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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MONY PREAP, EDUARDO VEGA PADILLA, and JUAN LOZANO MAGDALENO,

Plaintiffs-Petitioners,

v.

JEH JOHNSON, Secretary, United States Department of Homeland Security; ERIC H. HOLDER, JR., United States Attorney General; TIMOTHY S. AITKEN, Field Office Director, San Francisco Field Office, United States Bureau of Immigration and

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

PLAINTIFFS' TRAVERSE AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: March 18, 2014
Time: 2:00 p.m.
Ctrm: 5
Judge: Hon. Yvonne Gonzalez Rogers

Date Filed: December 12, 2013

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement, Defendants-Respondents.	Trial Date: Not Set

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I. INTRODUCTION

Basic procedural protections designed to guard against arbitrary imprisonment—in any form, whether government custody, detention, or any other form of physical restraint—lie at the heart of our system of justice in this country. The overlapping statutory and constitutional rights at issue here, which extend to everyone within the United States, regardless of citizenship status, protect this fundamental freedom. Make no mistake about it— that is what is at stake here.

Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno were each taken into immigration detention by the Government at some point after they had finished serving state or county sentences for various crimes and had returned to their communities. Each was denied any individualized determination that he posed a danger to the community or was likely to flee law enforcement due to his immigration status. Instead, each was held in what has been dubbed "mandatory detention"—detention under 8 U.S.C. § 1226(c) ("Section 1226(c)"), a statute that removes the Government's typical discretionary authority to release noncitizens on their own recognizance or on bond while their immigration proceedings are pending after individualized determinations that take into account the specific facts of their case.

The Government's sole justification for treating Messrs. Preap, Padilla and Magdaleno in this fashion, along with many others who are similarly situated, is an administrative decision by the Board of Immigration Appeals in *Matter of Rojas* (2003), a case that arose in the politically-charged environment following September 11th. *Rojas* interprets Section 1226(c) to apply to a large swath of individuals as a matter of law. It is an administrative attempt to apply principles of statutory construction without any prior guidance from the judiciary on the issue it addresses. It is a poorly reasoned decision that ignores nearly all of the traditional tools of statutory construction, that fails to mention or decide serious constitutional questions mandatory detention implicates, and that is undeserving of *Chevron* deference.

Applying Section 1226(c) to individuals like Messrs. Preap, Padilla and Magdaleno — individuals who have finished their state sentences and returned to their communities—is not only unsustainable under the plain terms of the statute, but violates Due Process. This case may be decided on both grounds, but the Court need not reach the Due Process issue. The plain terms of

Section 1226(c) are dispositive here. And under the doctrine that statutes should be construed to avoid constitutional questions where possible, any debate about the words of the statute should be construed in favor of Plaintiffs.

II. STATEMENT OF FACTS

A. Mony Preap

Plaintiff Mony Preap is 32 years old. His family is from Cambodia, but they fled Cambodia after his mother was arrested and tortured by the Khmer Rouge. Mr. Preap was born in a refugee camp that he believes was located in Malaysia. However, he has been informed by Government that he was actually born in Indonesia. Mr. Preap has no memory of his life before he arrived in the United States in 1981 as an infant. He has been a lawful permanent resident of the United States since his entry. (Compl. ¶ 16.)

Prior to being taken into detention, Mr. Preap lived with and was the primary caregiver for his 11-year-old son and his mother. Mr. Preap has had sole custody of his son—a U.S. citizen—since his son's mother abandoned them when his son was three months old. Mr. Preap's mother is in remission for breast cancer and also suffers from seizures. Because of her fragile health, she requires extensive care. Prior to his detention, Mr. Preap spent his day caring for her and their home, running errands for his mother who cannot drive and attending to his son. (Compl. ¶ 17.)

In 2004, Mr. Preap was arrested for possession of a small amount of marijuana in two separate incidents. His court proceedings for those incidents did not take place until June 2006. The first incident resulted in a misdemeanor conviction, for which he was given credit for the few weeks of time that he already served. The second incident also resulted in a misdemeanor conviction. Mr. Preap was released from state custody for those incidents on June 29, 2006. In 2013, Mr. Preap was convicted of simple battery following an argument between him and his ex-girlfriend. After she punched him, cutting his lip, she then bit his arm, leaving a large gash. He pushed her off; she did not sustain any injuries. She did, however, call the police. He awaited their arrival, at which time he was arrested. (Compl. ¶ 18). Mr. Preap was serving his 72-day sentence in the Sonoma County Detention Facility for his simple battery offense—a conviction that does not subject him to removal—when he was transferred to immigration detention on

September 11, 2013. (Compl. ¶ 19).[1] He was then detained in West County Detention Facility in Richmond, California for three months without an individualized custody determination or a bond hearing. (Compl. ¶¶ 19-21.) Since the filing of this action, Mr. Preap was granted cancellation of removal, and has returned to his family. *See* Government's Return to Petitions for Writs of Habeas Corpus and Motion to Dismiss Complaint, Dkt 24 (Feb. 7, 2014) ("Mot."), at Ex. 29.[2]

B. Eduardo Vega Padilla

Plaintiff-Petitioner Eduardo Vega Padilla is 48 years old. He was born in Mexico and came to the United States in 1966, when he was 16 months old. He became a lawful permanent resident in the same year. (Compl. ¶ 22.) Prior to being taken into immigration detention, he lived with his elderly mother, his daughter, and his grandson. They are all U.S. citizens. He has five children who are United States citizens. Four of his children are now adults. He also has six grandchildren, one of whom was born while he was in detention. His three siblings are all United States citizens and live in the Sacramento area. (Compl. ¶¶ 22-23.)

During a rough period in his life when his marriage had fallen apart, his grandmother had fallen ill and his father had died suddenly, Mr. Padilla was convicted of possession of a controlled substance in 1997 and in 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was then convicted of possessing a firearm while having a prior felony conviction. He was sentenced to six months in jail and was released in 2002. (Compl. ¶ 24.)[3]

On August 15, 2013, immigration officers came to his home, knocked on his door, and asked him to accompany them to the immigration office. He voluntarily complied, and was then taken into federal immigration custody, where he has remained until this day. (Compl. ¶ 25.) He is currently being detained at the Rio Cosumnes Correctional Center in Sacramento County. *Id.*

---

[1] These three convictions are, to use the Government's words, the extent of Mr. Preap's "numerous crimes." Mot. at 2.

[2] None of the Plaintiffs' claims regarding the constitutionality or legality of their detention under Section 1226(c) are moot because they are members of an inherently transitory class and seek to bring a class action. *See, e.g.,U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

[3] The Government does not contest that Mr. Padilla had no contact with law enforcement between his release from local custody in 2002 and when ICE arrived at his doorstep in 2013, eleven years later.

