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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MONY PREAP;
EDUARDO VEGA PADILLA;
JUAN LOZANO MAGDALENO;

Plaintiffs-Petitioners,

vs.

JEH JOHNSON, Secretary of the Department of Homeland Security;
ERIC H. HOLDER, JR., Attorney General of the United States;
TIMOTHY S. AIKEN, Immigration and Customs Enforcement ("ICE") San Francisco Field Office Director;
GREGORY ARCHAMBEAULT, ICE San Diego Field Office Director;
DAVID MARIN, ICE Los Angeles Field Office Director;

Defendants-Respondents.

Case No. 4:13-cv-05754-YGR

Honorable Yvonne Gonzalez Rogers

Defendants' Return to Petitions for Writs of Habeas Corpus and Motion to Dismiss Complaint

Date: March 18, 2014
Time: 2:00 p.m.
Courtroom 5, 2d Floor
Oakland Courthouse

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I. INTRODUCTION

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno (together "Petitioners") are convicted felons who were in the custody of the Department of Homeland Security ("DHS") when they filed this combined petition for habeas corpus and proposed class action complaint seeking injunctive and declaratory relief (hereinafter "the Petition"). Petitioners each seek "a bond hearing at which they may offer proof that they pose no flight risk or danger to the public and that they are entitled to be released while deportation proceedings are pending against them." (Pet. ¶ 1.) Defendants-Respondents Jeh Johnson, Secretary of the Department of Homeland Security, et al. (the "Government") hereby respond, and move to dismiss the Petition under Federal Rule of Civil Procedure 12(b)(6).

Petitioners raise two arguments. They allege that their detention without an individualized bond determination violates the Due Process Clause of the Constitution. (Pet. ¶ 50.) They also argue that their continued detention without a bond hearing is unlawful because the Government did not take them into custody immediately "'when [they were] released' from criminal custody," a fact that they claim exempts them from mandatory detention under 8 U.S.C. § 1226(c). (Pet. ¶¶ 47, 48.)

Petitioners' arguments are without merit. First, Petitioners' due process claims have already been rejected by the Supreme Court, which held in *Demore v. Kim* that "[d]etention during removal proceedings is a constitutionally permissible part" of the removal process such that detention without individualized bond hearings does not offend the Constitution. *Demore v. Kim*, 538 U.S. 510, 531 (2003). Second, Petitioners' proposed interpretation of 8 U.S.C. § 1226(c) is not mandated by the text of the statute, has been rejected by the Board of Immigration Appeals, and violates two fundamental rules of statutory construction. Section 1226(c) mandates "pre-order detention" [1] for all criminal aliens. Subsection 1226(c)(2) provides

[1] Lawful permanent residents subject to removal in the Ninth Circuit are "pre-order" and detained under 8 U.S.C. § 1226 throughout administrative removal proceedings and during judicial appeals of a removal order while a stay of removal is in place, and are "post-order" and detained under 8 U.S.C. § 1231 after receiving an administratively final removal order and either

the only circumstance when the Government may release a pre-order criminal alien described in subsection 1226(c)(1). Because Petitioners do not qualify for Congress's sole explicit exception to mandatory detention, this Court may not incorporate other exceptions into section 1226(c)'s mandatory detention scheme or subordinate Congress's goal of mandatory detention during removal proceedings to seamless custody before the commencement of such proceedings. Rather, the Court should defer to the Board of Immigration Appeals' ("Board") reasonable interpretation of 8 U.S.C. § 1226(c) in *Matter of Rojas,* and dismiss the Petition.

II. STATEMENT OF FACTS

Each Plaintiff-Petitioner has been convicted of crimes enumerated in subparagraphs (A) through (D) of 8 U.S.C. § 1226(c)(1), charged with removal from the United States, and detained by Immigration and Customs Enforcement ("ICE") of DHS.

A. Plaintiff-Petitioner Mony Preap

Mony Preap ("Preap") is a native of Cambodia who was born in a refugee camp to Cambodian parents. (Pet. ¶ 16.) He entered the United States as a refugee in 1981 and became a lawful permanent resident in 1992, retroactive to 1981. (Pet. ¶ 16; Ex. 28.) He was detained for three months at the ICE Contra Costa Detention Facility in Richmond, California, until he was granted relief from removal. (Pet. Ex. A; Ex. 29.)

1. Preap's Criminal History

Preap has been convicted of numerous crimes in California Superior Court.[2] In 2006, he was convicted of two counts of Possession of Marijuana in violation of California Health and Safety Code § 11357(a) and sentenced to time served. (Pet. ¶ 18; Ex. 28.) In 2013, Preap was arrested for Inflicting Corporal Injury on a Spouse in violation of California Penal Code § 273.5.

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the judicial stay of removal is lifted or no judicial stay of removal was in effect. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011). Padilla and Magdaleno are "pre-order" criminal aliens.

[2] Preap has several convictions for Driving Without a License in violation of Cal. Veh. Code § 12500(a) and Possession of Marijuana in violation of Cal. Health & Safety Code § 11357(a). (*See* Ex. 28.)

(Ex. 27; Ex. 28.) On September 9, 2013, he pleaded guilty to Battery in violation of California Penal Code § 242 and was sentenced to ninety days of incarceration. (Pet. ¶ 18; Ex. 27.)

2. Preap's Immigration Detention and Removal Proceedings

On September 11, 2013, immediately upon his release from the Battery conviction, ICE officers arrested and charged Preap with being removable from the United States under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance violation. (Ex. 28.) That same day Preap was detained at the ICE Contra Costa Detention Facility pending removal proceedings. Preap was mandatorily detained under 8 U.S.C. § 1226(c)(1)(B) based on his 2006 conviction for two counts of Possession of Marijuana. On October 7, 2013, the immigration judge found Preap removable as charged, and on December 17, 2013, the immigration judge granted him Cancellation of Removal. (Ex. 29). ICE released Preap from immigration detention on December 17, 2013.[3] (Ex. 29.)

B. Plaintiff-Petitioner Eduardo Vega Padilla

Eduardo Vega Padilla ("Padilla") is a native and citizen of Mexico. (Pet. ¶ 22; Ex. 1.) He entered the United States as a lawful permanent resident in 1966. (Pet. ¶ 22; Ex. 1; Ex. 2.) He has been detained at Rio Cosumnes Correctional Center in Elk Grove, California, for almost six months.[4]

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[3] Preap's release renders his individual petition moot, and he should be dismissed as a party under Rule 12(b)(1) for lack of subject matter jurisdiction over his claims. Federal district courts may grant a writ of habeas corpus if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." *Gutierrez v. Holder* --- F. Supp. 2d ----, 2014 WL 27059, at *2 (N.D. Cal. Jan. 2, 2014) (quoting 28 U.S.C. § 2241(c)(3)). A petition should be dismissed if the petitioner receives the relief requested. *Prieto-Romero v. Clark*, 534 F.3d 1053, 1053 (9th Cir. 2008) (holding that due process is satisfied once an alien has "had an opportunity to contest the necessity of his detention before a neutral decision maker and an opportunity to appeal that determination to the BIA"); *Flores-Torres v. Mukasey*, 548 F.3d 708, 710 (9th Cir. 2008) (dismissing as moot part of habeas petition challenging detention without an individualized bond hearing after an immigration judge held a bond hearing).

