No. 14-16326, No. 14-16779

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEH JOHNSON, Secretary of Homeland Security;
ERIC H. HOLDER, JR., U.S. Attorney General;
TIMOTHY S. AITKEN, Immigration and Customs Enforcement ("ICE") San Francisco Field Office Director;
GREGORY J. ARCHAMBEAULT, ICE San Diego Field Office Director;
and DAVID A. MARIN, ICE Acting Los Angeles Field Office Director,

Defendants-Appellants,

v.

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

Plaintiffs-Appellees.

Consolidated Appeals from Final Orders of the
United States District Court for the Northern District of California
No. 4:13-cv-05754-YGR

CONSOLIDATED OPENING BRIEF OF DEFENDANTS-APPELLANTS

JOYCE R. BRANDA
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

ELIZABETH J. STEVENS
Assistant Director

TROY D. LIGGETT
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4765

Attorneys for Defendants-Appellants

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JURISDICTIONAL STATEMENT

This is a consolidated appeal of two orders that imposed a preliminary injunction in a class action involving immigration detention. On December 12, 2013, Plaintiffs-Appellees Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno filed a class action complaint along with individual petitions for writs of habeas corpus in the U.S. District Court for the Northern District of California. The district court had jurisdiction over the class action complaint under 28 U.S.C. § 1331 for claims challenging the interpretation of 8 U.S.C. § 1226(c) and for claims arising under the Constitution. The district court also had jurisdiction under 28 U.S.C. § 1331 because the claims arose under 28 U.S.C. § 2241, which authorizes district courts to grant petitions for a writ of habeas corpus within their respective jurisdictions.

On May 15, 2014, the district court granted Plaintiffs-Appellees' motion for a preliminary injunction and motion to certify class, certifying a class of immigration detainees within the state of California and declaring that the class members were entitled to individualized bond hearings. In the same order, the district court also denied the motion to dismiss filed by Defendants-Appellants Jeh Johnson, Secretary of Homeland Security, et al. ("the Government").

On May 29, 2014, the Government filed a motion for clarification of the May 15, 2014, order. On July 11, 2014, the district court denied the motion for

clarification, and on July 21, 2014, the district court issued an order implementing the preliminary injunction.

On July 17, 2014, the Government timely filed a Notice of Appeal of the district court's May 15, 2015, order granting the preliminary injunction and motion for class action, and denying the Government's motion to dismiss. On September 39, 2014, the Government timely filed a Notice of Appeal of the district court's July 11, 2014, order denying the motion for clarification.[1] On September 17, 2014, the Government timely filed a Notice of Appeal of the district court's July 21, 2014, order imposing the preliminary injunction.

On October 20, 2014, this Court *sua sponte* consolidated the three appeals and ordered a consolidated opening brief to be filed by January 5, 2015.[2] The Court has jurisdiction over the consolidated appeal under 28 U.S.C. § 1291.

[1] On January 5, 2015, the Government filed an unopposed motion to voluntarily dismiss the appeal of the July 11, 2014, order denying the motion for clarification. *See Preap v. Johnson*, No. 14-16709, Dkt. 13 (9th Cir. Jan. 5, 2015).

[2] This consolidated brief is filed only for the appeals of the May 15, 2014, order (No. 14-16326) and the July 21, 2014, order (No. 14-16779). *See supra* note 1.

STATEMENT OF THE ISSUES

1. Whether the Board of Immigration Appeals' precedent decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), interpreting 8 U.S.C. § 1226(c), which mandates the detention of certain criminal and terrorist aliens pending the conclusion of removal proceedings, as applying to aliens convicted of qualifying crimes irrespective of whether they were taken into immigration custody upon their release from criminal custody, is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983).

2. Even if 8 U.S.C. § 1226(c) unambiguously requires the Department of Homeland Security to detain an alien immediately following the alien's release from criminal custody, whether the Government may nonetheless hold such an alien who is not immediately taken into custody because Section 1226(c) commands that result and, under *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), and similar cases, the Government's failure to timely fulfill its duty does not deprive the Government of its power to act.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The Immigration and Nationality Act ("INA") grants the Department of Homeland Security ("DHS") the discretionary authority to take an alien into custody during the pendency of his removal proceedings. 8 U.S.C. § 1226(a). In certain circumstances, however, Congress mandated detention during removal proceedings. 8 U.S.C. § 1226(c). In 1996, Congress determined that prior laws had not been effective in ensuring that criminal aliens were removed, and criminal aliens who were not detained during the their removal proceedings posed a danger to the community because they often committed more crimes before they were removed. *See Demore v. Kim*, 538 U.S. 510, 518-20 (2003); S. Rep. No. 104-48 (1995). Accordingly, Congress decided that aliens removable due to certain serious crimes must be detained, without bond, during removal proceedings. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. 309, 586 (Sept. 30, 1996).

To fulfill this purpose, Congress enacted 8 U.S.C. § 1226(c), which provides that DHS "shall take into custody any alien who" is deportable or inadmissible because he committed certain crimes "when the alien is released," and DHS "may release" an alien who is subject to detention under this provision only in limited

circumstances not present here.[3] 8 U.S.C. § 1226(c). Specifically, Section 1226(c) provides:

> (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) ["Criminal and related grounds"] of this title,
> >
> > (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 firearm 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.

[3] Although some relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), transferred most immigration law enforcement functions from the Department of Justice to DHS, but the Department of Justice's Executive Office for Immigration Review retained its role in administering immigration courts and the Board. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

> (2) Release.
>
> The Attorney General may release an alien described in paragraph 1226(c)(1) only if the Attorney General decides . . . that release of the alien from custody is necessary [to protect a witness in a criminal matter, provided that other conditions are met].

8 U.S.C. § 1226(c).

If an alien is detained under Section 1226(c), but believes he does not fall within the mandatory detention provision, he may request a "*Joseph*" hearing before an immigration judge to determine whether he is inadmissible or deportable because of a qualifying offense, and therefore properly detained under Section 1226(c). *See Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999), *clarified*, *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999); *see also Demore*, 538 U.S. at 514 (recognizing that alien may challenge whether he falls within the scope of Section 1226(c) through a *Joseph* hearing).

In *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), the Board considered whether a criminal alien who has been convicted of a qualifying offense listed in paragraph 1226(c)(1) is exempt from mandatory detention under paragraph 1226(c)(2) if DHS did not take him into custody immediately upon his release from criminal custody. The Board concluded that Section 1226(c) requires mandatory detention in those circumstances. The Board construed paragraph 1226(c)(2)'s reference to "an alien described in paragraph (1)" to refer "to an alien

described by one of four subparagraphs, (A) through (D)." *Id*. at 121. The language "when the alien is released" thus does not narrow the scope of mandatory detention under Section 1226(c); it identifies the point when DHS's duty to take a criminal alien into custody may arise. *See id*. at 120. The Board recognized that the statutory text is ambiguous on this point, but determined that the better reading is that "the statutory language imposes[s] a duty" on DHS "to assume the custody of certain aliens, and specifies the point in time at which that duty arises." *Id.* at 120-21. Thus, the Board "read the phrase 'when the alien is released' . . . as modifying the command that the '[DHS] shall take into custody' certain criminal aliens by specifying that it be done 'when the alien is released' from criminal incarceration." *Id*.

The Board explained that this interpretation is consistent with the statute's purposes, because the timing of the alien's release from criminal custody has no impact on whether the alien is removable or inadmissible. *See id.* at 121-22 ("[T]here is no connection in the Act between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and the applicability of any of the criminal charges of removability."). Congress's concern was expediting "the removal of criminal aliens in general," not only those aliens who were immediately taken into immigration custody. *Id*. at 122. The Board also noted that its view was consistent with the prior version of the statute,

which prohibited the release of criminal aliens regardless of when those aliens came into immigration custody. *Id.* at 122-23 (discussing former 8 U.S.C. § 1252(a)(2)(B)). Finally, the Board recognized that it would be impractical to expect that immigration officials could always take qualifying criminal aliens into custody immediately upon the expiration of their criminal sentences. *Id*. at 124.

II. FACTS AND PROCEEDINGS BELOW

A. Plaintiffs' Detention by the Immigration Authorities

1. Plaintiff Preap

Plaintiff-Appellee Mony Preap is a native of Cambodia and lawful permanent resident. (ER 016.) In 2006, Preap was convicted of two counts of Possession of Marijuana in violation of California Health and Safety Code § 11357(a) and sentenced to time served. (ER 016.) On September 11, 2013, immediately upon his release from incarceration for another conviction (involving battery on his spouse), immigration officers arrested and charged Preap with being removable from the United States under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance offense. (ER 016-017.) That same day, DHS detained Preap without a bond hearing under 8 U.S.C. § 1226(c)(1)(B) based on his 2006 controlled substance convictions. (ER 017.) An immigration judge reviewed Preap's detention and found that he was subject to mandatory detention under Section 1226(c). (ER 017.) On October 7, 2013, the immigration judge

found Preap removable as charged, and on December 17, 2013, the immigration judge granted him cancellation of removal. (ER 017.) Preap was detained by U.S. Immigration and Custom Enforcement ("ICE") at the Contra Costa West County Detention Facility in Richmond, California, until he was granted relief from removal. (Return & Mot. to Dismiss, ECF 24, Ex. 29.)