Mr. Padilla is being held in mandatory detention under Section 1226(c) based on two possession-of-a-controlled-substance convictions from 1997 and 1999, and his firearm-possession conviction from 2002. (Compl. ¶ 26.) If afforded a bond hearing, Mr. Padilla would present strong arguments for his entitlement to release. And if granted release on a bond, Mr. Padilla would be able to pay it with help from his family. (Compl. ¶ 27).[4]

C. Juan Lozano Magdaleno

Plaintiff Juan Lozano Magdaleno is 57 years old. He was born in Mexico and came to the United States as a teenager in 1974. He has been a lawful permanent resident of the United States since his entry. (Compl. ¶ 28.) Prior to being taken into immigration detention, Mr. Magdaleno lived with his wife, two of his four children, his son-in-law, and his grandchild, all of whom are United States citizens. All of his four children are United States citizens. They, along with his ten United States citizen grandchildren, live close to Mr. Magdaleno's home. (Compl. ¶ 29.)

Mr. Magdaleno is very close to his family. While he was in detention, one of his daughters got married. Although he was unable to attend because he was in immigration detention, his family arranged to have him call and make a speech at the reception over the speaker system. (Compl. ¶ 30.) Prior to being detained, Mr. Magdaleno took care of four of his grandchildren every day, taking them to school, picking them up and watching them after school until their parents returned from work. Because of his detention, one of his daughters has had to close her nail salon early each day to watch her children. *Id.*

Mr. Magdaleno has made a living selling antiques at antique stores and flea markets since the late 1980s. Throughout his career, he has owned an antique refinishing store, an antique store and a thrift store. In 2000, Mr. Magdaleno was convicted of possession of a firearm while having a prior felony conviction, a DUI conviction from the 1980s that is not a removable offense.[5] This conviction came about as follows: As part of Mr. Magdaleno's job working in a thrift store, he

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[4] Mr. Padilla's habeas petition is properly before this Court, as the individual with the ability to order his release resides within the Northern District of California. *See Bogarin-Flores v. Napolitano*, 12-CV-0399 JAH WMC, 2012 WL 3283287 at *2 (S.D. Cal. Aug. 10, 2012), *see also Espinoza v. Aitken*, 5:13-CV-00512 EJD, 2013 WL 1087492 (N.D. Cal. Mar. 13, 2013).

[5] In October 2007, Mr. Magdaleno was convicted of simple possession of a controlled substance. He was sentenced to six months in jail and released in January 2008. (Compl. ¶ 32.)

purchased storage units at auction and resold the contents. Bidders on the storage units at the auction have no knowledge of the contents of the units. One of the storage units Mr. Magdaleno purchased contained an old rifle, which he kept unloaded. When police officers came to his store for an unrelated matter, they arrested him for possession of the gun. (Compl. ¶ 31.)

Mr. Magdaleno has been in immigration custody since June 17, 2013, when ICE agents came to his home and took him into custody based on the 2007 controlled-substance conviction and the 2000 firearm-possession conviction. He is currently being detained at the West County Detention Facility in Richmond, California. (Compl. ¶ 33.) On February 14, 2014, Mr. Magdaleno was given a bond hearing, where he was denied release. This decision is currently being appealed.[6]

III. LEGAL BACKGROUND

A. Immigration Detention

Section 1226 controls the Government's detention of noncitizens during their removal proceedings. Section 1226(a) gives the Government the discretion to release an individual on his own recognizance or on bond while his removal case is pending if it determines that release would not create a risk of flight or a danger to the community. If the Government decides not to release an individual or conditions release upon a bond amount the individual is unwilling or unable to pay, the individual is entitled to have the Government's decision reviewed by an Immigration Judge at a bond redetermination hearing. At that hearing, the individual has the opportunity to demonstrate that he should be released.

Section 1226(c) is a narrow exception to the system created by Section 1226(a). It provides as follows:

> (1) Custody
>
> The Attorney General shall take into custody any alien who--
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,

[6] As with Mr. Padilla, the Government does not contest that Mr. Magdaleno had no contact with law enforcement between his release in 2008 and the beginning of his immigration detention five years later.

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist activities"] of this title or deportable under section 1227(a)(4)(B) ["Terrorist activities"] of this title,
>
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release
>
> The Attorney General may release ***an alien described in paragraph (1)*** only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(emphasis and square brackets added). If an individual falls into the category defined by Section 1226(c)(1), he or she is held in mandatory detention for the entirety of his or her removal proceedings, and is not provided the opportunity to present his or her case for release to a neutral arbiter.[7]

B. Board of Immigration Appeal's decision in *Matter of Rojas*

While Section 1226(c) on its face is quite limited—applying only to noncitizens with convictions for offenses enumerated in Section 1226(c)(1)(A)-(D) ("Section 1226(c)(1) Offenses") *and* who were transferred directly to ICE custody immediately upon release from state custody for that offense—the Board of Immigration Appeals expanded the section's reach in 2001 with the decision *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001) ("*Rojas*"). Faced with an

[7] Recognizing the drastic nature of detention that denies an individual the opportunity to present a case to a neutral arbiter for release, the Ninth Circuit recently held that the Government must provide bond hearings to individuals who have been detained for six-months or longer. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013).

individual who had a conviction for a Section 1226(c)(1) Offense but was not taken into custody immediately upon his release from state custody, the agency held Section 1226(c) applied to any noncitizen with a prior Section 1226(c)(1) conviction regardless of "when" he or she had been released. *Rojas* read 1226(c) as a stand-alone section, and completely failed to discuss the role it played within the larger framework created by Section 1226 as a whole. It made no mention of the Government's power, under Section 1226(a), to detain a noncitizen regardless of when he or she is taken into custody if it determines that that individual would pose a flight risk or a danger to the public if released. It similarly failed to employ numerous standard tools of statutory construction in reaching its decision. Further, *Rojas* did not discuss the constitutional implications of its decision. Nonetheless, the Government has used *Rojas* as a carte blanche to pluck individuals out of their communities months and years after they have had any contact with the criminal justice system and deny them access to the individualized custody determinations as to whether they should be kept in custody pending their removal proceedings. (Compl. ¶¶ 24-27, 32-34.) This arbitrary and meaningless mandatory detention violates both the intent of Congress and the Due Process Clause of the Fifth Amendment.

