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In the
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.

Appeal from the United States District Court
for the Southern District of New York.
No. 14 Civ. 2140(AJP) — Andrew J. Peck, *Magistrate Judge.*

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.

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Argued: April 20, 2015
Decided: October 28, 2015

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 sentence. 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*.

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.)

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7 AHILAN ARULANANTHAM, ACLU Immigrants'
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12 Union Foundation, New York, NY, *on the brief, for*
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18 *Watch Network; Families for Freedom; Immigrant*
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20 *Kathryn O. Greenberg Immigration Justice Clinic;*
21 *Make the Road New York; National Immigrant Justice*
22 *Center; National Immigration Project of the National*
23 *Lawyers Guild; Neighborhood Defender Service of*
24 *Harlem; New Sanctuary Coalition of New York City;*
25 *Northern Manhattan Coalition for Immigrant Rights.*

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30

31

1 BARRINGTON D. PARKER, *Circuit Judge*

2

3 In 1996, with the passage of the Illegal Immigration Reform
4 and Immigrant Responsibility Act (“IIRIRA”), Congress significantly
5 expanded the categories of non-citizens subject to mandatory
6 detention pending their removal proceedings.⁴ Under section
7 1226(c) of the revised INA, the Department of Homeland Security
8 (“DHS”) is required to detain aliens who have committed certain
9 crimes “when [they are] released.” The section contains no explicit
10 provision for bail.⁵ When the constitutionality of section 1226(c) was
11 challenged in *Demore v. Kim*, 538 U.S. 510 (2003), statistics showed
12 that removal proceedings were completed within forty-seven days in
13 eighty-five percent of cases in which aliens were mandatorily
14 detained. *Id.* at 529. Emphasizing the relative brevity of detention in
15 most cases, the Court concluded that detention during removal
16 proceedings was “constitutionally permissible.” *Id.* at 531.

17 However, the passage of the IIRIRA, which, among other
18 things, expanded the definition of criminal aliens and required states
19 to provide notice of aliens who violate state criminal laws, combined
20 with a simultaneous rise in immigration to the United States, has
21 resulted in an enormous increase in the number of aliens taken into
22 custody pending removal.⁶ By 2009, Immigration and Customs

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 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.”).

1 Enforcement (“ICE”) was imprisoning close to four hundred
2 thousand aliens every year, two-thirds of whom were subject to
3 mandatory detention under section 1226(c).⁷ Not surprisingly, the
4 time that each immigrant spends in detention has also risen
5 substantially. In 2001, the average time an alien was detained from
6 the initiation of removal proceedings to release or entry of a final
7 order of removal was approximately thirty-nine days.⁸ In 2003, the
8 average detention time for most section 1226(c) detainees was
9 approximately forty-seven days. *See Demore*, 538 U.S. at 529. Since
10 then, the situation has worsened considerably. ICE has not provided
11 statistics regarding the length of time that mandatory detainees
12 spend in detention. It is clear, however, that today, a non-citizen
13 detained under section 1226(c) who contests his or her removal
14 regularly spends many months and sometimes years in detention
15 due to the enormous backlog in immigration proceedings.⁹ There
16 are thousands of individuals in immigration detention within the
17 jurisdiction of this Court who languish in county jails and in short-
18 term and permanent ICE facilities.

19 No doubt an appreciable number of these detainees have
20 criminal records that subject them to mandatory deportation. Many
21 in this group are dangerous or have no ties to a community.
22 Congress was quite clear that it wanted such individuals detained
23 pending deportation. On the other hand, this group includes non-
24 citizens who, for a variety of individualized reasons, are not
25 dangerous, have strong family and community ties, are not flight

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).

1 risks and may have meritorious defenses to deportation at such time
2 as they are able to present them.