2. Plaintiff Padilla

Plaintiff-Appellee Eduardo Vega Padilla is a native and citizen of Mexico who entered the United States as a lawful permanent resident. (ER 017.) Padilla was twice convicted of Possession of a Controlled Substance (methamphetamine), in violation of California Health and Safety Code § 11377(a). (ER 017-018.) After he failed to abide by a diversion order on the first conviction, Padilla was sentenced to thirty days of imprisonment. (ECF 24, Ex. 3.) On January 14, 2002, while still on probation for the 2000 possession offense, Padilla was convicted of being a Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1). (ER 018.) He was sentenced to 180 days of imprisonment for the firearm conviction and an additional 185 days for violating probation from his 2000 conviction. (ER 018.)

On August 15, 2013, DHS charged Padilla with removability based on his controlled substance convictions and his firearm conviction. (ER 018.) That same day, ICE arrested Padilla in Sacramento, California, and detained him under 8

U.S.C. § 1226(c) at the Sacramento County Jail, and on October 22, 2013, transferred Padilla to the Rio Cosumnes Correctional Center in Elk Grove, California. (ECF 24, Exs. 6, 7, 8.) Padilla requested a custody redetermination hearing before an immigration judge, and on October 15, 2013, the immigration judge found Padilla lawfully detained under 8 U.S.C. § 1226(c). (ER 018.) On December 3, 2013, an immigration judge ordered Padilla removed from the United States under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of a controlled substance offense, and found him ineligible for any relief from removal. (ER 018.) On December 26, 2013, he appealed the removal order to the Board.[4] (ER 018.) On March 7, 2014, Padilla received a bond hearing in accordance with *Rodriguez v. Robbins* (*Rodriguez II*), 715 F.3d 1127 (9th Cir. 2013),[5] and the immigration judge granted him release on $1500 bond. (ER 018.) ICE released Padilla when he posted bond after the hearing. (ER 018.)

[4] In the latest briefing to the district court, Padilla's appeal was pending with the Board. (ER 018.) On March 6, 2014, the Board affirmed the removal order and dismissed the appeal. Padilla then asked the Board to reopen removal proceedings, submitting evidence that his firearm conviction was vacated and that he would be eligible for cancellation of removal. On April 14, 2014, the Board granted Padilla's motion to reopen and remanded the case to the immigration court, which scheduled a hearing on its non-detained docket for July 14, 2016.

[5] *Rodriguez II* limits custody under Section 1226(c) to six months of detention before the alien must receive a bond hearing under Section 1226(a), at which the burden is heightened to "clear and convincing" and shifted to the Government. 715 F.3d at 1131.

3. Plaintiff Magdaleno

Plaintiff-Appellee Juan Lozano Magdaleno is a native and citizen of Mexico who entered the United States as a lawful permanent resident. (ER 019.) On October 13, 2000, Magdaleno was convicted as a Felon in Possession of a Firearm in violation of California Penal Code § 12021(a)(1), and sentenced to 147 days of confinement and three years of probation. (ER 019.) On May 21, 2003, the California Superior Court revoked Magdaleno's probation for the 2000 firearm conviction and sentenced Magdaleno to sixteen months of incarceration. (ECF 24, Ex. 17.) On June 16, 2007, Magdaleno was convicted of Possession of a Controlled Substance (methamphetamine), a felony, in violation of California Health & Safety Code § 11377(a), and sentenced to six months of incarceration. (ER 019.)

On July 17, 2013, ICE arrested Magdaleno at his residence and charged him with removal under 8 U.S.C. § 1227(a)(2)(c) as an alien convicted of a firearms offense, and under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled substance offense. (ECF 24, Exs. 19, 20, 22.) ICE detained Magdaleno at Contra Costa West County Detention Center under 8 U.S.C. § 1226(c)(1)(A) based on his 2007 conviction for possession of a controlled substance. (ECF 24, Ex. 21.) On September 17, 2013, Magdaleno conceded the charges of removability, and the immigration judge found him removable by clear and convincing evidence. (ECF

24, Ex. 24.) On November 29, 2013, the immigration judge ordered Magdaleno removed and denied his application for relief from removal. (ECF 24, Ex. 24.) On December 26, 2013, Magdaleno appealed the removal order to the Board.[6] (ER 019.)

On December 12, 2013, the immigration judge found that Magdaleno was lawfully detained under 8 U.S.C. § 1226(c) and, thus, the immigration judge did not have jurisdiction to consider his request for a release on bond. (ER 020.) Magdaleno received a *Rodriguez* hearing before an immigration judge on February 14, 2014, and was denied release on bond as a flight risk. (ER 020.)

B. Relevant District Court Proceedings and Briefing

On December 12, 2013, Plaintiffs filed a combined class action complaint and individual petitions for writs of habeas corpus in the U.S. District Court for the Northern District of California. (ER 001.) On December 16, 2013, Plaintiffs filed a motion to certify a class. (Mot. to Certify Class, ECF 8.) Plaintiffs sought to serve as representatives for a putative class of similarly situated aliens detained after release from criminal custody, but not immediately upon release from

[6] In the latest briefing to the district court, Magdaleno's appeal was pending with the Board. (ER 019.) The Board dismissed Magdaleno's appeal on July 14, 2014. On August 14, 2014, the Board remanded the case to allow Magdaleno to apply for relief from removal. On September 5, 2014, the immigration judge conducted a second *Rodriguez* bond hearing and granted Magdaleno bond. He posted bond and was released on September 8, 2014. The immigration court scheduled a hearing on its non-detained docket for May 7, 2015, on the remanded proceedings.

criminal custody. (ECF 8 at 7.) Plaintiffs' class complaint and petitions contained two causes of action: (1) a statutory violation claim alleging that DHS violated 8 U.S.C. § 1226(c) by imposing mandatory detention on aliens that DHS did not detain immediately upon release from criminal custody; and (2) a Due Process claim arising from the aliens' allegedly unlawful detention (ER 011-012.) To remedy the allegedly unlawful detention, Plaintiffs sought an order directing bond hearings for Plaintiffs and class members. (ER 013.)

On February 7, 2014, Plaintiffs also filed a motion for a preliminary injunction seeking immediate bond hearings. (Mot. for Prelim. Inj., ECF 23.) On the same day, the Government filed a motion to dismiss the complaint and individual habeas petitions. (Mot. to Dismiss, ECF 24.) The Government filed responses in opposition to the motion for class certification and preliminary injunction. (Resp. in Opp'n to Class Cert., ECF 25; Resp. in Opp'n to Prelim. Inj., ECF 32.) Plaintiffs filed a traverse and response in opposition to the Government's motion to dismiss. (Resp. in Opp'n, ECF 34.) The Government filed a reply to Plaintiffs' traverse and opposition, (Reply, ECF 36), and Plaintiffs filed a reply to the Government's responses in opposition to the motions for class certification, (Reply, ECF 27), and a preliminary injunction, (Reply, ECF 34).

On March 18, 2014, the district court held oral argument on the motions, and ordered supplemental briefing from the parties. (Minute Entry, ECF 40.) The

parties submitted supplemental briefing and a joint submission as ordered. (Defs.' Suppl. Br., ECF 45; Joint Submission, ECF 46; Pls.' Suppl. Br., ECF 47.)

On May 15, 2014, the district court granted Plaintiffs' motions for class certification and a preliminary injunction and denied the Government's motion to dismiss. (ER 014.) In the order, the district court instructed the parties to submit materials on the implementation of the preliminary injunction, (ER 044), which the parties did on May 22, 2014, (Pls.' Resp. to Order, ECF 49; Defs.' Resp. to Order, ECF 50.)

On May 29, 2014, the Government moved to clarify the district court's May 15, 2014, order and to stay the preliminary injunction pending the district court's resolution of the motion. (Mot. for Clarification & Stay, ECF 51.) Plaintiffs filed a response in opposition to the Government's clarification motion, (Resp., ECF 53), the Government filed a reply to the opposition, (Reply, ECF 56), and Plaintiffs filed a sur-reply to the Government's reply, (Sur-Reply, ECF 58). On June 24, 2014, the district court granted the Government's stay motion. (Order, ECF 57.) On July 11, 2014, the district court held a hearing on the clarification motion, and denied the motion at the hearing. (Order, ECF 59; Minute Entry, ECF 67; Transcript of Proceedings, ECF 64.) At the hearing, the district court also ordered the parties to submit a proposed order implementing the preliminary injunction. (ECF 64 at 38.)

On July 17, 2014, the parties submitted a proposed order in accordance with the court's instructions at the July 11, 2014, hearing. (Joint Submission, ECF 65.) On July 21, 2014, the district court entered the parties' proposed order and ordered the Government to implement the preliminary injunction. (ER 047.)