IV. ARGUMENT

When ruling on a Rule 12(b)(6) motion to dismiss, all factual allegations of the complaint must be accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000). Courts "generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).[8] Plaintiffs' claims challenge the Government's uniform policy and practice of subjecting them and their proposed class members to mandatory detention in violation of Section 1226 and in violation of the Constitution. The Government argues that Plaintiffs' claims and petitions should

[8] In light of Mr. Preap's relief and that Mr. Magdaleno has been afforded a bond claim after six-months in detention under *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013), Plaintiffs do not oppose the Government's return on Mr. Preap's and Mr. Magdaleno's habeas corpus petitions. Mr. Padilla is scheduled for a *Rodriguez* bond hearing on March 7, 2014, and if such hearing is afforded, Plaintiffs similarly do not oppose the return of his petition. Plaintiffs will then move forward only as class representatives on their statutory and constitutional claims.

be dismissed because the Supreme Court has upheld mandatory detention for individuals such as Plaintiffs (which it has not), that *Matter of Rojas* deserves *Chevron* deference (it does not), that Plaintiffs request that this Court impermissibly expand explicit exceptions in Section 1226(c) (they do not), and that Plaintiffs try to extinguish the Government's authority to detain them for failing to meet a deadline (they do not). Mot. at 11, 29. For the reasons explained below, the Government's arguments fail and, accordingly, their motion should be denied.

A. The Government's application of *Matter of Rojas* violates Section 1226.

Through their statutory claim, Plaintiffs allege that the Government violates Section 1226 by subjecting to mandatory detention individuals who were not detained "when released" from criminal custody for a Section 1226(c)(1) Offense. *See* Compl. ¶¶ 3-4, 16-48. The Government does not argue that Section 1226 clearly allows its practice. Rather, the Government argues that the Supreme Court has decided this question, Mot. at 11-13, and that the BIA's decision in *Rojas* should be afforded *Chevron* deference because Section 1226 is ambiguous. Mot. at 13. But the Supreme Court in *Demore v. Kim* did not decide the scope and effect of Section 1226(c)'s "when released" clause. And, the plain language of Section of 1226(c), the structure of Section 1226 as a whole, and the cardinal rules of statutory interpretation demonstrate that Congress did not intend for Plaintiffs and their proposed class members to be subjected to mandatory detention.

None of the Government's arguments to the contrary hold water. The Government does not lose authority to do anything under the Plaintiffs' interpretation of Section 1226(c). Rather, the Plaintiffs' interpretation allows the Government to retain its authority to detain or not detain individuals as they see fit—taking into consideration those individuals' specific circumstances. The Government still has full authority to detain anyone with a Section 1226(c)(1) Offense within the framework of Section 1226(a), a framework that already exists to ensure that pre-hearing immigration detention is justified by individual considerations of flight risk and community safety.

1. The Supreme Court in *Demore v. Kim* did not address whether Plaintiffs and their proposed class members are subject to mandatory detention under Section 1226(c).

The Government first argues that Plaintiffs' claims have "already been rejected by the

Supreme Court" and that the Ninth Circuit has "defined the statutory parameters of mandatory detention under section 1226(c) to allay due process concerns." Mot. at 11. It is wrong on both accounts.

In *Demore v. Kim*, faced with a challenge to Section 1226(c) as unconstitutional on its face, the Supreme Court held that pre-removal detention of noncitizens "for the limited period of his removal proceedings," was constitutionally permissible. 538 U.S. 510, 531 (2003). However, *Demore* does not go nearly as far as the Government suggests. In *Demore*, the petitioner did not dispute that he was subject to mandatory detention under Section 1226(c), rather that Section 1226(c), in any circumstance, was unconstitutional. 538 U.S. at 513-14 (citing record). Rather, he argued that mandatory detention was impermissible under any circumstances. Indeed, the petitioner could not have raised the "when…released" question that is current before this Court, because he was transferred into immigration custody while still serving a state sentence for a removable offense.[9] This forms a critical distinction between Plaintiffs' statutory claim and the case presented in *Demore*: Plaintiffs' statutory claim alleges that the Government's authority to detain them and their proposed class members arises under Section 1226(a), not Section 1226(c). *See* Compl. ¶¶ 3-4, 16-48. Not once did the Supreme Court address Section 1226(c)'s "when released" language.

The Government's argument that "the Supreme Court recognized that criminal aliens receive additional due process before a neutral arbitrator" through custody redeterminations is similarly off the mark. Mot. at 12. The hearings referenced in the cited Supreme Court footnote, known as *Joseph* hearings, are opportunities for detainees to challenge whether their criminal convictions are within the scope of Section 1226(1)(A)-(D), but they are not opportunities to address whether an individual not detained "when…released" is nonetheless subject to mandatory detention under Section 1226(c).[10] *Rodriguez*, 715 F.3d at 1132 (at a *Joseph* hearing,

[9] *See Kim v. Schiltgen*, C 99-2257 SI, 1999 WL 33944060 (N.D. Cal. Aug. 11, 1999) aff'd on other grounds sub nom. *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002) rev'd sub nom. *Demore v. Kim*, 538 U.S. 510 (2003).

[10] The Court raised the issue only to note that because the petitioner did not contest that he was deportable because of a conviction triggering Section 1226(c) in a Joseph hearing, it "ha[d] no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to [Section] 1226." *Demore*, 538 U.S. at 514 & n.3I.

"[d]etainees are permitted to ask an Immigration Judge to reconsider the applicability of mandatory detention, see 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual's criminal history falls within the statute's purview)" (citing In re Joseph, 22 I. & N. Dec. 799 (BIA 1999)). Immigration Judges in *Joseph* hearings follow the BIA's decision in *Rojas*, and thus do not serve as any backstop to remedy Rojas's impermissible construction of Section 1226(c). See Section IV.A.2 & 3, *infra*.

The Government never actually articulates how "the Ninth Circuit has defined the statutory parameters of mandatory detention under section 1226(c) to allay due process concerns" and simply cites recent precedent limiting Section 1226(c) detention to six months. Mot. at 11. The government's suggestion that Circuit case law on the permissible ***length*** of Section 1226(c) detention somehow resolves the issue of whether Section 1226(c) ***applies*** to Plaintiffs and proposed class members fails on its face: courts are not in the business of defining parameters of a statute that are not at issue in the cases before it. Those aggrieved bring cases such as this one to challenge unconstitutional and unlawful practices. Indeed, Ninth Circuit case law clarifying some of the (im)permissible boundaries of mandatory detention make clear that the statute is limited in scope and purpose and requires close judicial scrutiny, but has not answered the question here. *See Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1133-36 (9th Cir. 2013) (discussing *Rodriguez v. Hayes;* 591 F.3d 1105, 1114 (9th Cir. 2010); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Casas-Castrillon v. Dept. of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011)).