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

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

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

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

11 On November 22, 2013, over three years into his probation
12 term, ICE agents arrested Lora in an early morning raid in the
13 Brooklyn neighborhood where he was living at the time. After the
14 agents took Lora into custody, he was transferred to Hudson County
15 Correctional Center in Kearny, New Jersey, where he was detained
16 without bond. Lora was charged with removability under INA §
17 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), for having been convicted of a
18 crime involving a controlled substance, and INA § 237(a)(2)(A)(iii), 8
19 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an
20 aggravated felony, namely, trafficking in a controlled substance as
21 defined in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). DHS took
22 the position that Lora's removal charges rendered him subject to
23 mandatory detention under section 1226(c) and that he was not
24 eligible for a bail hearing.

25 While his removal proceedings were pending, Lora moved in
26 New York state court to set aside his conviction. His motion was
27 granted on consent and in March 2014, his original plea and sentence
28 were vacated. Lora was then permitted to plead to a minor
29 offense—a single count of third degree possession of a controlled
30 substance—and was re-sentenced to a conditional discharge
31 imposed *nunc pro tunc* to July 21, 2010. With this new sentence, Lora
32 now has a strong argument for cancellation of removal under 1226(c)
33 because third degree possession is a Class B felony under N.Y. Penal

1 Law § 220.16(12) and does not qualify as an aggravated felony for
2 immigration purposes under 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1228b.¹²
3 However, he is still technically subject to mandatory detention under
4 section 1226(c) because he had been convicted of a crime involving a
5 controlled substance under 8 U.S.C. § 1227(a)(2)(B)(i). In March
6 2014, Lora requested that he be permitted to file an application for
7 cancellation of removal and that he be afforded a bail hearing. The IJ
8 granted Lora's request to file for cancellation of removal but denied
9 Lora's request for a bail hearing.¹³

10 At the same time, Lora filed a petition for a writ of habeas
11 corpus, challenging his continued detention. Lora argued that he
12 was not subject to mandatory detention under section 1226(c), which
13 requires an alien to be taken into DHS custody "when the alien is
14 released" because DHS did not take him into custody at the precise
15 time "when" he was released on his underlying convictions, but
16 years later, and that he could not have been detained when he was
17 "released" because he was never incarcerated or kept in physical
18 custody following his triggering conviction. Lora also argued that
19 his continued imprisonment without a bail hearing raised
20 constitutional concerns under the Due Process Clause of the Fifth
21 Amendment in light of his substantial defenses to removal and the
22 strong possibility of his indefinitely prolonged detention. Finally,
23 Lora raised the alternative argument that his continued detention

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 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.

1 was not in the public interest, and that he should be released on
2 parole.

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

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

32

1 **DISCUSSION**

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

9
10 (1) Custody

11 The Attorney General shall take into
12 custody any alien who . . .

13 (B) is deportable by reason of having
14 committed any offense covered in section
15 1227(a)(2)(A)(ii),(A)(iii), (B), (C), or (D) of
16 this title [*i.e.* specified offenses including
17 controlled substance offenses]; . . . *when the*
18 *alien is released*, without regard to whether
19 the alien is released on parole, supervised
20 release, or probation, and without regard to
21 whether the alien may be arrested or
22 imprisoned again for the same offense.

23
24 (2) Release

25 The Attorney General may release an alien
26 described in paragraph (1) only if the
27 Attorney General decides . . . that release of
28 the alien from custody is necessary [for
29 certain witness protection purposes], and
30 the alien satisfies the Attorney General that
31 the alien will not pose a danger to the
32 safety of other persons or of property and is
33 likely to appear for any scheduled
34 proceeding. . . .

1

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

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

9 This case calls for us to decide: (1) whether an alien is subject
10 to mandatory detention only if he or she has been sentenced to and
11 “released” from prison or some form of physical custody; and (2)
12 whether an alien is subject to mandatory detention if there is a gap
13 between the alien’s being on post-conviction release and his or her
14 confinement by DHS.¹⁴ Although these are issues of first impression
15 for this Court, other circuits as well as numerous district courts, both
16 within and outside of this Circuit, have addressed the issue but
17 remain divided on how to apply section 1226(c).¹⁵

18 **Meaning of “Released”**

19 The government argues that the Court should reject the
20 District Court’s holding that Lora is not subject to mandatory
21 detention because he was never “released” from a post-conviction
22 sentence of incarceration. The government relies on two BIA cases

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.