The Government submitted monthly status reports on the implementation of the preliminary injunction, listing the class members and relief provided to each. (Status Reports, ECF Nos. 73, 76, 82.) The Government certified that all class members received custody redeterminations before September 24, 2014, in accordance with the preliminary injunction. (ECF 82 at 2.)

C. District Court Orders on Appeal

The district court found that 8 U.S.C. § 1226(c) unambiguously requires ICE to detain criminal aliens immediately upon their release from criminal custody. (ER 015.) As a result, the district court held that *Chevron* principles did not require deference to the Board's interpretation of Section 1226(c) set forth in *Matter of Rojas*. (ER 032.)

The district court also found that the Government loses its authority to detain criminal aliens without a bond hearing if DHS does not detain the alien immediately upon release from criminal custody. (ER 034.) The district court reasoned that detention with a bond hearing is the general rule, and mandatory detention under Section 1226(c) is the exception. (ER 037.) Thus, when the an

alien is not detained immediately upon release from criminal custody, the alien no longer qualifies for mandatory detention under Section 1226(c)'s exception and must be provided a bond hearing under Section 1226(a).

The district court also certified a class consisting of the following:

> Individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense.

(ER 038, 044.)

At the hearing on the Government's motion for clarification, the district court ordered the parties to make a joint submission of a plan to implement the preliminary injunction. (ECF 64 at 8.) The district court outlined a series of parameters that the parties were to include in the proposal. (ECF 67 at 9-38.) The parties submitted a joint proposal with a proposed order implementing the preliminary injunction, (ECF 65), and the Court entered the parties' order on July 21, 2014, imposing the preliminary injunction and requiring the Government to submit monthly status reports until the preliminary injunction was fully implemented, (ER 047). On October 10, 2014, the Government certified that it had granted class members the relief set forth in the Court's order. (ECF 82.)

On July 17, 2014, the Government timely filed a Notice of Appeal of the district court's May 15, 2015, order granting the preliminary injunction and motion for class action, and denying the Government's motion to dismiss. (ER 045.) On September 17, 2014, the Government timely filed a Notice of Appeal of the district court's July 21, 2014, order imposing the preliminary injunction. (ER 051.) On October 20, 2014, this Court *sua sponte* consolidated the appeals.

SUMMARY OF THE ARGUMENT

A criminal or terrorist alien is not exempt from mandatory detention under 8 U.S.C. § 1226(c) simply because the Department of Homeland Security does not take him or her into custody immediately upon his or her relief from state criminal custody. Based on their convictions for qualifying offenses, criminal aliens such as Plaintiffs are subject to mandatory detention under Section 1226(c) pending the outcome of their removal proceedings. The district court erred in holding that Plaintiffs were exempt from mandatory detention under Section 1226(c) because DHS did not take them into immigration custody immediately upon their release from criminal custody. The Board and every circuit to have considered the issue have rejected such an "immediacy" requirement, and this Court should as well. First, Section 1226(c) is ambiguous, and the Board's interpretation of Section 1226(c) in *Matter of Rojas*, construing the statute to apply to criminal aliens regardless of the timing of their immigration detention, is entitled to *Chevron*

deference because it is a permissible interpretation of the statute. Indeed, given the statute's text and context, Congress's goal of mandating detention for all aliens who commit certain serious offenses, and the practical difficulties that flow from Plaintiffs' alternative interpretation, the Board's interpretation is the correct interpretation. Furthermore, even if Section 1226(c) required the Government to detain an alien immediately following his release, DHS's failure to do so would not deprive it of its power and obligation to act and thus would not exempt an alien from mandatory detention under paragraph 1226(c)(2).

ARGUMENT

I. STANDARD OF REVIEW

This appeal presents questions of law regarding the interpretation of 8 U.S.C. § 1226(c). The Court reviews such questions *de novo*. *See Calderon v. Prunty*, 59 F.3d 1005, 1008 (9th Cir. 1995).

The Board's interpretation of ambiguous provisions of the INA must be given substantial deference unless those interpretations are arbitrary, capricious, or manifestly contrary to the statute. *See Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 844); *accord Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (explaining that where a Court of Appeals confronts

questions implicating the Board's construction of a statute it administers, the court should apply principles of *Chevron* deference).

II. The Board's rejection of an "immediacy" requirement is entitled to *Chevron* deference.

The Board determined in *Matter of Rojas* that Section 1226(c) is ambiguous with respect to whether mandatory detention applies when a criminal or terrorist alien is not taken into immigration custody immediately following his release from criminal custody. The Board then considered the statute's text and context, the reasons Congress enacted the statute, and the impacts of the different possible interpretations of the statute on the effective administration of the immigration laws in accordance with Congress's mandate. As a result of this comprehensive analysis, the Board correctly concluded that Section 1226(c) should not be read to exempt criminal or terrorist aliens from mandatory detention if DHS does not take the qualifying alien into immigration custody at the time he is released from criminal custody.

Rather than defer to the Board's reasonable interpretation of statutory ambiguity, the district court found Section 1226(c) to unambiguously foreclose the Board's reading. (ER 032.) The district court also conducted its own analysis of how its interpretation of Section 1226(c) might further Congress's purposes. (ER 029.) That approach was in error. Section 1226(c) is ambiguous, and the district

court should have given weight to the Board's reasonable analysis of how its interpretation would further Congress's purposes, rather than substituting its own analysis of the effective administration of Congress's intentions.

A. Section 1226(c) is ambiguous.

Under *Chevron*, the Court must first consider "whether Congress has directly spoken to the precise question at issue," and whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. To determine congressional intent is "clear," a court must often undertake more than a cursory review of the statute's text, because [t]he meaning or ambiguity of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

In Section 1226(c), entitled "Detention of criminal aliens," Congress provided that aliens who commit certain serious offenses are subject to mandatory detention while they are in removal proceedings. Paragraph 1226(c)(1) provides that the Government "shall take into custody" specified aliens who qualify for detention under this provision because of criminal or terrorist activities, and paragraph 1226(c)(2) provides that the Government may not "release an alien described in paragraph (1)" except in one narrow circumstance – witness

protection – that is not applicable here. 8 U.S.C. § 1226(c). The statute evidences Congress's intent that all qualifying aliens be detained during removal proceedings to avoid the risk of their absconding or committing further crimes during the pendency of those proceedings. *See Demore*, 538 U.S. at 518-20.

As the Board acknowledged in *Matter of Rojas*, Section 1226(c) is ambiguous as to whether mandatory detention applies if DHS does not take an alien into custody "when the alien is released." On the one hand, the provision could require DHS to apprehend and detain a qualifying alien immediately upon release from criminal custody, or the alien must receive a bond hearing under Section 1226(a). On the other hand, the provision could mean that DHS's duty to take a qualifying alien into custody arises when the alien is released from criminal custody. *See Hosh*, 680 F.3d at 379-80. If DHS fails to detain the alien immediately upon release, the obligation to detain the criminal alien under paragraph 1226(c)(1) does not subside and, more importantly, paragraph 1226(c)(2)'s prohibition against releasing such criminal or terrorist aliens continues to apply, and the criminal or terrorist alien is not entitled to a bond hearing.

Paragraph 1226(c)(2) further contributes to this ambiguity. Paragraph 1226(c)(2) provides that DHS must detain "an alien described in paragraph (1)[,]" but it is not clear which portions of paragraph 1226(c)(1) "describe[]" the aliens

who must be detained. That is, aliens "described in" paragraph 1226(c)(1) could be the four classes of aliens enumerated in subparagraphs (A) through (D), or they could be aliens who qualify under the four enumerated classes *and* were taken into immigration custody immediately following their release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 121.

The district court therefore erred when it failed to recognize Section 1226(c)'s ambiguity, concluding instead that the "plain reading of the statute" requires immediate detention following release from criminal custody. (ER 028.) Under the district court's interpretation, if the Government does not detain a criminal or terrorist alien the moment he is released, the alien must be afforded a bond hearing under Section 1226(a). The district court incorrectly focused on the purported "inherent immediacy requirement" in the word "when." (ER 024.) But the term "when" – particularly as used in the phrase "when the alien is released" in Section 1226(c) – is open to a broader set of possible meanings than the district court allowed, and it is ambiguous whether the "when" clause narrows the set of aliens subject to mandatory detention under paragraph 1226(c)(2), or instead instructs DHS "when" its duty to detain set forth in paragraph 1226(c)(1) arises. The district court explained that "when" instructed DHS on when its duty arises – simultaneously with an alien's release – and then employed DHS's failure to

simultaneously detain aliens to describe which criminal or terrorist aliens are not subject to mandatory detention. (ER 025.)

