No. 16-1723

IN THE
United States Court of Appeals for the Ames Circuit

GREGORIOS V. LASH, WARDEN,

Respondent-Appellant,

v.

JACQUELINE PERALTA,

Petitioner-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

BRIEF FOR PETITIONER-APPELLEE

The Daniel J. Meltzer Memorial Team

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MARCH 23, 2016, 7:30 P.M.
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Oral Argument

QUESTIONS PRESENTED

1. Does every misdemeanor assault under Ames Rev. Stat. § 603-42(1) necessarily involve the use of physical force and thus qualify as an aggravated felony under the Immigration and Nationality Act?

2. Does the government have the power to hold an alien without bond after waiting two years to detain her, even though 8 U.S.C. § 1226(c) requires it to have detained her "when" she was released from state custody?

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PRELIMINARY STATEMENT

In 2008, Jacqueline Peralta came from El Salvador to the United States to start a new life. In the eight years that followed, she made Ames City her home: she got engaged, built a small business, and enrolled at Ames State University, all while caring for her ailing mother. Now, the government asks this Court to force Peralta into a deportation scheme she does not fit. Seizing on a two-year-old misdemeanor conviction, the government invokes an exceptional provision in the Immigration and Nationality Act and claims authority to detain and deport Peralta without ever giving her a bond hearing. But the Act does not grant such sweeping power. Congress crafted a narrow exception for violent, flight-risk aliens, and Peralta does not fit within it.

OPINIONS BELOW

The unreported opinions of the United States District Court for the District of Ames, the Immigration Judge, and the Board of Immigration Appeals are reproduced at pages 2, 13, and 15 of the Joint Appendix, respectively.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Peralta's habeas petition under 28 U.S.C. § 2241. The district court granted the petition on January 12, 2016, and the government filed a notice of appeal on January 14. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

All relevant provisions are reproduced in the Appendix.

STANDARD OF REVIEW

This case presents two questions of law. *See Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013) (aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (2012)); *Lora v. Shanahan*, 804 F.3d 601, 611–14 (2d Cir. 2015) (mandatory detention under 8 U.S.C. § 1226(c) (2012)). Both are reviewed de novo. *See United States v. Rodriguez-Ortiz*, 999 F. 1, 5 (Ames Cir. 1985).

STATEMENT OF THE CASE

Jacqueline Peralta left El Salvador in 2008 at age 14. J.A. 2. She arrived in Ames City and established permanent legal residency. *Id.* Peralta, now 22, has lived in Ames City ever since.

Growing Up in Ames

Peralta spent her teenage years adjusting to life in her new home. She became fluent in English, attended Ames Central High School, and took a job at a beloved local restaurant. *Id.* In 2013, shortly after her high school graduation, Peralta had a dispute with her neighbor over money that Peralta had loaned her to help with a car payment. J.A. 28. That dispute culminated in kicking and slapping, and Peralta was arrested. *Id.* She accepted responsibility and pleaded guilty to misdemeanor third-degree assault. J.A. 2.

Even at her plea hearing, though, Peralta looked forward to her future in Ames. She told the court she hoped to further her education. J.A. 25. Most of Peralta's one-year prison term was suspended, and she was released in September 2013. J.A. 2–3.

Putting Down Roots

Upon her release, Peralta immediately began rebuilding her life in Ames and focusing on her future. She fell in love and became engaged. J.A. 3. She and her fiancé opened a restaurant—The Sprouting Potato—now a "local favorite." J.A. 22. On top of managing

the restaurant, Peralta singlehandedly cares for her mother, Eve, who was badly injured in a car accident last year. *Id.* Between running her new restaurant and caring for her ailing mother, Peralta made good on her desire to go back to school. J.A. 3. She enrolled in night classes at Ames State University and is working toward a veterinary degree. *Id.* Peralta has become an integral member of the community, with neighbors who regard her as "one of the most honest, hardworking, and caring people" in town and an embodiment of "the American dream." J.A. 22. With her fiancé, her restaurant, her mother, and her veterinary career, Peralta has become a "model citizen." J.A. 3.

A New Arrest for an Old Crime

On December 23, 2015—over two years after her release—the government decided to revisit Peralta's teenage incident with her neighbor. Immigration and Customs Enforcement arrested Peralta, claiming her two-year-old misdemeanor now rendered her a deportable aggravated felon. *Id.* Her community rallied behind her and insisted that her deportation would be a "travesty." J.A. 22. Peralta promptly asked for a bond hearing to contest her deportation and continue her new life in Ames. J.A. 3. But the government opposed Peralta's request, the immigration judge rejected it, and the Board of Immigration Appeals (BIA) affirmed. J.A. 3–4.

The district court disagreed and ruled that Peralta was entitled to a hearing. J.A. 4. First, the court concluded that Peralta's conviction under Ames Rev. Stat. § 603-42(1), a misdemeanor third-degree assault statute, did not necessarily involve the use of physical force. J.A. 6. The misdemeanor therefore was not a "crime of violence" under 18 U.S.C. § 16, and not a deportable "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). *Id.* The district court also rejected the government's contention that it had authority to detain Peralta under 8 U.S.C. § 1226(c), which instructs the Attorney General to detain a criminal alien "when the alien is released." J.A. 6–7. This statutory language "unambiguously" barred application of § 1226(c) "where there [was] a two-year gap in custody." J.A. 9. Still determined to deport Peralta, the government now appeals both rulings. J.A. 30.

SUMMARY OF ARGUMENT

I. The Supreme Court has long acknowledged that deportation deprives an individual "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). In recognition of that fact, Congress has carefully specified which aliens the executive branch may remove. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Accordingly, when the government decided to deport Peralta, it had to act in a manner prescribed by Congress.

It sought to do so by alleging that Peralta's misdemeanor conviction under Ames Rev. Stat. § 603-42(1) ("the Ames statute") was a crime of violence and thus an aggravated felony under the Immigration and Nationality Act ("the INA"). But in characterizing a misdemeanor third-degree assault conviction as an aggravated felony, the government contorts the plain text of the INA and understates the reach of the Ames statute. This dogged attempt to fit a square peg into a round hole is unavailing.

The INA mandates Peralta's deportation only if she has committed a crime of violence under 18 U.S.C. § 16 and thus an aggravated felony under the INA. 8 U.S.C. § 1101(a)(43)(F) (2012). Peralta's conviction under the Ames statute is a crime of violence only if the two are a "categorical match"—that is, only if violating the Ames statute inevitably constitutes a crime of violence. *See Moncrieffe v.*

Holder, 133 S. Ct. 1678, 1684 (2013). Together, the Supreme Court's narrow interpretation of "crime of violence" and the broad reach of the Ames statute establish this is not so.

A state offense is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a) (2012). The Supreme Court in *Johnson v. United States* held that the phrase "physical force" in a similar statutory provision meant "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. 133, 140 (2010). Section 16(a)'s text and context demonstrate that *Johnson*'s violent force definition should also apply here.

The crime of violence definition in § 16(a) targets the *means* employed—violent force. By contrast, the Ames statute focuses on the *results* of a defendant's conduct—bodily harm. *See State v. James*, 231 Am. 432, 436 (Ames 2010). There are many ways to be convicted under the Ames statute without using violent force, or any force at all. A person could cause bodily harm by indirect action, as when someone leaves on a gas stove; by omission, as when a parent refuses to care for her child; or by deception, as when a person is tricked into drinking poison. None of these require the use of violent force, but all could result in conviction under the Ames statute. This mismatch frustrates the government's attempt to squeeze the broad Ames statute into the

narrow crime of violence definition. Peralta therefore did not commit an aggravated felony that requires mandatory detention and deportation.

II. Even if Peralta had committed an aggravated felony, the government forfeited its ability to detain her without a bond hearing when it waited two years to act. The INA provides a bond hearing for aliens detained during deportation proceedings. *See* 8 U.S.C. § 1226(a) (2012). In a narrow exception, § 1226(c) mandates detention *without* bond for aliens who satisfy two elements. Section 1226(c) applies only to aliens who have been convicted of an aggravated felony ("the predicate offense element"), *and* who were detained "when . . . released" ("the timing element" or "when released"). *Id.* § 1226(c)(1). Thus, § 1226(c) is not a blank check for the government to cash whenever it pleases. It is a limited carve-out, and to fit Peralta inside it, the government must satisfy both elements.