1 in which the Board determined that the word “released” in section
2 1226(c) includes pre-conviction release from arrests.¹⁶ See *In re*
3 *Kotliar*, 24 I. & N. Dec. 124, 125 (2007) (“[W]e have held that an alien
4 who is released from criminal custody[,] . . . including from an arrest
5 preceding a conviction, . . . is subject to mandatory detention.”); *In re*
6 *West*, 22 I. & N. Dec. 1405, 1410 (2000). *West* and *Kotliar* also suggest
7 that the alien must be released from some form of physical custody
8 for § 1226(c)(1) to apply. See, e.g., *West*, 22 I & N. Dec. at 1410 (“[W]e
9 construe the word ‘released’ . . . to refer to a release from physical
10 custody.”). The government urges that, consistent with these cases,
11 “released” can refer to a release from pre-conviction confinement,
12 such as an arrest.

13 Because we find that section 1226(c)(1) unambiguously
14 mandates detention in this circumstance for other reasons, we need
15 not confront the BIA decisions or the government’s interpretation of
16 them. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.
17 837, 842–43 (1984). “[D]eference to [an agency’s] statutory
18 interpretation is called for only when the devices of judicial
19 construction have been tried and found to yield no clear sense of
20 congressional intent.” *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S.
21 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48
22 (1987)). A natural reading of the statute suggests that the term
23 “released” in section 1226(c) means not incarcerated, not imprisoned,
24 not detained, i.e., not in physical custody. See *Demore*, 538 U.S. at 513
25 (“Congress[was] justifiably concerned that deportable criminal
26 aliens who are not detained continue to engage in crime and fail to
27 appear for their removal hearings . . .”). Thus, detention is
28 mandated once an alien is convicted of a crime described in section
29 1226(c)(1) and is not incarcerated, imprisoned, or otherwise
30 detained. This interpretation avoids nullifying the provision in
31 section 1226(c)(1) that DHS “shall take into custody any alien who . .
32 . is inadmissible [or] is deportable by reason of having committed [a

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.

1 certain type of crime] . . . when the alien is released, *without regard to*
2 *whether the alien is released on parole, supervised release, or probation*
3 (emphasis added)—which clearly contemplates non-carceral
4 sentences. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)
5 (noting that statutes should be read to avoid making any provisions
6 “superfluous, void, or insignificant” (internal quotation marks
7 omitted)). Moreover, where Congress has intended to limit
8 detention to aliens sentenced to a certain prison term, it has done so
9 explicitly. *See, e.g., 8 U.S.C. § 1182(a)(2)* (alien is not eligible for a
10 visa or admission if the alien has committed a crime involving moral
11 turpitude for which a sentence of at least six months has been
12 imposed). Accordingly, we conclude that an alien who has been
13 convicted of a qualifying crime under section 1226(c) is subject to
14 mandatory immigration detention, whether he is sentenced to a
15 prison term or to probation.