Accordingly, this Court should find that Plaintiffs' allegations sufficiently allege a violation of Section 1226.

2. *Matter of Rojas* does not merit *Chevron* deference because Congressional intent is clear.

The Government next argues that Plaintiffs' statutory claim does not allege a cognizable legal claim because the Government's practice is based on the BIA's decision in *Matter of Rojas*, and that decision is worthy of *Chevron* deference. Mot. at 11. But Congress clearly intended that Section 1226(c) should apply to those detained "when released" from criminal custody for a Section 1226(c)(1) Offense, not to Plaintiffs and their proposed class members, so the Court need

not address *Rojas* to find that *Chevron* deference does not apply. Even were there any ambiguity in Section 1226 (there is not), *Rojas* does not present a permissible construction of Section 1226 and for that reason also cannot be afforded deference.

a. Congress intended that Section 1226(c) would apply to those detained "when released," not Plaintiffs or their class members.

Before reaching the merits of an agency interpretation of its governing statute, courts must first determine "whether Congress has directly spoken to the precise question at issue," using the ordinary tools of statutory interpretation, starting with the text of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). If Congress has spoken clearly, that unambiguous language must be given effect, and the analysis ends. Only "if the statute is silent or ambiguous with respect to the specific issue" does a court then determine "whether the agency's answer is based on a permissible construction of the statute." *Diouf*, 634 F.3d at 1090 (citing *Chevron*, 467 U.S. at 843) (internal quotations omitted). Where an agency's interpretation of a statute raises substantial constitutional concerns, these concerns inform the court's reading congressional intent. *See, e.g., id.* (citations omitted); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," and will not reach the second step of the *Chevron* analysis. *Id.* at 574-575.

(i) The text of Section 1226(c) alone clearly demonstrates that Section 1226(c) does not apply to the Plaintiffs.

The text and structure of Section 1226(c) evidence Congress's intent that mandatory detention should apply to an individual who *both* committed an offense enumerated by Section 1226(c)(1) *and* was taken into immigration detention "when released" from criminal custody for that offense. In 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 noncitizen is released from criminal custody. 8 U.S.C. § 1226(c)(1). Section 1226(c)(2) confirms this reading of the statute. It references "an alien described in paragraph (1)," not "an alien described in paragraph

(1)(A)-(D)." 8 U.S.C. § 1226(c)(2). In other words, Section 1226(c)(1) describes "an alien"—an individual who has ***both*** (i) committed an offense enumerated by Section 1226(c)(1)(A)-(D); ***and*** (ii) been taken into immigration custody "when… released" from criminal custody for that offense. 8 U.S.C. § 1226 (emphasis added); *Espinoza*, 2013 WL 1087492 at *6 (Section 1226(c) "requires that an alien be taken into immigration custody at the time the alien is released from criminal custody in order for the mandatory detention provisions of subsection (c)(2) to apply, not at some time in the future…").

"If Congress had intended for mandatory detention to apply to aliens at any time after they were released, it easily could have used the language 'after the alien is released' or 'regardless of when the alien is released,' or other words to that effect." *Zabadi v. Chertoff, C05-03335 WHA*, 2005 WL 3157377, at *4 (N.D. Cal. Mar 13, 2013) (citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (proper statutory construction begins with the words used by Congress). It could also have begun Section 1226(c) by drafting it to read: "The Attorney General shall have the authority to take into custody any alien who—…. starting when the alien is released." It did none of these.

The fact that a word has many dictionary definitions or that courts have interpreted to mean different things in entirely different statutes tells us nothing. *See* Mot. at 15-16. "[A] word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). The doctrine of *noscitur a sociis* prevents courts from "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id.* (internal citations and quotations omitted). The term "when" may mean different things in different statutes, but here, the text tells us that "when…released" means immediately upon release. *Rojas* itself even acknowledged that "[t]he statute does direct the Attorney General to take custody of aliens immediately upon their release from criminal confinement," 23 I&N Dec. at 122, dispelling any notion that "when released"

means anything but "immediately upon release."[11]

The Government's argument that many courts within the Ninth Circuit have "implicitly" decided that "when…released" is ambiguous has no support. The Government does not cite a single instance in which a court "implicitly" found that an individual not detained immediately upon his or her release still fell under the purview of Section 1226(c)'s "when…released" language. *See* Mot. at 17 (citing *Deluis-Moreloes v. ICE Field Office Dir.* 12-cv-1905, 2013 U.S. Dist. LEXIS 65862 (W.D. Wash. May 8, 2013) (granting detainee's habeas corpus petition on the basis of an 8 year gap); *Borgain-Flores v. Napolitano*, 12-cv-399, 2012 WL 3283287 (S.D. Cal. Aug. 10, 2012); (same on the basis of a 3-year gap); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (granting detainee's habeas corpus petition because he was not taken into detention until "years" after he was released); *Bromfield v. Clark* (granting detainee's habeas corpus petition "because he was not taken into immigration custody when he was released from state custody as required by the express language of the statute."); *Zabadi*, 2005 WL 3157377 (granting detainee's habeas corpus petition after two year gap in custody). The fact that these courts chose not to decide issues irrelevant to the facts before them has no persuasive value, and any further articulations as to the meaning of "when…released" would have been dicta.

In addition to being in conflict with the cases cited above, the Government's proposed interpretation of Section 1226(c) eviscerates the actual text of the statute. Its interpretation would permit it to detain a noncitizen ***any time after*** the individual has been released from criminal custody for a Section 1226(c)(1) Offense. This interpretation renders the "when…released" clause a nullity, in violation of the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word

[11] Similarly, contrary to the Government's assertion, disagreement among the courts regarding the construction of a statute does not alone establish the existence of ambiguity. *De Osorio v. Mayorkas*, 695 F.3d 1003, 1013 (9th Cir. 2012). Courts regularly decide that statutory language is unambiguous, despite circuit splits over interpretation. *See, e.g., Roberts v. Sea–Land Servs., Inc.*, 132 S. Ct. 1350 (2012); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012). The Government's statement that "Petitioners' argument does not taken [sic] into account recent district court decisions in this jurisdiction," Mot. at 16-17, is both misleading and does not chance this. *Mora-Mendoza v. Godfrey*, 3:13-CV-01747-HU, 2014 WL 326047 (D. Or. Jan. 29, 2014) had not issued when the Complaint was filed, and even *Gutierrez* recognizes that the weight of authority is against it. 2014 WL 27059, at *4.

shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1995) ("give effect, if possible, to every clause and word of a statute"); *Rojas*, 117 I&N at 134 (Rosenberg, J., dissenting) (citing *Menasche*). For that reason, the Government's proposed interpretation cannot be right.