The BIA's interpretation—that the timing element is irrelevant—merits no *Chevron* deference. *See Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001). Courts defer to an agency's interpretation only if it is a permissible construction of an ambiguous statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). But the plain language, structure, and legislative history of § 1226(c) all point in one direction: a § 1226(c) alien is one detained "when

released." This timing element is a necessary characteristic of an alien described in § 1226(c). Even if this Court were to find "when released" ambiguous under *Chevron*, the BIA's interpretation runs counter to the rule of lenity and adopts a reading of § 1226(c) wholly devoid of any limiting principle.

Because "when released" is a necessary element of a § 1226(c) alien, the government can detain Peralta under § 1226(c) only if it complied with that clause. This Court must therefore resolve a question of interpretation that *Rojas* never reached: the meaning of "when." The text and history of § 1226(c) confirm that "when" means "immediately," not two years later. If "when" meant "at any time," then § 1226(c) would authorize detention decades after an alien is released and at the whim of the Attorney General. That approach would give rise to grave due process concerns about arbitrary detention of aliens who pose no danger or flight risk. To avoid that result, this Court should join the majority of courts in giving "when" its ordinary meaning.

Since the government waited two years to act, its authority to detain Peralta shifted to § 1226(a). The government invokes the loss of authority canon, but that canon does not apply where the statutory scheme provides a consequence for noncompliance. Congress specified a consequence when it crafted § 1226's default scheme—the statute's

very first paragraph. Section 1226(a) provides for a bond hearing, and it protects the public through safeguard after safeguard in the hearing process. The government tries to force Peralta into the narrow statutory exception, but she fits neatly within the default scheme instead. Therefore, Peralta is entitled to a bond hearing.

ARGUMENT

I. Peralta did not commit an aggravated felony because a conviction under the Ames statute is not a crime of violence.

Peralta does not fit into Congress's mandatory detention and deportation scheme unless her misdemeanor conviction qualifies as an aggravated felony. *See* 8 U.S.C. § 1226(c) (2012); *id.* § 1227(a)(2)(A)(iii). An aggravated felony includes any crime of violence for which the term of imprisonment is at least one year. *See Id.* § 1101(a)(43)(F). A "crime of violence" is defined in pertinent part as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (hereinafter "use of physical force"). 18 U.S.C. § 16(a) (2012). Peralta's misdemeanor conviction is therefore a crime of violence only if the Ames statute's elements include the use of physical force.

The Ames statute does not contain that element. The categorical approach supplies the proper framework to make this determination. That approach asks whether the Ames statute "categorically fits within the 'generic' federal definition" of a crime of violence. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). Crimes of violence require the use of violent force. *See Johnson v. United States*, 559 U.S. 133, 140 (2010). Yet because the Ames statute criminalizes

conduct based on results—not means—there are many ways to violate the statute without using violent force. *See* Ames Rev. Stat. § 603-42(1); *State v. James*, 231 Am. 432, 436 (Ames 2010). The Ames statute punishes a variety of conduct—whether violent or passive, immediate or latent, physical or psychological—not covered by the federal definition of a crime of violence. And there is a "realistic probability" that Ames would use its misdemeanor assault statute to punish that nonviolent conduct. Therefore, the Ames statute is not a categorical match to the crime of violence designation, and this Court should affirm the judgment of the district court.

A. The "physical force" needed to commit a crime of violence is "violent force."

In defining physical force, there is at least one point on which both parties agree: the physics definition—an object's mass multiplied by its acceleration—cannot control. *See* Appellant's Br. at 12. That would "make hash of the effort to distinguish ordinary crimes from violent ones," since it is impossible to commit either sort without such force. *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003). Facing this void, the government renews the argument *Johnson* dismissed—that the force required to commit a crime of violence should be the same needed to commit a common-law battery. *See* 559 U.S. at 139. The common-law force threshold is exceptionally low: a playful chair-pulling prank and a child's kick to the shin both clear it. *See Garratt v.*

Dailey, 279 P.2d 1091, 1092 (Wash. 1955); *Vosburg v. Putney*, 50 N.W. 403, 403 (Wis. 1891). That any act of that kind could constitute a crime of *violence* is nonsensical. To avoid this mismatch in a similar statute, the Supreme Court defined physical force as *violent* force. *Johnson*, 559 U.S. at 140. This Court should adopt the same definition for a crime of violence.

1. *Johnson*'s definition of physical force as violent force controls.

The Supreme Court in *Johnson* considered the Armed Career Criminal Act ("the ACCA") and its definition of violent felony, which contains an element-of-force clause nearly identical to the one at issue here. *Id.* at 135. The majority held that "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The Court expressly refused to apply the alternative common-law definition of force, which would have labeled crimes involving "even the slightest offensive touching" as violent felonies. *Id.* at 139.

Johnson's reasoning also applies to § 16(a), and this Court should therefore hold that a crime of violence requires the use of violent force. All but one court of appeals to confront the issue have held that § 16(a) requires the use of violent force. *See, e.g.*, *United States v. Fish*, 758 F.3d 1, 9 (1st Cir. 2014) (noting *Johnson*'s force definition and "see[ing] no reason to think the same would not apply to

the same phrase in section 16(a)"); *Karimi v. Holder*, 715 F.3d 561, 566–69 (4th Cir. 2013) (same); *see also Flores*, 350 F.3d at 672 (stating, pre-*Johnson*, that "force" under § 16(a) must be "violent in nature"). The BIA has also applied *Johnson*'s definition to § 16(a). *See Velasquez*, 25 I. & N. Dec. 278, 282 (B.I.A. 2010) (holding that "*Johnson* controls our interpretation of a 'crime of violence' under § 16(a)"). This near unanimity should come as no surprise. The text and context of § 16(a) bear out the wisdom of these decisions, and the odd circumstances that would result from a contrary reading of "physical force" bolster their conclusions. This Court should read physical force in § 16(a) to require violent force.

a. The text and context of § 16(a) establish that Johnson*'s definition of force applies.*

Any court interpreting § 16(a) "cannot forget that [it] ultimately [is] determining the meaning of the term 'crime of violence.'" *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). And "the ordinary meaning of [crime of violence], combined with § 16's emphasis on the use of physical force against another person," points to "a category of violent, active crimes." *Id.*

The ordinary meanings of "violence" and "violent" demonstrate that a crime of violence should require violent force. *Johnson* emphasized that the word "violent" alone "connotes a substantial degree of force." 559 U.S. at 140. Dictionaries define "violent"

similarly. "Violent" means "very forceful or powerful," *Oxford English Dictionary* 824 (7th ed. 2012), or "acting with or characterized by uncontrolled, strong, rough force," *Random House Dictionary of the English Language* 2124 (2d ed. 1987). "Violence," not surprisingly, connotes much the same: "behavior involving physical force intended to hurt, damage, or kill," *Oxford English Dictionary* 824 (7th ed. 2012), or "swift and intense force," *Random House Dictionary of the English Language* 2124 (2d ed. 1987). So when *Johnson* held that physical force in the context of a violent felony meant "violent force," 559 U.S. at 140, it simply gave the term its "ordinary meaning," *id.* at 138. That same meaning should apply to crimes of violence.

The government ignores this part of *Johnson*'s reasoning and argues instead that the Court required violent force only because it was defining a violent *felony*. *See* Appellant's Br. at 13. But *Johnson* did not rely primarily on the word "felony"—and for good reason. As with the INA's use of "aggravated felony," the word "felony" in the ACCA is merely a term of art that has no correspondence to state-law crimes. The government claims that the ACCA "expressly excluded all misdemeanors." *Id.* Not so. State-law misdemeanors can and do qualify as violent felonies under the ACCA. *United States v. Bregnard*, 951 F.2d 457, 461 (1st Cir. 1991) (holding that Massachusetts misdemeanors for assault and battery were "violent felonies" under the

ACCA). In the ACCA, it was the word "violent" that required violent force, *Johnson*, 559 U.S. at 140, and in § 16 the word "violence" requires the same.

b. The common-law force definition is overinclusive.