[4] Padilla was arrested and detained by ICE in the Eastern District of California. (Ex. 8.) Thus, in Padilla's case, the Government denies Petitioners' allegations that "a substantial part of the events giving rise to these claims" occurred in the Northern District of California." (Pet. ¶ 6.) Should the Court deny Petitioners' Motion to Certify Class, which was filed concurrently with

1. Padilla's Criminal History

In 1997, Padilla was convicted in California Superior Court of Possession of a Controlled Substance (methamphetamine), a misdemeanor, in violation of California Health and Safety Code § 11377(a). (Ex. 3.) After he failed to abide by a diversion order, Padilla was sentenced to thirty days. (Ex. 3.) In 2000, Padilla again was convicted in California Superior Court of Possession of a Controlled Substance (methamphetamine), a felony in violation of California Health & Safety Code § 11377(a). (Pet. ¶ 24; Ex. 4.) He was sentenced to 180 days of confinement. (Ex. 4.) On January 14, 2002, while still on probation for the 2000 possession offense, Padilla was convicted of Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1). (Pet. ¶ 24; Ex. 5.) Padilla was sentenced to 180 days for the firearm conviction and an additional 185 days for violation of probation from his 2000 conviction. (Ex. 5.)

2. Padilla's Immigration Detention and Removal Proceedings

On August 15, 2013, ICE charged Padilla with being removable from the United States based on his 1997 and 1999 controlled substance convictions and his 2002 firearm conviction. (Ex. 9; Ex. 10). That same day, during Operation Cross Check,[5] ICE arrested Padilla in Sacramento, California, and detained him at Rio Cosumnes Correctional Center under 8 U.S.C. § 1226(c). (Pet. ¶ 9; Ex. 6; Ex. 7; Ex. 8.) Padilla requested a custody redetermination before an immigration judge, and on October 15, 2013, the immigration judge found that Padilla was

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the Petition, the Government requests that Padilla's individual petition for a writ of habeas corpus should be transferred to the U.S. District Court for the Eastern District of California under Federal Rule of Civil Procedure 12(b)(3).

[5] Operation Cross Check is a concerted effort by ICE to target priority criminal aliens who are subject to removal from the United States. *See* ICE, Fact Sheet: National Cross Check Overview, Apr. 2, 2012, http://www.ice.gov/news/library/factsheets/crosscheck.htm; *see also* ICE Director John Morton, Memorandum for All ICE Employees, March 2, 2011, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (setting priorities for the apprehension, detention, and removal of aliens).

lawfully detained under 8 U.S.C. § 1226(c) and, thus, the immigration judge did not have jurisdiction to consider his request for a release on bond. (Ex. 13.)

On December 3, 2013, an immigration judge ordered Padilla removed from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of a controlled substance offense. (Ex. 11.) The immigration judge also found that Padilla is ineligible for any relief from removal. (Ex. 11.) On December 26, 2013, Padilla appealed the removal order to the Board, where it remains pending. (Ex. 12.) Padilla will be eligible for a *Rodriguez* hearing on February 14, 2014. *See Rodriguez v. Robbins (Rodriguez II)*, 713 F.3d 1127, 1138 (9th Cir. 2013).

C. Plaintiff-Petitioner Juan Lozano Magdaleno

Juan Lozano Magdaleno ("Magdaleno") is a native and citizen of Mexico. (Ex. 14.) He entered the United States as a lawful permanent resident in 1974. (Ex. 14; Ex. 15.) Magdaleno has been detained at the Contra Costa West County Detention Center in Richmond, California, for approximately six months. (Pet. ¶ 10; Ex. 21.)

1. Magdaleno's Criminal History

Magdaleno has been convicted of numerous crimes in California Superior Court.[6] Relevant to his immigration detention, on October 13, 2000, Magdaleno was convicted as a Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1) based on his possession of a firearm after three prior Driving Under the Influence convictions. (Ex. 16.) He was sentenced to 147 days of confinement and three years of probation. (Ex. 16.) On May 21, 2003, the California Superior Court revoked Magdaleno's probation for the 2000 firearm conviction and sentenced Magdaleno to sixteen months of incarceration. (Ex. 17.) On June 16, 2007, Magdaleno was convicted of Driving on a Suspended License/Driving Under the Influence

[6] Magdaleno has over twenty misdemeanor convictions, including Hit and Run-Property Damage in violation of California Vehicle Code § 20002(a), Possession of a Controlled Substance in violation of California Health & Safety Code § 11377(a), Under the Influence of a Controlled Substance in violation of California Health & Safety Code § 11550(a), and Driving on a Suspended License in violation of California Vehicle Code § 14601. He also has two felony convictions for Driving Under the Influence in violation of California Vehicle Code § 14601.2(a), (*See* Ex. 16.)

in violation of California Vehicle Code § 14601.2(a), a misdemeanor, and Possession of a Controlled Substance (methamphetamine), a felony, in violation of California Health & Safety Code § 11377(a). (Ex. 18.) He was sentenced to six months of confinement for the convictions. (Ex. 18.)

2. Magdaleno's Immigration Detention and Removal Proceedings

On July 17, 2013, ICE arrested Magdaleno at his residence and charged him with removal under 8 U.S.C. § 1227(a)(2)(c) as an alien convicted of a firearms offense and under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance offense. (Ex. 19; Ex. 20; Ex. 22.) He was detained at Contra Costa West County Detention Center under 8 U.S.C. § 1226(c)(1)(A) based on his 2007 conviction for possession of a controlled substance. (Pet. ¶ 10; Ex. 21.) Magdaleno challenged his detention before an immigration judge, and on December 12, 2013, the immigration judge found that Magdaleno was lawfully detained under 8 U.S.C. § 1226(c) and, thus, the immigration judge did not have jurisdiction to consider his request for a release on bond. (Ex. 23.) Magdaleno is scheduled to receive a *Rodriguez* hearing before an immigration judge on February 14, 2014, (Ex. 26), where the Government will be required to show that he would be a danger to society or a flight risk should he be released from immigration detention, *see Rodriguez II*, 713 F.3d at 1135-36.

On September 17, 2013, Magdaleno conceded the charges of removability, and the immigration judge found him to be removable by clear and convincing evidence. (Ex. 24.) On November 29, 2013, the immigration judge ordered Magdaleno to be removed and denied his application for relief from removal. (Ex. 24.) On December 26, 2013, Magdaleno appealed the removal order to the Board, where it remains pending. (Ex. 25.)

