerns that would arise from interpreting Section 1226(c) to authorize prolonged detention, the district court itself premised its decision on the inapplicability of Section 1226(c) to individuals who were never criminally incarcerated for their allegedly removable offenses or who were detained years after any release from criminal custody. *Id.* at 12a-13a, 40a-41a. Thus, contrary to the government's arguments, the question of the scope of Section 1226(c) is intertwined with the question of the interpretation of the statute in the context of prolonged detention. Resp. 8.[4] Before asking whether prolonged detention is permissible under the proper reading of Section 1226(c), one should first decide who is subject to Section 1226(c).

[4] Because Mr. Lora's case presents these issues, it is irrelevant that they do not arise in *Jennings.* Resp. 8. Two cases are pending before the Ninth Circuit on the "when . . . released" issue. *See Preap v. Johnson*, No. 14-16326 (9th Cir., filed Jul. 14, 2015); *Khoury v. Asher*, No. 14-35482 (9th Cir., filed June 5, 2014). The government does not contest that these issues arise throughout the country, including in the First Circuit, which has issued a divided en banc decision upholding two district court decisions rejecting the government's position. *Castañeda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc). The government argues that *Castañeda* is not precedential and that the government has appealed a "when . . . released" class action decision in Massachusetts. Resp. 17 (citing the government's appeal in *Gordon v. Johnson*, 300 F.R.D. 31 (D. Mass. 2014)). However, the government acknowledges that *Castañeda* is "law of the case" for the district court in *Gordon*, seeking a remand. *See* Brief of Respondents-Appellants, *Gordon v. Lynch*, No. 14-1729 (filed May 5, 2016), at 8 n.3, 12-14.

II. The Government's Arguments On The Merits Of The Issues Raised In Mr. Lora's Conditional Cross-Petition Are Incorrect.

The government does not contest the importance of the issues described in the cross-petition, nor does it suggest that the cross-petition should be denied at this stage. In taking the position that the petition should be held, however, the government raises several arguments contesting the merits of Mr. Lora's claims. These arguments are based largely on an overbroad, atextual view of Congressional intent that fails to consider the statutory context.

The question presented in Mr. Lora's cross-petition addresses the interpretation of the "when . . . released" clause in Section 1226(c) in two respects. The first pertains to the meaning of the term "released" and whether the government may deny a bond hearing to an individual who has never been criminally incarcerated, and thus has never been "released" from a custodial sentence. The second pertains to the meaning of the "when . . . released" clause and whether the government may deny a bond hearing to an individual whom it detains years after any release from criminal custody. Both issues have resulted in decisions by the Board of Immigration Appeals (BIA) and numerous federal courts. Cross-Pet'n 10-11, 18.

In its response to the first issue, the government adopts the Second Circuit's interpretation that "released" includes individuals who have never been in physical custody for their underlying offense. Resp. 15

(citing Pet. App. 18a). Notably, the position of the government is at odds with the BIA's narrower reading. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (B.I.A. 1999) (holding that mandatory detention only applies to immigrants "released" from prior criminal custody). Furthermore, the BIA has specifically held that a sentencing court's order to place an individual on probation alone is not enough to trigger the "released" provision of the statute. *See Matter of West*, 22 I. & N. Dec. 1405, 1410 (B.I.A. 2000) ("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.").

Where the BIA and Mr. Lora differ is on whether a release following an arrest prior to conviction may be sufficient alone to trigger Section 1226(c). *See Matter of Kotliar*, 24 I. & N. Dec. 124, 125 (B.I.A. 2007) (relying on *West* for the proposition that release from arrest is sufficient to trigger Section 1226(c)); *West*, 22 I. & N. Dec. at 1410 (stating in dictum that release from an arrest could suffice as a qualifying release). For the reasons explained by the district court in Mr. Lora's case, release from an arrest is not sufficient – Congress was focused on post-conviction releases, rather than pre-conviction events such as arrests. Pet. App. 65a-66a.[5]

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[5] The history of the statute's reference to release "without regard to whether the alien is released on parole, supervised release, or probation. . . ." also undermines the government's argument that release on probation may suffice in the absence of a