Common sense counsels that crimes of *violence* require *violent* force. Applying the common-law force definition would result in the same "comical misfit" the Court rejected in *Johnson*. *See* 559 U.S. at 145. Consider an alien convicted of common-law battery in Florida for "tapping [a person] on the shoulder without consent," *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007), or another convicted in Indiana for a "paper airplane inflict[ing] a paper cut" or a "snowball caus[ing] a yelp of pain," *Flores*, 350 F.3d at 670 (discussing examples punishable under Indiana battery law). That these would be considered crimes of violence under § 16(a) is "just what the English language tells us not to expect." *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006). Yet the government urges this Court to adopt that contorted reading. If Congress wished to define crime of violence in such "an unexpected way," it "would need to tell us so." *Id.* While the words "physical force" in isolation may plausibly evoke the common-law definition, employing it here would encompass far more than the "violent, active" crimes that were the statute's focus. *Leocal*, 543 U.S. at 11. *Johnson*'s violent force definition, by contrast, targets those violent crimes.

2. The *Castleman* definition of physical force does not apply.

In *United States v. Castleman*, the Supreme Court held that Congress intended force to encompass "offensive touching" in defining a "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A). 134 S. Ct. 1405, 1410 (2014). This definition accorded with the purpose of the Domestic Violence Offender Gun Ban, *see* 18 U.S.C. § 922(g)(9), which sought to root out the volatile combination of guns and domestic conflict. *Castleman*, 134 S. Ct. at 1409. But the Court confined its application of the common-law force definition to the domestic violence context and the gun ban's special purpose. *See id.* at 1411 n.4. And the Court explicitly disclaimed any attempt to apply its holding to the INA and, by extension, to § 16(a). *Id.*

a. Castleman *limited its physical force definition to the domestic violence context.*

The government's attempt to wrench *Castleman* from the domestic violence context is proscribed by the opinion itself. *Castleman* noted that most courts of appeals have rejected the common-law force definition for a crime of violence, and stated that "[n]othing in today's opinion casts doubt on these holdings, because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Id.* Reaffirming that the word "'violent' or 'violence' standing alone 'connotes a substantial degree of force,'" *Castleman* held only that a

different definition applied in the domestic violence context. *Id.* at 1411 (quoting *Johnson*, 559 U.S. at 140). That was because "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* Since "the accumulation of [minor] acts over time can subject one intimate partner to the other's control," the Court adopted the only definition of force that would preserve the statute's intended bite. *Id.* at 1412. But in doing so, *Castleman* time and again stated that its reasoning could not be generalized beyond the domestic violence context.

Try as it might, the government cannot discard that limitation. *Castleman*'s holding adds to a long history recognizing the unique concerns of domestic violence. Domestic violence has frequently received special treatment in criminal procedure and criminal substantive law. *See, e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 118 (2006) (recognizing consensual-search exception to Fourth Amendment in domestic violence context); *State v. Koss*, 551 N.E.2d 970, 973 (Ohio 1990) (allowing evidence of battered-woman syndrome when raising self-defense argument). Such special treatment is appropriate because domestic violence almost always involves psychological harm, while crimes of violence deal only with physical harm. *Castleman* continued the tradition of providing extra protection for domestic violence

victims, but such concerns simply are not present outside that context. Indeed, in the first case after *Castleman* to examine § 16(a), the government itself conceded that *Johnson*'s definition applies. *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015). The First Circuit thus continued to "extend[] *Johnson*'s interpretive gloss to section 16(a)," not *Castleman*'s. *Id.* As *Whyte* made clear, *Castleman*'s only application to this case is to foreclose reliance on the reasoning of decisions involving domestic violence. *Id.* at 471.

b. Castleman*'s reasoning forecloses the government's other arguments.*

The government identifies only one case that applied the common-law force definition to § 16(a), but that case is explained purely by an accident of timing. *See* Appellant's Br. at 14 (citing *Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336, 1340 (11th Cir. 2008)). *Hernandez* came before both *Johnson* and *Castleman*, and before the Court limited the common-law definition of force to the domestic violence context. Without this insight, *Hernandez* relied heavily—and mistakenly, it turns out—on its circuit's prior refusal to require violent force in the same domestic violence provision at issue in *Castleman*. *Hernandez*, 513 F.3d at 1340 (citing *United States v. Griffith*, 455 F.3d 1339, 1345 (11th Cir. 2006)). *Hernandez* is obsolete, and this Court should not follow it.

This Court should also refuse to apply the interpretive canon relied on in *Castleman*. Though the rule that statutory terms carry their common-law meaning worked there, it does not make sense here. The Supreme Court has flatly rejected the use of this canon where it would "force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Johnson*, 559 U.S. at 139–40 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)). But the government employs the canon to do just that, transforming a mere touch into a crime of violence and an aggravated felony. *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004). No interpretive principle can force the common-law definition into a context where it plainly does not fit.

3. The INA's structure and the government's enforcement capability support using *Johnson*'s violent force definition.

In advancing the common-law definition, the government contends that Congress intended every assault to qualify as an aggravated felony under the INA. *See* Appellant's Br. at 27–28. But if Congress intended that result, why not just list assault as a removable offense? Congress willingly took that bright-line approach with respect to many offenses in the INA. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) (murder and rape); *id.* § 1101(a)(43)(B) (drug trafficking). But it chose another method for designating crimes of violence. It crafted a generic

federal definition that examines each crime's elements as defined by state law. The government finds this result odd, *see* Appellant's Br. at 27–28, but Congress disagreed when it chose to base the crime of violence determination on state-law definitions, *see Whyte*, 807 F.3d at 466.

Meanwhile, in its zeal to mandate deportation for neighborhood spats like Peralta's, the government forgets its own enforcement limitations. The Government Accountability Office's most recent estimate found that aliens commit 213,047 assaults each year. U.S. Gov't Accountability Off., GAO-11-187, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs* 21 (2011). Applying the common-law force definition would transform every one of those assaults into a mandatory-deportation offense. That figure stands in stark contrast to the 139,368 deportations for *all* criminal convictions in 2015, when Immigration and Customs Enforcement (ICE) was "prioritizing its limited resources" on convicted criminals. U.S. Immigr. & Customs Enforcement, *Enforcement and Removal Operations Report* 1–2 (2015). Grafting the common-law definition onto § 16(a) would dramatically increase the burden on the judicial system and ICE. Neither institution could cope, and it would contravene ICE's "targeted focus on the most significant threats to national security, public safety, and border security." *Id.* at 1. Making

common-law use of force a crime of violence and an aggravated felony frustrates that focus; requiring the use of violent force aids it.

B. The Ames statute is not a crime of violence because it does not require the use of violent force.

Under the categorical approach, Peralta's conviction qualifies as a crime of violence only if a conviction for an Ames misdemeanor assault "necessarily involve[s]" violent force. *See Moncrieffe*, 133 S. Ct. at 1684. The specific facts underlying Peralta's conviction are "quite irrelevant." *Id.* (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (Hand, J.)). This Court instead "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* (quoting *Johnson*, 559 U.S. at 137). Thus, if Peralta *could have* been convicted of third-degree assault for *any* conduct that would not also qualify as a crime of violence, there is no categorical match and she is not subject to mandatory deportation.

The Ames statute contains two elements, neither of them having to do with violent force: that a person cause bodily harm, and that she do so intentionally. Because there are many ways to cause harm without using violent force, Peralta's offense does not categorically fit within the "crime of violence" definition.

1. The plain text of the Ames statute does not list the use of violent force as an element.

The categorical approach sets a high bar, and it dooms the government's attempt to recast a misdemeanor as an aggravated felony. Ames law allows conviction for third-degree assault when, "with intent to cause bodily harm to another, [a defendant] causes bodily harm to that person or to another person." Ames Rev. Stat. § 603-42(1). That law does not categorically match the federal definition because, as the district court held, "[t]he Ames statute focuses on the effect of the defendant's act, not whether the act itself involved physical force." J.A. 5.