The Government nonetheless argues that the word "when," unlike the word "whenever," could denote a starting point: in this case, the point in time at which the Government's authority to detain an individual arises. This argument fails for two reasons. First, courts resort to an examination of the legislative history of a statute only if the statute's language is unclear. Second, it presents a false dichotomy: "when" and "whenever" were not the only two phrases that Congress had available when drafting Section 1226. As already noted, if it had indeed intended for "when" to mean "at the time of or any time after," or simply "after," it could have said so. Its decision not to use the word "whenever" in the statute sheds no light on how the clause "when released" should be interpreted.

(ii) The structure of Section 1226 confirms that the "when released" language describes the individual subject to mandatory detention.

The structure of Section 1226 confirms that the "when released" language forms a necessary description of the individual subject to mandatory detention under Section 1226(c). Congress structured Section 1226 such that the Government's discretionary authority to detain operated as the default under Section 1226(a). 8 U.S.C. § 1226. Accordingly, "***[e]xcept as provided in subsection (c)***," individuals are entitled to seek release on bond or their own recognizance. 8 U.S.C. § 1226(a) (emphasis added). Section 1226(c) is thus an exception to the Attorney General's general authority to detain and release noncitizens pending removal proceedings. As discussed above, Section 1226(c)(2) refers to "***an alien*** described in paragraph [(c)]1," not "an alien described in paragraph [(c)]1(A)-(D)." *See* Mot. at 8. Therefore, an alien ***not*** described by Section (c)(1) would be subject to the Government's discretionary detention authority under Section 1226(a).

Moreover, the "when released" clause aligns flush with the margin of Section 1226(c)(1),

indicating that it applies to all of subparagraph (1) and therefore modifies each of subparagraphs (A)-(D) immediately preceding it. *See Sherwin-Williams Co. Employee Health Plan Trust v. C.I.R.*, 330 F.3d 449, 454 n.4 (6th Cir. 2003) (citing *Snowa v. Comm'r*, 123 F.3d 190, 196 n.10 (4th Cir. 1997) (The phrase ''flush language'' refers to language that is written margin to margin, starting and ending ''flush'' against the margins. Flush language applies to "the entire statutory section or subsection…")). Accordingly, the Government's attempt to divorce the "when…released" clause from subparagraphs (A)-(D) to find that the latter describes an "alien" but the former does not, artificially separates statutory provisions meant to be read together.[12]

The Government's resort to muddled rules of grammar does not advance its interpretation of Section 1226(c). For example, Morton S. Freeman's *The Grammatical Lawyer* states that "when" tends to serve as an adverb when it begins a "subordinate" clause—a clause that "typically stands at the beginning or end of a sentence." Mot. at 23. But Section 1226's "when…released" clause comes in the middle of a contiguous sentence. Relying on grammatical style guides can lead to many different, contradictory conclusions, as the Government's own use of them shows, and are not more authoritative than the traditional canons of construction or the holistic structure and context of statutes.

The Third Circuit's "paraphrasing" Section 1226(c) by moving its various pieces to make "when…released"—in the Government's view—into an "adverbial" clause, Mot. at 24, is similarly unconvincing. Had Congress intended the pieces of the statute to be read in that order, it could have drafted it that way. Again, it did not. And the Government cites no cases, style guides, or sources of any kind for its argument that the indentation of paragraphs (A)-(D) affects how the contiguous sentence of Section 1226(c)(1) should be read, let alone why that would override the actual text, punctuation, context, and traditional canons of construction to govern how the statute should be construed by the Court.

[12] Similarly, Congress defined the individual subject to mandatory detention with a dash after "who—." 8 U.S.C. § 1226(c). Each of subparagraphs (A)-(D) follow, along with the "when released" clause, further confirming Plaintiffs' interpretation of the "when released" clause as modifying the individual subject to mandatory detention.

(iii) The context in which Congress enacted Section 1226(c) demonstrates that it intended Section 1226(c) to apply to individuals detained immediately upon release.

The context in which Congress passed Section 1226(c) further confirms that Congress intended those subject to Section 1226(c) to be taken into immigration detention immediately upon their release from criminal custody for a Section 1226(c)(1) Offense. Concurrently with Section 1226(c), Congress passed the Transition Period Custody Rules (TPCR). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009, 3009-586 (Sept. 30, 1996). Acknowledging that there might be "insufficient detention space and . . . personnel available" to carry out the newly-enacted mandatory detention provisions, the transition rules gave the Attorney General one year (which could be extended an additional year), to suspend the application of Section 1226(c). *Id.*; *In re Garvin-Noble*, 21 I&N Dec. 672, 675 (BIA 1997) (citing 142 Cong. Rec. S11, 838-01, S11, 839, (daily ed. Sept. 30, 1996), available in 1996 WL 553814 (statement of Sen. Hatch)). The TPCR would have been unnecessary had Congress intended the Attorney General to subject to mandatory detention an individual at *any* time after his or her release from criminal custody for a Section 1226(c) Offense.

(iv) The canon of constitutional avoidance supports Plaintiffs' interpretation of Section 1226(c), and counsels against affording *Chevron* deference to *Rojas*.

While the text, structure, and context in which Congress passed Section 1226 negate the need for this Court to look any further for the meaning of the "when…released" clause in Section 1226(c), Plaintiffs' construction is also supported by the doctrine of constitutional avoidance. Under this doctrine, when a court must decide which of two plausible statutory constructions to adopt, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Rodriguez II*, 715 F.3d at 1133-34 (applying canon of constitutional avoidance and citing cases).[13] Even within the context of

[13] *Cf. INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (citing the rule of lenity's "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (internal quotation marks and citation omitted).

Chevron deference, the court must adopt the construction that avoids constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575 (internal quotations omitted)); *Diouf*, 634 F.3d at 1090 (citing *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001)); *Williams v. Babbitt*, 115 F.3d 657, 663-64 (9th Cir. 1997)). This stems from the "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency*, 531 U.S. at 172-73.