The government's arguments regarding the "when . . . released" clause are similarly flawed. The government argues that the statute's prohibition on release in Section 1226(c)(2) applies to "an alien described in paragraph (1)" and it is ambiguous whether the "when . . . released" clause is incorporated in this reference. Thus, it urges deference to the BIA's decision in *Matter of Rojas*, which concluded that the "when . . . released" clause is not part of the description of noncitizens subject to mandatory detention. 23 I. & N. 117, 125 (B.I.A. 2001).[6]

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custodial sentence. Resp. 16. This language was introduced as an amendment to the first mandatory detention statute, which originally directed that mandatory detention begin "upon completion of the alien's sentence." 8 U.S.C. § 1252(a)(2) (1989). In response to litigation over the term "sentence," Congress amended the statute to clarify that mandatory detention applies at the end of custodial incarceration – i.e., when the person would otherwise return to the community following a conviction. Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (Nov. 29, 1990) (codified at 8 U.S.C. § 1252(a)(2) (1991)); H.R. Rep. No. 101-681(I), at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554 ("At least one immigration judge has ruled that an aggravated felon who has been paroled by the sentencing court continues to serve his "sentence" while out on parole . . . Section 1503 amends existing law by requiring INS to incarcerate aggravated felons upon release from confinement. . . .").

[6] Contrary to *Rojas*, the government also argues that the term "when" is ambiguous, and could refer to either "at or around the same time" or "in the event that." Resp. 11 n.1. This conflicts with the BIA's conclusion that the statute connotes immediacy. *See Rojas*, 23 I. & N. Dec. at 122 (the statute "does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement").

The government's argument also suffers from textual flaws, most notably the statute's unambiguous reference to paragraph (1) as a whole, rather than subparagraphs (1)(A)-(D). *See Castañeda*, 810 F.3d at 25 (comparing cross-references in various parts of the statute). Nor does the term "described" inherently limit the cross-reference, as noncitizens may be described by both their offenses and their detention upon release from custody for those offenses. *Id.* (descriptions may include adverbial phrases, noting that "the narrator 'described in' Frost's famous poem is the one who 'took the road less travelled' "). Similarly, the government's argument that "when" might connote something other than immediacy runs counter not only to the BIA's interpretation, but the government's own assertion that Congress enacted mandatory detention to require government officials to act expeditiously to detain noncitizens before they could return to society. *Id.* at 27 (critiquing the government's "oddly half-hearted understanding of the detention mandate").

The flaw in the government's analysis is apparent in its "milk, eggs, or cheese" example:

> If someone gave you a two-paragraph shopping list saying (1) "You shall pick up any groceries that are milk, eggs, or cheese, when the groceries are made available for sale at the store"; and (2) "you shall refrigerate the groceries described in paragraph (1)," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store opened, you could leave them out on

> the counter rather than the put them in the refrigerator.

Resp. 11. Needless to say, immigrants are not milk, eggs, or cheese, and detaining them without bond is not a grocery store purchase. But the example does illustrate the government's error.

The government's example renders its "when" clause meaningless. When else would one be able to pick up groceries, other than "when the groceries are made available for sale at the store"? Its reading of the "when . . . released" clause in Section 1226(c) similarly renders the clause mere surplusage. If the "when . . . released" clause has no relevance to the application of mandatory detention, one could excise the clause from the statute.[7]

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[7] The government does not argue, nor is it plausible, that "when" means "not before" release (i.e., a prohibition on detention prior to release). Section 1226(c) does not cover all circumstances involving removable individuals in criminal custody. Had Congress intended the "when . . . released" clause to serve as a prohibition on detention prior to release from incarceration, it would have enacted a broadly applicable provision, if one were even necessary. *Cf.* 8 U.S.C. § 1231(a)(4) (prohibiting deportation of an "alien who is sentenced to imprisonment until the alien is released from imprisonment"). Similarly, a "not before" reading is implausible in light of the Transition Period Custody Rules ("TPCR"), which permitted the Attorney General to delay the effective date of Section 1226(c) for up to two years. Concerned that "the Attorney General did not have sufficient resources" to implement mandatory detention, the TPCR were "designed to give the Attorney General a . . . grace period . . . during which mandatory detention of criminal aliens would not be the general rule." *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (B.I.A. 1997). If Congress

