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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. AITKEN, Immigration and Customs Enforcement ("ICE") San Francisco Field Office Director;
GREGORY J. ARCHAMBEAULT, ICE San Diego Field Office Director;
DAVID A. MARIN, ICE Los Angeles Acting Field Office Director;

Defendants-Respondents.

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

Honorable Yvonne Gonzalez Rogers

Defendants' Response in Opposition to Petitioners' Motion for Preliminary Injunction

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

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I. INTRODUCTION

The issue presented in this case – whether the Government maintains the authority granted by Congress to mandatorily detain criminal aliens under 8 U.S.C. § 1226(c) even when the aliens are not immediately arrested upon their release from criminal custody – has been decided in the Government's favor numerous times. The only two circuit courts to consider the issue – as well as the most recent district court decisions in this jurisdiction and elsewhere in this circuit – have found that Congress granted the authority to the Government to detain criminal aliens for the duration of their removal proceedings, and criminal aliens who are not immediately detained are not entitled to a windfall for the Government's delay.[1]

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 seek bond hearings under 8 U.S.C. § 1226(a) even though they committed crimes as enumerated in the mandatory detention statute, 8 U.S.C. § 1226(c). Petitioners now seek a preliminary injunction on their behalf and all putative class members. Defendants-Respondents (together, "the Government") oppose Petitioners' motion because the sole issue in the case can be decided on the briefs already submitted to the Court, and there is no need to provide the extraordinary relief requested by the motion. Petitioners and putative class members will not suffer irreparable harm without a preliminary injunction because they have or soon will receive a bond hearing under current Ninth Circuit law, and it is in the public interest to detain these criminal aliens pending their removal proceedings. Even if the Court disagrees with the

[1] *See Sylvain v. Att'y Gen.*, 714 F.3d 150 (3d Cir. 2013); (affirming mandatory detention of criminal aliens not detained immediately upon their release from criminal custody); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (same); *see also Gutierrez v. Holder*, --- F. Supp. 2d ----, 2014 WL 27059 (N.D. Cal. Jan. 2, 2014) (upholding mandatory detention for a criminal alien detained six months after his release from criminal custody); *Mora-Mendoza v. Godfrey*, No. 3:13-cv-01747, 2014 WL 326047 (D. Or. Jan. 29, 2014) (upholding mandatory detention for a criminal alien detained six years after his release from criminal custody).

Government's position on the issue, the balance of equities does not sharply tip in Petitioners' favor, and Petitioners' motion should be denied.

II. STATEMENT OF FACTS

Each Petitioner has been arrested, subject to removal proceedings, found to be removable from the United States by an immigration judge, and subject to mandatory detention under 8 U.S.C. § 1226(c) because each committed crimes that rendered them inadmissible or removable under the Immigration and Nationality Act ("INA").[2] Petitioner Preap was released from immigration detention after being granted relief from removal, Petitioner Magdaleno received a bond hearing as requested, and Petitioner Padilla is scheduled to receive a bond hearing on March 7, 2014. (Ex. 43.)

Preap is a native of Cambodia and lawful permanent resident. (Ex. 34.)[3] 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. (Ex. 35.) On September 11, 2013, immediately upon his release from incarceration for a conviction of Battery on his spouse, 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. 36) That same day, ICE detained Preap without a bond hearing under 8 U.S.C. § 1226(c)(1)(B) based on his 2006 controlled substance conviction. An immigration judge reviewed Preap's detention and found that he was subject to mandatory detention under section 1226(c). (Ex. 37.) 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. 38). Preap was detained at the ICE Contra Costa Detention Facility in Richmond, California, until he was granted relief from removal. (Defendants' Return and Motion to Dismiss ("Return"), Doc. 24, Feb. 7, 2014, Ex. 29.)

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[2] *See* the Statement of Facts in Defendants' Return at 2 for a detailed recitation of Petitioners' criminal, immigration, and detention histories.

[3] Preap's full alien registration file was inaccessible while in transit to the National Records Center in Missouri after he was granted relief from removal, so Defendants are presenting these documents from Preap's alien registration file for the first time starting with Exhibit 34.