III. RELEVANT LAW

A. Legal Framework of Alien Detention

Congress enacted a multi-layered detention statute that provides for civil detention of aliens during their removal proceedings. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). Where an alien falls within this scheme determines whether his detention is

discretionary or mandatory, as well as the available custody review process. *See id.* at 1057. Generally, the statutory authority of the Government to detain a lawful permanent resident alien during removal proceedings ("pre-order") is found in 8 U.S.C. § 1226, and the authority to detain an alien following the issuance of a final removal order ("post-order") is found in 8 U.S.C. § 1231.[7]

When an alien receives a Notice to Appear and is charged with removal, ICE may detain the alien during removal proceedings. 8 U.S.C. § 1226(a). Aliens detained under subsection1 226(a) are released or provided a bond hearing. *Id.* However, if the alien committed a serious crime or is involved in terrorist activity under one of the categories enumerated in 8 U.S.C. § 1226(c)(1)(A) through (D), ICE must detain the alien under 8 U.S.C. § 1226(c) pending a final removal order. *See* 8 U.S.C. § 1226(a) (granting ICE authority to determine conditions of custody "[e]xcept as provided in subsection (c)"); 8 C.F.R. § 1236.1 (2003) (further defining the custody process under section 1226). Although subsection 1226(a) vests immigration authorities with the authority to release pre-order aliens on bond or parole, section 1226(c) prohibits such release except under the one exception articulated in subsection 1226(c)(2) involving witness protection, which is not applicable here. *See Gutierrez v. Holder*, --- F. Supp. 2d ----, 2014 WL 27059, at *3 (N.D. Cal. Jan. 2, 2014) (upholding mandatory detention for a criminal alien detained six months after his release from criminal custody). This case turns on the statutory interpretation of 8 U.S.C. § 1226(c), which provides:

> **(c) Detention of criminal aliens**
> **(1) Custody**
> The Attorney General[8] ***shall take into custody*** any alien who –

[7] *See* note 2 differentiating between pre-order and post-order aliens.

[8] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135 (Nov. 25, 2002). The INS was divided into three separate agencies, the Bureau of Immigration and Customs Enforcement ("ICE"), the Bureau of Customs and Border Protection, and the Bureau of Citizenship and Immigration

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under 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) 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.

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

Subparagraphs 1226(c)(1)(A) through (D) enumerate the categories of deportable and inadmissible aliens subject to detention without an individualized custody determination. Many of the grounds of inadmissibility and deportability cross-referenced in subparagraphs 1226(c)(1)(A) through (D) require criminal convictions, but several do not. *See Rodriguez II*, 713 F.3d 1131, n1 (listing the numerous grounds cross-referenced in subparagraphs 1226(c)(1)(A) through (D) and delineating between "committed," "having been involved in," and "having been convicted of" criminal activity"). Subparagraph 1226(c)(1)(D) only requires "connections to terrorism." *Id.*

Services. ICE, an agency within DHS, assumed INS's (and thus the Attorney General's) detention and removal authority. *Id.* at § 441.

ICE issues an initial determination on whether an alien is deportable or inadmissible under subparagraphs 1226(c)(1)(A) through (D). 8 C.F.R. §§ 236.1(c)(1), (8) (setting out the procedures for custody under section 1226). An alien detained under section 1226(c) may request an individualized custody redetermination hearing before an immigration judge. *See Demore*, 538 U.S. at 514, n.3 (explaining "*Joseph* hearing"); *Rodriguez II*, 715 F.3d at 1132; (same); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999) (requiring individualized hearing). The immigration judge reviews whether the alien is properly included in a mandatory detention category enumerated in the subparagraphs and, thus, properly detained under 8 U.S.C. § 1226(c). 8 C.F.R. § 1003.19(h)(2)(ii).

Although the issue is still being litigated,[9] pre-order criminal aliens in the Ninth Circuit are detained without bond under section 1226(c) for the first sixth months of removal proceedings. *Rodriguez II*, 715 F.3d at 1138. After six months, the Ninth Circuit has directed that the authority for pre-order detention shifts to 8 U.S.C. § 1226(a) and the aliens are entitled to an individualized bond hearing.[10] *Id.*

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[9] *See Rodriguez v. Hayes*, No. 2:07-cv-3239-TJH (C.D. Cal. filed May 16, 2007). On September 19, 2012 2007, the Central District of California issued a preliminary injunction ordering a bond hearing for aliens detained for 180 days or longer in the Central District of California under subsections 1226(c) and 1225(b) other mandatory detention statutes. (No. 2:07-cv-3239, Doc. 255.) The order was appealed to the Court of Appeals for the Ninth Circuit, which upheld the preliminary injunction and held that aliens detained under subsections 1226(c) and 1226(b) were due a hearing after six months detention. *Rodriguez II*, 715 F.3d at 1138. (Thereafter, the decision was implemented throughout the Ninth Circuit.) On August 6, 2013, the Central District of California granted summary judgment for plaintiffs and issued a permanent injunction mandating the bond hearings for all aliens detained in the Central District of California for 180 days or longer under any of the four major immigration detention provisions, subsections 1226(c), 1225(b), 1226(a), and 1231. (No. 2:07-cv-3239, Doc. 353.) The Government filed an appeal of the judgment in the Ninth Circuit, and the case is scheduled for briefing. (No. 13-56706, docketed Oct. 1, 2013.)

[10] At present, a *Rodriguez* hearing is automatically scheduled and provided before an immigration judge when an alien's period of detention exceeds six months. *Rodriguez v. Holder*, No. 07-3239, 2013 WL 5229795, at *2 (C.D. Cal. Aug. 6, 2013) (clarifying procedural requirements of *Rodriguez II*). Pre-order criminal aliens are provided notice of the *Rodriguez* hearing at least seven days before the hearing. *Id.*

B. Legislative History of 8 U.S.C. § 1226(c)

Starting in 1988, Congress amended the Immigration and Nationality Act ("INA") to attempt to curb the Government's inability to remove dangerous, deportable criminal aliens. *Gutierrez*, 2014 WL 27059, at *2 (citing *Demore v. Kim*, 538 U.S. 510, 519 (2003)). In 1996, Congress passed the current version of 8 U.S.C. § 1226 in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Div. C, Pub. L. No. 104-208, § 303(b), 110 Stat. 3009-586 (Sept. 30, 1996). Section 1226(c) was enacted in response to evidence that the INS was unable to remove the majority of criminal aliens, in large part because of their failure to appear for removal hearings after being served with charges of removability, and that such aliens displayed a high rate of recidivism. *See Demore*, 538 U.S. at 518-20; *see also Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012) (noting that Congress passed 8 U.S.C. § 1226(c) to deal with "near-total inability to remove deportable criminal aliens"); *Matter of Rojas*, 23 I. & N. Dec 122, 122 (BIA 2001). Section 1226(c) prevents criminal aliens from absconding or reoffending while free on bond after being served with removal charges and placed in removal proceedings. *Demore*, 538 U.S. at 518-19. In *Demore*, the Supreme Court recognized Congress's intent in drafting that statute, and upheld its constitutionality for those purposes. 538 U.S. 510 at 513.

C. The Board's Interpretation of Section 1226(c) in *Matter of Rojas*

Following the enactment of section 1226(c) in IIRIRA, the Board confronted challenges from aliens who argued that they were not subject to the new detention rules because they had not been taken into custody "when . . . released" from criminal custody. The Board concluded that the Government's authority to detain criminal aliens under 8 U.S.C. § 1226(c) did not depend on how soon they were taken into immigration custody after their release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 121-26 (construing 8 U.S.C. § 1226(c)). In *Matter of Rojas*, the Board concluded that an alien, whose conviction would otherwise subject him to 8 U.S.C. § 1226(c), was not exempt from mandatory detention because he was not taken into immigration custody until two days after his release from state criminal custody. *Id.* at 117-18.