The statutory text is straightforward: § 16(a) requires "the use, attempted use, or threatened use of physical force," and the Ames statute does not. Many courts have conducted a routine textual analysis and concluded that misdemeanor state assault convictions are not categorically crimes of violence. *See, e.g.*, *Chrzanoski v. Ashcroft*, 327 F.3d 188, 197 (2d Cir. 2003) (holding Connecticut's assault statute does not fit within § 16(a)'s "plain language"); *see also United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (same, for Texas assault statute); *Persaud v. McElroy*, 225 F. Supp. 2d 420, 422 (S.D.N.Y. 2002) (same, for New York assault statute). The BIA itself has acknowledged that convictions for other offenses are not crimes of violence if the "offense does not involve as an element the use of violent

or destructive physical force." *Small*, 23 I. & N. Dec. 448, 449 n.1 (B.I.A. 2002); *see also Sweetser*, 21 I. & N. Dec. 709 (B.I.A. 1999). And the government has conceded this very point in other contexts. *See, e.g.*, *United States v. Gracia-Cantu*, 302 F.3d 308, 312 (5th Cir. 2002) ("The government concedes that, because the statutory definition of the offense does not explicitly require the application of force as an element, 18 U.S.C. § 16(a) does not apply . . . ."). There is simply nothing in the text of the Ames statute that requires proof of the use of force to obtain a conviction, and the government's attempt to equate "physical pain" with violent force, Appellant's Br. at 19–20, cannot overcome that gaping textual absence.

The First Circuit rejected the government's best efforts to bridge the textual gap when it considered a Connecticut assault statute nearly identical to the Ames statute. *Whyte*, 807 F.3d at 467. Connecticut's third-degree assault law applies when a person, "[w]ith intent to cause physical injury to another person, [] causes such injury to such person." Conn. Gen. Stat. § 53a-61 (2012); *cf.* Ames Rev. Stat. § 603-42(1) (substituting "bodily harm" for "physical injury"). *Whyte* found that the statute identified just two elements: (1) intent to cause an injury and (2) actually causing an injury. *Whyte*, 807 F.3d at 468. Entirely absent from the text is any requirement for the use of violent force; the "text thus speaks to the 'who' and the 'what' of the offense,

but not the 'how.'" *Id.* "Common sense" therefore suggested a "realistic probability" that statutes like Connecticut's would punish conduct resulting in injury that did not require the use of violent force. *See id.*

Other circuits agree. Courts have identified many plausible ways to commit assault without violent force. The Fifth Circuit held that a Texas assault statute was not a crime of violence because it penalized "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim she can safely back her car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Villegas-Hernandez*, 468 F.3d at 879. The Tenth Circuit held third-degree assault in Colorado could be committed by "intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals." *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005). And of the remainder of the circuits to have addressed the issue, "a clear plurality of the courts of appeals" have reasoned similarly. *United States v. Rice*, No. 14-3615, 2016 WL 537589, at *4 (8th Cir. Feb. 11, 2016) (Kelly, J., dissenting) (collecting cases from the First, Second, Fourth, Fifth, Sixth, and Tenth Circuits).

These textual analyses comport with basic intuition. Saying the intentional infliction of bodily harm "necessarily involves" the use of

violent force underestimates the ingenuity of the human mind. People harm one another without violent force all the time. Examples abound: depriving someone of needed medication, letting a car idle in a garage, refusing to feed an invalid, and abandoning a child in a hot car, to name just a few. Not one of those examples involves the use of common-law force, much less the violent force *Johnson* requires. Yet because they all involve the intentional infliction of bodily harm, Ames could punish each of them under its assault statute.

2. Causing bodily harm is distinct from using violent force.

The government attempts to avoid this conclusion by drawing a target it will inevitably hit. It does so by collapsing the distinction between "*force capable of causing* physical pain or injury," *Johnson*, 559 U.S. at 140 (emphasis added), and "physical pain or injury," s*ee* Appellant's Br. at 19. But this sleight-of-hand transforms *Johnson*'s means-based test into a results-based test. *Johnson* defined—but did not eliminate—the force requirement, and the Ames statute does not align with that definition.

The government's attack on the distinction between direct and indirect force similarly misses the mark. Section 16(a) specifically prohibits the use of physical force "against" another person. The word "against" suggests that the force must be applied to that individual. Using a gun would, of course, qualify as violent force. *See* Appellant's

Br. at 24. Guns are tools, which channel physical force in a specific direction. By contrast, poison causes injury through chemical reactions, and it requires no force to be applied to the intended victim. The government's definition would render an intentional sneeze that spreads a painful cold the "use of physical force." Indeed, it would render *anything* that results in pain the "use of physical force." But force is a means, not a result, and poisoning—just like withholding medication, keeping the car running in a garage, and refusing to feed an invalid—does not employ that means.

3. States regularly convict people for causing bodily harm without the use of violent force.

State cases confirm that harm-without-force convictions are not merely the product of a "legal imagination." *Moncrieffe*, 133 S. Ct. at 1685 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Though the bulk of Ames state criminal cases are unavailable, other states' records demonstrate a "realistic probability" that Ames would use its statute to punish conduct that does not involve the use of force. *Id.* Just last year, Pennsylvania convicted a woman of simple assault for spiking a victim's orange juice with antifreeze. *Commonwealth v. Galli*, No. 786 MDA 2014, 2015 WL 6165501, at *1 (Pa. Super. Ct. Apr. 30, 2015). The statute at issue in that case encompassed the same range of conduct as does the Ames statute. *Compare* Ames. Rev. Stat. § 603-42(1), *with* 18 Pa. Stat. and Cons. Stat. Ann. § 2701(a)(1) (West 2014).

Courts have also upheld convictions for intentionally causing injury to a child where the defendant failed to procure adequate medical care, *see Babers v. State*, 834 S.W.2d 467 (Tex. Ct. App. 1992); for assault where a parent starved her child, *see Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005); and for second-degree assault where the defendant slipped a tranquilizer into his victim's drink, *see State v. Nunes*, 800 A.2d 1160 (Conn. 2002).

Indeed, the Supreme Court has encouraged the government to prosecute certain harm-without-force crimes as assaults. In *Bond v. United States*, the defendant caused minor skin irritations by spreading toxic chemicals on the mailbox and car door of her husband's paramour. 134 S. Ct. 2077, 2085 (2014). The government charged Bond under the Chemical Weapons Convention Implementation Act. Chief Justice Roberts, writing for the Court, held that the Act did not reach Bond's "attempted assaults." *Id.* He admonished the prosecutors who brought the charge, noting that "simple assaults" would "likely cover" Bond's offense. *Id.* at 2092. And he pointed out that "state authorities regularly enforce these laws in poisoning cases," listing as examples a Pennsylvania woman charged with assault for poisoning her family with burritos laced with prescription medication and another charged with assault for poisoning her boyfriend with eye drops. *Id.* It follows that intentionally causing bodily harm to another,

and thus conviction for third-degree assault under Ames law, does not "necessarily involve" the use of violent force as either a textual or a practical matter.

C. Congressional purpose and workability also demonstrate that the Ames statute is not a crime of violence.

Given the textual obstacles in the way of the government's preferred reading, one might expect its argument to at least comport with congressional purpose. But the opposite is true. In passing the INA, Congress created a limited class of crimes for which deportation is made *mandatory*. And since "[d]eportation is a drastic measure and at times the equivalent of banishment or exile," courts should "not assume that Congress meant to trench on [an immigrant's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). Without clear textual support, forcing misdemeanor third-degree assaults into the aggravated felony box would not only run counter to logic—it would undermine Congress's decision to make deportation mandatory only for "violent, active" crimes. *Leocal*, 543 U.S. at 11.

Workability is the final casualty on the government's road to its desired result. For the last century, the categorical approach has simplified courts' task in this field by directing them to examine the

state crime's elements. That simple and traditional approach would result in a victory for Peralta here, since "[t]he government concedes that [the state's] intentional assault in the third degree statute does not expressly identify the use, attempted use, or threatened use of physical force as an element for conviction." *Chrzanoski*, 327 F.3d at 193; *see also* Appellant's Br. at 5. So the government argues that "force is implicit in the statute's requirement of the intentional causation of physical injury." Appellant's Br. at 5. But this invitation to speculate about what sort of conduct is "implicit in" the elements of a state-law crime returns courts to the same quandary the Supreme Court only recently escaped. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015) (rejecting the "speculative" practice of imagining "the idealized ordinary case of a crime" as "detached from statutory elements"). Faithful adherence to the categorical approach requires a focus on the statute's elements. And that focus leads to one conclusion: Peralta did not commit an aggravated felony.