As the Fourth Circuit recognized, "'when' in section 1226(c) can be read on one hand, to refer to 'action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun.'" *Hosh*, 680 F.3d at 379-80 (quoting *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007), which in turn cited *The Oxford English Dictionary*, (2d ed. 1989)). "On the other hand, 'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that . . . .'" *Id.* (citing *Free Merriam-Webster Dictionary*, on-line version, www.merriam-webster.com/dictionary). As the Fourth Circuit concluded, it is not clear which meaning Congress intended. *Id.*

Numerous dictionaries confirm that "when" can mean "at any time after" as well as "immediately upon." *See, e.g.*, *20 The Oxford English Dictionary* 209 (2d ed. 1989) (defining "when" in definition 8.a as "In the, or any, case or circumstances in which; sometimes nearly = if"); *The American Heritage Dictionary of the English Language* 1958 (4th ed. 2000) (defining "when" in definition 3 as "whenever"); *Webster's Third New International Dictionary* 2602 (3d ed. 1976) (defining "when" in entry 2, definition 2 as "in the event that; on condition that"). Likewise, the Supreme Court has long recognized that "when" can mean either "at any time after" or "immediately upon" depending on the

context. *United States v. Willings*, 8 U.S. 48, 55 (1807) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted."). This Court has also recognized, in the immigration context, that "when" could mean either "immediately" or "while." *See Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (citing dictionaries defining "when" as meaning "[a]t which time, on which occasion; and then"). These alternative definitions of "when" demonstrate that the statute is ambiguous. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (holding that a statute is ambiguous if its "plain terms admit of two or more reasonable ordinary usages"); *see also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions . . ., each making some sense under the statute, itself indicates that the statute is open to interpretation.").[7]

The district court also incorrectly concluded that Section 1226(c)'s structure supports the court's interpretation. (ER 025.) According to the district court,

[7] In *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014), a First Circuit panel rejected the Government's interpretation of "when . . . released" and did not defer to the Board, *id*. at 41-44 & n.8, but the First Circuit also squarely rejected the "immediacy" interpretation plaintiffs advance here, *id*. at 44. The panel emphasized that "[i]t would make little sense to interpret the statute to strictly require immediate detention in all cases, since that is an impossible task, as Congress recognized." *Id*. Accordingly, although the Government disagrees with *Castaneda*'s outcome, even *Castaneda* shows that the district court's interpretation of Section 1226(c) was wrong.

Section 1226(a) provides a general rule that "affords the Government both deference and discretion as to whether an individual is either detained pending removal proceedings or released on bond" and Section 1226(c) is an "an exception" within the "broader scheme" of immigration detention the statutory framework of Section 1226. (ER 025.) But characterizing mandatory detention as an exception says nothing about when that exception applies. The district court posits that Section 1226(c) is a "time-sensitive" directive that criminal or terrorist aliens must be taken into custody "at the time of release from state custody and not at any point in time thereafter." (ER 025.) But it is not logical to characterize mandatory detention as an exception for criminal or terrorist aliens due to their inherent increased flight risk and danger to the community, and then require the Government to provide a bond hearing if the Government fails to immediately detain the alien until after their release from criminal custody.

In fact, the structure of Section 1226(c) supports the Board's interpretation of the statute. Congress specifically enumerated the classes of qualifying aliens in subparagraphs (A) through (D) of paragraph 1226(c)(1). As the Third Circuit noted, the placement of the "when . . . released" clause outside the enumerated list of aliens to whom the section is intended to apply suggests that Congress intended the phrase "aliens described in paragraph (1)" to mean all aliens described in subparagraphs (A) through (D), and thus intended the "when . . . released"

language not to limit the scope of mandatory detention pursuant to paragraph 1226(c)(1) but instead to specify the point in time when the Government's duty to take the alien into custody arises under paragraph 1226(c)(1). *See Sylvain*, 714 F.3d at 159. Paragraph 1226(c)(1) does not "explicitly tie[] the government's authority to the time requirement" and "[a]s a result, the government retains authority . . . despite any delay." *Id.* As the Board explained, the language before and after those subparagraphs (A) through (D) ("The [DHS] shall take into custody an alien . . . when the alien is released . . . .") defines what the Government is supposed to do (take the qualifying aliens into custody); it does not describe which aliens qualify for mandatory detention under paragraph 1226(c)(2) once they have been taken into custody, whenever that may occur. *See Matter of Rojas*, 23 I. & N. Dec. at 120, 121, 126. At a minimum, the statute is ambiguous for this reason, and the district court should have deferred to the Board's reasonable construction of the statutory ambiguity.

The district court also found that the Board had reached an impermissible construction of the statute, which is an unwarranted jump to step two of *Chevron* analysis without first explicitly determining whether the statute was ambiguous. *See Chevron*, 467 U.S. at 844 (agency interpretation of a statute it is charged with administering must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."). The district court attempted to discredit

Matter of Rojas by implying that the Board looked to the incorrect part of the statute in determining whether 1226(c) was ambiguous. (ER 032.) The district court rejected the Board's determination that the "when . . . released" clause in paragraph 1226(c)(1) created an immediacy requirement but the phrase "an alien described in paragraph (1)" in paragraph 1226(c)(2) was ambiguous. (ER 033.) The district court opined that the statute must be read as a whole, but opted to decide the issue based only on the meaning of the "when . . . released" phrase in paragraph 1226(c)(1) without recognizing the ambiguity in the "an alien described in paragraph (1)" phrase in paragraph 1226(c)(2). (ER 033.) The two must be read together as integral parts of Section 1226(c).

The district court also recognized other courts that have agreed with its conclusion, (ER 028-029), but failed to cite any of the district courts that found Section 1226(c) to be ambiguous. *See, e.g.*, *Mora-Mendoza v. Godfrey*, No. 3:13-cv-01747, 2014 WL 326047 (D. Or. Jan. 29, 2014) ("Thus, after performing the textual analysis, I conclude both readings of "when . . . released" are plausible and the statute remains ambiguous as to the precise question at issue."); *Sanchez Gamino v. Holder*, 6 F. Supp. 3d. 1028, 1032-33 (N.D. Cal. 2013) (listing cases in recognition of the split in district court decisions on whether 1226(c) is ambiguous); *see also Romero v. Shanahan*, No. 14-cv-6631, 2014 WL 6982937 (S.D.N.Y. Dec. 10, 2014) ("Congress was not explicit in addressing whether the

mandatory detention provision applies only if an alien is detained immediately upon release from criminal custody."); *Clarke v. Phillips*, 17 F. Supp. 3d 254, 258-59 (W.D.N.Y. 2014) ("Short of engaging in an etymological analysis of the clause 'when the alien is released,' suffice to say that its ambiguity is confirmed by the divergent results reached by many of the district courts that have done so."). The divergent judicial views on whether the "when . . . released" clause is ambiguous also suggests the ambiguity of the statute. *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (recognizing that the disagreement among courts on the meaning of a phrase in a statute suggests ambiguity).

Thus, there are many reasons for this Court to find that the statute as a whole is ambiguous. Accordingly, the next question becomes whether the Board's interpretation of the statute in *Matter of Rojas* is entitled to *Chevron* deference. It is, because the Board's interpretation is not only a permissible interpretation, it is the correct one.

B. The Court should defer to the Board's permissible and reasonable interpretation of Section 1226(c) in *Matter of Rojas*.

Once a court has concluded that a statute is ambiguous, it must determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. An agency interpretation of a statute it is charged with administering must be "given controlling weight unless [it is]

arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Thus, the Court must defer to the agency's construction of the statute so long as that construction is reasonable. *See id.* Here, the Board's interpretation of Section 1226(c) is entirely reasonable; indeed, it is correct.

1. The text and context of Section 1226(c) support the Board's conclusion that the statute is ambiguous.

As the Board explained in *Matter of Rojas*, the more natural reading of Section 1226(c)'s text is that "when the alien is released" specifies the time at which the Government's duty to take an alien into custody arises, and not a limitation on the mandate in paragraph 1226(c)(2) that the Government may not release such criminal or terrorist aliens on bond. *Matter of Rojas*, 23 I. & N. Dec. at 121 ("[T]his statutory language imposed a duty on the Service to assume the custody of certain criminal aliens and specified the point in time at which that duty arises."). Paragraph 1226(c)(1) imposes a duty on DHS to take certain criminal or terrorist aliens into custody "when" they are released from non-DHS custody (if, at the time of release, they meet the description in subparagraphs (A) through (D)); and paragraph 1226(c)(2) provides that such criminal or terrorist aliens must be detained without bond while their removal proceedings are pending, with only one limited exception for witness-protection purposes that is not applicable here.

The "when . . . released" clause in the flush paragraph of paragraph 1226(c)(1) signifies that Congress did not want DHS to preempt state and federal law enforcement officials by trying to take criminal aliens into immigration custody before they completed their terms of criminal custody. Congress wanted DHS to take them into immigration custody once their criminal custody was complete. Congress also made clear that it did not want DHS to refrain from immigration detention because the "alien [was] released on parole, supervised release, or probation," or because "the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1). The term "when . . . released" in subparagraph 1226(c)(1) thus specifies the time at which DHS's duty to detain in subparagraph 1226(c)(1) may arise: at or after the time of the alien's release from non-immigration custody, regardless of whether the alien remains under court supervision or is subject to re-arrest.