16 **“When” the Alien is Released**

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

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

1 Over a decade ago, the BIA, the agency charged with
2 administering this statute, considered a challenge from a detainee to
3 his mandatory detention. *See In re Rojas*, 23 I. & N. Dec. 117 (BIA
4 2001). The detainee argued that because he had not been taken into
5 custody “when . . . released,” as directed by section 1226(c)(1), he
6 was not subject to mandatory detention under section 1226(c)(2). *Id.*
7 at 118. The BIA declined to consider whether “when . . . released”
8 meant immediately upon release or merely sometime after the
9 detainee was released, and instead agreed with the government that
10 regardless of the proper interpretation of “when . . . released,” the
11 text, structure, history, and purpose of the statute all suggested that
12 Congress did not intend the “when . . . released” clause to limit the
13 authority of agents to detain an alien. *Id.* at 121–25. Under the BIA’s
14 interpretation, “when . . . released” refers to the time at which the
15 duty to detain arises, and does not place a temporal limit on the
16 agents’ authority to detain an alien—thus, 1226(c)(2) mandates
17 detainment even if DHS does not detain the alien immediately upon
18 release. *Id.* at 123–24. This has been referred to in this Circuit as the
19 “duty-triggering” construction, while Lora argues for what has been
20 referred to as the “time-limiting” construction. *See Straker v. Jones*,
21 986 F. Supp. 2d 345, 352–53 (S.D.N.Y. 2013).

22 Because we are faced with an administrative agency’s
23 interpretation of a statute, we follow the two-step *Chevron* inquiry.
24 *See Chevron*, 467 U.S. at 842–44. If we find, based on the plain
25 language of the statute, that “the intent of Congress is clear, that is
26 the end of the matter.” *Id.* at 842. However, if we find that the
27 statute is silent or ambiguous with respect to the specific issue, we
28 will proceed to the second step: determining “whether the agency’s
29 answer is based on a permissible construction of the statute.” *Id.* at
30 843. We defer to the BIA’s interpretation so long as it is “reasonable,
31 and not ‘arbitrary, capricious, or manifestly contrary to the statute.’”
32 *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (quoting *Chevron*, 467
33 U.S. at 844). The government argues that, because the statute is

1 ambiguous, the District Court should have followed the BIA's
2 reasonable interpretation. We agree.

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

11 As the BIA recognized, it is unclear from the text of section
12 1226(c) whether the "when . . . released" clause is part of the
13 definition of aliens subject to mandatory detention. *Rojas*, 23 I. & N.
14 Dec. at 120. Section 1226(c) requires that DHS take custody of aliens
15 convicted of four categories of predicate criminal or terrorist acts and
16 offenses ("A" through "D") when they are released and that DHS
17 may not "release an alien described in paragraph (1)" unless that
18 alien falls under an exception for protected witnesses. But it is not
19 clear whether the phrase "an alien described in paragraph (1)" refers
20 to the aliens described in categories "A" through "D," as the
21 government argues, or to aliens who both qualify under these
22 subcategories and were taken into immigration custody "when . . .
23 released" from custody, as Lora argues. Noting this difficulty, the
24 Tenth Circuit has described how the "when . . . released" phrase can
25 be considered adverbial, modifying the opening verb phrase "the
26 [DHS] shall," or it can be considered adjectival, modifying the noun
27 phrases in categories (A) through (D). *See Olmos*, 780 F.3d at
28 1318–19.

29 Because we find that Congress has not directly spoken on the
30 meaning or application of "when . . . released" in this statute, we
31 must consider whether the BIA's interpretation of section 1226(c) is
32 permissible and thus entitled to *Chevron* deference. *See Khouzam v.*
33 *Ashcroft*, 361 F.3d 161, 164 (2d Cir. 2004). In *Rojas*, the alien argued

1 that he was not subject to mandatory detention under section 1226(c)
2 because immigration authorities did not take him into custody until
3 two days after his release. To resolve the statute's ambiguity, the
4 BIA used four separate approaches to analyze section 1226(c): (1) the
5 ordinary meaning of the statute's language, although that language
6 was ambiguous;¹⁷ (2) the overall statutory context and goals; (3) the
7 statute's predecessor provisions; and (4) practical considerations.
8 *Rojas*, I. & N. Dec. at 121–24. The BIA, while not deciding whether
9 “when . . . released” meant immediately upon release or something
10 else, concluded that “the duty to detain is not affected by the
11 character of an alien’s release from criminal incarceration,” *id.* at 121,
12 and “that [the alien was] subject to mandatory detention pursuant to
13 section [1226(c)] of the Act, despite the fact that he was not taken
14 into [immigration] custody immediately upon his release from state
15 custody,” *id.* at 127.¹⁸ Consistent with *Chevron*, we are not convinced
16 that the interpretation is “arbitrary, capricious, or manifestly
17 contrary to the statute.” *Adams*, 692 F.3d at 95 (internal quotation
18 marks and citation omitted). As the BIA explained in *Rojas*, “[i]t is
19 difficult to conclude that Congress meant to premise the success of
20 its mandatory detention scheme on the capacity of [DHS] to appear
21 at the jailhouse door to take custody of an alien at the precise
22 moment of release.” 23 I. & N. Dec. at 128.

