No. 14-16326, No. 14-16779

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEH JOHNSON, Secretary of Homeland Security, et al.,

Defendants-Appellants,

v.

MONY PREAP, EDUARDO VEGA PADILLA, and JUAN MAGDALENO,

Plaintiffs-Appellees.

Consolidated Appeals from the United States District Court
Northern District of California
The Honorable Yvonne Gonzalez Rogers, Presiding
Case No. 4:13-cv-05754 YGR

RESPONSIVE BRIEF OF PLAINTIFFS-APPELLEES

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I. INTRODUCTION

This appeal presents a simple question: does a statute that calls for mandatory detention of noncitizens who have served criminal sentences "when released" mean what is says? Or does that language instead confer boundless discretion on the government to detain such noncitizens without a bond hearing or other process at any point in time, even decades after they have been released from state custody and are leading productive lives in their communities?[1] This is no theoretical exercise: the government plucked Eduardo Vega Padilla (eleven years), Mony Preap (seven years), and Juan Lozano Magdaleno (five years) from their communities and detained them without any explanation, let alone individualized determinations that they posed a danger to the community or were likely to flee law enforcement. Fortunately for the plaintiff class members, the statute's text and structure, Congress's intent, and basic decency all weigh in their favor, as the district court correctly found. This Court must do the same and find for Plaintiffs.

II. STATEMENT OF THE ISSUES

1. The named plaintiffs served their sentences and were released from criminal custody between five and eleven years before ICE took them into immigration detention. The Immigration and Nationality Act (the "INA") §

[1] For convenience, unless the context requires more specificity, the Secretary of the Department of Homeland Security ("DHS"), the Attorney General, and all other named defendants are the "government."

236(c), 8 U.S.C. § 1226(c), applies mandatory detention only to noncitizens who are detained "when [they are] released" from custody from a predicate offense. Was the district court correct in interpreting the statute to permit mandatory detention only as to those detainees the federal government in fact detains upon release from criminal custody, as opposed to years or decades later?

2. The loss-of-authority doctrine forgives the government's failure to abide by a statutory deadline when the alternative is to eliminate the government's ability to act at all to the detriment of the public. Did the district court correctly hold that the "loss of authority" doctrine is inapplicable to the challenged mandatory-detention scheme here because the noncitizens are not released but simply receive a hearing under INA § 236(a), 8 U.S.C. § 1226(a), in which the noncitizen must prove that he or she poses no flight risk or danger to an Immigration Judge with unreviewable, absolute authority?

III. STATEMENT OF THE FACTS AND THE CASE

A. Legal Background

1. Congress imposed mandatory detention for detainees who were seamlessly transferred following the conclusion of their jail or prison sentence.

After years of acknowledgement that the immigration system was flawed, Congress in 1996 created a framework for the detention and release of noncitizens in removal proceedings with Section 1226 of Title 8 of the United States Code, INA § 236 ("Section 1226"). *See* Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, Pub.L. No. 104-208, Div. C, § 303(b), 110 Stat. 3009-546, 3009-586 (1996) ("IIRIRA"). Under this framework, Congress gave the Department of Homeland Security ("DHS")[2] the discretionary authority to release most individuals on their own recognizance or on a bond while their removal cases were pending if DHS determines they do not pose bail risks or dangers to the community. 8 U.S.C. § 1226(a). If DHS decides not to release an individual or conditions release upon a bond amount the individual is unwilling or unable to pay, the individual may have the government's decision reviewed at a bond redetermination hearing. At that hearing, the individual has the opportunity to demonstrate that he should be released. 8 C.F.R. § 1236.1(c)(8).

Bond hearings take place in front of Immigration Judges ("IJ"). IJs are members of the executive branch, *see* 8 C.F.R. § 1003.10(a), and they may take into account a number of factors when deciding whether release on bond is appropriate in any particular situation. These factors include the seriousness of any criminal offense, the noncitizen's family and community ties, and the likelihood the noncitizen will appear at future hearings. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). The noncitizen bears the burden of proof at a bond

[2] Although the text of the statute refers to the "Attorney General," the Attorney General's detention authority under Section 1226 is now shared with the Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107- 296, § 441, 116 Stat. 2135, 2192 (2002).

hearing. 8 C.F.R. § 1236.1(c)(8); *see Guerra*, 24 I. & N. Dec. at 40 (holding noncitizen must demonstrate that he or she is not a threat to the national security, that his or her release would not pose a danger to property or persons, and that he or she is likely to appear for any future proceedings); *see also Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999).