Padilla is a native and citizen of Mexico who entered the United States as a lawful permanent resident. (Return, Ex. 1; Return, Ex. 2.) Padilla was twice convicted of Possession of a Controlled Substance (methamphetamine), in violation of California Health and Safety Code § 11377(a). (Return, Ex. 3.) After he failed to abide by a diversion order on the first conviction, Padilla was sentenced to thirty days. (Return, Ex. 3.) Padilla was sentenced to 180 days for the second conviction. (Return, 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) and sentenced to 180 days for the firearm conviction and an additional 185 days for violation of probation from his 2000 conviction. (Pet. ¶ 24; Return, Ex. 5.)

On August 15, 2013, ICE charged Padilla with being removable based on his controlled substance convictions and his firearm conviction. (Return, Ex. 9; Return, Ex. 10). That same day, ICE arrested Padilla in Sacramento, California, and detained him under 8 U.S.C. § 1226(c). (Return, Ex. 6; Return, Ex. 7; Return, Ex. 8.) Padilla requested a custody redetermination before an immigration judge, and on October 15, 2013, the immigration judge found that Padilla was lawfully detained under 8 U.S.C. § 1226(c). (Return, 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, and found him ineligible for any relief from removal. (Return, Ex. 11.) On December 26, 2013, he appealed the removal order to the Board of Immigration Appeals ("Board"), where it remains pending. (Return, Ex. 12.) Padilla is scheduled for a bond hearing on March 7, 2014, (Ex. 43), in accordance with the preliminary injunction in *Rodriguez v. Robbins*. *See Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1138 (9th Cir. 2013). He has been detained at Rio Cosumnes Correctional Center in Elk Grove, California, pending the conclusion of removal proceedings.

Petitioner Magdaleno is a native and citizen of Mexico who entered the United States as a lawful permanent resident. (Return, Ex. 14; Return, Ex. 15.) On October 13, 2000, Magdaleno was convicted as a Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1), and sentenced to 147 days of confinement and three years of probation. (Return,

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. (Return, Ex. 17.) On June 16, 2007, Magdaleno was convicted of Possession of a Controlled Substance (methamphetamine), a felony, in violation of California Health & Safety Code § 11377(a), and sentenced to six months. (Return, Ex. 18.)

On July 17, 2013, ICE arrested Magdaleno and placed in removal proceedings 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. (Return, Ex. 19; Return, Ex. 20; Return, Ex. 22.) He was detained under 8 U.S.C. § 1226(c)(1)(A) based on his 2007 conviction for possession of a controlled substance. (Return, Ex. 21.) On November 29, 2013, the immigration judge ordered Magdaleno to be removed and denied his application for relief from removal. (Return, Ex. 24.) On December 26, 2013, Magdaleno appealed the removal order to the Board, where it remains pending. (Return, Ex. 25.)

On December 12, 2013, the immigration judge found that Magdaleno was lawfully detained under 8 U.S.C. § 1226(c). (Return, Ex. 23.) On February 14, 2014, Magdaleno received a bond hearing in accordance with *Rodriguez II* before an immigration judge, who denied bond because he is a flight risk. (Ex. 39.)[4] On February 20, 2014, Magdaleno appealed the denial to the Board. (Ex. 41.) He remains detained at the Contra Costa West County Detention Center, pending the conclusion of removal proceedings. (Pet. ¶ 10; Return, Ex. 21.)

III. STANDARD OF REVIEW

A preliminary injunction is intended to preserve the status quo, not to serve as a preliminary adjudication on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.1984). "'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A C.

[4] The Government presented evidence to the immigration judge, including Magdaleno's extensive criminal record and a report on the detention and removal of aliens. The filings are attached as Exhibit 40.

Wright et al., *Federal Practice and Procedure* § 2948 at 129-130 (2d ed. 1995)). To obtain a preliminary injunction, the moving party must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). A mandatory injunction is "particularly disfavored and a district court should deny such relief unless the facts and law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (internal quotations and citations omitted).

IV. RELEVANT DETENTION LAW

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.

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 subsection 1226(a) may be released by ICE on parole or bond and may request a bond redetermination hearing before an immigration judge.. *Id*; 8 C.F.R. § 1003.19. 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 (2013) (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* 2014 WL 27059, at *3. This case turns on the statutory interpretation of 8 U.S.C. § 1226(c). The relevant language includes the following:

> "The Attorney General[5] ***shall take into custody*** any alien who [is described by one of four enumerated categories] ***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 . . . . The Attorney General ***may release an alien described in paragraph (1) only if*** the Attorney General decides [that the alien deserves special protection under 18 U.S.C. § 3251]."