23 Moreover, the BIA’s interpretation of section 1226(c) follows
24 Supreme Court precedent establishing that statutes providing “that
25 the Government ‘shall’ act within a specified time, without more,”
26 are not “jurisdictional limit[s] precluding action later.” *Barnhart v.*

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).

1 *Peabody Coal Co.*, 537 U.S. 149, 158 (2003). “[I]f a statute does not
2 specify a consequence for noncompliance with statutory timing
3 provisions, the federal courts will not in the ordinary course impose
4 their own coercive sanction.” *United States v. James Daniel Good Real*
5 *Prop.*, 510 U.S. 43, 63 (1993); *see also United States v. Montalvo-Murillo*,
6 495 U.S. 711 (1990) (holding that the government may detain
7 criminal defendants leading up to trial even if they do not comply
8 with the relevant statute’s command that a judicial officer “shall”
9 hold a bail hearing “immediately upon the person’s first
10 appearance” before the officer); *Sylvain*, 714 F.3d at 157–59 (applying
11 *Barnhart* and *Montalvo-Murillo* to section 1226(c) and concluding that
12 “the government retains authority under [section 1226(c)] despite
13 any delay”).

14 Finally, the BIA’s interpretation has the added benefit of
15 accounting for practical concerns arising in connection with
16 enforcing the statute. Particularly for criminal aliens in state
17 custody, it is unrealistic to assume that DHS will be aware of the
18 exact timing of an alien’s release from custody, nor does it have the
19 resources to appear at every location where a qualifying alien is
20 being released. State and local law enforcement may also have
21 difficulty determining citizenship, since records of arrests and
22 convictions may be incomplete in this regard. Accordingly, we join
23 the Third, Fourth, and Tenth Circuits in holding that DHS retains its
24 authority and duty to detain an alien even if not exercised
25 immediately upon the alien’s release.¹⁹ Regardless of whether
26 “when . . . released” contemplates detainment immediately upon
27 release or merely sometime after release, we adopt the “duty-
28 triggering” construction, and hold that an alien may be subject to

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.”).

1 mandatory detention even where DHS does not immediately detain
2 the alien after release from criminal custody.²⁰

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

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

14 It is well-settled that the Fifth Amendment entitles aliens to
15 due process in deportation proceedings. *Reno v. Flores*, 507 U.S. 292,
16 306 (1993). “[T]he Due Process Clause applies to all ‘persons’ within
17 the United States, including aliens, whether their presence here is
18 lawful, unlawful, temporary, or permanent.” *Zadvydas*, 533 U.S. at
19 693 (considering a challenge to post-removal detention). As noted,
20 more than a decade ago, in *Zadvydas*, the Supreme Court signaled its
21 concerns about the constitutionality of a statutory scheme that
22 ostensibly authorized indefinite detention of non-citizens. *Id.* Two
23 years later, when the court upheld the constitutionality of section

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 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).

1 1226(c) in *Demore v. Kim*, it emphasized that, for detention under the
2 statute to be reasonable, it must be for a brief period of time. *See*,
3 *e.g.*, 538 U.S. at 528 (detention permissible because, as compared to
4 *Zadvydas*, “the detention here is of a much shorter duration”).
5 Justice Kennedy explained in his concurrence that “[w]ere there to be
6 an unreasonable delay by the INS in pursuing and completing
7 deportation proceedings, it could become necessary then to inquire
8 whether the detention is not to facilitate deportation, or to protect
9 against risk of flight or dangerousness, but to incarcerate for other
10 reasons.” *Id.* at 532–33 (Kennedy, J., concurring).