The Board reviewed the language of section 1226(c) in light of several factors. First, the Board concluded that section 1226(c) is ambiguous. Subsection 1226(c)(2)'s prohibition on release of "an alien described in paragraph (1)," "when read in isolation, . . . [was] susceptible to different readings." *Id.* at 120. Similarly, the term "when" as used in the "when . . . released" clause does not unambiguously limit section 1226(c)'s application to the moment "immediately upon" an alien's release from state custody. *See id.* at 127.

IV. ARGUMENT

The Court should dismiss the Petition because Congress, through 8 U.S.C. § 1226, directs the Government to mandatorily detain criminal aliens, such as Petitioners, during the pendency of their removal proceedings. Petitioners' argument – that they should receive a bond hearing because the Government failed to act expeditiously in arresting them – is unavailing and, as a result, the Court should dismiss the Petition.

First, each Petitioner has criminal convictions that are enumerated in section 1226(c), and the Supreme Court has upheld the mandatory detention of criminal aliens such as Petitioners. Second, under the principles of *Chevron* deference, the Court should defer to the Board's reasonable interpretation of this ambiguous statute. Third, under Supreme Court precedent, this Court may not read the statute in such a way as to expand the explicit exceptions already written into section 1226(c) or to extinguish the Government's authority to detain Petitioners for failure to meet a deadline. *See Gutierrez*, 2014 WL 27059, at *8.

A. Mandatory Pre-Order Detention for up to Six Months Does not Offend Due Process Within the Ninth Circuit.

Petitioners claim that their mandatory pre-order detention violates the due process clause of the Constitution. (Pet. ¶ 50.) Their claims, however, have already been rejected by the Supreme Court, and the Ninth Circuit has defined the statutory parameters of mandatory detention under section 1226(c) to allay due process concerns.

The Supreme Court held that mandatory detention under 8 U.S.C. § 1226(c) of criminal aliens pending final orders of removal is permissible and not unconstitutional. *Demore*, 538 U.S.

at 528. The congressional concerns underlying the passage of 8 U.S.C. § 1226(c), discussed at length in the opinion of the Supreme Court and found to be valid in terms of the exercise of legislative judgment, included Congress's determination that detention pending the conclusion of proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528.

In *Demore*, the Supreme Court distinguished mandatory detention of criminal aliens during removal proceedings from the potentially open-ended, post-order detention addressed in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Demore*, 538 U.S. at 524. The Court approved of mandatory detention of criminal aliens for "the limited period necessary for their removal proceedings." *Id.* at 526. The Ninth Circuit recently found that continued detention under section 1226(c) beyond six months posed constitutional concerns, and therefore detention authority shifts to section 1226(a) after six months. *Rodriguez II*, 715 F.3d at 1138. At that point, once section 1226(c) no longer applies, the Ninth Circuit directed the Government to provide bond hearings to all criminal aliens previously detained under section 1226(c). *See Id.*

In *Demore*, the Supreme Court recognized that criminal aliens receive additional due process before a neutral arbitrator when they request a custody redetermination of their detention. Demore, 538 U.S. at 514, n.3. After ICE issues an initial determination on whether an alien is deportable or inadmissible under subparagraphs 1226(c)(1)(A) through (D), aliens may receive a custody redetermination reviewing ICE's initial determination by an immigration judge. *Id.; see also Rodriguez II*, 715 F.3d at 1132; (same); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

Here, each Petitioner committed a crime that required the Government to detain him under 8 U.S.C. § 1226(c). Preap was deportable under 8 U.S.C. § 1227(a)(2)(B) as an alien with two controlled substance convictions and, thus, was lawfully detained under 8 U.S.C. § 1226(c)(1)(B) until the conclusion of his removal proceedings. (*See* Ex. 28.) Padilla was convicted of a controlled substance offense which makes him removable under 8 U.S.C.

§ 1227(a)(2)(A)(iii), and, thus, is lawfully detained under 8 U.S.C. § 1226(c)(1)(B) until mid-February. (*See* Ex. 11.) Magdaleno is removable under 8 U.S.C. § 1227(a)(2)(c) as an alien convicted of a firearms offense and under 8 U.S.C. § 1227(a)(2)(B)(i) and as an alien convicted of a controlled substance offense, which makes him lawfully detained under 8 U.S.C. §§ 1226(c)(1)(A) and 1226(c)(1)(B) until mid-February. (*See* Ex. 24.)

Preap has been released from immigration detention, and Magdaleno and Padilla both received custody review determinations by an immigration judge who issued written determinations on whether each was properly detained under section 1226(c). (Ex. 29 (Preap); Ex. 13 (Padilla); Ex. 23 (Magdaleno).) Padilla was detained on August 15, 2013, so his six-month *Rodriguez* hearing will be held on or about February 15, 2014. Magdaleno is scheduled for a *Rodriguez* hearing on February 14, 2014. (Ex. 26.)[11] Thus, Petitioners' allegations of due process violations are meritless, and their detention during their removal proceedings without an individualized bond hearing is constitutionally permissible.

B. The Board's decision in *Matter of Rojas* is entitled to *Chevron* Deference.

The Court should adopt the Board's interpretation in *Matter of Rojas* under the principles of *Chevron* deference. *See Hosh*, 680 F.3d at 378. The *Chevron* inquiry is a two-step process: courts must inquire (1) whether "the statute is silent or ambiguous with respect to the specific issue," and if so (2) whether the agency's interpretation is based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The first prong of the *Chevron* test is met here because section 1226(c) is ambiguous with regard to the question at hand. As discussed more fully below, the statute is ambiguous because multiple reasonable interpretations exist as to the meaning of the "when . . . released" clause based upon its text and placement within the statute. The existence of multiple reasonable interpretations demonstrates the statute's ambiguity. Read as a whole, section 1226(c)'s ambiguity requires the Court to defer to the Board's reasonable interpretation of section 1226(c). *See Chevron*, 467 U.S. at 843-44.

[11] The Government will provide notice to the Court on the outcome of both *Rodriguez* hearings.

Under the second prong of the *Chevron* test, this Court should give the Board's interpretation controlling weight because it is consistent with the overall immigration scheme, statute's congressional purpose, and the text and structure of the statute. *See Matter of Rojas*, 23 I. & N. Dec. at 121-24. Where the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron, 467 U.S.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

1. Section 1226(c) is ambiguous because there are multiple interpretations of the placement and meaning of the "when . . . released" clause.

The placement of the "when . . . released" clause within subsection (c)(1) renders the subsection open to at least two interpretations when read with subsection (c)(2). Subsection (c)(2) holds that "an alien described in [subsection (c)(1)]" must be held in mandatory detention unless he falls into a narrow exception regarding the protection of criminal witness. 8 U.S.C. § 1226(c)(2). Under Petitioners' proposed reading of subsections 1226(c)(1) and (2), the "when . . . released" clause of subsection 1226(c)(1) must be read as part of the definition of aliens contained in that section, *i.e.*, that an alien may be detained without bond only if he or she fits into one of the classes of aliens enumerated in subparagraphs (1)(A) through (1)(D) *and* additionally was detained by ICE at the moment he or she was released from state custody. (Pet. ¶ 47.) Subsection (c)(2), however, can also be read as extending mandatory detention to those aliens described in subparagraphs (1)(A) through (1)(D) of section 1226(c), with the "when…released" clause interpreted as describing when the Government's duty to apprehend criminal aliens begins. *See Sulayao v. Shanahan*, No. 09-cv-7347, 2009 WL 3003188, at *4-5 (S.D.N.Y. Sept. 15, 2009) (finding section 1226(c) ambiguous because "an alien described in [subsection (c) (1)]" may refer only to the classes of aliens described in subparagraphs 1226(c)(1)(A) through (D) or to the classes of aliens described in subparagraphs 1226(c)(1)(A)

through (D) who are taken into custody "when . . . released"); *Rojas*, 23 I. & N. Dec at 120, 121, 126.