8 U.S.C. § 1226(c) (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*, 715 F.3d 1131, n.1 (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.*

ICE issues an initial determination on whether an alien is deportable or inadmissible under subparagraphs 1226(c)(1)(A) through (D). *See* 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 v. Kim*, 538 U.S. 510, 514, n.3 (2003). 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

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[5] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an independent agency within the Department of Justice, and ICE, an agency within DHS, assumed INS's (and thus the Attorney General's) detention and removal authority. *Id.* at § 441.

issue is still being litigated,[6] 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. *Id.* Furthermore, if a criminal alien is ordered removed by an immigration judge, the order is affirmed by the Board, and the alien appeals to the Ninth Circuit and the circuit court stays the aliens' removal, then the alien is provided yet another bond hearing on request. *See Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 949 (9th Cir. 2008) (mandating a "*Casas* hearing").

Congress enacted mandatory detention under section 1226(c) to attempt to curb the Government's inability to remove dangerous, deportable criminal aliens. *Gutierrez*, 2014 WL 27059, at *2 (citing *Demore*, 538 U.S. at 519). 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. Following the enactment of section 1226(c), the Board reviewed the statute and 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. 122, 121-26 (BIA 2001) (construing 8 U.S.C. § 1226(c)).

V. ARGUMENT

The Court should decline to grant Petitioners' request for the "extraordinary remedy" of a preliminary injunction for three reasons. First, the Government is likely to prevail on the merits of the case as evidenced by the decisions of the only two circuit courts to address the issue, the latest decision from this jurisdiction, and the latest decision from a district court in this circuit – all of which agreed with the Government's application of section 1226(c). Second, Petitioners

[6] *See* discussion at Defendants' Return at 9, n.9, on *Rodriguez v. Hayes*, No. 2:07-cv-3239-TJH (C.D. Cal. filed May 16, 2007).

do not face imminent harm in the absence of an injunction because they have or will be provided at least one bond hearing, and some putative class members may be prejudiced by a preliminary injunction because they will bear the burden under Petitioners' proposed detention scheme. Third, Petitioners cannot show that the balance of equities tip sharply in their favor, notably because the public interest favors continued detention of criminal aliens and the prudent expenditure of government resources.

A. The Government is likely to prevail on the sole legal issue of whether ICE loses the authority to detain criminal aliens who are not arrested immediately upon their release from criminal custody.

There is only one legal issue in this case – whether the Government may detain criminal aliens such as Petitioners if they are not arrested immediately upon their release from custody for an offence enumerated in subsection 1226(c)(1). As Petitioners correctly allege, "[i]n a single sentence, Section 1226(c)(1) mandates the detention of a noncitizen falling under categories enumerated in Sections (c)(1)(A)-(D) when the [criminal alien] is released from criminal custody."[7] (Mot. at 9.) Petitioners allege that their detention without an individualized bond determination violates the Due Process Clause of the Constitution, (Pet. ¶ 50), and 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." (Pet. ¶¶ 47, 48.) However, with the support of decisions from the two circuits who have considered the issue and the most recent decision from this district, the Government is likely to prevail because this authority is not extinguished when ICE fails to detain an alien immediately upon his release from criminal custody. Thus, the Court should decide the one legal issue with a decision on the Petition itself, and not by providing the "extraordinary" relief in a preliminary injunction.

[7] Petitioners use the term "noncitizen" to describe the aliens who committed crimes or terrorist activity that rendered them removable as enumerated in subparagraphs 1226(c)(1)(A) through (D). The term "noncitizen" is nowhere defined within the INA or the Code of Federal Regulations.

1. The Government is likely to prevail over Petitioners' due process challenge because mandatory pre-order detention for six months does not offend due process.

Petitioners' due process claims have already been rejected by the Supreme Court, which held 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*, 538 U.S. at 531. 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.