11 These cases clearly establish that mandatory detention under
12 section 1226(c) is permissible, but that there must be some
13 procedural safeguard in place for immigrants detained for months
14 without a hearing. Accordingly, we join every other circuit that has
15 considered this issue, as well as the government, in concluding that
16 in order to avoid serious constitutional concerns, section 1226(c)
17 must be read as including an implicit temporal limitation. *See, e.g.*,
18 *Rodriguez*, 715 F.3d at 1137 (“[I]n several decisions over the past
19 decade . . . we have consistently held that *Demore’s* holding is limited
20 to detentions of brief duration.”); *Diop v. ICE/Homeland Sec.*, 656 F.3d
21 221, 231 (3d Cir. 2011) (applying canon of constitutional avoidance to
22 “conclude that the statute implicitly authorizes detention for a
23 reasonable amount of time”); *Ly v. Hansen*, 351 F.3d 263, 267–68, 271
24 (6th Cir. 2003) (noting that *Demore* “is undergirded by reasoning
25 relying on the fact that [the alien in the case], and persons like him,
26 will normally have their proceedings completed within a short
27 period of time” and the case must be understood as only authorizing
28 detention for brief periods of time).

29 However, while all circuits agree that section 1226(c) includes
30 some “reasonable” limit on the amount of time that an individual
31 can be detained without a bail hearing, courts remain divided on
32 how to determine reasonableness. This Court has not yet had the
33 opportunity to decide which approach to follow. The first approach,

1 employed by the Third and Sixth Circuits and favored by the
2 government, calls for a “fact-dependent inquiry requiring an
3 assessment of all of the circumstances of any given case,” to
4 determine whether detention without an individualized hearing is
5 unreasonable. *Diop*, 656 F.3d at 234; *see also Chavez-Alvarez v. Warden*
6 *York Cty. Prison*, 783 F.3d 469, 475 n.7 (3d Cir. 2015) (explaining “the
7 highly fact-specific nature” of the balancing framework). Under this
8 approach, every detainee must file a habeas petition challenging
9 detention, and the district courts must then adjudicate the petition to
10 determine whether the individual’s detention has crossed the
11 “reasonableness” threshold, thus entitling him to a bail hearing.

12 In contrast, the second approach, adopted by the Ninth
13 Circuit, is to apply a bright-line rule to cases of mandatory detention
14 where the government’s “statutory mandatory detention authority
15 under Section 1226(c) . . . [is] limited to a six-month period, subject to
16 a finding of flight risk or dangerousness.” *Rodriguez*, 715 F.3d at
17 1133. We believe that, considering the relevant Supreme Court
18 precedent, the pervasive confusion over what constitutes a
19 “reasonable” length of time that an immigrant can be detained
20 without a bail hearing, the current immigration backlog and the
21 disastrous impact of mandatory detention on the lives of immigrants
22 who are neither a flight risk nor dangerous, the interests at stake in
23 this Circuit are best served by the bright-line approach.

24 First, *Zadvydas* and *Demore*, taken together, suggest that the
25 preferred approach for avoiding due process concerns in this area is
26 to establish a presumptively reasonable six-month period of
27 detention. In *Zadvydas*, the Court held that six months was a
28 “presumptively reasonable period of detention” in a related context,
29 namely post-removal-determination detention. 533 U.S. at 700–01
30 (finding that there was “reason to believe . . . that Congress
31 previously doubted the constitutionality of detention for more than
32 six months”). After that point, “once the alien provides good reason
33 to believe that there is no significant likelihood of removal in the