Section 1226(c) creates a limited exception to the framework set up by Section 1226(a). Individuals taken into immigration detention "when [they are] released" from criminal custody for certain statutorily-enumerated offenses may ***not*** be considered for release—whether on a bond or otherwise. *See* 8 U.S.C. § 1226(c)(1) (listing offenses); *see also* 8 U.S.C. § 1226(a) ("***Except*** as provided in subsection (c) of this section [the government] may…) (emphasis added).

Section 1226(c) provides as follows:

> (1) Custody
>
> The Attorney General shall take into custody any alien who—
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of

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

(emphasis and square brackets added).[3] Detention under Section 1226(c) is commonly referred to as "mandatory detention."

Congress enacted Section 1226 against the backdrop of a wholesale failure by the federal government to identify or locate—much less effect the deportation of—noncitizens subject to removal. *Demore v. Kim*, 538 U.S. 510, 518 (2003). It

[3] Recognizing the drastic nature of detention that denies an individual the opportunity to present a case to a neutral arbiter for release, this Court has held that the government must provide bond hearings to individuals who have been detained under Section 1226(c) for six months or longer. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013).

structured Section 1226(c) to eliminate the challenge of identifying and locating certain noncitizens whose removal it considered to be of the highest priority—individuals with convictions for the offenses enumerated in Section 1226(c)(1)(A)-(D) ("enumerated offenses")—by mandating seamless transitions between criminal and immigration custody. ER 026. Congress simultaneously put in place additional requirements that would facilitate the federal government's ability to effect direct transfers. *See* 8 U.S.C. § 1236(d) (requiring the creation of a system to identify criminal aliens); 8 U.S.C. § 1366 (imposing annual reporting requirements regarding criminal aliens); 8 U.S.C. 1228 (providing for the expedited removal of certain criminal aliens by allowing removal proceedings to begin while noncitizen is serving criminal sentence); IIRIRA, Pub.L. No. 104-208, Div. C, §303(b), 110 Stat. at 3009-586.

In recognition that implementing Section 1226(c) would create initial logistical hurdles, Congress enacted the Transition Period Custody Rules ("TPCR") concurrently with Section 1226. *See* IIRIRA, Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. at 3009-586. Under the TPCR, the government was not required to implement Section 1226(c) until October 8, 1998. *See id.* The TPCR also instructed that Section 1226(c) was non-retroactive, expressly applying only to individuals "released after" the October 8, 1998 effective date. *Id.* The idea was to give the federal bureaucracy time to change its systems and operations so as to

account for the new, streamlined framework that required the seamless transition of those subject to mandatory detention into federal immigration custody upon their release from jail or prison.

2. The BIA, as many courts have held, misconstrued the statutory framework in the *Matter of Rojas* decision.

While Section 1226(c) on its face is quite limited—applying only to noncitizens with convictions for offenses enumerated in Section 1226(c)(1)(A)-(D) *and* who were transferred directly to immigration custody immediately upon release from predicate criminal custody—the Board of Immigration Appeals (the "BIA") expanded the section's reach in 2001 with its decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001) ("*Rojas*"). Faced with an individual who had a conviction for an enumerated offense but who was not taken into custody immediately upon his release from criminal custody, the BIA held that Section 1226(c) applied to any noncitizen who had committed an enumerated offense regardless of "when" he or she had been released.

To be clear, the BIA did recognize that the "when…released" clause "direct[s] the Attorney General to take custody of aliens ***immediately*** upon their release from criminal confinement." *Id.* at 122 (emphasis added). However, it held that the "when…released" clause had no bearing on which noncitizens were subject to Section 1226(c) because the phrase "an alien described in paragraph (1)" in Section 1226(c)(2), which prohibits the release of covered noncitizens, in fact

referred merely to aliens described in paragraph (1)(A)-(D)—and thus did not include the "when…released" clause. *Id.* at 122.