The Ninth Circuit recently found that continued detention under section 1226(c) beyond six months posed constitutional concerns, and therefore detention authority must shift to section 1226(a) after six. *Id.*. At that point, once section 1226(c) no longer applies, and the Ninth Circuit directed the Government to provide bond hearings to all criminal aliens previously detained under section 1226(c). *See Id*. This effectively alleviates any lingering concerns about prolonged mandatory detention.

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), each received an initial custody determination by ICE, each received review of the administrative custody determination by an immigration judge, and each who remains detained for six months will receive a full bond hearing.

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). (Return, Ex. 29 (Preap); Return, Ex. 13 (Padilla); Return, Ex. 23 (Magdaleno).) Magdaleno received a full bond hearing on February 14, 2014, after six months detention. (Ex. 39.) Padilla is scheduled to receive a *Rodriguez* hearing on March 7, 2014. (Ex. 43.) All proposed class members will receive the same process, so Petitioners' allegations of due process violations are meritless, and their initial detention during their removal proceedings without an individualized bond hearing is constitutionally permissible.

2. The Government is correct in interpreting Section 1226(c) and is likely to prevail on the merits.

Under the basic rules of statutory construction and *Chevron* deference, the Government has the authority to detain criminal aliens under section 1226(c), and that authority is not extinguished by the language of the statute. The "when . . . released" language answers the simple question: *For those who were convicted of crimes enumerated in subparagraphs 1226(c)(1)(A) through (D), should the Government take them into custody as soon as they are identified but before they complete their criminal sentence?* Thus, the Board's interpretation in *Matter of Rojas* is being correctly applied in California, and Petitioners are unlikely to prevail on the merits.

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

Under the first prong of the *Chevron* inquiry, a court must inquire whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The first prong is met here because section 1226(c) 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.

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, the 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)). Petitioners contend that Congress could have used the language "'after the alien is released' or 'regardless of when the alien is released,' or other words to that effect" if the statute were meant to apply any time after the alien was released. (Mot. at 14 (quoting *Zabadi v. Chertoff*, No. 05-cv-3335, 2005 WL 3157377, at *4 (N.D. Cal. Nov. 22, 2005)). Petitioners ignore the obvious counterargument: Congress could have used the language "except when the Government fails to detain the alien immediately upon release from criminal custody" or similar language to resolve this issue where reasonable judicial officials have disagreed.

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). Subsection (c)(2) 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").

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. Dictionaries indicate that "when" can mean "at any time after" as well as "immediately upon."[8] These alternative dictionary definitions of "when," each making sense under the statute, demonstrate Petitioners' interpretation is not compelled by the language of the statute. 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 v. Lucero*, 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). 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,

[8] *See* Defendants' Return at 15 for a full discussion of the alternative meanings of "when."

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).

Petitioners allege that the "weight of authority" holds that the Government's practice violates section 1226. (Mot. at 11.) 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* 2014 WL 326047, at *6; *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).

Moreover, to adopt Petitioners' reading of the statute assumes that all classes described in subparagraphs 1226(c)(1)(A) through (D) would have some relevant predicate custody. However, the national security categories of mandatory detention referred to in subparagraph 1226(c)(1)(D) (describing aliens found to be engaging in terrorist activities, espionage, sabotage, and other activities contrary to national security) do not require a conviction or predicate custody. Thus, to require immediate detention following a criminal release ignores the subsection aimed at detaining terrorist aliens. 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.

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

i. *The Board's interpretation conforms with Congress's concern about detaining criminal aliens during 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"). Criminal aliens generally face difficult, and in some cases, insurmountable challenges to demonstrating eligibility for relief from removal which bears significant weight in the context of a bond hearing.[9]

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 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

[9] The enumerated grounds of inadmissibility and removability are reflective of criminal bars to relief found throughout the INA. Aggravated felony offenses bar almost all relief from removal. *See St. Cyr*, 533 U.S. at 325. Furthermore, criminal offenses enumerated in 8 U.S.C §1226(c) generally bar a grant of Cancellation of Removal, 8 U.S.C. 1229c(b); asylum, 8 U.S.C. § 1158(b)(2); Waiver of Inadmissibility, 8 U.S.C. INA § 1182(h), and other forms of relief from removal.

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.").

ii. *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);[10] *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

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

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).

iii. *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.[11] 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

[11] *See* the Government's Return at 4, note 5, for more information on Operation Cross Check and the Morton Memorandum prioritizing ICE resources to the removal of criminal aliens.

share information on aliens in criminal custody. Notably, the new Trust Act, 2013 Cal. A.B. 4 (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.