Even if the Court reads subsection 1226(c)(2) to restrict mandatory detention to aliens who both fall within the enumerated categories set out in subparagraphs (A) through (D) and entered ICE custody "when . . . released" from criminal custody, the meaning of "when" itself is imprecise. First, dictionaries indicate that "when" can mean "at any time after" as well as "immediately upon." *See, e.g.*, *20 The Oxford English Dictionary* 209 (2d ed. 1989) (defining "when" in definition 8.a as "In the, or any, case or circumstances in which; sometimes nearly = if"); *The American Heritage Dictionary of the English Language* 1958, (4th ed. 2000) (defining "when" in definition 3 as "whenever"); *Webster's Third New International Dictionary* 2602 (3d ed. 1976) (defining "when" in entry 2, definition 2 as "in the event that; on condition that") (attached as Ex. 32). These alternative dictionary definitions of "when," each making sense under the statute, demonstrate Petitioners' interpretation is not compelled by the language of the statute. *See Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (holding that a statute is ambiguous if its "plain terms admit of two or more reasonable ordinary usages"); *see also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions [. . .], each making some sense under the statute, itself indicates that the statute is open to interpretation.").

The Board is not the only court to have recognized the imprecision of the term "when." *Rojas*, 23 I. & N. Dec. at 124 (questioning whether "when" could mean "'immediately' upon release, or would there be a greater window of perhaps 1 minute, 1 hour, or 1 day'"). Indeed, many federal courts, including the Supreme Court, have recognized that "when" has at least two possible meanings: "at any time after" and "immediately upon." *See United States v. Willings*, 8 U.S. 48, 55 (1807) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted."). More recently, the Ninth Circuit examined the meaning of "when" in an immigration statute and cited multiple dictionaries that define "when" as meaning both "immediately" and "while." *See Lagandaon v.*

Ashcroft, 383 F.3d 983, 988 (9th Cir. 2004). And even more recently, the Fourth Circuit found the word "when" in section 1226(c) to be ambiguous because it possesses two definitions that make sense within that statute. *See Hosh*, 680 F.3d at 380 ("[I]t is far from plain, and indeed unlikely, that 'when . . . released' means 'at the moment of release, *and not later*.") (emphasis in original). "[W]e cannot conclude that Congress clearly intended to exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into federal custody." *Id.* at 381 (emphasis in original).

Further evidence of the ambiguity of 8 U.S.C. § 1226(c) is the fact that courts cannot agree on what the subsection means. *See Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (disagreement among courts suggests ambiguity); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004) ("Judicial decisions that differ on the proper interpretation of [a statute] reflect this ambiguity."); *State Ins. Fund v. Southern Star Foods (In re Southern Star Foods)*, 144 F.3d 712, 715 (10th Cir. 1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase."). There are numerous district court decisions on point: some supporting Petitioners' position and some finding the word "when" ambiguous and, thus, deferring to the Board's interpretation in *Matter of Rojas*. *See, e.g., Sanchez Gamino v. Holder*, --- F. Supp. 2d. ----, 2013 WL 6700046, at *3 (N.D. Cal. Dec. 19, 2013) (recognizing split in district court decisions on whether section 1226(c) is ambiguous); *Bumanlag v. Durfor*, No. 2:12-cv-2824, 2013 WL 1091635 (E.D. Cal. Mar. 15, 2013) (same). "The fact that courts have disagreed so in interpreting [section 1226(c)] supports the conclusion that it is ambiguous." *Diaz v. Muller*, No. 11-cv-4029, 2011 WL 3422856, at *3 (D.N.J. Aug. 4, 2011).

Petitioners allege that the district courts in the Ninth Circuit "have consistently rejected the [Board's] interpretation of section 1226(c)." (Pet. ¶ 38.) This claim is misleading for two reasons. First, Petitioners' arguments does not taken into account recent district court decisions in this jurisdiction and elsewhere in the Ninth Circuit that have found that both the object of the "when . . . released" clause and the meaning of the word "when" are ambiguous or at least imprecise. *See, e.g., Mora-Mendoza v. Godfrey*, No. 3:13-cv-01747, 2014 WL 326047, at *6 (D.

Or. Jan. 29, 2014); *Gutierrez*, 2014 WL 27059, at *5; *Gatbonton v. Lauer*, No. 2:12-cv-02069-RCJ-VCF, 2013 U.S. Dist. LEXIS 98357 (D. Nev. July 12, 2013).

Second, Petitioners' claim belies the fact that, while declining to defer to the Board, many of the courts within the Ninth Circuit to have reached this issue have implicitly – though not explicitly – found the "when . . . released" clause ambiguous. For example, in *Deluis-Morelos*, the district court did not find "when" to have a single precise meaning, instead holding that "the plain language of 8 U.S.C. § 1226 unambiguously requires the government to detain an alien at the time the alien is released from custody, *or* within a reasonable period of time thereafter." *Deluis-Morelos v. ICE Field Office Dir.* No. 12-cv-1905, 2013 U.S. Dist. LEXIS 65862, at *13 (W.D. Wash. May 8, 2013) (emphasis added); *see also Bogarin-Flores v. Napolitano*, No. 12-cv-399, 2012 WL 3283287 (S.D. Cal. Aug. 10, 2012) (distinguishing, rather than outright rejecting, *Rojas* on the ground it involved only a two-day gap between criminal release and immigration detention); *Quezada- Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (finding that mandatory detention "does not apply to aliens who have been taken into immigration custody *several months* . . . after they have been released.") (emphasis added); *Bromfield v. Clark*, No. 06-cv-757, 2007 WL 527511, at *4 (W.D. Wash. Feb. 17, 2007) (limiting section 1226(c) to "those aliens taken into immigration custody *immediately* after their release from state custody" (emphasis added)); *Zabadi v. Chertoff*, No. 05-cv-3335, 2005 WL 3157377, at *4-5 (N.D. Cal. Nov. 22, 2005) (finding that ICE "need not act immediately but has a *reasonable period of time* after release from incarceration in which to detain," yet nonetheless failing to acknowledge that the statute was ambiguous under the first prong of *Chevron* step one (emphasis added)).

Given the various possible readings of sections 1226(c)(1) and (2), this Court should find that the statute is ambiguous and move to the second prong of the *Chevron* analysis.

2. The Board's reading of section 1226(c) is reasonable.

a. The Board's reasonable interpretation conforms with Congress's expressed concern about detaining criminal aliens throughout their removal proceedings.