Rojas is poorly reasoned and incorrect. The BIA incorrectly read Section 1226(c) as a stand-alone section, without consideration of the role that section played within the framework created by Section 1226 as a whole. The BIA also failed to discuss the significance of the agency's power, under Section 1226(a), to detain noncitizens regardless of when they are taken into custody. It similarly did not employ numerous standard tools of statutory construction and glossed over the severe constitutional implications of subjecting individuals to mandatory detention regardless of how long ago they were released from criminal custody. *Id.* at 126.

No circuit to consider the question has followed *Rojas*' reasoning. The Fourth Circuit was the first circuit court to analyze *Rojas*. In *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), the Fourth Circuit reached the same result as the BIA in *Rojas*, but it focused on the alleged ambiguity in the word "when," rather than in the phrase "an alien described in paragraph (1)." The Third Circuit was the next circuit to consider *Rojas*. *See Sylvain v. Attorney General*, 714 F.3d 150 (3d. Cir. 2013). Like in *Hosh*, the Third Circuit came to the same conclusion as the BIA, but it emphasized that it did so for different reasons. *Id.* at 156-57 ("*Chevron* deference lurks in the background of this case…but [w]e need not take a stand on this issue."). It based its holding on the "loss of authority" doctrine, a doctrine

created by the Supreme Court that permits an agency to act even in the face of a missed deadline in certain situations where the public would otherwise suffer. For the reasons given by the district court and discussed below, the Third Circuit wrongly applied this doctrine to mandatory detention. *See* Section V.C., *infra*.[4]

B. Facts and Proceedings Below

1. Class Representatives

a. Plaintiff Eduardo Vega Padilla was illegally held in mandatory detention *eleven years* after his release from criminal custody.

Plaintiff Eduardo Vega Padilla is 48 years old. SER 71 (Declaration of Eduardo Vega Padilla in Support of Preliminary Injunction ("Padilla Decl.") ¶ 2). He was born in Mexico and came to the United States in 1966, when he was a toddler. He became a lawful permanent resident in the same year. SER 71 (Padilla Decl. ¶ 2). Prior to being taken into immigration detention, he lived with his elderly mother, his daughter, and his grandson. They are all United States citizens.

[4] A First Circuit panel recently held in favor of petitioners due to their gaps in custody. In *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014), the First Circuit panel rejected *Rojas*' position that Section 1226(c) can apply regardless of when a noncitizen is apprehended by DHS. *Id.* at 44. It did, however, find that there should be a reasonableness requirement built into Section 1226(c). The government moved for a rehearing *en banc*, which was granted on January 23, 2015. Dkt. No. 9. Although *Casteneda*'s "reasonableness" interpretation is certainly more faithful to congressional intent than the government's position, that interpretation is not grounded in the language of Section 1226(c). Congress declared "when" a noncitizen had to be detained in order to fall under Section 1226(c)'s purview: immediately upon his or her release from state custody.

He has five children who are United States citizens. Four of his children are now adults. He also has six grandchildren, one of whom was born while he was in immigration detention. His three siblings are all United States citizens and live in the Sacramento area. SER 71-72 (Padilla Decl. ¶ 3, 8).

During a difficult period in his life when his marriage had fallen apart, his grandmother had fallen ill, and his father had died suddenly, Mr. Padilla was convicted of possession of a controlled substance in 1997 and in 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was then convicted of possessing a firearm while having a prior felony conviction. He was sentenced to six months in jail and was released in 2002. SER 71-72 (Padilla Decl. ¶ 6).

Eleven years later, on August 15, 2013, immigration officers came to his home, knocked on his door, and asked him to accompany them to the immigration office. He voluntarily complied, and was then taken into federal immigration custody and held in mandatory detention for six months. SER 71 (Padilla Decl. ¶ 4). His detention was based on the two possession-of-a-controlled-substance convictions from 1997 and 1999, and his firearm-possession conviction from 2002. SER 71-72 (Padilla Decl. ¶ 6). Since the filing of this case, he was granted a bond hearing under *Rodriguez v. Robbins*, at which an immigration judge found he did

not present a danger to the community and was not a flight risk. ER 018. Mr. Padilla has now returned to his family. ER 018.

b. Plaintiff Mony Preap was illegally held in mandatory detention *seven years* after his release from predicate criminal custody.