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). 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 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.[12] For example, in Santa Clara County, local officials refuse to expend any local resources to share information on an alien's criminal custody. *See* Santa Clara Board of Supervisor Policy § 3.54(C). Petitioners are asking the Court to treat criminal aliens who were not immediately detained due to local governments' policies differently from those incarcerated

[12] *See, e.g.*, Santa Clara County Board of Supervisor Policy § 3.54 Civil Immigration Detainer Requests, adopted Oct. 18, 2011, (Return, Ex. 30); San Francisco, Cal., Admin. Code Chapter 12I: Civil Immigration Detainers, Ord. 204-13, Effective Nov. 7, 2013, (Return, Ex. 31).

in local jurisdictions who choose to honor immigration detainers and share information with ICE officials.

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.

iv. *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.[13] 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.

[13] *See* the Government's Return at 23 for further discussion of the structure of section 1226(c).

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). 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. 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, Petitioners are unlikely to prevail, and the Motion should be denied.

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.

As the most recent decision from the Northern District of California confirmed, Petitioners are unlikely to prevail on the merits because the Government's authority to mandatorily detain criminal aliens cannot be blocked by a judicial exception to its scope nor may the Court turn an aspirational deadline into a jurisdictional definition. *See Gutierrez*, 2014 WL 27059, at *5. The Supreme Court has implemented tools of statutory construction in addition to *Chevron* to limit what courts may – or may not -- read into statutes. Following the reasoning applied to section 1226(c) by *Gutierrez* in this jurisdiction, as well as the Third and Fourth Circuits, two such rules apply here.

i. *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.

ii. *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 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. 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. *Gutierrez*, 2014 WL 27059, 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 *3, *8.

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.

B. Petitioners cannot show irreparable harm.

The Court should deny the Motion for Preliminary Injunction because Petitioners cannot show irreparable harm for three reasons.

First, Petitioners will not suffer irreparable harm because the Court can rule on the ultimate relief in the case as quickly as it can rule on this Motion. *Sierra On-Line, Inc.*, 739 F.2d at 1422 ("A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment."). Thus, an injunction is not needed to preserve Petitioners' rights before judgment. *See Anselmo v. Mull*, No. 12-cv-1422, 2012 WL 5304799, at *9 (E.D. Cal. Oct. 25, 2012) (denying preliminary injunction seeking ultimate relief available from trial starting forthwith). Petitioners claim their mandatory detention violates the law and Constitution, but that claim does not differ from every other habeas petition, which necessarily makes the same allegation. *See Martin v. Solem*, 801 F.2d 324, 330 (8th Cir. 1986). Because the Motion merely restates the non-extraordinary claims for relief set out the Petition, the Court should deny the extraordinary relief of a preliminary injunction. *See Mazurek*, 520 U.S. at 972 (preliminary injunction is extraordinary remedy).

Second, the Court should disregard Petitioners' claim that their mandatory detention is causing them the particular irreparable harm based on the "unnecessary detention, without individualized custody review based on facts related to flight risk and threat to community." (Mot. at 21-22.) Congress and the Supreme Court have found that Petitioners' detention is essential to prevent their flight and to protect the public. *See Demore*, 538 U.S. at 520. As noted

above, the risk of flight is heightened for aggravated felons in removal proceedings, where they face almost "certain" removal because their crimes disqualify them from relief from removal. *See St. Cyr*, 533 U.S. at 325. Because of that risk, Petitioners' mandatory detention is not "unnecessary." *See Demore*, 538 at 520.

Third, Petitioners' various claims regarding the impact on their families and other adverse impacts caused by their detention, while unfortunate, do not avail them here. (*See* Mot. at 22.) Aliens have repeatedly brought such claims within the removal context as proof of harm, and Courts have rejected them.[14] Interference with the right to family integrity is "incidental to the [G]overnment's legitimate interest in effectuating detentions pending the removal of persons illegally in the country." *See Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 22 (1st Cir. 2007). Thus, Petitioners cannot show that injunctive relief is warranted because they have suffered or are likely to suffer irreparable harm.