1 reasonably foreseeable future, the Government must respond with
2 evidence sufficient to rebut that showing.” *Id.* In *Demore*, the Court
3 held that section 1226(c) authorized mandatory detention only for
4 the “limited period of [the alien’s] removal proceedings.” 538 U.S. at
5 531. At that time (2003), the “limited period” referred to “last[ed]
6 roughly a month and a half in the vast majority of cases in which
7 [section 1226(c) was] invoked, and about five months in the minority
8 of cases in which the alien cho[se] to appeal.” *Id.* at 529–30; *see*
9 *Rodriguez*, 715 F.3d at 1138 (“As a general matter, detention is
10 prolonged when it has lasted six months and is expected to continue
11 more than minimally beyond six months.”).

12 Secondly, the pervasive inconsistency and confusion exhibited
13 by district courts in this Circuit when asked to apply a
14 reasonableness test on a case-by-case basis weighs, in our view, in
15 favor of adopting an approach that affords more certainty and
16 predictability. Notably, the Supreme Court has recognized that
17 bright-line rules provide clear guidance and ease of administration
18 to government officials. *See, e.g., Zadvydas*, 533 U.S. at 700–01
19 (adopting six-month rule “for the sake of uniform administration,”
20 while also noting that it would limit the need for lower courts to
21 make “difficult judgments”). *Compare, e.g., Martin v. Aviles*, No. 15
22 Civ. 1080(AT)(AJP), 2015 WL 3929598, at *2–3 (S.D.N.Y. June 15,
23 2015) (holding an alien for over a year without a bond hearing
24 violated his due process rights), *and Minto v. Decker*, No. 14 Civ.
25 07764(LGS)(KNF), 2015 WL 3555803, at *7 (S.D.N.Y. June 5, 2015)
26 (“Because Petitioner’s detention has exceeded twelve months—in the
27 absence of any evidence that Petitioner might be a flight risk or a
28 danger to the community—he is entitled to an individualized bond
29 hearing.”), *and Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y.
30 2010) (ordering bond hearing after eight months detention), *and*
31 *Scarlett v. DHS*, 632 F. Supp. 2d 214, 223 (W.D.N.Y. 2009) (five years
32 detention unreasonable), *with Johnson v. Orsino*, 942 F. Supp. 2d 396
33 (S.D.N.Y. 2013) (fifteen month detention not unreasonable), *and*
34 *Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 194 (W.D.N.Y. 2010)

1 (nearly three years of detention not unreasonable). Adopting a six-
2 month rule ensures that similarly situated detainees receive similar
3 treatment. Such a rule avoids the random outcomes resulting from
4 individual habeas litigation in which some detainees are represented
5 by counsel and some are not, and some habeas petitions are
6 adjudicated in months and others are not adjudicated for years.

7 Moreover, while a case-by-case approach might be workable
8 in circuits with comparatively small immigration dockets, the
9 Second and Ninth Circuits have been disproportionately burdened
10 by a surge in immigration appeals and a corresponding surge in the
11 sizes of their immigration dockets.²² With such large dockets,
12 predictability and certainty are considerations of enhanced
13 importance and we believe that the interests of the detainees and the
14 district courts, as well as the government, are best served by this
15 approach.

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

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).

1 gainfully employed for over two decades while he has resided in the
2 United States.²³

3 For these reasons, we hold that, in order to avoid the
4 constitutional concerns raised by indefinite detention, an immigrant
5 detained pursuant to section 1226(c) must be afforded a bail hearing
6 before an immigration judge within six months of his or her
7 detention. Following the Ninth Circuit, we also hold that the
8 detainee must be admitted to bail unless the government establishes
9 by clear and convincing evidence that the immigrant poses a risk of
10 flight or a risk of danger to the community. *Rodriguez*, 715 F.3d at
11 1131.²⁴

12 CONCLUSION

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

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.

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.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: October 28, 2015
Docket #: 14-2343pr
Short Title: Lora v. Shanahan

DC Docket #: 14-cv-2140
DC Court: SDNY (NEW YORK CITY)
DC Judge: Peck

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature