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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 Acting Los Angeles Field Office Director;

Defendants-Respondents.

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

Honorable Yvonne Gonzalez Rogers

**Defendants' Reply to Petitioners' Opposition to 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 and lawful permanent residents 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") now reply to Petitioners' opposition to the Government's return on their individual habeas petitions and motion to dismiss the proposed class action.

## II. ARGUMENT

### A. The Government lawfully detained Petitioners.

In *Demore v. Kim*, the Chief Justice began his opinion for the Court by stating "Section 236(c) of the Immigration and Nationality Act provides that '[t]he Attorney General shall take into custody any alien who' is removable from this country because he has been convicted of one of a specified set of crimes." *Demore v. Kim*, 538 U.S. 510, 513 (2003) (citations omitted). The Court went on to find that mandatory detention of criminal aliens is constitutional because it is a necessary part of the removal process and not indefinite. *Id.* This case involves whether a criminal alien in California – who is placed in removal proceedings because the alien committed one of the specific crimes enumerated in 8 U.S.C. §§ 1226(c)(1)(A) through (D) – has a right to a bond hearing under 8 U.S.C. § 1226(a) when Immigration and Customs Enforcement ("ICE") fails to immediately transfer the alien from criminal custody for the enumerated offense into immigration detention during removal proceedings. Current ICE policy emphasizes the detention and removal of criminal aliens like Petitioners, and the Government follows the reasonable interpretation of the Board of Immigration Appeals ("Board") in necessarily detaining all criminal aliens under 8 U.S.C. § 1226(c).

ICE's top enforcement priority is the removal of aliens who pose a danger to national security or a risk to public safety.[1] This includes aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security (Morton Memo. at 1), who are described in subparagraph 1226(c)(1)(D) and mandatorily detained under subsection 1226(c). ICE's top priority also includes criminal aliens, adults in organized criminal gangs, aliens without outstanding criminal warrants, and other aliens who pose a serious risk to public safety.[2] (*Id.* at 2.)

ICE prioritizes the apprehension and removal of criminal aliens depending on the severity of their crimes. (*Id.*) Aliens are "Level 1" if they committed aggravated felonies or two or more crimes each punishable by more than one year, and "Level 2" if convicted of any felony or three or more misdemeanors. (*Id.*) "Level 3" offenders, also in ICE's top priority but with less emphasis than Levels 1 or 2 offenders, include any alien convicted of a crime punishable by less than one year. (*Id.*) The Government recounts these priorities to emphasize that ICE is targeting its limited resources at the most dangerous aliens, as evidenced by their criminal records and other substantive measures of risk to the security and safety of our local communities and nation.[3] All Petitioners and putative class members are within ICE's top priority for enforcement and removal from the United States because they committed a crime enumerated in subparagraphs 1226(b)(1)(A) through (C).

This case involves whether a broad group of criminal aliens in California are entitled to a bond hearing where an immigration judge may release them into the community when the Government has failed to detain them immediately upon their release from criminal custody, even though the criminal aliens are within the Government's top removal priority based on their

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[1] *See* ICE Director John Morton, Memorandum for All ICE Employees ("Morton Memo."), March 2, 2011, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (setting priorities for the apprehension, detention, and removal of aliens) (attached as Ex. 42).

[2] ICE's lower priorities include recent illegal entrants (Priority 2) and aliens who are fugitives or otherwise obstruct immigration controls (Priority 3), with all other aliens falling outside of ICE's top removal priorities. (*See* Morton Memo.)

[3] In 2013, 82% of the 133,551 aliens apprehended in the interior areas of the United States and removed from the country had been previously convicted of a crime. FYI 2013 ICE Immigration Removals, Department of Homeland Security, http://www.ice.gov/removal-statistics/.

inherent threat to the security and safety of our nation and local communities. The sole issue in this case cannot be decided without considering the state and local policies in California that hinder the Government's ability to detain and remove the aliens convicted of crimes described in subparagraphs 1226(c)(1)(A) through (D). Congress enacted subsection 1226(c) to address how immigration officials are expected to handle these most dangerous removable aliens, and the Government's inability to adhere to Congress's directive is important in this analysis.

The Government advances two theories of statutory construction in its motion to dismiss, and either can independently be applied to the statute to find that Petitioners were lawfully detained under section 1226(c). Assuming, *arguendo*, that the Court finds that the section 1226(c) is unambiguous under Petitioners' interpretation, it still must find that the Government's duty to detain criminal aliens without a bond hearing is not extinguished if the detention authority is not exercised immediately upon the aliens' release from criminal custody. *See Gutierrez v. Holder*, --- F. Supp. 2d ----, 2014 WL 27059, *5 (N.D. Cal. Jan. 2, 2014). "Even if the statute calls for detention 'when the alien is released,' and even if 'when' implies something less than [two months], nothing in the statute suggests that immigration officials lose authority if they delay." *Sylvain v. Att'y Gen. of the U.S.*, 714 F.3d 150, 157 (3d Cir. 2013).

**1. The Government's interpretation of Section 1226(c) fits all of the categories of dangerous aliens enumerated in subparagraphs 1226(c)(1)(A) through (D).**

Petitioners imply that *Matter of Rojas* was a "politically charged" decision because it arose soon after the terrorist attacks of September 11, 2001. (Petitioners' Response at 1, Doc. 34, Feb. 21, 2014.) Although Petitioners' implication is incorrect because the Board upheld the long-standing and well-established practice of mandatory detention under section 1226(c) that was exercised long before 9-11, Petitioners are helpful in reminding the Court of the terrorism-related application of section 1226(c). The Government's interpretation of section 1226(c) is read in context of all categories of aliens detained under section 1226(c), while Petitioners fail to recognize the terrorist aliens described under subparagraph 1226(c)(1)(D).

Petitioners allege that the "when . . . released" phrase is part of the definition of all aliens detained under 1226(c). However, this phrase cannot be a part of a definition of all aliens

detained under section 1226(c) when some do not have criminal convictions by definition. *See* 8 U.S.C. § 1226(c)(1)(D). This distinction obliterates Petitioners' argument that "section 1226(c) describes 'an alien' – an individual who had ***both*** (i) committed an offense enumerated by Section 1226(c)(1)(A)-(D); ***and*** (ii) has been taken into immigration custody 'when… released' from criminal custody for that offense." (Resp. at 12 (emphasis in original)) Congress could not have intended the "when . . . released" phrase to be a requisite second filter to be applied to all aliens enumerated in subparagraphs 1226(c)(1)(A) through (D) because Congress expressly included a category of terrorist aliens that Congress never expected to be convicted of any crime before being detained for their removal proceedings. Thus, the argument that the "when . . . released" language describes all aliens described under subsection 1226(c)(1) must fail.

Petitioners' proposed interpretation of the text is wholly discredited when the confusion of the cross-citations is removed. The Government's interpretation is, however, indisputable when read in context with the clear language of section 1182(a)(3)(B) and section 1227(a)(4)(B), the two groups of aliens covered by subparagraph 1226(c)(1)(D), those who committed some act indicating their threat to national security as a terrorist or affiliated with terrorist activity.[4]

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[4] 8 U.S.C. § 1182(a)(3) defines as inadmissible any alien who:

> (I) ***has engaged in terrorist activity***;
> (II) a consular officer, the Attorney General, or the Secretary of Homeland Security know, or has reasonable ground to believe, ***is engaged in or is likely to engage*** after entry [into the United States] ***in any terrorist activity*** . . .
> (III) has, under circumstances indicating an intention to cause death or serious bodily harm, ***incited terrorist activity***;
> (IV) ***is a representative*** of . . . (aa) a terrorist organization or (bb) a political, social, or other group that endorses or espouses terrorist activity;
> (V) ***is a member*** of a terrorist organization . . .;
> (VI) ***is a member*** of a terrorist organization . . .;
> (VII) ***endorses or espouses*** terrorist activity or ***persuades others to endorse or espouse*** terrorist activity or support a terrorist organization;
> (VIII) ***has received military-type training*** . . .; or
> (IX) ***is the spouse or child*** of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years . . . .

8 U.S.C. § 1227(a)(4)(B) defines as deportable any alien who:

> ***has engaged, is engaged, or at any time after admission engages in*** –

Petitioners' interpretation would read into the statute a requirement that Congress clearly did not intend, namely that an alien described by subparagraph 1226(c)(1)(D) to be convicted of a crime and then be detained immediately upon release from the criminal conviction before the Government could detain the terrorist alien without a bond hearing. Under Petitioner's two-pronged interpretation of aliens covered by section 1226(c), any terrorist alien who was not convicted of a crime and incarcerated for at least some period of time would not be "described in paragraph 1" of section 1226(c). Clearly, this was not Congress's intent for terrorist aliens.

These cross-citations make section 1226(c) confusing, if not ambiguous, even for trained attorneys. The Court should not confuse the statute further by adopting Petitioners' interpretation, and should dismiss the Petition.

**2. The context and placement of the "when . . . released" phrase also indicate the time at which the Government's authority commences, not a description of all aliens described in subparagraphs 1226(c)(1)(A) through (D).**

The phrase "when . . . released" is clearly "known by the company it keeps" within the INA. *Gustafson v. Alloyd Co., Inc.*513 U.S. 561, 575 (1995). The INA consistently requires aliens who are convicted of crimes to serve their full terms in criminal custody before they are subject to removal proceedings. *See* 8 U.S.C. § 1228(a)(3) ("Nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined."); 8 U.S.C. § 1231(a)(4)(A) (ICE "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment"); *cf.* Anti–Drug Abuse Act of 1988, Pub.L. No. 100–690, 102 Stat. 4181, former 8 U.S.C. § 1252(a)(2) (Supp. I 1989) (the

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(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.

8 U.S.C. § 1227(a)(4)(B) (emphasis added).

predecessor to § 1226(c), which provided that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony *upon completion of the alien's sentence for such conviction*.") (emphasis added). Thus, under the Board's interpretation in *Matter of Rojas*, Congress included the phrase to emphasize that criminal aliens covered by section 1226(c) must complete their criminal sentences before they may be taken into immigration custody. *Matter of* Rojas, 23 I. & N. Dec. 117, 126 (BIA 2001) ("[W]e read the 'upon release' clause as a direction pertaining to when the duty arises to take the alien into custody."). This interpretation is both logical and reasonable within the full context of section 1226(c) and the INA as a whole.

The placement of the contested "when . . . released" phrase also indicates the time at which the Government's authority commences. The phrase is flush right after the four indented subparagraphs describing aliens subject to the Government's mandatory detention authority prescribed by subsection (c)(2). When read in context with the four enumerated subparagraphs – and more specifically the sixteen words immediately preceding the phrase in subparagraph 1226(c)(1)(D) – the phrase logically cannot describe all the aliens subject to mandatory detention.

Petitioners accuse the Government of using "muddled rules of grammar" (Resp. at 15), and the Government accepts that accusation because the meaning of section 1226(c) is obvious to those with the duty of applying it, but difficult to understand – if not wholly ambiguous – when legal liturgists attempt to decipher its meaning. However, the Government employs these basic rules of statutory construction and grammar to illustrate how respected judicial officials may arrive at different interpretations of the "when . . . released" phrase in section 1226(c). Using these rules, the only reasonable and logical interpretation was posited by the Board in *Matter of Rojas*, and should be accepted by this Court.

**3. The implementation of the Trust Act and sanctuary city policies in California supports the Government's interpretation of section 1226(c).**

As explained above, the Government is concentrating its limited resources on removing aliens who pose some immediate threat to the community or have a history of criminal activity that poses a potential threat combined with a higher certainty of absconding during removal

proceedings. Petitioners' interpretation of section 1226(c) would lead to an arbitrary result where some criminal aliens receive an initial bond hearing while others do not, thus diverting the Government's limited resources away from detention and removal and to additional administrative hearings that potentially free criminal aliens back into the communities, which is directly contrary to Congress's clear intentions.

Petitioners allege in footnotes that the Trust Act and similar local initiatives that hinder the Government's ability to identify criminal aliens' release dates have no bearing on the interpretation of section 1226(c), (Resp. at 14 n.8; Resp. at 19 n.15), but the Government respectfully disagrees. Under the Government's current policies, all Level 1, 2, and 3 criminal aliens are top removal priorities, and should be subject to removal. (*See* Morton Memo.)

The Trust Act does, in fact, *prohibit* the disclosure by the state, 58 counties, and numerous local law enforcement jurisdictions in California of information concerning some criminal aliens incarcerated in the dozens of prisons and local jails. *See* Cal. Gov't Code § 7282.5(b). As Petitioners correctly allege, ICE does have access to the criminal records for all aliens who are detained in local custody through the Secured Communities program.[5] But even though ICE may know that a certain criminal alien is in custody in a certain jail, the Government generally does not have access to the criminal aliens' release dates unless the state or local governments voluntarily communicate the information to immigration officers. (*See* Mot. at 19 n.15 (alleging that the Government has access to a database showing where each criminal alien is detained so the Government should be able to detain any criminal alien immediately upon his release)). Petitioners ignore the fact that in sanctuary communities like Santa Clara County, local officials refuse to disclose release dates of criminal aliens who would be detained under section 1226(c) upon their release from criminal custody.[6] These laws are heralded by the same

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[5] For more information on the ICE Secured Communities program, see ICE, Secured Communities, http://www.ice.gov/secured_communities.

[6] Santa Clara County refuses to share information with ICE on any criminal aliens held in their custody, including information on the alien's release dates. Santa Clara Co. Board of Supervisors Policy § 3.54, Civil Immigration Detainer Requests, adopted Oct. 18, 2011*; see also* Tracey Kaplan, Jailed Illegal Immigrants: Santa Clara County Sticks With Lenient Policy, SAN JOSE MERCURY NEWS, Nov. 5, 2013, http://www.mercurynews.com/crime-

concerted effort that is attacking the Government's inability to detain some criminal aliens immediately upon their release from criminal custody.[7]

Petitioners allege that the Government's interpretation renders an "absurd result" where the Government "has complete discretion" as to when to charge a criminal alien and detain the alien pending removal proceedings. (Resp. at 19.) First, the Government objects to Petitioners' characterization of the Government's attempts to enforce the immigration laws – even when hindered by a concerted effort to hinder those efforts – as "absurd." Second, Petitioners seem to challenge the Government's discretionary decision to initiate removal proceedings, which is not reviewable. *See* 8 U.S.C. § 1252(g).

Third, this allegation ignores the efforts necessary to arrest and detain any one criminal alien after his release from criminal custody, especially when a local government releases a criminal alien into the community without giving ICE the opportunity to detain the alien. After criminal aliens are released into the community, the Government cannot simply locate the alien and send an officer to detain him or her the next day. The Government must first set priorities on which aliens it will apprehend at any given time and determine what limited resources would be best expended on which criminal aliens. As explained above, these priorities are outlined in specific ICE policies, which prioritize the most dangerous aliens. (*See* Morton Memo.) When the Government decides to charge a criminal alien with removal and detain the alien for removal proceedings, officers must first determine the aliens' whereabouts, choose potential detention locations that avoid altercations or encounters that may endanger the alien's children or other relatives, scout the alien's daily routines, formulate a specific plan that usually involves numerous officers, and then implement the plan. Sometimes the best-laid plans fail, and it takes

courts/ci_24460689/supervisors-stick-lenient-santa-clara-county-immigration-policy?IADID=Search-www.mercurynews.com-www.mercurynews.com.

[7] 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; *see also* Julia Harumi Mass, ACLU-NC Urges Santa Clara County to Keep Current Immigration Policy, Oct. 29, 2013, https://www.aclunc.org/blog/aclu-nc-urges-santa-clara-county-keep-current-immigration-policy.

several attempts over several months or years to detain one criminal alien, even when the alien is not attempting to abscond from authorities.[8] *See Gutierrez* 2014 WL 27059, *3 (upholding alien's detention under 1226(c) after ICE unsuccessfully attempted to arrest him multiple times after he was released from criminal custody). If a criminal alien is not an immediate priority – but still a priority – it may be some time before ICE is able to attempt to charge him with removal.

It is an unavoidable fact that a criminal alien convicted of a serious crime by a California jurisdiction that refuses to share release dates with ICE will not be detained upon release like a criminal alien convicted of the same crime by a California jurisdiction that chooses to cooperate with ICE. As the Third Circuit aptly stated, some criminal aliens should not receive a "windfall" due to the Government's inability to detain them immediately upon their release. *Sylvain*, 714 F.3d at 159; *see also Rosciszewski v. Aducci*, --- F. Supp. 2d. ----, 2013 WL 6098553, *3 (E.D. Mich. 2013) ("[E]ven if this Court were to conclude that the statutory language is unambiguous, the Government's failure to abide by the statutory language should not be a windfall to the alien."). "[T]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 v. Godfrey*, No. 3:13-cv-17447, 2014 WL 326047, *6 (D. Or. Jan. 29, 2014).

The Government does not dispute that Congress intended for all criminal aliens to be detained and placed in removal proceedings soon after they served their criminal sentences. *See Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012) ("Thus, while we agree that Congress's command to the Attorney General to detain criminal aliens "when ... released" from other custody *connotes some degree of immediacy*, we 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.") (emphasis added). The INA commands that ICE "shall take into custody" a criminal alien convicted of certain crimes "when

[8] *See* Return, discussion in notes 16 and 18, on recent foiled ICE attempts to detain a convicted rapist in Riverside County and an alien with a lengthy criminal record in Santa Clara County.

the alien is released." 8 U.S.C. § 1226(c). "To be sure, immigration officials should act without delay." *Sylvain*, 714 F.3d at 159. "The sooner [ICE officers] detain dangerous aliens, the safer the public will be." *Id.* The question in this case, however, is what happens if the Government, with its limited resources and local and state government's non-cooperation, is unable to detain every criminal alien immediately when the alien is released from criminal custody. Petitioners' arguments would impose an arbitrary system where aliens from California jurisdictions that do not cooperate with ICE efforts would, in fact, receive the windfall of a bond hearing, to the detriment of the public safety that section 1226(c) was intended to safeguard.

**4. The Transition Period Custody Rules ("TPCR") support the Government's interpretation of section 1226(c).**

Implementation of 8 U.S.C. § 1226(c) was deferred for two years on the request of the Government because of concerns regarding insufficient detention space and personnel. *Kim v. Schiltgen*, No. C 99-2257, 1999 WL 33944060, *3 n.3 (N.D. Cal. Aug. 11, 1999) (*rev'd*, *Demore*, 538 U.S. 510).[9] During that time, the Transition Period Custody Rules ("TPCR") provided all criminal aliens with bond hearings before an immigration judge, at which the alien could show that he or she did not present a substantial risk of flight or threat to the community. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Div. C, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009-586 (Sept. 30, 1996). The Immigration Court then had the discretion to grant bond for the duration of the alien's deportation proceedings. *See* IIRIRA § 303(b)(3). The TPCR expired on October 8, 1998, and the mandatory detention provision of 8 U.S.C. § 1226(c) became effective. *Id.*

Petitioners allege that the TPCR indicates that Congress meant for the Government to be able to immediately detain every criminal alien immediately upon their release from criminal custody by the time section 1226(c) took effect after the two-year grace period. (Resp. at 16.) In an ideal world where the federal government works in perfect harmony with every state and local

[9] Notably, *Demore v. Kim* was decided on appeal from a decision in this jurisdiction that found detention under 1226(c) was arbitrary and *per se* unconstitutional because criminal aliens were not provided with an initial bond hearing where they could demonstrate they were not a flight risk or threat to public safety. *See Kim*, 1999 WL 33944060, *9.

government in the country, there may be a chance that this perfect system is possible. However, in the real world where the Government cannot be expected to know the release date of every criminal alien and meet each and every criminal alien at the doorstep of the local courthouse or prison, Petitioners' supposition of congressional intent is preposterous.

A more reasonable interpretation of congressional intent with TPCR was to give immigration officials time to funnel resources and expertise to implement the mandatory detention system. *See Kim*, 1999 WL 33944060 at *3 n.3. TPCR gave the Government time to implement the system, but not to perfect the system. As the Government explained in its motion to dismiss the Petition, case law shows that ICE is often delayed in detaining criminal aliens for a myriad of unavoidable reasons, which makes the Government's interpretation of section 1226(c) reasonable. *See, e.g.*, *Gutierrez*, 2014 WL 27059 at *7 (explaining the delay in detaining petitioner after his release from criminal custody and finding that the Government's duty to detain criminal aliens under section 1226(c) is not extinguished due to a delay).

**B. This is a case about statutory construction, not arbitrary detention.**

Detention may not be arbitrary, prolonged, or indefinite, *see Prieto-Romero v.* Clark, 534 F.3d 1053, 1065-66 (9th Cir. 2008), but this case involves none of these factors or others that support a substantive due process claim. This is a case about the statutory construction of section 1226(c), and the only interpretation of section 1226(c) that could be considered arbitrary is Petitioners' assertion that criminal aliens who are detained at the moment they are released from criminal custody may not receive a bond hearing, but criminal aliens detained a moment after they are released from criminal custody must be provided a bond hearing. The Government refuses to concede that the inability to detain a criminal alien immediately upon his release from state or local criminal custody merits a bond hearing where an immigration judge may exercise his discretion to release the alien contrary to Congress's clear intent for section 1226(c). *See Demore*, 538 U.S. at 520 (recognizing Congress's concern that, "even with individualized screening, releasing deportable criminal aliens lead to an unacceptable rate of flight").

ICE correctly applies section 1226(c) to detain aliens who are removable under one of the enumerated categories in subparagraphs 1226(c)(1)(A) through (D). Petitioners hypothesize that

their detention was "arbitrary" because of the Government's misinterpretation, Mot. at 1, but then present no valid constitutional questions concerning detention of criminal aliens under section 1226. Petitioners concoct an allegation that the Government contends that the Supreme Court settled the issue in this case in *Demore v. Kim*. (Resp. at 8.) However, the Government acknowledges only that the Supreme Court settled the issue that the mandatory detention of criminal aliens, such as Petitioners and members of the putative class, was *per se* constitutional, although the detention should not be indefinite. *Demore*, 538 U.S. at 523 (reiterating that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"), 528 (recognizing that mandatory detention under section 1226(c) is less constitutionally suspect than post-order detention because pre-order detention generally is not "indefinite" or "potentially permanent").

The Government is cognizant of the vital liberty interest of detained criminal aliens subject to removal, but Petitioners and putative class members detained under section 1226(c) are provided due process during their detention. First, they may request a custody redetermination by an immigration judge that reviews whether they fit one of the enumerated categories of aliens to be detained without a bond hearing. *See Demore*, 538 F.3d at 514 n.3. Then, after six months detention they are entitled to an individualized bond hearing. The Ninth Circuit, following the Supreme Court's holding, recently held that detention under section 1226(c) is prolonged and raises constitutional concerns after six months. *Rodriguez v. Robbins ("Rodriguez II")*, 715 F.3d 1127, 1138 (9th Cir. 2013).[10] Petitioners do not and, per *Demore*, cannot present a valid claim that the immigration detention of criminal aliens is unconstitutional.[11]

Again, Petitioners do not contest that their detention is prolonged or indefinite or otherwise constitutionally questionable as foreclosed in *Demore*, but instead attempt to hang a

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[10] *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), which is still be litigated in the U.S. Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California.

[11] After arguing that their detention under 1226(c) is unconstitutional, Petitioners concede that the mandatory detention of criminal aliens such as themselves "has been held not to be *per se* unconstitutional." (Resp. at 17 n.14, citing *Demore*, 538 U.S. at 527-28.)

due process violation on the allegation that their freedom before detention was prolonged and they were able to "lead productive and non-threatening lives" and develop ties to the community before they were detained by ICE. (Resp. at 17.) They complain that "[u]nder *Rojas*, the Government may wait indefinitely before taking a [criminal alien] into immigration custody and then subject him or her to mandatory detention."[12] (*Id.*) Thus, Petitioners allege a due process violation because the Government waited "indefinitely" before charging them with removal and taking them into immigration detention. The Government fails to see any requisite deprivation of liberty or property in Petitioners' prolonged freedom before immigration detention.