The Board's interpretation of section 1226(c) is also reasonable because it is consistent with Congress's dual intentions for section 1226(c): "to keep dangerous aliens off the streets" and to prevent them from absconding during removal proceedings. *Sylvain v. Att'y Gen.*, 714 F.3d 150, 160 (3d Cir. 2013). Congress was concerned not just with detaining criminal aliens at the beginning of their removal proceedings, but also at their conclusion. *See Rojas*, 23 I. & N. Dec. at 122 (recognizing that "Congress was frustrated with the ability of aliens, and particularly criminal aliens, to avoid deportation if they were not actually in Service custody when their proceedings were completed"); *Demore*, 538 U.S. at 519 (noting that, "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings").

Section 1226(c) supports Congress's goals by eliminating the discretion to release criminal aliens on bond, thereby preventing the release of those aliens most likely to abscond or reoffend. *See Sylvain*, 714 F.2d at 160. The Board's interpretation therefore does not subordinate Congress's objective (detention of criminal aliens during removal proceedings) to perfect performance by ICE. *See* S. Rep. No. 104-48, at 1 (showing that Congress was aware when it enacted 8 U.S.C. § 1226(c) that the Government's inability to detain criminal aliens was often attributable to factors outside the Government's control). Petitioners' interpretation, on the other hand, would. Under Petitioners' interpretation, "a dangerous alien would be eligible for a hearing – which could lead to his release – merely because an ICE official missed the deadline or because a state or local official refused to disclose information to ICE. This reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *Sylvain*, 714 F.2d at 160-161; *cf. United States v. Montalvo-Murillo*, 495 U.S. 711, 719-20 (1990) ("Our conclusion is consistent with the design and function of . . . the Bail Reform Act . . . [which is]

an appropriate regulatory device to assure the safety of persons in the community and to protect against the risk of flight.").

b. The Board's interpretation comports with the overall statutory scheme.

The Board's interpretation is also reasonable because it is consistent with congressional objectives reflected in other parts of the INA. For example, the Board interprets section 1226(c) as delaying immigration detention until after an alien has completed his sentence of criminal incarceration. *See Matter of Rojas*, 23 I. & N. Dec. at 121-24. Such an interpretation comports with provisions in other statutes not to take custody of a criminal alien "before the alien's release from incarceration." 8 U.S.C. § 1228(a)(3);[12] *see also* 8 U.S.C. § 1231(a)(4)(A); 8 U.S.C. § 1231(a)(4)(D). In *Khodr v. Adduci*, the court asked rhetorically, "when else could the Attorney General take an alien into custody except when he or she is released" from criminal custody. *Khodr v. Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010). The answer is simple: given the supremacy accorded to federal law under Article VI of the Constitution, section 1226(c) would permit federal officials to take an alien into immigration custody before he is released from state or local custody, were it not for the "when . . . released" clause.

The Board's decision also harmonized section 1226(c) with "other statutory provisions pertaining to the removal process" because none of them places "importance on the timing of an alien's being taken into custody" by ICE. *Matter of Rojas*, 23 I. & N. Dec. at 121. Where nowhere in the INA is an immigration benefit or presumption tied to the timing of an alien's release from criminal custody, it is reasonable to find no such linkage here. *Id*. at 122. Moreover, whereas numerous courts have found the length of an alien's time in the community relevant to the application of section 1226(c) to the alien, this period in the community does not affect an alien's classification as an inadmissible or deportable alien – the initial classification that brings the alien under the scope of section 1226(c).

[12] ICE's institutional removal program attempts to finalize many criminal aliens' removal orders before they are released from criminal custody.

c. The Board's interpretation furthers rather than frustrates Congress's goal of detaining criminal aliens during removal proceedings.

The Board also addressed the impracticability of an interpretation that required immediacy. *See* 23 I. & N. Dec. at 124. There are two major factors preventing DHS from taking criminal aliens into custody at the conclusion of criminal custody: (1) the significant resources required to safely effect the arrest of a criminal alien; and (2) legislation, policy, and local ordinances that prohibit or restrict California law enforcement officers' discretion to notify ICE officials about aliens in their custody. In *Matter of Rojas*, the Board concluded that it would be inconsistent to construe section 1226(c) "in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by the [Government]." *Rojas*, 23 I. & N. Dec. at 124. In interpreting section 1226(c), the Court must remain cognizant of these limitations in the immediate detention scheme enacted by Congress.

A recent decision from this court illustrates the impediments, even though ICE prioritizes its limited resources on arresting and removing criminal aliens.[13] In *Gutierrez*, the alien was finally detained six months after his release from criminal custody after two other unsuccessful attempts by immigration officials to arrest him. *Gutierrez*, 2014 WL 27059, at *3. Although the decision does not indicate whether ICE issued an immigration detainer while the alien was in criminal custody, San Francisco-based ICE officers were delayed in detaining the criminal alien "due to manpower, caseload, and geological coverage" that prohibited them from focusing on petitioner's case more than the three attempts necessary to detain him in Sonoma County. *Id.*

Another significant reason for the Government's current and future inability to detain criminal aliens immediately upon their release from criminal custody in California involves recent trends by the state and local governments to refuse to honor immigration detainers or share information on aliens in criminal custody. Notably, the new Trust Act, 2013 Cal. A.B. 4

[13] *See* note 2 on Operation Cross Check and the ICE Memorandum prioritizing resources to the removal of criminal aliens.

(codified at Cal. Gov't Code §§ 7282-7282.5 (2014), allows local governments to limit ICE's ability to use immigration detainers to track and detain pre-order criminal aliens upon their release from state and local criminal custody. The Trust Act was a concerted effort to respond to ICE's efforts in Secured Communities, a program designed to enhance efforts to identify and remove convicted criminal aliens from the United States by sharing information with other law enforcement agencies.[14]

Effective January 1, 2014, the Trust Act mandates that state and local officials in California have the discretion to honor immigration detainers for criminal aliens convicted of most of the serious crimes enumerated in subparagraphs 1226(c)(1)(A) through (C) who are in criminal custody at state and local facilities.[15] The Trust Act expressly prohibits local officials from sharing any information on aliens convicted of some of the crimes covered under subparagraphs 1226(c)(1)(A) through (C). Cal. Gov't Code § 7282.5(b) (2014).[16] The inevitable consequence of the Trust Act is that certain criminal aliens who are described in 8 U.S.C. §1226(c) will be released into the community and not into ICE custody because local governments in California are prohibited from notifying ICE officials that removable aliens are in their custody. Petitioners ask the Court to require immediate detention of individuals subject to mandatory detention, but fail to recognize that in some instances this has become extremely difficult or simply impossible.

Concerted efforts to frustrate ICE's enforcement ability can be seen in the increasing number of "sanctuary" cities and counties in California. Indeed, at least two local governments

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[14] For more information on the concerted effort, see Danielle Riendeau, Trust Act: California Could Set National Model for Correcting Damage Done by S-Comm, July 7, 2012, https://www.aclu.org/blog/immigrants-rights-racial-justice-national-security/trust-act-california-could-set-national. For more information on the ICE Secured Communities program, see ICE, Secured Communities, http://www.ice.gov/secured_communities.

[15] Subsection 1226(c)(2)(D) covers aliens who engage in terrorist activity, regardless of whether they have been convicted of any crime.