Because Petitioners have failed to demonstrate that irreparable harm is likely to befall them and all members of the putative class without a preliminary injunction in advance of a ruling on the merits, the Court should deny the Motion.

C. Petitioners cannot show that the equities tip sharply in their favor and that the public interest warrants injunctive relief.

Petitioners cannot show that the equities tip in their favor and that the public interest warrants injunctive relief. An injunction requiring individualized bond hearings under 8 U.S.C. § 1226(a) for the putative class could conserve minimal public resources by allowing immigration judges to release aliens they felt to be less risky. (Mot. at 24.) Congress, however, abolished bond for criminal aliens such as Petitioners expressly because it found that detention during removal proceedings was the best way to ensure the successful removal of criminal aliens from this country *See Demore*, 538 U.S. at 520. This Court, by ordering bond hearings for the putative class, would be restoring the discretion to immigration judges that Congress expressly

[14] *See, e.g., Briseno v. Immigration & Naturalization Servs.*, 192 F.3d 1320, 1323 (9th Cir. 1999) (aliens have no entitlement to remain in the United States); *Mamanee v. Immigration & Naturalization Servs.*, 566 F.2d 1103, 1106 (9th Cir. 1977) (alien cannot use a child's United States citizenship status as a basis to prevent removal).

limited for good reason – to abolish the high rate of absconding by criminal aliens who face difficult, if not insurmountable, barriers to any relief from removal. *Id.*

In enacting this mandatory detention requirement for a sub-class of criminal aliens awaiting removal, Congress was responding to specific, compelling public concerns caused by the failure to timely deport aliens. As the Supreme Court has noted, Congress adopted section 1226(c) "against a backdrop of wholesale failure by [the Government] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518 (citing Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S.Rep. No. 104–48, p. 1 (1995). "Deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Demore*, 538 U.S. at 518. Thus, Congress mandated the detention of all criminal aliens such as Petitioners and members of the putative class to protect the public. The liberty rights of some aliens are subject to limitations and conditions not applicable to citizens, and the mandatory detention of criminal aliens fits into this very limited category. *Id.* at 521-22; ; See also *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952)(stating that in regards to detention, dangerous aliens have no constitutional right to be at liberty in the United States pending the completion of proceedings to remove them from the country).

Even if Petitioners possess characteristics that make flight less likely, the putative class likely contains members who pose a greater risk of flight and reoffending – those with a shorter gap between criminal and immigration custody, or who committed more heinous crimes, or who enjoy fewer family ties. Petitioners' Motion seeks bond hearings for these aliens, too. (Mot. at 1.) Congress' goal in enacting section 1226(c) fully applies to aliens who have not reintegrated into society. Such widespread, immediate bond hearings for all criminal aliens who have not reintegrated into society may lead to the public harm that Congress specifically sought to curtail by enacting Section 1226(c).

Requiring the Government to delineate between aliens who committed the same crimes but were arrested and detained under different circumstances will require the expenditure of limited government resources. Likewise, immediate bond hearings for aliens such as Preap who

find relief from removal within three months of their arrest and detention will require the expenditure of limited government resources on both trial attorneys to present the government's case at the hearings as well as the Executive Office of Immigration Review which provides immigration judges and staff to implement the hearings. The expedited bond hearings requested by Petitioners for all putative class members under the preliminary injunction will further strain the Government's limited resources devoted to enforcing the immigration laws.

Because *Rodriguez II* mitigated the constitutional concerns regarding the prolonged detention of criminal aliens under section 1226(c), Petitioners have no argument that they and the putative class members merit a bond hearing to avoid serious constitutional questions. *See Rodriguez II*, 715 F.3d at 1146. "ICE is entitled to carry out its duty to enforce the mandates of Congress," *id.*, and allowing the Government to arrest and detain criminal aliens no matter whether they are able to detain them immediately upon their release, is certainly within ICE's duty and the public interest.

VI. CONCLUSION

The Court should deny the Motion for a preliminary injunction because Petitioners cannot demonstrate that they raised serious questions going to the merits of their claims and that the balance of hardships tips in their favor. Petitioners do not face irreparable harm pending a decision on their Petition, and bond hearings for Petitioners and the putative class members would endanger the public by restoring bond discretion to immigration judges that Congress, for the public's benefit, expressly withdrew.

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