The district court erroneously concluded that the Board's reading of Section 1226(c) "read that requirement out of the statute entirely." (ER 033.) To the contrary, the Board's interpretation comports with provisions in other parts of the INA. Congress directed immigration authorities not to take custody of a criminal alien "before the alien's release from incarceration." 8 U.S.C. § 1228(a)(3). The INA commands that the Government "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment."

8 U.S.C. § 1231(a)(4)(A). At the same time, Congress did not want DHS to delay immigration detention if an "alien [was] released on parole, supervised release, or probation" or because "the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1); *see also* 8 U.S.C. § 1231(a)(4)(A) ("Parole, supervised release, probation, or possibility of arrest of further imprisonment is not a reason to defer removal." The term "when" specifies the time at which DHS's duty to detain may arise: at or after the time of the alien's release from non-immigration custody, regardless of whether the alien remains under court supervision or is subject to re-arrest.

Reading "when" as designating a starting point for a duty to take an alien into custody in the first instance, rather than a point in time that imposes a limit on the mandatory detention of an alien who is in custody, is also consistent with legislative history suggesting that Congress intended mandatory detention to apply "whenever such an alien is released from imprisonment." House Conf. Report 104-828 at 210-11; *see also Webster's Third New International Dictionary* 2602 (1993) ("whenever" entry 1, definition 1: "at any or all times that"). Thus, the Board reasonably interpreted "when" to designate a starting point, and doing so gives meaning to the statute's "when . . . released" language.

The Board's reading is also the more natural way of reading the two paragraphs of the statute together. Paragraph 1226(c)(1) specifies that qualifying

aliens must be taken into custody pending the completion of their removal proceedings, and paragraph 1226(c)(2) provides that "an alien described in paragraph (1)" shall not be released except in one narrow circumstance that is inapplicable here. The Board reasonably concluded that "[a]n alien described in paragraph 1226(c)(1)" should be interpreted to refer to any alien who qualifies for mandatory detention because his removable offense falls into one of the four categories specified in subparagraphs (A) through (D). The language of these sections is descriptive (it identifies aliens who are deportable or inadmissible because they have committed certain crimes), and it is set off from the rest of the text in subparagraphs, to show that Congress intended the statute to cover these four categories of aliens. As the Board explained, one would not naturally understand the opening and concluding clauses in paragraph 1226(c)(1) to be part of the "description" of aliens subject to mandatory detention; instead, those clauses specify what actions DHS should take. *Matter of Rojas*, 23 I. & N. Dec. at 121. The "when . . . released" phrase "modif[ies] the command that the '[DHS] shall take into custody' certain criminal aliens;" it does not describe the aliens who shall not be released from detention under paragraph 1226(c)(2). *Id.*

Finally, the Board's reading of the statute is reasonable in the context of the INA as a whole. As the Board explained, "[t]here is no connection in the [INA] between the timing of an alien's release from criminal incarceration, the

assumption of custody over the alien . . ., and the applicability of any of the criminal charges of removability," and the INA "does not tie an alien's eligibility for any form of relief from removal to the timing of the alien's release from incarceration and the assumption of custody" by DHS. *Id.* at 122. Indeed, numerous provisions in the INA are directed at expediting the removal of criminal aliens, and they generally "cover criminal aliens regardless of when they were released from criminal confinement." *Id.* The Board also recognized that its view was consistent with the statute's history, because a prior version of the statute likewise contained a prohibition on release for criminal aliens that did not depend on when those aliens came into immigration custody. *Id.* at 122-23 (discussing former 8 U.S.C. § 1252(a)(2)(B)). As the Board explained, when an alien is released from criminal custody "is irrelevant for all other immigration purposes." *Id.* at 122. Thus, treating the "when . . . released" language as part of the "definition" of qualifying aliens, and therefore requiring immediate detention upon release from criminal custody, would not make sense in the broader context of the INA.

2. Congress's intent and purposes for Section 1226(c) support the Board's reasonable interpretation.

Matter of Rojas was also informed by the Board's understanding of Congress's intent and purposes in enacting Section 1226(c), and the Board's long

experience in administering the immigration laws. The Board recognized that reading Section 1226(c) to require a criminal alien to be taken into immigration custody immediately following release from criminal custody would thwart Congress's intent and purposes. Congress enacted this provision because it was concerned that criminal aliens were not being removed and were committing crimes and endangering the public while their removal proceedings were pending. *See Demore*, 538 U.S. at 518-19.

As the Supreme Court explained, "Congress's investigations showed . . . that the [Immigration and Naturalization Service] could not even identify most deportable aliens, much less locate them and remove them from the country," and "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Id.* at 518-19. "Congress also had before it evidence that one of the major causes of the INS's failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id*. at 519. When Section 1226(c) was enacted, the Government already had the discretion to detain criminal aliens pending the completion of their removal proceedings, but Congress determined that authority was insufficient and detention must be mandatory for criminal aliens. *Id*. at 518 (noting that bond hearings were often afforded to criminal aliens and "[o]nce

released, more than 20% of deportable criminal aliens failed to appear for their removal hearings").

The Board's interpretation of Section 1226(c) in *Matter of Rojas* furthers Congress's purposes with regard to the detention and removal of criminal aliens. When it enacted Section 1226(c), "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Matter of Rojas*, 23 I. & N. Dec. at 122. The Board explained that it would be "inconsistent with our understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by the [Government]." *Id.* at 124.

As the Fourth Circuit recognized, Congress wanted criminal aliens to be detained so that they would be removed and so that they could not endanger the public while their removal proceedings were pending, and those purposes apply both to those aliens who are detained upon release from criminal custody and to those who are detained at some later time.[8] In light of Congress's purposes in

[8] "We cannot deem it clear that Congress would, on one hand, be so concerned with criminal aliens committing further crimes, or failing to appear for their

enacting Section 1226(c), it is implausible "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." *Hosh*, 680 F.3d at 381 (emphasis in original).

The Board's interpretation of Section 1226(c) also avoids the disparate application of mandatory detention to aliens who commit the same removable offenses based on nothing more than when they were taken into immigration custody. As the Board explained, it would be "incongruous" for Congress to enact a new rule to create stricter detention standards, but under that same rule "permit the release of a subgroup of criminal aliens (based on the wholly fortuitous date of release from incarceration) under a more lenient standard." *Matter of Noble*, 21 I. & N. Dec. 672, 681 (BIA 1997); *see also Matter of Rojas*, 23 I. & N. Dec. at 124. The Fourth Circuit similarly concluded that if an alien is deportable or inadmissible because of his criminal conviction, he should not receive a windfall that would not be bestowed upon other aliens who committed precisely the same crime merely because he "was released from state custody and then got as far as

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removal proceedings, or both, that Congress would draft and pass the mandatory detention provision, but on the other hand, decide that if, for whatever reason, federal authorities did not detain the alien immediately upon release, then mandatory detention no longer applies." *Hosh*, 680 F.3d at 380 n.6.

the adjacent parking lot before being detained by federal authorities." *Hosh*, 680 F.3d at 380 n.6.

Tying Section 1226(c) to the timing of DHS detention means that whether a criminal alien is mandatorily detained turns on multiple factors, some of which are arbitrary and many of which are outside DHS's control. The Board's interpretation, by contrast, takes these arbitrary factors out of the equation.

Indeed, in enacting Section 1226(c), Congress recognized that it may be impractical to require the immediate detention of aliens due to local law enforcement officials' failure and/or unwillingness to identify these aliens or to notify the immigration authorities in advance of their release. *See* S. Rep. No. 104-48, at 1. The Board likewise recognized that it can be logistically difficult for DHS to assume custody of every removable alien immediately upon release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 124; *Matter of Adeniji*, 22 I. &. N. Dec. 1102, 1110 (BIA 1999). In light of the practical difficulties facing immigration officials, the Board's interpretation of Section 1226(c) provides a reasonable means of fulfilling Congress's goals of "keep[ing] dangerous aliens off the streets" and preventing them from absconding during removal proceedings. *Sylvain*, 714 F.3d at 160; *see also Demore*, 538 U.S. at 513 (stating that Congress was "justifiably concerned that deportable criminal aliens who are not detained

continue to engage in crime and fail to appear for their removal hearings in large numbers").

By contrast, under the district court's interpretation, aliens who indisputably are deportable or inadmissible because of crimes listed in subparagraphs (A) through (D) would be allowed to remain in the community, where they could commit further crimes or abscond pending removal, as Congress feared. "[A] dangerous alien would be eligible for a hearing – which could lead to his release – merely because an official missed the deadline. This reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *Sylvain*, 714 F. 3d at 160-61 ("[G]overnment officials are neither omniscient nor omnipotent. 'Assessing the situation in realistic and practical terms, it is inevitable that, despite the most diligent efforts of the Government and the courts, some errors in the application of the time requirements . . . will occur.'" (quoting *Montalvo-Murillo*, 495 U.S. at 720)).