II. Because the government waited two years to detain Peralta, she is entitled to a bond hearing.

The INA grants the government discretion to detain aliens during removal proceedings, so long as each alien receives a bond hearing. *See* 8 U.S.C. § 1226(a). There is a narrow exception to the bond hearing requirement in § 1226(c). That provision orders the government to hold without bond only one type of alien: one detained

when released from custody. *See id.* § 1226(c)(1). But Peralta is not that alien. After her release, Peralta built a life in Ames, while the government waited to detain her for two years. Two years is too late.

The government's delay entitles Peralta to a bond hearing. Section 1226(c)'s mandatory detention exception applies only to aliens who satisfy two elements. First, the alien must have committed a predicate offense listed in § 1226(c)(1)(A)–(D) ("the predicate offense element"). Second, the alien must have been detained "when released" ("the timing element").

The timing element is essential for Peralta to qualify as an alien under § 1226(c). The BIA's contrary interpretation in *Rojas*—that the timing element is irrelevant—merits no *Chevron* deference. *See Rojas*, 23 I. & N. Dec. 117 (B.I.A. 2001). Section 1226(c) is unambiguous. Its plain language, structure, and legislative history demonstrate that the timing element is vital.

This Court must therefore decide whether the government satisfied the timing element—that is, whether the government detained Peralta "when" she was released. It did not. "When" means "immediately," not "two years after." The government's failure to detain Peralta "when" she was released means Peralta is not a § 1226(c) alien. If the government wants to detain Peralta at all, it must give her a bond hearing under § 1226(a).

A. The government was required to detain Peralta when she was released.

Both parties agree this Court should apply *Chevron* to decide whether the BIA's interpretation in *Rojas*—that the timing element is irrelevant—warrants deference. *See* Appellant's Br. at 31. The disagreement is on how that analysis turns out. Under *Chevron*'s two-step framework, courts first look to the statutory text. If "Congress has directly spoken to the precise question at issue, that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Courts proceed to step two only if the text is ambiguous. Even then, courts defer to an agency's interpretation only if it "is based on a permissible construction of the statute." *Id.* at 843. *Rojas* fails at both steps.

1. The statute is unambiguous under *Chevron* step one: a § 1226(c) alien is one detained "when released."

At *Chevron* step one, courts apply the "traditional tools of statutory construction" to determine the statute's meaning. *Id.* at 843 n.9. Where the meaning is clear, courts must give it effect. Here, the statute's plain language, structure, and legislative history yield the same result: the timing element must be satisfied for an alien to fall under § 1226(c).

a. Section 1226(c)'s plain language is unambiguous.

Courts assume that "Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). The plain language of § 1226(c) reveals that an "alien described in paragraph (1)" refers to *all* of paragraph (1)—including its timing element. Section 1226(c) states:

> (c) **Detention of criminal aliens**
>
> (1) **Custody**
>
> The Attorney General shall take into custody *any alien who*—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) **Release**
>
> The Attorney General may release *an alien described in paragraph (1)* . . . .

8. U.S.C. § 1226(c) (emphasis added).

Congress referred to "an alien described in paragraph (1)," not an alien described in subparagraphs (A) through (D). The word "describe" refers to all "relevant characteristics." *See The New Oxford American Dictionary* 462 (2001). *Rojas* gave meaning to only one characteristic. Its reading acknowledged the predicate offense element, not the timing element. But paragraph (1) is a single sentence that includes *two* elements: a § 1226(c) alien is one who has committed a predicate offense *and* was detained "when released." If Congress had meant to limit the definition of an alien to subparagraphs (A) through (D), it would have said so. Indeed, Congress did say so in other INA provisions. *See* 8 U.S.C. § 1153(b)(1) (2012) (specifying that "qualified immigrants" are "aliens described in . . . subparagraphs (A) through (C)"). But here, it did not. Congress incorporated both elements when it referenced paragraph (1).

The BIA's contrary reading is self-defeating. If, as the BIA contended, "when released" adds nothing to the meaning of an alien, ICE could detain without bond any alien who satisfied the predicate offense element of the statute, even if the alien had *never been taken into (or released from) custody* in the first place. Thus, an alien who merely paid a fine for his § 1226(c)(1)(A) offense of marijuana possession would be swept into the BIA's broad interpretation of the definition of an alien. *See Castañeda v. Souza*, 810 F.3d 15, 26 n.14

(1st Cir. 2015) (en banc) (opinion of Barron, J.). But that interpretation cannot work: criminal custody is a prerequisite for detention under § 1226(c). *See Saysana v. Gillen*, 590 F.3d 7, 14 (1st Cir. 2009). "When released" adds something distinct to the definition of an alien that is otherwise absent: a § 1226(c) alien is one who has committed a predicate offense *and* who has been released from custody.

The canon against surplusage counsels that a § 1226(c) alien must have both of these elements. That canon bars interpretations that "render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013). The government suggests that "when released" modifies the word "shall." Appellant's Br. at 36. In other words, "when released" functions to tell ICE that it "must wait until the qualifying alien is released." *Id.* at 40. But that reading renders "when released" superfluous, because it parrots another INA provision. Section 1231 already gives ICE that exact instruction: ICE "may not remove an alien who is sentenced to imprisonment *until the alien is released* from imprisonment." 8 U.S.C. § 1231(a)(4)(A) (2012) (emphasis added). Courts must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)). To give "when

released" the meaning the government wants is to give it no effect at all. The timing element has effect only if "when released" modifies the word "alien."

Grammar confirms that the timing element is essential. The government prematurely cuts off § 1226(c) after subparagraph (D). But § 1226(c) continues with a modifying phrase: "when the alien is released." The predicate offenses modify a § 1226(c) alien, but so does the "when released" clause. And a modifier must be granted its meaning—no matter how far away it is from its subject. In the nursery rhyme, the "little star" is both "up above the world so high" and "like a diamond in the sky." So too here. The predicate offense element and the timing element both modify an alien in paragraph (1).

Congress used punctuation to make its meaning clear. Congress chose an em dash to show that the phrase "alien who—" was about to be defined. *See Mitchell v. Chapman*, 343 F.3d 811, 830 (6th Cir. 2003) (em dashes introduce definitions). Congress next used a comma to introduce the "when released" language. Where a modifier is "set off from a series of antecedents by a comma," it applies "to each of those antecedents." *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999). Those two punctuation marks—the em dash and the comma—work in concert. The em dash signals that the word "alien" is about to be defined, while the comma signals a phrase

further modifying it. Together, these deliberate choices clarify Congress's desire to apply the timing element to a § 1226(c) alien.

b. Section 1226(c)'s structure reinforces its plain meaning.

"[T]he 'plain meaning' of a statutory provision is often made clear not only by the words of the statute but by its structure as well." *Saysana*, 590 F.3d at 13. The structure of paragraph (1) demonstrates that "when released" describes a § 1226(c)(1) alien. Critically, the "when released" language is *not* indented, though the government presents it that way. *See* Appellant's Br. at 34. It is instead written flush against the margin. 8 U.S.C. § 1226(c)(1). And "[f]lush language applies to the entire statutory section or subsection." *Snowa v. Comm'r*, 123 F.3d 190, 196 n.10 (4th Cir. 1997). Viewing the "when released" clause where it was written makes its function clear: "when released" applies to *all* of § 1226(c)(1)'s detention scheme, including the word "alien."

When § 1226 is viewed as a whole, it becomes clear that the inclusion of "when released" was purposeful. Where language appears in one part of a statute but not in another, courts "presume[] that Congress act[ed] intentionally and purposely." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)). Here, Congress included the "when released" language in § 1226(c), but excluded it from § 1226(a). The clear implication is that

"when released" serves a function in § 1226(c) that was unnecessary in § 1226(a). It narrows the category of aliens the government may detain without a bond hearing.

c. Section 1226(c)'s legislative history further clarifies its plain meaning.