The Supreme Court's primary rules of statutory construction dictate that Petitioners are lawfully detained under section 1226(c). *See, e.g.*, *Hosh*, 680 F.3d at 380 ("Applying *Chevron*, we conclude that the [Board's] determination that criminal aliens like Hosh are subject to mandatory detention, despite not having been detained immediately upon release from state custody, is based on a permissible construction of § 1226(c)."); *Sylvain*, 714 F.3d at 157-58 (holding that the Government does not lose the statutory authority to detain a criminal alien without a bond hearing under the Supreme Court's tenet of statutory interpretation that "a provision that the Government 'shall' act within a specified time, without more, is not a jurisdiction limit precluding action later"). Petitioners' detention is not arbitrary and raises no constitutional concerns because each concedes that they committed crimes and are removable under at least one of the enumerated categories of subparagraphs 1226(c)(1)(A) through (D). Likewise, the putative class is composed of criminal aliens who committed crimes that rendered them removable under one of the categories enumerated in subparagraphs 1226(c)(1)(A) through

[12] The Government objects to Petitioners' use of "noncitizen" to describe putative class members. *See, e.g.*, Resp. at 1 (describing 8 U.S.C. § 1226(c) as "a statute that removes the Government's typical discretionary authority to release noncitizens . . . ."); Resp. at 5 ("Section 1226 controls the Government's detention of noncitizens during removal proceedings."). This case involves the detention of lawful permanent residents who were convicted of criminal acts enumerated under 8 U.S.C. §§ 1226(c)(1)(A) through (C), but not all individuals in the United States without U.S. citizenship. Other sections of the INA involve the detention and removal of other categories of removable aliens, *see e.g.*, 8 U.S.C. § 1225 (detention of arriving aliens); 8 U.S.C. § 1231(a) (detention of aliens with final removal orders).

(D). Thus, their detention is mandated by Congress and not a violation of due process, and the Court should dismiss the Petition for failure to state a claim.

In addition to Petitioners' substantive due process claim, Petitioners for the first time in their Response also allege a procedural due process claim and cite the test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to challenge the amount of due process they received during their detention. (*See* Resp. at 24.) However, Petitioners' procedural claim is without merit. As described above, all aliens detained under section 1226(c) may receive a custody redetermination before a neutral arbitrator upon their initial detention. *Demore*, 538 F.3d at 514 n.3. They also will receive an individualized bond hearing after six months, which is the time period that the Ninth Circuit has determined their detention to be prolonged and, thus, constitutionally questionable. *Rodriguez II*, 715 F.3d at 1138. These independent reviews satisfy any procedural due process concerns.

Here, each Petitioner requested and received an initial custody redetermination. (Return, Exs. 13 (Padilla), 23 (Magdaleno); Resp. to Preliminary Injunction, Ex. 37 (Preap).) Petitioner Preap was released from detention (Return, Ex. 29), and Petitioner Magdaleno remains detained under section 1226(c) after receiving a *Rodriguez* hearing (Resp. to Preliminary Injunction, Ex. 39). Petitioners concede Preap and Magdaleno's individual petitions are moot under the circumstances and should be dismissed. (Resp. at 7 n.8.) Petitioner Padilla is scheduled for a *Rodriguez* hearing in accordance with the Ninth Circuit's law in *Rodriguez* on bond hearings under section 1226(c) (Resp. to Preliminary Injunction, Ex. 43), and Petitioners also concede that his individual petition will be moot thereafter (Resp. at 7 n.8).

In regard to the putative class, the Supreme Court recognized two justifications for detention without a hearing under § 1226(c): "(1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens." *Demore*, 538 U.S. at 515. Congress enacted mandatory detention because criminal aliens were unlikely to find relief in removal and, thus, were much more likely to abscond once they were placed in removal proceedings. *Id.* Aliens who have established a life here and enjoyed our country's benefits will be as likely – if not more likely – to abscond to avoid their almost certain removal.

The few criminal aliens such as Preap who will find relief from removal most likely will find it within the first few weeks or months of removal proceedings. Thus, the justifications for section 1226(c) detention do not diminish over a criminal aliens' prolonged freedom between criminal custody and removal proceedings, but potentially become more profound as his ties within the United States increase and the alien becomes more likely to abscond to avoid removal.

As Petitioners conceded, this Court need not even reach their due process claim (Resp. at 1), but the case should be decided on statutory construction grounds. Thus, there are no valid constitutional claims raised in this litigation, and Petitioners' phantom due process claims should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

## III. 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 also should dismiss the Complaint for Injunctive and Declaratory Relief under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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