Furthermore, contrary to the district court's suggestion that the Government's interpretation "would have the perverse effect of validating the Government's failure to comply," (ER 032), Congress did not decide to exempt some aliens from mandatory detention if the aliens were not detained immediately upon their release from criminal custody. Instead, Congress decided that all aliens who have committed certain criminal offenses are subject to mandatory detention

unless Congress specifically provided otherwise (as it did in paragraph 1226(c)(2)). Indeed, Congress recognized that certain criminal aliens face near "certain" removal, *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 325 (2001), and thus possess a strong incentive to flee after – but not necessarily before – immigration authorities turn their attention to them. *See Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996) (recognizing that a released alien "may not be so easy to find once his litigation options are exhausted"). Thus, Congress rejected the view that the more time an individual spends in a community, the lower his flight risk is likely to be. And the fact that Congress included some limited exceptions to mandatory detention in paragraph 1226(c)(2) – but not the exception fashioned by the district court – underscores that the Board's decision not to recognize additional exceptions is a reasonable one. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

The district court erroneously believed the Board's view of the statute would not further Congress's purposes because Congress mandated that an alien "must be taken into custody at the time of release from state custody and not at any point in time thereafter," and "[s]ection 1226 establish[es] that Congress's directive to the Government regarding apprehension of certain criminal aliens was both time-

sensitive and non-discretionary." (ER 025.) The district court, however, conflates two issues: (1) the Government's discretion to initiate removal proceedings against an alien at any time after he becomes removable, *see* 8 U.S.C. § 1252(g), and (2) the Government's obligation to detain a criminal alien without bond once it initiated removal proceedings against him. The first issue recognizes that the Government may not be aware of the alien's release or lack the resources to begin removal proceedings against aliens for days, months, or years after an alien's conviction and release from criminal custody. *See id.*; *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 487 (1999). The second issue recognizes that once the Government initiates removal proceedings against criminal aliens, it has an interest in their actual removal that mandatory detention helps achieve. *See Demore*, 538 U.S. at 518. Because the Government retains discretion over the initiation of removal proceedings, and because criminal aliens abscond at unacceptably high rates after – but not necessarily before – their removal proceedings begin, see *Demore*, 538 U.S. at 527-28, the public retains an interest in mandatory detention of criminal aliens during removal proceedings, even if the Government delays in initiating removal proceedings against them. The district court erred by substituting its judgment for that of the agency.

3. Practical issues support the Board's permissible and reasonable interpretation of Section 1226(c).

The district court's interpretation of the statute also raises serious practical difficulties. DHS may not know when a qualifying alien will be released from criminal custody or have the resources to appear at every place a qualifying alien is being released. *See Hosh*, 680 F.3d at 380 (opining that an alien might "not [be] immediately detained after release due to an administrative oversight or any other reason"). Requiring DHS to be present at the moment of release is unrealistic, and difficult line-drawing questions emerge. "Practically speaking, the government cannot always detain criminals at the precise moment of their release from state custody." *Castaneda v. Souza*, 769 F.3d 32, 44 (1st Cir. 2014). As the Board asked, "Would mandatory detention apply only if an alien were literally taken into custody 'immediately' upon release, or would there be a greater window of perhaps 1 minute, 1 hour, or 1 day?" *Matter of Rojas*, 23 I. & N. Dec. at 124.

Many factors outside the Government's control can delay apprehension of a criminal alien, and those factors should not thwart Congress's detention scheme. In enacting Section 1226(c), Congress recognized that it could not require immediate detention of criminal aliens because local law enforcement officials might refuse or fail to identify criminal aliens or to notify immigration authorities in advance of their release. *See* S. Rep. No. 104-48, at 1. "For one thing, such

immediate detention requires foreknowledge of an alien's impending release from custody, for which the government must depend on the cooperation of state and local authorities." *Castaneda*, 769 F.3d at 44. "This cooperation is often less than perfect." *Id.*

The Government is unable to track the criminal dockets of every criminal alien in the United States, and programs intended to assist the apprehension of criminal aliens are facing challenges. Trust Act legislation enacted by California, and under consideration by other states, reflects recent trends by state and local governments to refuse to honor immigration detainers or share information on aliens in criminal custody. *See* 2013 Cal. A.B. 4 (codified at Cal. Gov't Code §§ 7282-7282.5 (2014); *see also, e.g.*, H.R. 6659, Pub. Act No. 13-155 (Conn. 2013), Connecticut Trust Act, http://www.cga.ct.gov/2013/ACT/PA/2013PA-00155-R00HB-06659-PA.htm. Local governments in California and other states are increasingly disregarding DHS requests to share information on aliens in local custody, including their release dates. Cindy Carcamo, *More Jails Refuse to Hold Inmates for Federal Immigration Authorities*, Los Angeles Times, Oct. 4, 2014, available at http://www.latimes.com/nation/immigration/la-na-ff-immigration-holds-20141005-story.html; *see also, e.g.*, Santa Clara Co. Board of Supervisors Policy § 3.54, Civil Immigration Detainer Requests, adopted Oct. 18, 2011 (forbidding the sharing of information with DHS on any criminal aliens held in

their custody, including information on the aliens' release dates). The Board recognized the difficulties faced by the Government and, therefore, acted reasonably when it interpreted Section 1226(c) to permit mandatory detention even with a gap in custody, and the district court's interpretation would lead to arbitrary results.

Under the district court's view, aliens who are not taken into immigration custody for some period of time following their criminal sentences would not be subject to mandatory detention, even though they remain subject to removal and are no less dangerous or less likely to abscond. Moreover, when DHS does not take an alien immediately into mandatory detention following release from criminal custody, it is often for reasons beyond the agency's control. In other words, the fact that there can be a delay between an alien's release and his detention by DHS does not mean DHS is making arbitrary distinctions among criminal aliens.

The district court's decision reflects its own judgment that it is more important to exclude from mandatory detention those who have a gap between their release from criminal custody and their detention by DHS than it is to ensure the mandatory detention of all aliens who commit qualifying offenses, regardless of when they are detained. But the Board's rationale – which consistently requires detention during the pendency of removal proceedings of all aliens who are subject

to removal based on qualifying offenses – is not only a permissible interpretation, but the decision Congress made. In the face of statutory ambiguity, the Board's judgment is controlling. *Chevron* teaches that the court should not be allowed to substitute its judgment for that of the agency, even if the agency's interpretation is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. As long as the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

Here, the Board's interpretation is not only a permissible reading of the statute, but it is the better reading. As the First Circuit recognized, mandatory detention serves an important purpose, and requiring the immediate detention of criminal aliens in all cases "is an impossible task" that "would make little sense." *Castaneda*, 769 F.3d at 44. This Court therefore should defer to that interpretation under *Chevron*.

III. Even if Section 1226(c) contains a deadline for DHS to detain a criminal alien, the Government is not deprived of its detention authority if it misses the deadline.

Even if this Court declines to afford *Chevron* deference to the Board's interpretation of Section 1226(c), it should nonetheless reverse the district court's decision. As both the Third and Fourth Circuits have recognized, DHS's failure to take an alien into custody immediately does not preclude DHS from continuing to detain the alien, as paragraph 1226(c)(2) commands. *See Sylvain*, 714 F.3d at 157-58; *Hosh*, 680 F.3d at 381-82. This conclusion comports with the language of paragraph 1226(c)(2) and follows from a long line of Supreme Court cases establishing that statutes providing "that the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003), and that courts should avoid interpretations in which "public interests [are] prejudiced by the negligence of the officers or agents to whose care they are confided," *Montalvo-Murillo*, 495 U.S. at 717-18.

A. Statutes requiring the Government to act by a certain time generally do not take away the Government's ability to act after that time.

"Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches the chance to avoid their obligations just by dragging their

feet." Congress creates statutory deadlines to urge the Executive to take prompt action. *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009), *aff'd*, 560 U.S. 605 (2010). Statutes that provide guidance on how quickly a government official should discharge his duties "are usually construed as 'directory, whether or not worded in the imperative.'" *Ralpho v. Bell*, 569 F.2d 607, 627 (D.C. Cir. 1977) (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871)). "Directory" deadlines do not affect an agency's authority to act after the deadline has passed, as opposed to "jurisdictional" deadlines, beyond which action is proscribed. *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997); *see also Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1377 (Fed. Cir. 2002) (noting that directory "timing provisions are at best precatory").