Courts need not defer to an agency's interpretation where "the statute's legislative history reveals an unequivocal answer as to the statute's meaning." *Goldings v. Winn*, 383 F.3d 17, 21 (1st Cir. 2014). The first iteration of § 1226(c)'s mandatory detention scheme appeared in the Anti-Drug Abuse Act of 1988 ("the ADAA"). Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470. That statute provided: "The Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion* of the alien's sentence for such conviction. . . . [T]he Attorney General shall not release *such felon* from custody." *Id.* (emphasis added). Courts and the BIA interpreted the "upon completion" clause (the predecessor to "when released") as modifying "such felon" (the predecessor to "an alien described in paragraph (1)"). *See, e.g.*, *Montero v. Cobb*, 937 F. Supp. 88, 95 (D. Mass. 1996); *Eden*, 20 I. & N. Dec. 209, 211 (B.I.A. 1990).

Because "Congress is aware of existing law when it passes legislation," it had several opportunities to voice its disapproval. *Castañeda*, 810 F.3d at 34 (citing *Miles v. Apex*, 498 U.S. 19, 32 (1990)). But in the eight years of amendments following the ADAA's

enactment, Congress never severed the timing element from the description of an alien. In fact, when Congress amended the INA in 1996 to include "when released," Congress "intended to 'restate'" the prior statute. *Id.* (quoting H.R. Rep. No. 104-469(I), at 230 (1996)). Consequently, the modern formulation still contains a timing element coupled with a reference to a category of aliens subject to detention. "When released" unambiguously applies to an alien described in § 1226(c)(1).

d. The rule of lenity requires that § 1226(c) be construed in Peralta's favor.

The Supreme Court has consistently recognized that "lingering ambiguities" in immigration statutes must be construed "in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. Judges and scholars agree that when the rule of lenity conflicts with *Chevron* in the immigration context, the rule of lenity prevails. *See, e.g.*, *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1157 (D. Colo. 2013); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 Geo. Immigr. L.J. 515 (2003). This Court should apply the rule of lenity and resolve any lingering ambiguity in Peralta's favor.

Applying the rule of lenity here comports with how courts read exceptions. "When a statute sets out exceptions to a general rule, courts 'read the exception narrowly . . . .'" *Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 261 (S.D.N.Y. 2015) (quoting *Comm'r v. Clark*, 489

U.S. 726, 739 (1989)). Section 1226(c) sets out an exception to § 1226(a)'s general rule that aliens receive bond hearings. The BIA's interpretation "impermissibly broaden[s] that exception." *Id.* at 262. It expands the scope of § 1226(c) to include aliens like Peralta, who have led law-abiding lives since their incarceration. *See id.* The rule of lenity bars that expansion.

The Fourth Circuit's refusal to apply the rule of lenity rested on two errors. *See Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012). First, the court drew a distinction between statutory provisions leading to deportation and those leading to detention, suggesting that the rule of lenity should apply only to deportation proceedings. *Id.* But the Supreme Court has never used this distinction to limit the rule of lenity. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143, 201–02 (2015). And this is for good reason: courts should not construe ambiguity to *broaden* the category of aliens who must be detained without bond hearings.

Second, the Fourth Circuit asserted that the rule of lenity applies only to "grievous" ambiguities. *Hosh*, 680 F.3d at 383; *see also* Appellant's Br. at 26–27. But the "grievous" standard is inappropriate. If the traditional tools of statutory construction leave "*any* doubt about the meaning" of the statute, this Court should "invoke the rule [of

lenity]." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (emphasis added). This should end the *Chevron* inquiry. Any ambiguity as to whether the timing element is essential must be interpreted in favor of Peralta.

2. Even proceeding to *Chevron* step two, the BIA's reading of § 1226(c) is impermissible.

The BIA's interpretation in *Rojas* is "unreasonable as a matter of ordinary usage and exhibits arbitrariness and caprice in its application." *Gordon v. Johnson*, 991 F. Supp. 2d 258, 267 (D. Mass. 2013). Under the BIA's reading, two aliens who committed the same offense and who were released from custody on the same day could be treated completely differently. One alien could be detained without a bond hearing as soon as he left prison. But the other alien, "for whatever reason, [could] be allowed to return to his family and community for years" before ICE detains him—if he is ever detained at all. *Id.* at 268. Thus, ICE would have discretion to choose which aliens to detain right away and which aliens to detain later, if ever. Because Congress wanted "to *eliminate*, not broaden, discretion through this statute," the BIA's reading runs counter to congressional intent by inviting arbitrary enforcement. *Id.* Robbing "when released" of its meaning leads to arbitrary results; giving "when released" its meaning leads to consistent application.

What's more, the government's reading has no limiting principle. *See id.* (noting a "complete absence of *any* temporal limitation"). ICE could detain an alien two, ten, or twenty years after her release. But this reading does not fit with Congress's purpose in enacting § 1226(c). Courts will not defer to interpretations that fail to effectuate the goals embodied in a statute. *See Ohio v. Dep't of Interior*, 880 F.2d 432, 444–45 (D.C. Cir. 1989) (rejecting agency's measure of damages where that measure would not carry out statutory purpose). In crafting § 1226(c), Congress was concerned with "individuals whose criminal propensity or risk of flight, or both, rendered quick and mandatory detention critical." *Gordon*, 991 F. Supp. 2d at 266. Waiting years to detain an alien who "has re-integrated into society" frustrates the purpose of § 1226(c). *Id.* It is arbitrary and impermissible to interpret the statute to apply to Peralta long after any risk of danger or flight has subsided.

B. The government failed to detain Peralta "when" she was released.

It is important not to confuse the interpretation at issue in *Rojas* with the outcome of that case. The only question before the BIA in *Rojas* was whether the "when released" clause operated as a timing element—that is, whether the clause described the class of aliens subject to § 1226(c)'s mandatory detention scheme. The government has suggested that the word "when" is a source of ambiguity in §

1226(c) and that this Court should thus defer to the BIA under *Chevron*. Appellant's Br. at 34–35. But the BIA "did not explicitly interpret the word 'when,'" and to the extent it opined at all, "it suggested that 'when' denotes immediacy." *Sylvain v. Att'y Gen.*, 714 F.3d 150, 157 n.9 (3d Cir. 2013). And although the *effect* of *Rojas* was that ICE could detain aliens at any time, "it is the agency's *interpretation* of the statute and not the [*effect*] that follows from that interpretation that deserves [*Chevron*] deference." *Castañeda*, 810 F.3d at 36 (emphasis added) (citing *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 191–92 (2d Cir. 2005)). *Rojas*'s interpretation was *not* that "when" can mean "two years after"; its interpretation was that, whatever "when" meant, it was not a necessary element of a § 1226(c) alien. Because *Rojas* wrongly held that the timing element was irrelevant, this Court must next resolve a question of interpretation that does not fall under the *Chevron* framework: whether ICE detained Peralta "when" she was released.

It did not. "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 107 (1980). Language must be construed "in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9. Here, the job is made easy: both the text and its legislative

history show that "when" means immediately at release, not two years later.

1. The text unambiguously shows that "when" means "immediately."

Dictionary definitions ascribe a sense of immediacy to the word "when." "When" means "at the time." *See, e.g.*, *The Random House Dictionary of the English Language* 2164 (2d ed. 1987); *see also The New Oxford American Dictionary* 1921 (2001) ("when" means "at or during the time that"). Multiple dictionary definitions of a word do not make it ambiguous. *Prot. & Advocacy for Pers. with Disabilities, Conn. v. Mental Health & Addiction Servs.*, 448 F.3d 119, 126 (2d Cir. 2006). This is especially true where one meaning of "when" conforms with its ordinary usage.