[16] For example, the Riverside County Sheriff's Department was prohibited from honoring an ICE detainer on a Mexican national unlawfully in the United States who was arrested for Driving Under the Influence in 2014 and previously convicted of misdemeanor Rape in 2001.

in this jurisdiction have passed ordinances or policies limiting local law enforcement's ability to honor ICE detainers under the discretion codified in the Trust Act, while others prohibit any communication with ICE or the expenditure of any local resources except for the most violent serious felonies.[17]

For example, in Santa Clara County, local officials refuse to expend any local resources to share information on an alien's criminal custody.[18] *See* Santa Clara Board of Supervisor Policy § 3.54(C) ("Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.") Petitioners are asking the Court to treat criminal aliens who were not immediately detained due to local governments' policies differently from those incarcerated in local jurisdictions who choose to honor immigration detainers and share information with ICE officials. Again, the Court should not bestow a windfall on criminal aliens that the Government fails to detain

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[17] *See, e.g.*, Santa Clara County Board of Supervisor Policy § 3.54 Civil Immigration Detainer Requests, adopted Oct. 18, 2011 (prohibiting ICE officers from access to individuals in county custody or use of county facilities for investigative interviews or other purposes, prohibiting any expenditure of county resources on responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates, and limiting county responses to immigration detainers to those convicted of homicide or serious or violent felonies under certain circumstances) (attached as Ex. 30); San Francisco, Cal., Admin. Code Chapter 12I: Civil Immigration Detainers, Ord. 204-13, Effective Nov. 7, 2013 (prohibiting law enforcement officials from honoring immigration detainers for all aliens except those convicted of a "Violent Felony" in the seven years immediately before the date of the detainer) (attached as Ex. 31).

[18] For example, in 2012 Santa Clara County released an alien in criminal custody without notifying ICE, despite the issuance of an immigration detainer, after the alien was serving time for a violation of probation on a 2004 conviction for Possession of Controlled Substance Paraphernalia, Possession for Sale with a Firearm; Under the Influence of a Controlled Substance, and Taking a Vehicle Without Owner's Consent. Because local officials refused to share the information, the alien remains at large despite the best efforts of ICE's Fugitive Operations.

immediately upon their release from criminal custody, including those where ICE fails to detain an alien as a result of local government policies. *See Sylvain*, 714 F.2d at 160-161.

The impediments to "immediate" detention encountered by DHS in California illustrate the reasonableness of the Board's decision. As the District of Oregon opined, "[a]s in *Montalvo-Murillo*, the criminal alien should not receive the windfall of the opportunity for release on bond, and the public should not bear the penalty of the possibility of the alien's release pending removal proceedings, simply because ICE did not timely take the alien into custody." *Mora-Mendoza*, 2014 WL 326047, at *6.

d. The structure of section 1226(c) supports the Board's reading.

Standard rules of structure and grammar also support the Board's reading of the statute in *Matter of Rojas*. For example, in finding that the "when . . . released" clause triggers DHS's duty to detain rather than limits the categories of aliens subject to mandatory detention, the Board applied common rules of grammar. The "when . . . released" clause in section 1226(c) is set off by commas, indicating that it is a subordinate clause. *See* Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 1.6(d) (3d ed. 2013); Morton S. Freeman, *The Grammatical Lawyer* 303 (1979). Subordinate clauses beginning with the subordinating conjunction "when" normally serve as adverbs – meaning that they modify a verb. *The Grammatical Lawyer 304*; *see also The Redbook* § 10.49(a) ("A dependent (or *subordinate*) clause typically stands at the beginning or end of the sentence and serves an adverbial function by specifying when, where, or why the main clause takes effect") (latter emphasis added); *Kidd v. Cox*, No. 06-cv-997, 2006 WL 1341302, at *12 (N.D. Ga. May 16, 2006) ("[T]he word 'when' is used as a subordinating conjunction [modifying the action of redistricting] . . . . 'When,' in this context, means 'just after the moment that,' 'at any and every time that,' or 'on condition that.'"). In line with these rules of grammar, the Board reasonably determined that "when . . . released" serves as an adverbial clause and modifies the verb clause at the beginning of the sentence. Thus, the operative langue of section 1226(c) is, "The Attorney General shall take into custody any alien [who is described in subsections A through D] when the alien is released . . . ." As a subordinate clause, the "when

. . . released" language appropriately appears toward the conclusion of subsection 1226(c)(1) and modifies the Government action appearing at the beginning of the paragraph. *See The Redbook* § 10.49(a).

The Third Circuit embraced this construction of subsection 1226(c)(1) when it condensed and paraphrased section 1226(c) as follows: "Subsection (c), in turn, states that '[t]he Attorney General shall take into custody,' 'when released' following his sentence, 'any alien who ... is deportable by reason of having committed,' among other crimes, one 'involving moral turpitude' or one 'relating to a controlled substance.'" *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 230 (3d Cir. 2011). By moving the "when . . . released" clause immediately after the "shall take into custody" clause, the Third Circuit properly treated "when . . . released" as an adverbial clause modifying "shall," rather than as an adjectival clause modifying the four categories of aliens in subparagraphs 1226(c)(1)(A) through (D) that the Third Circuit entirely omitted from its paraphrase. This interpretation is a reasonable reading of section 1226(c), and contradicts Petitioners' allegation that the section is unambiguous.

This construction is further supported by the indenting of subparagraphs 1226(c)(1)(A) through (D). This indentation signals that the definition of an alien subject to mandatory detention referenced in subsection 1226(c)(2) is limited to subparagraphs 1226(c)(1)(A) through (D), and not all of the text within subsection (c)(1). Indeed, not every word or phrase in the flush text of subsection 1226(c) (1) can be read to "describe[ ]" an alien because subsection 1226(c)(1) is not merely a definitional section. It is also an empowering statute for alien detention. For instance, the clause "[t]he Attorney General shall take into custody," does not define an alien but instead empowers the Government to act. Similarly, the clause "when the alien is released" empowers the Government to act, as opposed to defining the aliens subject to mandatory detention. Thus, subsection (c)(1) both defines a type of alien and directs the Government to take certain action, as the Board reasonably held.

Consequently, under the Board's interpretation, the clause "when the alien is released" is not surplusage; it specifies the time at which the Government's duty to take custody of an alien

first arises. *See Matter of Rojas*, 23 I. & N. Dec. at 121-24. This reading of "when" as designating a starting point rather than a single point in time is reasonable in light of legislative history suggesting that Congress intended mandatory detention to apply "whenever such an alien is released from imprisonment." House Conf. Report 104-828 at 210-11. "Whenever" most commonly means "at any or all times that." *Webster's Third New International Dictionary* 2602 (1986) ("whenever" entry 1, definition 1) (attached as Ex. 33). "Whenever" also commonly means "at whatever time: no matter when." *Id.* ("whenever" entry 2, definition 2). Thus, the Board reasonably interpreted "when" to designate a starting point.

For all of the above reasons, the Board's interpretation of section 1226(c) in *Matter of Rojas* is reasonable, and this Court should defer to the Board's interpretation under *Chevron*.

C. Supreme Court Guidance Prohibits this Court from Expanding Subsection 1226(c)(2)'s Exceptions or Extinguishing the Government's Duty to Mandatorily Detain Petitioners

Chevron is not the only tool of statutory construction that the Supreme Court has provided to courts. The Supreme Court has additionally counseled courts on what they may – or may not – read into statutes. Two such rules apply here.