Plaintiff Mony Preap is 32 years old. His family fled Cambodia after his mother was arrested and tortured by the Khmer Rouge. Mr. Preap has no memory of his life before he arrived in the United States in 1981 as an infant. He has been a lawful permanent resident of the United States since his entry. SER 27 (Declaration of Mony Preap in Support of Class Certification ("Preap Decl.") ¶ 2).

Prior to being taken into immigration detention, Mr. Preap lived with and was the primary caregiver for his 11-year-old son and his mother. Mr. Preap has had sole custody of his son—a United States citizen—since his son's mother abandoned them when his son was three months old. Mr. Preap's mother is in remission for breast cancer and also suffers from seizures. Because of her health, she requires extensive care. Prior to his detention, Mr. Preap spent his day caring for her and their home and raising his son. SER 27 (Preap Decl. ¶ 4).

In 2004, Mr. Preap was arrested for possession of a small amount of marijuana in two separate incidents. His court proceedings for those incidents took place in June 2006 and resulted in two misdemeanor convictions. Mr. Preap was released from criminal custody for those incidents on June 29, 2006. In 2013,

Mr. Preap was convicted of simple battery—a conviction that does not subject him to removal—following an argument between him and his ex-girlfriend. SER 28 (Preap Decl. ¶ 7). Mr. Preap was serving a 72-day sentence for his simple battery offense when he was transferred to immigration detention on September 11, 2013. SER 27 (Preap Decl. ¶ 3). He was then detained in West County Detention Facility in Richmond, California, for three months without an individualized custody determination or a bond hearing. SER 27 (Preap Decl. ¶¶ 3, 6).

Since the filing of this action, Mr. Preap was granted cancellation of removal, and has returned to his family. ER 018.

c. Plaintiff Juan Lozano Magdaleno was illegally held in mandatory detention *more than five years* after his release from criminal custody.

Plaintiff Juan Lozano Magdaleno is 57 years old. He was born in Mexico and came to the United States as a teenager in 1974. He has been a lawful permanent resident of the United States since his entry. SER 77 (Declaration of Juan Lozano Magdaleno in Support of Preliminary Injunction ("Magdaleno Decl.") ¶ 2). Prior to being taken into immigration detention, Mr. Magdaleno lived with his wife, two of his four children, his son-in-law, and his grandchild, all of whom are United States citizens. All of his four children are United States citizens. They, along with his ten United States citizen grandchildren, live close to Mr. Magdaleno's home. SER 77 (Magdaleno Decl. ¶ 5).

Mr. Magdaleno is very close to his family. While he was in detention, one of his daughters got married. Although he was unable to attend because he was in immigration detention, his family arranged to have him call and make a speech at the reception over the speaker system. SER 78 (Magdaleno Decl. ¶ 9). Prior to being detained, Mr. Magdaleno took care of four of his grandchildren every day, taking them to school, picking them up, and watching them after school until their parents returned from work. Because of his detention, one of his daughters has had to close the nail salon she owns early each day to watch her children. SER 78 (Magdaleno Decl. ¶ 9).

Mr. Magdaleno has made a living selling antiques at antique stores and flea markets since the late 1980s. Throughout his career, he has owned an antique refinishing store, an antique store, and a thrift store. In 2000, Mr. Magdaleno was convicted of possession of a firearm while having a prior felony conviction (a DUI conviction from the 1980s that is not a removable offense). In October 2007, Mr. Magdaleno was convicted of simple possession of a controlled substance. He was sentenced to six months in jail and released in January 2008. SER 77 (Magdaleno Decl. ¶ 6).

Five-and-a-half years later, on June 17, 2013, ICE agents came to Mr. Magdaleno's home and took him into custody based on the 2007 controlled-substance conviction and the 2000 firearm-possession conviction. He was then

held in mandatory detention at the West County Detention Facility in Richmond, California. SER 77 (Magdaleno Decl. ¶ 3). On February 14, 2014, Mr. Magdaleno was given a bond hearing under *Rodriguez v. Robbins*, where he was initially denied release based on flight risk. SER 124. On September 5, 2014, however, an IJ granted Mr. Magdaleno release on bond after the BIA held that Mr. Magdaleno is statutorily eligible for cancellation of removal.[5] Mr. Magdaleno has since been released.