Everyday usage is rife with examples of "when" connoting "immediacy." *See Straker v. Jones*, 986 F. Supp. 2d 345, 354 (S.D.N.Y. 2013). "Take the lasagna out of the oven when the timer sounds" does not mean "take the lasagna out of the oven at any time after the timer sounds, even years later." Likewise, "if a wife tells her husband to pick up the kids when they finish school, implicit in this command . . . is the expectation that [he] is waiting at the moment the event in question occurs." *Longshore*, 7 F. Supp. 3d at 1155. "Run when the starter's gun fires," "stop writing when I say so," and "pay when you check out"

all contemplate immediate action. So too here: "when released" demands action the moment an alien is released from custody.

The words around "when" reinforce its plain meaning. After all, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *see also United States v. Willings*, 8 U.S. (4 Cranch) 48, 54 (1807) (holding that the phrase "in every such case" changed the plain meaning of "when" to "if"). The words "when released" are surrounded by terms like "parole," "supervised release," and "probation." *See* 8 U.S.C. § 1226(c). Those conditions begin at the time of a prisoner's release from custody; their inclusion here narrows the scope of "when released." They signal to the government that an alien can—and should—be detained immediately, notwithstanding continued conditions placed on the alien's sentence.

If Congress wanted "when" to mean "at any time after" an alien's release, it knew how to say so. Indeed, in a neighboring provision of the INA, Congress did just that. *See, e.g.*, 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry.") (emphasis added). Congress chooses its words with "precision and intent." *Rodriguez*, 84 F. Supp. 3d at 259 (quoting *Clark*, 489 U.S. at 739). Here, Congress chose "when."

2. Legislative history bolsters the conclusion that "when" means "immediately."

The history of § 1226(c) demonstrates that Congress never intended to "authorize detention *anytime* after an alien is released from state custody." *Snegirev v. Asher*, No. C12-1606MJP, 2013 WL 942607, at *2 (W.D. Wash. Mar. 11, 2013) (emphasis added). When Congress enacted § 1226(c) in 1996, it was concerned that "non-citizens convicted of specific crimes might (1) commit additional crimes, and thus pose a danger to their community, and (2) avoid appearing at their immigration proceedings to evade deportation, and thus pose a flight risk." *Rodriguez*, 84 F. Supp. at 263; *see also Demore v. Kim*, 538 U.S. 510, 518–22 (2003). To address these concerns, Congress "sought to create a pipeline for [an alien's] transfer" directly from state or federal custody to ICE custody. *Rodriguez*, 84 F. Supp. at 263. But this pipeline could work only if aliens were detained "when"—that is, "at the time that"—they were released. Because "Congress understood that it would take time for [ICE] to put mechanisms in place to comply" with the mandate, Congress delayed § 1226(c)'s implementation for two years. *Id.* at 264. If Congress had intended "when" to mean "any time after," there would have been no need for delayed implementation: ICE "would just detain certain noncitizens whenever it got around to it." *Id.*

Moreover, Congress enacted § 1226(c) against a backdrop of courts interpreting "when released" as "immediately." *See, e.g.*, *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997); *Cobb*, 937 F. Supp. at 95. Courts presume that Congress is aware of recent judicial decisions. *See McCarthy v. Bronson*, 500 U.S. 136, 140 (1991); *see also Castañeda*, 810 F.3d at 34 (citing *Miles,* 498 U.S. at 32). If Congress had disapproved of the prevailing interpretation—that "when" meant "immediately"—it could have changed the language in the present statute to curb that practice. But Congress did not alter the language of the statute to say "after" or "at any time." It said "when." Courts "must defer to Congress's choice of words." *Rodriguez*, 84 F. Supp. 3d at 260.

Most courts have. The vast majority of federal district courts inside and outside of Ames agree: two years is too late. *See, e.g.*, *Sylvain*, 714 F.3d at 156 n.6 (collecting cases); *Wilton v. Zolikoffer*, 567 F. Supp. 3d 300, 306–07 (D. Ames 2014) (collecting cases); *see also Parfait v. Holder*, No. 11-4877, 2011 WL 4829391, at *6 (D.N.J. Oct. 11, 2011) (two and a half years was too late); *Antoniou v. Shanahan*, 112 F. Supp. 3d 1, 4 (S.D.N.Y. 2015) (two years was too late); *Zabadi v. Chertoff*, No. C 05-03335 WHA, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (same). The BIA itself concurs: § 1226(c) directs the government "to take custody of aliens *immediately upon their release*."

Rojas, 23 I. & N. Dec. at 122 (emphasis added). "When released" creates a small window, and Peralta does not fit inside it.

3. Interpreting "when" to mean "at any time" raises due process concerns.

Reading the "when released" language to authorize detention years after an alien is released would raise grave constitutional doubts. Because "[f]reedom from imprisonment . . . lies at the heart" of the Due Process Clause, the government must provide "special justification" for detention that "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001). A prior conviction cannot supply that special justification. *See Gordon v. Johnson*, 300 F.R.D. 31, 42 (D. Mass. 2014). And where detention is two years removed from the predicate offense, there is no other justification to fill the gap.

Ordinarily, § 1226(c) draws its special justification from the government's interest in preventing dangerous aliens from fleeing or harming the community. *Demore*, 538 U.S. at 531 (Kennedy, J., concurring). But as an alien's conviction fades into the past, leaving that individual free to build a new life, the risk of her flight or dangerous behavior fades with it. Peralta's life in the two years since her release bears this out: she has become engaged, runs a business, takes veterinary classes, and singlehandedly cares for her mother.

J.A. 22. A "model citizen since her release," Peralta is neither a flight risk nor a danger to her community. J.A. 3, 22. In light of the due process concerns that accompany mandatory detention without special justification, this Court should avoid a reading of § 1226(c) that mandates detention without bond long after the reasons for denying bond have given way.

C. Because the government failed to detain Peralta when she was released, its authority to detain her shifted to the default detention scheme.

Invoking the loss of authority canon, the government insists it has an escape hatch. The government argues that even if "when" means "immediately," it retains the authority to hold Peralta without a bond hearing. But the loss of authority canon applies only if a statute "specifies [no] consequence for noncompliance." *United States v. Daniel James Good Real Prop.*, 510 U.S. 43, 63 (1993); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716–17 (1990). Here, § 1226 *does* specify a consequence for failure to follow § 1226(c): a bond hearing under § 1226(a), the default detention scheme. Reverting to § 1226(a) is in the public's interest, because Peralta will be released only if she demonstrates at her hearing that she poses no danger. Practical considerations cannot excuse the government's two-year disregard of a statutory command. The government must provide Peralta a bond hearing.

1. The loss of authority canon does not apply.

The statute specifies a consequence for noncompliance with § 1226(c). If either element in § 1226(c)(1) goes unmet, the default detention scheme kicks in. *See* 8 U.S.C. § 1226(a). That default mandates that the government "provide all non-citizens an individualized bond hearing." *Rodriguez*, 84 F. Supp. 3d at 254; *see also* 8 C.F.R. § 1236.1(c)(8) (2015). Thus, § 1226 is not silent on what happens to an alien detained long after her release. In fact, its instructions—found in the very first paragraph—could not be clearer: the government "may release the alien on bond." 8 U.S.C. § 1226(a)(2). And under § 1226(b), the government "may revoke" that bond "at any time." *Id.* § 1226(b). The "government loses nothing" when it reverts to § 1226's default scheme. *Khoury v. Asher*, 3 F. Supp. 3d 887, 889 (W.D. Wash. 2014).

The comprehensive default scheme sets this case apart from *Montalvo-Murillo*. There, the defendant claimed he should be released without any bail conditions after the government missed its deadline for immediate pretrial bail review. *See Montalvo-Murillo*, 495 U.S. at 716. But unlike § 1226, the statute in *Montalvo-Murillo* was silent on the consequences for failing to hold an immediate bail hearing. *Id.* No part of the statute included a sanction for the government's failure to comply with its procedural deadline; no part "even suggest[ed]" that

without an immediate hearing, a defendant must be released. *Id.* at 717. Section 1226 does far more than "suggest" Peralta receive a bond hearing. The statute has a built-in alternative in case the government misses its cue: § 1226(a).