Rojas's construction of Section 1226(c) threatens the "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint [that] lies at the heart of the liberty that [the Due Process] Clause protects." *Rodriguez II*, 715 F.3d at 1134 (internal quotation omitted); *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (quoting *Addington v. Texas*, 441 U.S. 418, 425, 427 (1979) ("The Supreme Court . . . 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty.'")).[14] Because Section 1226 is a civil and not criminal detention scheme, its application must be reasonably related to its purposes and accompanied by strong procedural protections. *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

Under *Rojas*, the Government may wait indefinitely before taking a noncitizen into immigration custody and then subject him or her to mandatory detention. In the intervening period of time, individuals like the Plaintiffs may have led productive and non-threatening lives. The categorical presumption of danger and bail risk that the Government applies to individuals who are directly transferred to ICE from state custody cannot, under the Due Process Clause, be applied to all individuals with gaps in custody. Indeed, "[b]y any logic, it stands to reason that

[14] Though mandatory detention has been held not to be *per se* unconstitutional, *Demore*, 538 U.S. at 527-28, its application under various circumstances has been limited to avoid due process concerns. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001) (prohibiting indefinite detention after an alien has been adjudicated removable); *Rodriguez II*, 715 F.3d at 1137 (holding that Section 1226(c) could not authorize indefinite mandatory detention of criminal aliens as that would be "constitutionally doubtful"); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) ("an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community.").

the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be." *See Sanchez Gamino*, 2013 WL 6700046, at *4 (quoting *Saysana*, 590 F.3d at 17-18). The indiscriminate detention of noncitizens with criminal convictions who were released as long as 15 years ago (and counting) is simply not reasonably related to the purposes of mandatory detention. The Government's presumptive treatment of all individuals as dangerous or likely to abscond, even if they have not done so in their years since their release from custody for a Section 1226(c)(1) Offense, is constitutionally suspect, and for that reason, the doctrine of constitutional avoidance applies here.

(v) Courts that have nonetheless held that Section 1226(c)'s "when released" language is ambiguous have not properly applied the canons of statutory construction.

Courts that find Section 1226(c) to be ambiguous do so erroneously. For example, the Fourth Circuit in *Hosh* (the only circuit to grant deference to *Rojas*) found ambiguity in Section 1226(c) without analysis of its statutory language, its structure, its legislative history, or the context of its enactment. *See Hosh*, 680 F.3d at 379. Accordingly, many courts have found it unpersuasive as failing to "present any independent reasoning or statutory construction." *See Bogarin-Flores*, 2012 WL 3283287, at *3; *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) ("[p]resumably because of the inadequacy of the analysis in *Rojas* and the dearth of analysis in *Hosh* itself, *Hosh* has had little persuasive impact beyond the Fourth Circuit…."). *Hosh's* deference to *Rojas* results in an interpretation contrary to Section 1226(c)'s own language by effectively excising from the statute the temporal requirement imposed by the "when released" clause. This violates the fundamental directive of statutory interpretation "to give effect, if possible, to every clause and word of a statute." *Menasche*, 348 U.S. at 538-39.

Other courts have dodged *Chevron's* charge altogether, declining to acknowledge that the statute's language is unambiguous, but effectively reaching the same result as *Rojas*. *See Sylvain*, 714 F.3d at 155-57 (acknowledging question regarding applicability of *Chevron* deference to *Rojas*, but declining to decide it); *Gutierrez*, 2014 WL 27059, at *5 (declining to decide whether the "when released" language is ambiguous). This is true, even while these courts acknowledge that the majority of courts to have addressed the issue conclude that the "when released" language

is unambiguous. *E.g.*, *Gutierrez*, 2014 WL 27059 at *4-*5.

b. *Rojas* does not provide a permissible construction of Section 1226(c).[15]

Were the Court to find any ambiguity in Congress's intent as to the scope of Section 1226(c), *Rojas* does not provide a permissible construction of the statute and should not be granted deference. *See Chevron*, 467 U.S. at 844; *Judulang v. Holder*, 132 S.Ct. 476, 483 n.7 (2011). The Government fails to construe Section 1226(c) consistently with its limited purpose: to ensure that individuals who are currently in custody for certain removable offenses, and whom Congress deemed a categorical bail risk due in part to the recency of their offenses, remain detained pending removal proceedings. Rather, the government applies Section 1226(c) to noncitizens who have already returned to the community—in some cases, many years ago—and who do not, as a class, pose the risks that concerned Congress. To the contrary, many have strong

[15] The difficulty of detaining noncitizens upon their release that the Government argues exists also has no bearing on statutory interpretation and whether the "when…released" is ambiguous. Mot. at 20. Although the Government blames the TRUST Act and similar measures that limit compliance with immigration detainers or limit information sharing regarding immigrants in criminal custody for its inability to comply with the language of Section 1226(c), the existence of state statutes and local ordinances that came into effect nearly two decades after Congress promulgated Section 1226 cannot logically affect what Congress intended the words of Section 1226(c) to mean. Moreover, the TRUST Act has no significant bearing on the Government's abilities to detain individuals with convictions listed in Section 1226(c)(1) because the TRUST Act does not protect individuals with (1) a federal aggravated felony conviction; (2) a firearm conviction (3) a felony conviction for simple possession of a controlled substance; or (4) convictions for many common crimes involving moral turpitude, including common burglary, receipt of stolen property, forgery, or embezzlement. *See* Cal. Gov't Code § 7282.5 (Jan. 1, 2014). The only individuals with convictions for Section 1226(c)(1) Offenses who are potentially protected by the TRUST Act are those with convictions for misdemeanor possession of a controlled substance and minor crimes involving moral turpitude, such as petty theft, which are individuals for whom the Government itself has a stated policy not to issue detainers. *See* John Morton, Director, U.S. Immigrations and Customs Enforcement, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal State, Local, and Tribal Criminal Justice Systems (Dec. 21, 2012) ("Morton Mem."), http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf. Additionally, despite the TRUST Act, the Government is still notified whenever any individual is arrested and their fingerprints or other identifying data is submitted to the "Secure Communities" database. The submission of identifying information to the Secure Communities database is common practice across the country, regardless of an individual's immigration status. Counties like Santa Clara have asked to opt-out of Secure Communities notification feature, but have been denied. *See* http://www.sccgov.org/sites/opa/nr/Pages/County-of-Santa-Clara-Denied-Opt-Out-of-Immigration-Enforcement-Program.aspx. Through that program, the fingerprints of all individuals booked into state prisons or local jails are automatically checked against federal immigration databases. *See* Statement of Janet Napolitano, DHS Secretary, before House Judiciary Committee, Department of Homeland Security Oversight, 2011 WLNR 24789661 (Oct. 26, 2011); *see also* www.ice.gov/secure_communities.

claims for release on bond and a strong incentive to appear for their proceedings.