2. Relevant District Court Proceedings

On December 12, 2013, Plaintiffs filed a habeas-corpus class-action complaint challenging their detention without bond hearings under Section 1226(c). ER 001-13. They alleged that their detention violated the statute and the Due Process Clause of the Fifth Amendment. ER 010-11. On December 16, 2013, Plaintiffs filed a motion to certify a class consisting of:

> "[A]ll individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 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 [an offense enumerated in 8 U.S.C. § 1226(c)(1)(A)-(D)]."

Plaintiffs also requested that they be named as representative plaintiffs for the proposed class, and that their counsel be appointed as class counsel. SER 7 (Class Cert. Mot.). On February 7, 2014, Plaintiffs moved for a preliminary injunction

[5] *See In re Magdaleno*, Administrative Bond Order, Case No. A034 297 194 (San Francisco Immigration Court Sept. 5, 2014).

enjoining the government from detaining their proposed class under Section 1226(c), ER 060, which the government opposed, ER 061. The district court granted Plaintiffs' motion for class certification and a preliminary injunction on May 15, 2014. ER 015. The government has not appealed the district court's grant of class certification.

The district court based its holding for the preliminary injunction on Plaintiffs' statutory claim and consequently did not reach their constitutional claim. ER 020 n.5. The court held that under the plain language of Section 1226(c), only individuals who have both committed an offense enumerated in Section 1226(c)(1)(A)-(D) and who have been transferred directly from criminal to immigration custody are subject to mandatory detention. ER 037. Thus, the BIA's decision in *Rojas* merited no deference. ER 037. The court further held that the "loss of authority" doctrine did not apply to Section 1226(c), as even under Plaintiffs' interpretation, the government retains the authority to detain individuals under Section 1226(a). ER 036-37. Finally, the court rejected the government's argument that allowing bond hearings under Section 1226(a) constitutes a "windfall" to a noncitizen or a sanction to the government, as noncitizens must still persuade the executive that they do not pose a flight risk or danger to the public before they are released. ER 036-37.

On July 21, 2014, the district court issued an order providing guidance as to how the government should implement the preliminary injunction. The order instructed the government to cease and desist subjecting class members to mandatory detention under Section 1226(c). ER 048. The order gave the government until September 24, 2014, to reevaluate the custody status of members of the certified class who were currently being held in mandatory detention, and to provide all class members with a Redetermination Notice to inform them (1) of any change in their custody status—i.e., if DHS has decided to release them on their own recognizance or set a bond—and (2) that they are entitled to bond hearings if they wish to contest DHS's custody determination. ER 048.

Along with the Redetermination Notice, the district court instructed DHS to provide each class member with a Form I-286, with which an individual can request or decline to pursue a bond hearing. ER 048. The district court ordered that the Executive Office of Immigration Review schedule bond hearings for each class member who requested one, or who did not affirmatively opt out after reviewing his or her Form I-286, within 14 days of receiving the class member's Form I-286 from DHS. ER 048. Finally, the court ordered that the government provide monthly status reports to the district court until it was in full compliance with the preliminary injunction. ER 049.

The government appeals both the district court's May 15 order granting the preliminary injunction and the district court's July 21 order providing instructions as to how the preliminary injunction should be implemented. The government, however, presents no argument regarding the July 21 order. The government's failure to present any argument about the order's substance constitutes waiver. *See Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (holding appellant waives arguments not raised in opening brief).[6]

IV. STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2., Plaintiffs agree with and incorporate the government's statement of jurisdiction.

V. SUMMARY OF THE ARGUMENT

Section 1226(c) unambiguously establishes that mandatory detention applies only to those detained "when…released" from criminal custody for an enumerated offense, not to Plaintiffs and their class members. Had Congress intended to craft a mandatory detention statute such that it applied to every noncitizen who was merely removable for a criminal offense, it could have done so. Instead, it chose to

[6] Similarly, in its brief to the court, the government does not argue that Plaintiffs failed to show a likelihood of irreparable harm or that the balance of hardships and the public interest do not favor a preliminary injunction. Therefore, the government has waived any argument based on these factors. *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 917-18 (9th Cir. 2014) (holding party appealing preliminary injunction who failed to present arguments regarding likelihood of irreparable harm, balance of hardships, and the public interest waived those arguments).

reserve mandatory detention for those who have both committed enumerated offenses ***and*** were taken into immigration custody "when…released" from criminal custody. The text of Section 1226(c) itself settles the issue.