To dodge this result, the government contorts thirty-year-old dicta into a "timeframe" requirement. Relying on *Brock v. Pierce County*, the government argues it may invoke § 1226(c) indefinitely, absent "an express requirement that the government act within a certain timeframe." Appellant's Br. at 45 (citing *Brock v. Pierce Cty.*, 476 U.S. 253, 262 (1986)). But *Brock*'s holding was much narrower: *Brock* held only that "the mere use of the word 'shall'" did not provide an alternative course of action. *Brock*, 476 U.S. at 262. Section 1226 contains more than a standalone "shall." It provides a comprehensive default scheme, triggered every time the government fails to detain an alien "when released."

The government's reliance on *Brock* has an even deeper flaw. Though *Brock* noted that some circuit courts had devised a timeframe requirement, it also noted that the Supreme Court had "never expressly adopted" the circuits' requirement. *Id.* at 259. And more recent Supreme Court opinions have buried the timeframe requirement altogether. Those opinions have "summed up" the loss of authority canon: the government retains its authority only if "a statute

does not specify a consequence for noncompliance." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *Daniel James Good Real Prop.*, 510 U.S. at 63)). The government's "timeframe" requirement is dead on arrival.

Even playing by the government's new rules, the timeframe requirement is satisfied here. Because "when" means "immediately," § 1226(c)'s timing element *is* a timeframe requirement. The sound "underpinnings" *Brock* saw in the requirement, *see Brock*, 476 U.S. at 260—public safety and practicality—cut in Peralta's favor, as explained below.

2. Granting Peralta a bond hearing does not threaten public safety.

Courts have, at times, forgiven government oversight where punishing it would endanger the public. *See, e.g.*, *Montalvo-Murillo*, 495 U.S. at 720; *Brock*, 476 U.S. at 260. But a bond hearing endangers no one, because it does not deal Peralta a get-out-of-jail-free card. In fact, the deck is stacked against her at every turn. First, she must demonstrate "to the satisfaction" of an immigration officer that she does not "pose a danger" and that she is "likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). Second, the government may appeal the officer's decision for review by an immigration judge. *Id.* § 1236.1(d)(1). Third, following the order by the immigration judge, the government may appeal again—this time to the BIA. *Id.* §

1236.1(d)(3). At every step of the way, if Peralta is released on bond, the Attorney General has discretion to revoke bond "at any time." 8 U.S.C. § 1226(b). And that decision is unreviewable. *Id.* § 1226(e). With so many safeguards in place, Peralta's request will not lead to "automatic release." *Montalvo-Murillo*, 495 U.S. at 720. She simply asks for a chance to show that she is "not a threat to anybody." J.A. 22. Giving her that chance poses no danger to the public.

3. No practical consideration justifies the government's two-year disregard of its statutory duty.

Montalvo-Murillo assessed a delayed bond hearing "in realistic and practical terms." 495 U.S. at 720. The chain of events that led to the hearing was fast-paced and disorganized: an arrest in New Mexico on Wednesday; a failed drug bust in Chicago on Thursday; a preliminary hearing in Chicago on Friday; a detention hearing requested in New Mexico on Monday; missing paperwork at the hearing on Thursday; the courthouse closed for President's Day the following Monday; the bond hearing, finally, on Tuesday. *Id.* at 713–15. Understandably, the Court was willing to credit the government's best efforts during the "disordered period following arrest." *Id.* at 720. This was a case of "a missed deadline for which no real blame [could] be fixed." *Id.*

Two years is worlds away from a "missed deadline." The government briefly lost the *Montalvo-Murillo* defendant in the shuffle; it utterly forgot about Peralta. Any "disordered period" had long since passed. ICE maintains a 24-hour database to monitor "the arrest, conviction, and release of any alien charged with an aggravated felony," anywhere in the country. *See* 8 U.S.C. § 1226(d)(1). ICE had every opportunity to take Peralta into custody at the time she was released. But instead it waited over two years. And in the interim, Peralta put down roots in Ames: she cared for her ailing mother, tended to her fledgling business, and hoped to start a family with her fiancé. J.A. 3. Practical considerations cannot justify—and this Court should not condone—ripping Peralta from her community. Peralta is entitled to a bond hearing.

CONCLUSION

This Court should hold that Jacqueline Peralta did not commit an aggravated felony. In the alternative, this Court should hold that the government did not detain Peralta "when" she was released, and must therefore provide her a bond hearing. The judgment of the District Court for the District of Ames should be affirmed.

February 29, 2016

Respectfully submitted,

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APPENDIX

United States Constitution

Amend. V.

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et. seq.* (2012)

(selected sections)
§ 1101. Definitions

(a) As used in this chapter—
. . . .
(43) The term "aggravated felony" means—
. . . .
(A) murder, rape, or sexual abuse of a minor;
(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;
. . . .
(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

* * *

§ 1153. Allocation of immigrant visas
. . . .
(b) Preference allocation for employment-based immigrants
Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:
(1) Priority workers
Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

§ 1226. Apprehension and Detention of Aliens

(a) **Arrest, detention, and release**

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) **Revocation of bond or parole**

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.

(c) **Detention of criminal aliens**

(3) **Custody**

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(4) **Release**

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) **Identification of criminal aliens**

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) **Judicial review**

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

* * *

§ 1227. Deportable aliens

(a) **Classes of deportable aliens**

. . . .

(2)Criminal offenses

(A) General Crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * *

§ 1231. Detention and removal of aliens ordered removed

(a) **Detention, release, and removal of aliens ordered removed**

. . . .

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2), the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

. . . .

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

* * *

Anti-Drug Abuse Act of 1988 § 7343(a), 102 Stat. 4470

§ 7343. DEPORTATION OF ALIENS COMMITTING AGGRAVATED FELONIES

(a) RETENTION IN CUSTODY BY THE ATTORNEY GENERAL.—Section 242(a) (8 U.S.C. 1252(a)) is amended—

(1) in the second sentence, by striking out "Any" and inserting in lieu thereof "Except as provided in paragraph (2), any";

(2) by redesignating clauses (1), (2), and (3) as clauses (A), (B), and (C), respectively;

(3) by inserting "(1)" immediately after "(a)"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. Notwithstanding subsection (a), the Attorney General shall not release such felon from custody.

"(3)(A) The Attorney General shall devise and implement a system—

"(i) to make available, daily (on a 24–hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

"(ii) to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

"(iii) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony and who have been deported; such record shall be made available to inspectors at ports of entry and to

border patrol agents at sector headquarters for purposes of immediate identification of any such previously deported alien seeking to reenter the United States.

"(B) The Attorney General shall submit reports to the Committees on the Judiciary of the House of Representatives and of the Senate at the end of the 6–month period and at the end of the 18–month period beginning on the effective date of this paragraph which describe in detail specific efforts made by the Attorney General to implement this paragraph.".

Comprehensive Crime Control Act, 18 U.S.C. § 16 (2012)

§16. Crime of violence defined

The term "crime of violence" means—

a. an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

b. any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Armed Career Criminal Act, 18 U.S.C. § 924 (2012)

§ 924. Penalties

. . .

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

. . . .

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Domestic Violence Offender Gun Ban, 18 U.S.C. § 922(g)(9) (2012)

§ 922

(g) It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Ames Rev. Stat. § 603-42. Third Degree Assault

A person is guilty of third-degree assault when: (1) with intent to cause bodily harm to another, he or she causes bodily harm to that person or to another person; or (2) he or she recklessly or negligently causes serious bodily harm to another person. Any person convicted of third-degree assault is guilty of a misdemeanor and may be sentenced to not more than one year in prison.

Conn. Gen. Stat. § 53a-61 (2012). Assault in the third degree: Class A misdemeanor

(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

(b) Assault in the third degree is a class A misdemeanor and any person found guilty under subdivision (3) of subsection (a) of this section shall be sentenced to a term of imprisonment of one year which may not be suspended or reduced.

18 Pa. Stat. and Cons. Stat. Ann. § 2701(a)(1) (West 2014). Simple Assault

(a) Offense defined.—Except as provided under section 2702 (relating to aggravated assault), a person is guilty of assault if he:

> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;

8 C.F.R. § 1236.1 (2015). Apprehension, custody, and detention.

(c) Custody issues and release procedures—

. . .

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

. . .

(d) Appeals from custody decisions—

(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

. . .

(3) Appeal to the Board of Immigration Appeals. An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.