In fact, it is precisely those individuals who have been returned to the community since their release from the criminal justice system who are most likely to have accumulated the equities that may entitle them to forms of discretionary immigration relief, and who thus have a greater incentive to appear for proceedings. *See United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) ("as a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk").[16] It is inconsistent with the statutory purpose and unreasonable to read 1226(c) to "sweep in individuals who have been living peacefully in their communities for many years." *Snegirev v. Asher*, 2013 WL 942607, at *3 (W.D. Wash. Mar. 11, 2013).[17]

Further, the Government's argument amounts to the absurd proposition that while Section 1226(c) imposes mandatory detention, the Government has complete discretion as to when to act. *See* Mot. at 27 (discussing *Gutierrez*). But statutes must be read in a way that avoids absurd results. *United States v. Granderson*, 511 U.S. 39, 78 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); *Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (Justice Scalia, dissenting) ("[i]f possible, we should avoid construing the statute in a way that produces such absurd results"); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope").[18] Assuming *arguendo* that Section 1226(c)'s "when…released" language confers a grant of authority to the Government, the Government's interpretation of Section 1226(c) effectively renders Congress's mandatory command to the Attorney General—e.g., that he "shall take into custody"—entirely optional.

The Government's argument that *Rojas* "harmonize[s]" Section 1226(c) with other

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[16] These same individuals are more likely to have built up the community and family ties that mitigate concerns regarding danger and flight risk.

[17] For example, proposed class members may seek asylum, withholding, or Convention Against Torture relief; discretionary 212(c) and 212(h) waivers; possible adjustment to lawful permanent residence; U visas for victims of violent crimes; and other forms of relief. See 8 U.S.C. §§ 1101(a)(15)(U), 1182(h), 1182(c) (1996), 1231(b)(3), 1255(m); 8 C.F.R. § 1208.18.

[18] Even the Fourth Circuit in *Hosh* acknowledged that Section 1226 imposes some immediacy requirement, it just came to the wrong conclusion as to how that requirement should affect the construction of Section 1226's narrow exception to the general framework created by Section 1226(a).

provisions in the INA because "none of them places 'importance on the timing of an alien's being taken into custody' by ICE," Mot. at 19, is similarly unconvincing. As the First Circuit in *Saysana* observed, Section 1226(c)'s implementation was deferred for two years, during which time the TPCR governed detention; under the TPCR, an immigration judge could set bond for an individual after an individualized hearing. 590 F.3d at 10 n.2. Under the framework of the TPCR, which as passed at the same time as Section 1226(c), timing of convictions undoubtedly mattered. Thus,[19]

3. The Government's appeal to two inapplicable canons of construction does not save their practice from violating Section 1226.

Citing two canons of construction inapplicable to this case, the Government argues that Plaintiffs' proposed interpretation of Section 1226(c) cannot prevail. However, the Government is incorrect on both fronts.

a. Plaintiffs seek no expansion of Section 1226(c)(2)'s exceptions

The Government first argues that the Court cannot construe Section 1226(c) to permit the release of criminal noncitizens except for those explicitly subject to Section 1226(c)(2)'s exception for witness-protection purposes. Mot. at 25. But this argument misses the point. Plaintiffs seek a declaratory judgment that neither they nor their proposed class members fall under Section 1226(c) at all because they do not fall under the class of individuals detained "when released" from criminal custody for a Section 1226(c)(1) offense. *See* Mot. for Prelim. Inj. at 7. As Plaintiffs have consistently argued, the Government's authority to detain them and their proposed class members arises from Section 1226(a). *See* Mot. for Prelim. Inj. at 8-21.

Section 1226(a) plainly does not constitute an "exception" to Section 1226(c). Rather, precisely the opposite is true: the statutory structure Congress created by enacting Section 1226 contemplates a broad framework of discretionary release under Section 1226(a), with Section 1226(c) to be applied in narrow circumstances as the exception to that rule. *Saysana*, 90 F.3d at

[19] The Government also argues that Rojas "comports with the overall statutory" by citing *Khodr v. Adduci*, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010). But *Khodr* ultimately supports Plaintiffs' statutory interpretation: that "the phrase 'when the alien is released' clearly and unambiguously requires that the Government take an individual into custody immediately upon the alien's release from criminal custody." Id. at 778 (citing Section 1226(c)). The only other authority that the Government cites in support of its argument is *Rojas* itself. This argument is purely circular.

16. The Ninth Circuit has recognized that much, holding that where the Government's prolonged application of mandatory detention, the Ninth Circuit has held that detention becomes governed by Section 1226(a), not Section 1226(c). *E.g.*, *Rodriguez II*, 715 F.3d 1127 (9th Cir. 2013); *Casas-Castrillon v. Dept. of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008). The Ninth Circuit cannot be said to have created an exception to Section 1226(c) in *Rodriguez II* or in *Casas-Castrillon* by holding that after a certain period of time, detention authority shifts to Section 1226(a). Any argument to the contrary by the Government is clearly foreclosed by this precedent.

b. The "Loss-of-authority" line of cases is inapplicable to this case, because the Government does not lose authority to detain individuals under Plaintiffs' proposed construction of Section 1226(c).

The Government next argues that even if Section 1226(c) requires ICE to detain noncitizens immediately upon their release from custody for a Section 1226(c)(1) Offense, its failure to do so does not result in a loss of its authority to impose mandatory detention on individuals. Mot. at 26-29. However, the loss-of-authority cases it cites do not apply here.

First, the Government cites a line of inapposite cases, primarily stemming from administrative claims, applying a "better late than never" principle. Mot. at 26-27 (citing cases). However, these are administrative cases that do not implicate due process concerns, let alone an individual's fundamental liberty interest in being free from physical restraint. In *Brock v. Pierce County*, the Supreme Court held that a missed deadline for making final determination as to misuse of federal grant funds does not prevent later recovery of those misused funds. 486 U.S. 253, 260 (1986).[20] In *Barnhart v. Peabody*, the Supreme Court held that a missed deadline for assigning industry retiree benefits did not prevent a later award of those benefits. 537 U.S. 149, 170-71 (2003). In *Montana Sulphur & Chemical Co. v. U.S. E.P.A.*, the Ninth Circuit held that the EPA was authorized to promulgate federal implementation plan after a two-year statutory deadline imposed by the Clean Air Act. 666 F.3d 1174, 1190 (9th Cir. 2012). In *Dolan v. United*

[20] That Congress knew of *Brock* does nothing to achieve clarity here: so too did Congress know of the Due Process Clause, the canon of constitutional avoidance, and that courts would interpret Section 1226 to avoid absurd results.