The Supreme Court has explained on numerous occasions that statutes providing "that the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart*, 537 U.S. at 161. For example, the Supreme Court held that congressional deadlines to government agencies are generally interpreted not to "limit their power or render its exercise in disregard of the requisitions ineffectual." *French*, 80 U.S. at 511. Over time, this rule served as a primary tool of statutory construction. As the Supreme Court observed, "[i]t ignores reality to expect that the Government will be able to secure perfect performance from its hundreds of thousands of employees scattered

throughout the continent." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990) (internal quotation omitted). Taking these realities into consideration, the Supreme Court directs that statutory deadlines, when applied to the Government, are generally interpreted as advisory deadlines meant to prod the Government to expeditious action. *See Barnhart*, 537 U.S. at 158; *Dolan*, 571 F.3d at 1027. "Bureaucratic inaction – whether the result of inertia, oversight, or design – should not rob the public of statutory benefits." *Sylvain*, 714 F.3d at 158.

This default rule of statutory construction applies even when courts are interpreting statutes that contain unambiguous and explicit deadlines. For example, in *Brock v. Pierce Cnty.*, 476 U.S. 253 (1986), the Supreme Court considered the Comprehensive Employment and Training Act, which contained a provision requiring the Secretary of Labor to determine whether an allegation is substantiated within 120 days of receiving a complaint regarding misuse of funds disbursed under the Act. *Id*. at 254-55. Even though the deadline for action was clear and mandatory, the Supreme Court still found that "[t]he 120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority." *Id*. at 265. Thus, the Court found that the statute permitted the Secretary's actions even after the 120-day deadline had passed. *Id*.; *see also Gottlieb v. Pena*, 41 F.3d 730, 733-34 (D.C. Cir. 1994) (finding statute directing Secretary of Transportation "to ensure that a complete application for correction of

military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt" expressed hortatory deadline); *Hendrickson v. FDIC*, 113 F.3d 98, 101 (7th Cir. 1997) ("Standing alone, moreover, use of the word 'shall' in connection with a statutory timing requirement has not been sufficient to overcome the presumption that such a deadline implies no sanction for an agency's failure to heed it."); *compare Bustamante v. Napolitano*, 582 F.3d 403, 409 (2d Cir. 2009) ("Unlike the statute considered in *Brock*, the language . . . demonstrates that Congress intended [DHS's] failure to act on a naturalization application within 120 days of the initial interview to have a consequence . . . .").

B. Courts should not interpret a missed deadline as withdrawing executive authority.

The Supreme Court has also made clear that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993). The Court has taken this view because it did not want "every failure of an agency to observe a procedural requirement" to "void[] subsequent agency action, especially when important public rights are at stake." *Pierce Cnty.*, 476 U.S. at 260 (citations omitted). Mandatory language in a statute is not enough to overcome this

presumption. As the Supreme Court explained, "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart*, 537 U.S. at 161.

This and other courts of appeals have routinely followed the Supreme Court's guidance in this area. For example, in *Montana Sulphur and Chemical Company v. U.S. Environmental Protection Agency*, a statute required that an agency "shall" promulgate an implementation plan within two years. 666 F.3d 1174, 1190 (9th Cir. 2012) (citing 42 U.S.C. § 7410(c)). The Ninth Circuit held that in the absence of any congressional indication otherwise, the failure of the agency to act within two years did not deprive the agency of the authority to promulgate the implementation plan at a later date. *See id.* at 1191.

Similarly, in *Southwestern Pennsylvania Growth Alliance v. Browner*, the Third Circuit followed the Supreme Court's reasoning in *Pierce County*, noting that the absence of a sanction in the Clean Air Act for missing a deadline suggested "that Congress did not intend for the EPA to lose its power to act after 18 months." 121 F.3d 106, 114 (3d Cir. 1997). In *Cyberworld Enterprise Technologies, Inc. v. Napolitano*, the Third Circuit rejected the argument that the Secretary of Labor's failure to make a determination under 8 U.S.C. § 1182(n) within the required thirty-day deadline precluded the Secretary from imposing a fine under that provision. 602 F.3d 189, 196 (3d Cir. 2010). Noting that "a statutory time limit

does not divest an agency of jurisdiction unless the statute specifies a consequence for failure to comply with the provision," the Third Circuit determined that Congress's use of the word "shall" and a thirty-day deadline in 8 U.S.C. § 1182A(n) were insufficient to deprive the Secretary of statutory authority to act. *Id.* (citation and internal quotation marks omitted). The court applied this principle even though the Government's delay was lengthy. *Id.* at 199-200.

The Federal Circuit applied the same Supreme Court precedent to several deadlines in the Agent Orange Act. *Liesegang v. Secretary of Veterans Affairs*, 312 F.3d at 1371. The statute provided that the Secretary of Veterans Affairs "shall issue proposed regulations" "not later than 60 days after making" a determination regarding a service-connected illness, 38 U.S.C. § 1116(c)(1)(A), and then gave the Secretary ninety more days to issue final regulations, 38 U.S.C. § 1116(c)(2). The Secretary missed both deadlines, the first by three days and the second by thirty days. 312 F.3d at 1371. The Federal Circuit rejected the plaintiff's pleas to treat these deadlines as jurisdictional and "[t]he price the agency must pay for its errors in timing." *Id.* at 1376. The Court cited the "well settled" rule that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Id.* (quoting *James Daniel Good Real Prop.*, 510 U.S. at 63).

C. DHS retains its ability to detain criminal aliens under Section 1226(c) even if it does not act by a statutory deadline.

Both the Third and Fourth Circuits have held, in accordance with this well-settled principle that an alien is still subject to mandatory detention under Section 1226(c) even if he is not taken into immigration custody immediately following his release from criminal custody. *See Hosh*, 680 F.3d at 382 ("The negligence of officers, agents, or other administrators, or any other natural circumstance or human error that would prevent federal authorities from complying with § 1226(c), cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate."); *Sylvain*, 714 F.3d at 161 (holding that "even if the statute calls for detention 'when the alien is released,' . . . nothing in the statute suggests that officials lose authority if they delay").

Both circuits recognized that the Supreme Court's decision in *Montalvo-Murillo* is particularly instructive with respect to Section 1226(c). *See Sylvain*, 714 F.3d at 158; *Hosh*, 680 F.3d at 382. In *Montalvo-Murillo*, the Supreme Court interpreted the Bail Reform Act of 1984, 18 U.S.C. § 3142, which allowed the Government to detain criminal defendants pending trial if they pose a risk of flight or a danger to others. 18 U.S.C. § 3142(a)-(f). The statute provides that before the Government may detain a defendant, a judicial officer "shall" hold a bond hearing "immediately upon the person's first appearance before the [] officer" to assess the

defendant's flight risk and danger. *Id.*; *see also* 18 U.S.C. § 3142(f)(2). Montalvo-Murillo did not receive a bond hearing at his first appearance, and instead received one a few days later. He argued that the delay stripped the Government of authority to detain him under the Act. The Supreme Court rejected this argument, holding that "a 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. The Court explained that "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Id.* Instead, the Court determined that its interpretation of the Act "must conform to the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 717-18 (citations and quotations omitted).

"The detention provision of the [Bail Reform Act] examined by the Court in *Montalvo-Murillo* is exceedingly similar to the INA's mandatory detention provision." *Gutierrez v. Holder*, 6 F. Supp. 3d 1035, 1042 (N.D. Cal. 2014). "Like the Bail Reform Act, the mandatory-detention statute allows the government to detain a person in the days leading up to a legal proceeding." *Sylvain*, 714 F.3d at 159. Under the Bail Reform Act, the Government must conduct a hearing

"immediately upon the person's first appearance," to determine whether the defendant poses a flight risk or a danger to the public. *Id*.; *see also* 18 U.S.C. § 3142(f)(2). Under Section 1226(c), for criminal aliens, the Government must take the alien into immigration custody "when . . . released," and the alien must have committed one of the crimes enumerated in the statute. *Sylvain,* 714 F.3d at 159; *see* 8 U.S.C. § 1226(c)(1). As the Third Circuit noted, "neither statute explicitly ties the government's authority to the time requirement" and so "the government retains authority under both statutes despite any delay." *Sylvain*, 714 F.3d at 159.