The government's example also illustrates its failure to consider the role of the "when . . . released" clause in context. Consider a different grocery list that gives meaning to the "when" clause: "(1) You shall pick up any groceries that are milk, eggs, or cheese, when the groceries are fresh. (2) You shall refrigerate the groceries described in paragraph (1)." By providing meaning to the "when" clause, the relationship between paragraphs (1) and (2) changes. No sensible person would believe that, if you carelessly picked up groceries long past their expiration date, you must put spoiled groceries in the refrigerator. The point of refrigeration is to keep the groceries fresh, and it no longer serves its purpose if the groceries have already expired.

While these types of examples are distasteful when analogizing to the liberty issues at stake here, they demonstrate that context matters. Section 1226(c) was enacted as an exception to the ordinary bond procedures preserved in Section 1226(a) for noncitizens in removal proceedings. Congress chose to focus its exception on incarcerated noncitizens – persons about to be "released." The purpose of the mandatory detention statute is to prevent incarcerated noncitizens from returning to the community based on a presumption of what might happen in the future – the commission of additional crimes, or flight before individuals may be

had intended "when" to mean simply "not before" or "any time after" release, providing a two-year delay in its effective date would have been unnecessary.

identified for removal – if they are released. If a noncitizen is no longer incarcerated when she is detained – i.e., if the noncitizen is not detained when released from incarceration but years later – the statute no longer serves this purpose.

This disconnect between the government's reading and the purpose of the statute underscores the serious constitutional concerns raised by the government's interpretation. Notably, the government does not argue that its reading of the statute raises no constitutional concerns, nor does it contest that the canon of constitutional avoidance trumps any *Chevron* deference that may otherwise apply. Resp. 14 & n.10 (citing *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008)).[8] Rather, the government seems to argue that any concerns are not significant enough to merit constitutional avoidance. It states, for example, that "cross-petitioner does not explain why an alien would have materially greater due process rights if a span of time passed after (rather than before) his qualifying criminal detention." Resp. 14.

This line of reasoning betrays the government's misunderstanding of the constitutional concerns at stake. The constitutionality of Section 1226(c) is premised upon its twin justifications – the prevention of flight risk and dangerousness to the community. The Supreme Court noted that Congress was concerned

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[8] As noted in Mr. Lora's brief in opposition to the government's petition, the *Chevron* framework is inapplicable in the detention context. *See* BIO 33 n.16.

about the growing population of noncitizens in jails and prisons and the risk of flight and recidivism that they would pose if released. *See Demore v. Kim*, 538 U.S. 510, 518 (2003). Detention without bond hearings is arbitrary, however, if this irrebuttable presumption of risk is unreasonable. Individuals who have never been incarcerated for their offenses, and/or those who are detained years after release, have, by definition, been identified and located for removal proceedings. The question is not whether they may be detained – the government retains that authority – the question is whether they may be deprived of a bond hearing during their detention.[9] Contrary to the government's suggestion, it is precisely the period of time that has passed after their allegedly removable offense that matters. *See Castañeda*, 810 F.3d at 21 ("[T]heir intervening period of freedom makes it possible to take account of their post-release conduct in evaluating the flight risk or danger they may pose."). Detaining them without a bond hearing thus raises serious due process

[9] For this reason, the government's argument that it loses its authority to act under Mr. Lora's reading is inapposite. Resp. 12-13. The government retains authority to detain noncitizens like Mr. Lora under Section 1226(a), and may deny bond to noncitizens who are flight risks or dangerous. Moreover, because the statute specifies that Section 1226(c) is an exception to Section 1226(a), resort to Section 1226(a) is neither a sanction to the government nor a windfall to the immigrant. *See Castañeda*, 810 F.3d at 42-43 (distinguishing *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990)).

concerns that may be avoided by rejecting the government's reading of the statute.

CONCLUSION

For the foregoing reasons, Mr. Lora urges this Court to grant his cross-petition if the Court grants the government's petition in this case.

Respectfully submitted,

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