States, the Supreme Court held that a sentencing court that missed the Mandatory Victims Restitution Act's (MVRA's) 90-day deadline for district court to make final determination of victim's losses and impose restitution nonetheless retains the power to order restitution, at least where the court makes clear prior to the deadline's expiration that it would order restitution, leaving open for more than 90 days only the amount. 560 U.S. 605 (2010). None of these cases dealt with due process. Moreover, in none of these cases did the parties dispute that affected individuals were in a substantive class of individuals described as subject to government action. These cases simply address different issues than the one at hand.

Second, the Government invokes *Sylvain*, *Hosh*, and *Gutierrez* – cases which apply the Supreme Court's rationale in *Montalvo-Murillo* to their interpretation of Section 1226. In *Montalvo-Murillo*, the Supreme Court addressed whether the government entirely lost its authority to seek pretrial detention of an individual pending the individual's criminal trial if it did not request a hearing upon the person's first appearance before the court, as required by the Bail Reform Act of 1984 then effective. 495 U.S. at 713-14 (discussing 18 U.S.C. § 3142(e), (f) (West 1990)). Because the government did not timely comply with the statute's timing requirement, the district court ordered the defendant's release from custody as the appropriate remedy, 713 F.Supp. 1407, 1414-15 (D.N.M. 1989), and the Tenth Circuit affirmed. 876 F.2d 826, 832 (10th Cir. 1989). The Supreme Court reversed, holding that the government's "failure to comply with the first appearance requirement does not defeat the Government's authority ***to seek detention*** of the person charged." *Montalvo-Murillo*, 495 U.S. at 717 (emphasis added).

But that "critical component" of "essential governmental power at issue" in the loss-of-authority descending from *Montalvo-Murillo* does not exist in the context of Section 1226. In this case, even assuming both of Plaintiffs' claims are resolved in their favor, the Government retains its authority to detain non-citizens during the pendency of their removal proceedings under Section 1226(a).[21] *Gordon v. Johnson*, --- F.Supp.2d ----, 2013 WL 6905352, at *10 (D. Mass.

[21] Note that Plaintiffs do not concede, on their own behalf, or on behalf of members of their proposed class, that they are properly detained. For purposes of this action, however, Plaintiffs submit that their detention is governed by Section 1226(a) which permits them a bond hearing, not Section 1226(c).

Dec. 31, 2013); *Valdez v. Terry*, 874 F.Supp.2d 1262, 1266 (D.N.M. 2012); *Nabi v. Terry*, 934 F.Supp.2d 1245, 1250 (D.N.M. 2012); *Castillo v. ICE Field Office Dir.*, 907 F.Supp.2d 1235, 1239 (W.D.Wash.2012) ("As the *Hosh* court acknowledged, even if this Court finds that § [1226](c) is not applicable, "the Government would retain the ability to detain criminal aliens after a bond hearing."); *see also Castaneda v. Souza*, --- F.Supp.2d ----, 2013 WL 3353747, at *9-*11 (D. Mass. July 3, 2013) ("[S]ection 1226(c) … requires their immediate detention upon completion of their criminal sentence. If members of this group do return to the community, however, then the calculus must change."). Accordingly, Plaintiffs' requested relief has no impact on the Government's authority to detain them.

Third, a statutory right to a bond hearing does not constitute a "windfall," nor does it constitute a "sanction" on the public—it is precisely what the statute envisions. "[T]his case is about providing due process to an individual, not taking away a benefit afforded the government." *Castillo*, 907 F.Supp.2d at 1235. Indeed, due process concerns with the Government's interpretation of Section 1226(c) distinguishes this case from *Montalvo-Murillo* and *Dolan*.[22]

Because Section 1226(c) is clear and *Rojas* does not present a plausible construction of Section 1226(c), the Court need not reach the Plaintiffs' due process claims. *DeBartolo*; *Catholic Bishops*.

B. The Government's application of *Matter of Rojas* violates the Due Process Clause.

"It is well-settled that noncitizens are persons entitled to the protection of the Due Process Clause of the Fifth Amendment. It applies regardless of whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* at 693 (internal citations and quotations omitted). "While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values." *Rodriguez II*, 715 F.3d at 1146. In *Mathews v. Eldridge*, the Supreme Court created a three-part balancing test weighing individual interests

[22] The phrase the "Due Process Clause" never entered the vocabulary of the *Hosh* and *Sylvain* decisions. In *Montalvo-Murillo*, only the dissent discusses it. 495 U.S. at 723-730. In *Gutierrez*, despite an oblique reference to the "vital liberty interest" vitiated by its opinion, the court never actually discusses the Due Process implications of a broader reading of Section 1226(c). 2013 WL 27059 at *8.

against the increased burden of additional procedure to determine the amount of process due. 424 U.S. 319 (1976). Under the *Mathews* test, a court should weigh three factors: (1) the type of individual interest at stake; (2) the risk of erroneous deprivation of the interest if additional safeguards are not implemented; and (3) the costs and administrative burden on the government of providing additional process. *Id.* at 321.[23]

The Government argues that it lacks the necessary resources to take individuals into immigration custody immediately after criminal custody. But the Government's inability to abide by the language of 8 Section 1226(c) does not dissolve an individual's right to due process. In the present case, the individual interest at stake is the most fundamental right—to be free from arbitrary detention. *See Rodriguez II*, 715 F.3d at 1134 (quoting *Zadvydas*, 533 U.S. 678, 690, 121 (2001)). The Government's categorical treatment of individuals with a gap between their state and local custody and their detention by ICE creates a high risk of the erroneous deprivation of a basic, fundamental right. *See id.* Such deprivation easily could be avoided by affording Plaintiffs an individualized bond hearing to determine whether an individual is a flight risk or threat to the community. The additional burden of an individualized bond hearing is minimal at best compared to the right at stake. As the Government has already noted, an individualized hearing is already afforded to all individuals subject to 1226(c) after six months under *Rodriguez*. *See* Def.'s Resp. to Pets. & Mot. To Dismiss at 9, fn. 10 (quoting *Rodriguez v. Holder*, No. 07-3239, 2013 WL 5229795, at *2 (C.D. Cal. Aug. 6, 2013). Moving that hearing up—which is all the Plaintiffs ask—would save a potentially large number of individuals from an unnecessary period of imprisonment.

V. CONCLUSION

For the foregoing reasons, the Plaintiffs request that the Court DENY the Government's Motion to Dismiss.

[23] The Plaintiffs' Due Process claims present inherently factual questions that should not be decided on a motion to dismiss. At this stage, all reasonable inferences must be drawn in favor of the Plaintiffs. *Johnson*, 207 F.3d at 653.

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