Further, like the Bail Reform Act, "section 1226(c) does not specify any consequence for the Government's failure to detain a criminal alien immediately upon release." *Hosh*, 680 F.3d at 382. As explained above, it would make no sense to read the provision to eliminate DHS's authority in cases where an alien who committed a qualifying offense was not identified or located by DHS" until after release from custody – a circumstances often beyond DHS's control. Therefore, "even if 'the duty is mandatory, the sanction for breach is not loss of all later powers to act.'" *Id.* (quoting *Montalvo-Murillo*, 495 U.S. at 718). Indeed, the principle that delay does not take away the Government's ability to act is "doubly persuasive in [this] setting" because the provision of the Bail Reform Act at issue in *Montalvo-Murillo* "was unquestionably written for the benefit of defendant-

arrestees," whereas "section 1226(c) was undeniably *not* written for the benefit of criminal aliens facing deportation." *Hosh*, 680 F.3d at 382-383. And as the Third Circuit recognized, the *Montalvo-Murillo* principle applies with special force because "an important public interest is [at] stake." *Sylvain*, 714 F.3d at 159. "Congress adopted the mandatory-detention statute against a backdrop of rising crime by deportable aliens," and it had before it studies establishing that "many aliens failed to show up at their deportation proceedings" and committed crimes while their removal proceedings were pending. *Id.*

In *Castaneda*, the First Circuit distinguished *Montalvo-Murillo* and held that criminal aliens are exempt from mandatory detention under Section 1226(c) if the Government does not take them into immigration custody within a "reasonable" time of their release from criminal custody. *Castaneda*, 769 F.3d at 47-49. As noted above, however, *Castaneda* squarely rejected the "immediacy" requirement, which plaintiffs press (and the district court accepted) here. *Castaneda*'s rationale further undercuts the "immediacy" requirement, as *Castaneda* construed the statute not to apply when detention did not start for a reasonable period of time because, in its view, "those who have resided in the community *for years* after release cannot reasonably be presumed either to be dangerous or flight risks." *Id*. at 47 (emphasis added). This rationale does not apply, however, when the delay is short. *Castaneda* addressed habeas petitions brought by two aliens who were free for

years before they were taken into immigration custody, *id.* at 36, but this case involves a class action suit on behalf of aliens who "were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense," no matter the delay, (ER 038).

As the Third and Fourth Circuits have both held, the Government's authority to impose mandatory detention under Section 1226(c) does not depend on compliance with any deadline imposed by the "when . . . released" phrase. *Sylvain*, 714 F.3d at 157; accord *Hosh*, 680 F.3d at 382 ("[E]ven if we assume that the statute commands federal authorities to detain criminal aliens at their exact moment of release from other custody, we still conclude that a criminal alien who is detained after that exact moment is not exempt from mandatory detention.") Thus, the Government does not lose the authority to mandatorily detain class members.

D. The district court erred by sanctioning the Government and denying it the authority to detain Plaintiffs under Section 1226(c).

Because Congress presumably was aware of this rule of statutory construction when it drafted Section 1226(c), and nonetheless chose not to specify a sanction for failure to take an alien into immigration custody immediately upon release from criminal custody, this Court should not prohibit DHS from fulfilling its duty to detain criminal aliens described in 8 U.S.C. § 1226(c)(1)(A) through (D)

during the pendency of their removal proceedings. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Congress's failure to specify any alternate rules that apply if the Government fails to detain an alien immediately after his release from non-immigration custody "is quite telling." *Shenango Inc. v. Apfel*, 307 F.3d 174, 194 (3d Cir. 2002); *see Sylvain*, 714 F.3d at 160 n.10 (noting that "Congress created mandatory detention in the wake of" Supreme Court decisions setting out the principle that the Government does not lose the authority to act when it fails to meet a statutory deadline).

It would be especially odd for courts to provide a bond hearing to criminal aliens as a sanction for the Government's failure to act when Congress itself expressly prohibited the release of such aliens in any circumstances except one, for witness-protection purposes, that is inapplicable here. *See TRW Inc.*, 534 U.S. at 28. Congress's choice indicates its intent to preserve DHS's authority under Section 1226(c), even when there are delays in apprehending criminal aliens.

Here, the district court reasoned that taking away the Government's ability to take criminal aliens into custody under Section 1226(c) is not a sanction because the Government may still detain them, subject to a bond hearing, under Section 1226(a). (ER 036.) But taking away the Government's mandatory detention

authority under paragraph 1226(c)(2) is precisely the type of sanction courts are loath to impose. *See Sylvain*, 714 F.3d at 157 (finding that the "text does not explicitly remove that authority" and under well-established law, courts "are loath to interpret a deadline as a bar on authority after the time has passed"). "[A]lthough the Government would retain the ability to detain criminal aliens after a bond hearing" under the district court's reading, "Congress intended those aliens to be mandatorily detained *without* a bond hearing." *Hosh*, 680 F.3d at 382. Congress's intent with respect to criminal aliens is clear, and "[t]he negligence of officers, agents, or other administrators, or any other natural circumstance or human error" that would prevent an alien from immediately being taken into immigration custody "cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate." *Id.*at 382.

That is especially true here because, as the Supreme Court explained, Congress recognized that "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society," but it nonetheless determined that that authority was insufficient to ensure that criminal aliens would be removed and would not commit more crimes in the meantime. *Demore*, 538 U.S. at 518-19; *see also id.* at 520 (noting that "one out of four criminal aliens

released on bond absconded prior to the completion of his removal proceedings"). Thus, Congress already rejected the district court's view that detention subject to a bond hearing under Section 1226(a) is an adequate alternative for the random class of criminal aliens that DHS did not detain immediately upon their release from criminal custody.

The district court also posited that providing a bond hearing to criminal aliens would not be a "windfall," because providing a bond hearing "*is* the general rule; the lack thereof pursuant to Section 1226(c) is the exception." (ER 037.) However, the rule for criminal aliens is no bond hearing, and providing a bond hearing would be an exception that Congress did not contemplate. Like the INA, the Bail Reform Act also provides an analogous, implicit consequence for compliance with the timing requirement – treatment of the pretrial detainee under one of the other prongs of Section 3124, such as conditional release, or release on personal recognizance. *Gutierrez*, 6 F. Supp. 3d at 1043. The Supreme Court was not persuaded that Congress intended to apply one of those other prongs to pretrial detainees when the Government failed to provide a timely bond hearing. *Id.*

The district court suggested that providing a bond hearing to some criminal aliens when they are first detained would follow this Court's holding in *Rodriguez II*, 715 F.3d at 1138, that criminal aliens must receive a bond hearing after six months of detention under Section 1226(c). (ER 037.) But this Court recognized

that the detention without a bond hearing is authorized so long as it is not prolonged, and for criminal aliens this means detention is authorized by Section 1226(c) for six months. *Rodriguez II*, 715 F.3d at 1139.

Finally, Congress took away the Government's discretion to provide criminal aliens with bond hearings to protect the public, and providing criminal aliens with bond hearings when the Government does not immediately detain them impinges on the public interest that Congress was trying to protect. Nothing in paragraph 1226(c)(2) precludes mandatory detention where DHS did not act when its duty arose assuming "when" represents such a deadline at all, which, for the reasons above, it does not. This Court should not create such a sanction.

"To be sure, immigration officials should act without delay," because "[t]he sooner they detain dangerous aliens, the safer the public will be." *Sylvain*, 714 F.3d at 159. But "despite the most diligent efforts of the Government," "some errors in the application of the time requirements . . . will occur," and when they do, courts should not "bestow upon [aliens] a windfall" and "visit upon the Government and the citizens a severe penalty" by taking away the Government's ability to detain aliens under Section 1226(c). *See Montalvo-Murillo*, 495 U.S. at 720. "Congress designed the statute to keep dangerous aliens off the streets," yet the district court's interpretation "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing – which could

lead to his release – merely because an official missed the deadline." *Sylvain*, 714 F.3d at 160. For this reason as well, the district court's decision should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs and class members were lawfully detained under the mandatory detention provisions of 8 U.S.C. § 1226(c), even though they were not taken into custody by DHS immediately upon their release from criminal custody. This Court should therefore reverse the district court's orders and permit the mandatory detention of Plaintiffs and similarly situated criminal aliens.

DATED: January 5, 2015

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

ELIZABETH J. STEVENS
Assistant Director, District Court Section
Office of Immigration Litigation

/s/ Troy D. Liggett
TROY D. LIGGETT
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4765
(202) 305-7000 (facsimile)
troy.liggett@usdoj.gov

ATTORNEYS FOR
DEFENDANTS-APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, and Circuit Rule 32-1, I certify that this Brief: (1) complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

I also certify that the text of the electronic brief is identical to the text of the paper copies filed with the Court. The electronic brief has been scanned for viruses with Microsoft Forefront Endpoint Protection, and no virus was detected.

Dated: January 5, 2015

/s/ Troy D. Liggett

TROY D. LIGGETT
Trial Attorney
District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice

ATTORNEY FOR
DEFENDANTS-APPELLANTS

STATEMENT OF RELATED CASES

In accordance with 9th Circuit Rule 28-2.6, Defendants-Appellants notify the Court of the following related case, currently pending before the Court, which raises the same issues as those raised in the instant appeal:

Khoury v. Asher, No. 14-35482 (9th Cir. docketed Jun. 5, 2014)

Dated: January 5, 2015

/s/ Troy D. Liggett

TROY D. LIGGETT
Trial Attorney
District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice

ATTORNEY FOR
DEFENDANTS-APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I filed the foregoing document and any exhibits and attachments thereto with the Clerk of the Court through the Court's ECF system and that the foregoing document will be served electronically upon registered participants identified on the Notice of Electronic Filing.

Dated: January 5, 2015

/s/ Troy D. Liggett

TROY D. LIGGETT
Trial Attorney
District Court Section
Office of Immigration Litigation
Civil Division
United States Department of Justice

ATTORNEY FOR
DEFENDANTS-APPELLANTS