1. Courts may not construe a statute to contain exceptions to its scope where Congress explicitly provided exceptions.

The Supreme Court has directed that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Section 1226(c) explicitly provides that a criminal alien may be released "only if the [Secretary of Homeland Security] decides . . . that release of the alien from custody is necessary" to protect a witness or other individual. 8 U.S.C. § 1226(c)(2). Congress's specific inclusion of a provision for the release of a narrow class of aliens subject to detention under 8 U.S.C. § 1226(c)(2) makes clear that other aliens falling within the scope of 8 U.S.C. § 1226(c) *may not* be released. Thus, this Court may not construe subsection 1226(c)(1) as creating additional exceptions.

2. Courts may not turn aspirational deadlines into prerequisites to agency action.

Even if section 1226(c) requires immigration detention immediately upon an alien's release from criminal custody, which the Government does not concede, ICE's failure to detain Petitioners immediately should not entitle them to bond hearings under section 1226(a). The Supreme Court has repeatedly held that if a statute imposes a duty on an agency to act by a deadline, absent a clear indication otherwise, the agency does not lose the authority to act after that deadline. *See Brock v. Pierce County*, 476 U.S. 253, 266 (1986) (holding that failure of agency to act within statutorily mandated 120 days to recover misused funds did not deprive the agency of the power to act after that time); *Barnhart v. Peabody Coal* Co., 537 U.S. 149, 160-61 (2003) (concluding that because statute was adopted six years after *Brock*, Congress was "presumably aware that we do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time"). Here, Congress charged the Government with detaining criminal aliens, and that duty did not expire when ICE failed to detain Petitioners upon their release from criminal confinement.

The Tenth Circuit coined this Supreme Court tenet the "better-late-than-never" principle. *See United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009), *aff'd* 560 U.S. 605 (2010). The Supreme Court has additionally directed that "[i]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993).

This principle has also been applied by the Ninth Circuit. *See, e.g., Montana Sulphur & Chemical Co., v. U.S. E.P.A.*, 666 F.3d 1174, 1190 (9th Cir. 2012). In *Montana Sulphur*, a statute required that an agency "shall" promulgate an implementation plan within two years. *Id.* (citing 42 U.S.C. § 7410(c)). The Ninth Circuit held that in the absence of any Congressional indication otherwise, the failure of the agency to act within two years does not deprive the

agency of the authority to promulgate the implementation plan at a later date. *See Montana Sulphur*, 666 F.3d at 1191.

The most recent decision on the issue from this jurisdiction applied this principle of statutory construction to the "when . . . released" language in section 1226(c). *Gutierrez*, 2014 WL 27059, at *5. The statute mandates that the Government "shall take into custody any alien" described in subparagraphs 1226(c)(1)(A) through (D) "when the alien is released" from criminal custody. *Id.* at *7. The statute "commands" the Government to detain criminal aliens, but the statute does not provide any express sanction if the Government fails to immediately detain criminal aliens. *Id.* at *3, *7 (quoting *Hosh*, 680 F.3d at 381-83). If the statute is read to impose a deadline for the Government to exercise its authority immediately upon the alien's release from criminal custody, neither the plain language of the statute nor the legislative history provide any indication that Congress intended the Government to lose its authority to mandatorily detain criminal aliens if it fails to detain them immediately. *Id.* at *8; *see also Marshall Durbin Food Corp.*, 959 F.2d at 919 (finding that deadline in statute that did not contain a sanction was hortatory and not jurisdictional, and the Government did not lose its power to act after the deadline); *see also Gutierrez*, 2014 WL 27059, at *3 (reaching the same conclusion on any deadline in subsection 1226(c)(1)'s "when . . . released" clause).

The Third and Fourth Circuits also have applied this principle in the context of section 1226(c). *See Sylvain*, 714 F.3d at 158; *Hosh*, 680 F.3d at 382. First, the *Sylvain* court found that the mandatory detention provision does not explicitly strip the Government of the authority to "impose mandatory detention" if the criminal alien already has been released from criminal custody. *Sylvain*, 714 F.3d at 157. Likewise, the *Hosh* court reached the same result. Oversight by the government "cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate." *Hosh*, 680 F.3d at 382. The court reasoned that even if "the duty is mandatory, the sanction for breach is not loss of all powers later to act" after the purported deadline. *Id.* at 381.

The *Sylvain* court also found that "bureaucratic inaction – – whether the result of inertia, oversight, or design – – should not rob the public of statutory benefits." *Id.* at 158. Thus, the court found "no reason to bestow upon [aliens] a windfall and to visit upon the Government and the citizens a severe penalty' by mandating a bond hearing 'every time some deviation from the strictures of [the statute] occurs.'" *Id*. at 159. To hold otherwise would "lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing – – which could lead to his release – merely because an official missed the deadline." *Id.* at 160-61.

Petitioners may not escape the reach of this principle by portraying the "when . . . released" clause as forming part of the "description" of the alien rather than a deadline. In *United States v. Montalvo-Murillo*, the Supreme Court found that "failure to comply with the first appearance requirement does not defeat the Government's authority." *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990). The statute at issue (the Bail Reform Act) authorized a detention hearing under 18 U.S.C. § 3142 (f) "immediately" upon the suspect's first appearance before the judicial officer. 495 U.S. at 714-18. However, in that case the Government failed to comply with this deadline. *Id.* at 715. The Supreme Court held that notwithstanding this failure, the Government retained the authority to seek the detention of the suspect because the Bail Reform Act did not explicitly sanction the Government's failure to comply with the statutory time requirement by revoking the Government's authority. *Id.* at 718, 721 (holding that courts should not "invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits").[19] Significantly,

[19] Respondents acknowledge that the Bail Reform Act discussed in *Montalvo-Murillo* authorizes a bond hearing, while Section1226(c) authorizes mandatory detention without a bond hearing. Despite this difference, the better-late-than-never principle applies to both statutes: the Court may not impose the less secure of two detention alternatives simply because the Government missed a detention-related deadline. *See Hosh*, 680 F.3d at 382-83. Moreover, the portion of the Bail Reform Act at issue in *Montalvo-Murillo* was "unquestionably written for the benefit of defendant-arrestees," whereas 8 U.S.C. § 1226(c) was "undeniably *not* written for the benefit of criminal aliens facing deportation." *Id.* Thus, the Supreme Court's holding that the Government does not forfeit its ability to detain a defendant due to a failure to comply with a statutory immediacy requirement is "doubly persuasive" in the context of 8 U.S.C. § 1226(c). *Id.*; *see also Sylvain*, 714 F.3d at 159 (discussing the *Brock* principle in the context of 8 U.S.C. § 1226(c)).

the Supreme Court also held that the deadline in the Bail Reform Act could not be construed as forming part of the definition of a "hearing pursuant to subsection (f)" such that a failure to meet a time limit would" strip[] the Government of all authority to act" under that provision. *Id*. at 719 (citation omitted).

V. CONCLUSION

For the foregoing reasons, the individual petitions for writs of habeas corpus should be denied. Because Petitioners have failed to allege a cognizable claim under the law, the Court should dismiss the Complaint for Injunctive and Declaratory Relief in accordance with Federal Rule of Civil Procedure 12(b)(6).

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