Because Section 1226(c) is unambiguous, *Chevron* deference is unmerited. Even if the statute were ambiguous, however, the interpretation given by *Rojas*—which the government urges this Court to adopt—creates illogical consequences and conflicts with the purpose of the statute.

The government's appeal to the "loss of authority" doctrine also fails. The government does not lose the authority to detain anyone under Plaintiffs' interpretation of Section 1226(c). Rather, Plaintiffs' interpretation gives the government discretion to detain or not detain individuals as it sees fit, based on those individuals' specific circumstances. Under Plaintiffs' interpretation and the interpretation adopted by the district court, the government retains the full authority to detain all individuals at issue within the framework of Section 1226(a). The district court's grant of a preliminary injunction must be affirmed.

VI. STANDARD OF REVIEW

Questions of law regarding statutory interpretation are reviewed *de novo*. *Calderon v. Prunty*, 59 F.3d 1005, 1008 (9th Cir. 1995). *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* establishes the familiar two-step process for courts that evaluate a governmental agency's application of a statute. 467 U.S.

837 (1984). *First*, the court independently determines if the statute at issue is ambiguous. If the answer is no, the analysis ends and the unambiguous statutory interpretation applies. *Id.* at 843. If the statute is ambiguous, the court then considers whether the agency's interpretation is reasonable. *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (citing *Chevron*, 467 U.S. at 843). If yes, the court defers; if not, the court applies its own interpretation. *Chevron*, 467 U.S. at 844.

Courts bring all conventional tools of statutory construction to bear during *Chevron* step one. Relevant here, these tools include the plain meaning of the words used, the structure of the statute as a whole, and the context in which the statute was enacted. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403, 405 (1988).

Another tool employed in Chevron step one is constitutional avoidance: where a statute may be interpreted in two fashions, one of which raises a constitutional issue and the other of which avoids that issue, the court must apply the avoiding interpretation. *Edward J. DeBartolo Corp. v. Florida Gulf Coast*

Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988); *Diouf*, 634 F.3d at 1090 n.11.

VII. ARGUMENT

A. The district court correctly held that mandatory detention applies only to noncitizens directly transferred from criminal to immigration custody.

In one continuous sentence, Section 1226(c)(1) mandates the detention of a noncitizen who has committed an offense enumerated in Sections (c)(1)(A)-(D) ***when*** that noncitizen is released from criminal custody. 8 U.S.C. § 1226(c)(1). Section 1226(c)(2) prohibits the release of an individual "described in paragraph (1)"; in other words, Section 1226(c)(2) requires that he or she be held in "mandatory detention." The district court correctly found that Section 1226's language, structure, and history unambiguously establish that mandatory detention applies only if a noncitizen has ***both*** committed an enumerated offense and DHS has transferred him or her directly from criminal custody into immigration custody.

The doctrine of constitutional avoidance also compels the district court's ruling. Mandatory detention of individuals who have lived for years in the community without committing a removable offense implicates the Fifth Amendment, and Congress must be clear before authorizing such sweeping liberty restrictions.

1. The district court correctly held that the language of Section 1226(c) unambiguously requires apprehension at the time of release and no later.

The government does not argue—and the BIA in *Rojas* did not find—that Section 1226(c) unambiguously mandates its proposed construction of the statute. Instead, it argues that the statute is ambiguous and thus courts should defer to *Rojas*' interpretation. Gov't Br. at 19-22. The government attempts to read ambiguity into two phrases: (1) the "when…released" clause in Section 1226(c)(1), and (2) the phrase "an alien described in paragraph (1)" in Section 1226(c)(2). *First*, it argues that "when" could mean either "immediately" or "any time after." *Second*, it argues that even if "when…released" does mean "immediately upon release," "an alien described in paragraph (1)" could mean "an alien described" only by "paragraph (1)(A)-(D)," and thus the "when…released" clause has no bearing on whether any particular noncitizen is subject to mandatory detention. The district court correctly rejected these arguments as contrary to plain language of Section 1226(c).

a. "When…released" means what it says.

(i) The plain language of Section 1226(c) establishes that "when" means "immediately upon."

Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). "The plainness or ambiguity of statutory language is determined by

reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The district court correctly analyzed these factors to determine that "when" means "immediately upon."

Section 1226(c)'s plain text "establishes a mandate with an inherent immediacy requirement." ER 024. Section 1226(c)(1) is only one sentence long, and when reduced to its relevant terms reads:

> "The Attorney General ***shall*** take into custody any alien who – [has committed an enumerated offense], ***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."

ER 024 (citations omitted) (emphasis in original). With Section 1226(c)(1), "Congress issued a command that the government take into custody [certain noncitizens] at the moment they are released" from predicate criminal custody. Used in the context of a command, "when" means immediately, not after some "unbounded delay." ER 024.

If Congress had intended Section 1226(c) to apply to noncitizens any time after they were released from predicate criminal custody, it would have said so. Congress "easily could have used the language 'after the alien is released' or 'regardless of when the alien is released,' or other words to that effect." *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004). Congress did so

in other sections of the statute. *See, e.g.,* 8 U.S.C. § 1227(a)(2)(A)(i) (rendering deportable "any alien who is convicted of a crime involving moral turpitude within five years…***after*** the date of admission") (emphasis added); 8 U.S.C. § 1227(a)(2)(E)(i) (rendering deportable "[a]ny alien who ***at any time after*** admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment") (emphasis added); Pub. L. No. 101–238, § 2, 103 Stat. 2099 (1989), as amended by Pub. L. No. 101–649, Title I, §162(f)(1), 104 Stat. 5011 (1990) (formerly 8 U.S.C. § 1255) (explaining certain immigration limitations "shall not apply" if a noncitizen is a registered nurse "whether or not" that employment began "***before, on, or after,*** the date of the enactment of this Act [Dec. 18, 1989]") (emphasis added). As the district court observed, "[t]he fact that no such language appears in the statute cannot be ignored." ER 024; *see also Nken v. Holder*, 556 U.S. 418, 430 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation and citation omitted)).

Even the BIA in *Rojas* recognized that "when" meant immediately in this context. 23 I. & N. Dec. at 122. While it reached an incorrect result as to how Section 1226(c) should be applied, it acknowledged that the "statute ***does*** direct the

Attorney General to take custody of aliens ***immediately*** upon their release from criminal confinement[.]" *Id.* (emphasis added).

(ii) The government's interpretation of Section 1226(c) has the perverse result of turning a clear directive into boundless executive-branch discretion.

The district court repeatedly (and correctly) emphasized that the interpretation the government advances creates the illogical consequence of turning a mandatory task into a purely discretionary one. ER 024-26, 31. Reading "when" to mean "any time after" has "the practical effect of rendering the detention contemplated by Section 1226(c) discretionary in the first instance, for the government could simply choose to delay apprehension indefinitely." ER 031. This makes no sense. It is a well-established principle of statutory construction that "statutory interpretations which would produce absurd results are to be avoided." *Arizona State Bd. For Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (internal citations and quotations omitted). For this reason alone, the interpretation the government advances should be rejected. "Had Congress intended to provide the Government discretion as to when Section 1226(c)'s mandatory detention commences, it would not have used mandatory language." ER 024. The Court should not sanction this distorted reading of Section 1226(c).

(iii) The government's interpretation of Section 1226(c)(2) reads "when…released" out of the statute.

It is a "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1995) ("give effect, if possible, to every clause and word of a statute"); *Rojas*, 117 I. & N. at 134 (Rosenberg, J., dissenting) (citing *Menasche*, 348 U.S. at 538-39). The government's interpretation of Section 1226(c) reads the "when…released" clause out of the statute. If "when" in facts means "any time after," the clause serves no purpose. Compare the following two sentences:

> "The Attorney General shall take into custody any alien who – [has committed an enumerated offense], ***any time after 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."

and

> "The Attorney General shall take into custody any alien who – [has committed an enumerated offense] 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."

They convey the same instruction: namely, that the Attorney General must apprehend certain individuals regardless of when they finish serving certain criminal sentences. The "when…released" clause is rendered "superfluous, void,

[and] insignificant" if "when" is interpreted to mean "any time after." *TRW Inc.*, 534 U.S. at 31(citation omitted).

The government speculates that the function of the "when…released" clause is to prevent immigration officials from preempting state and federal law enforcement officials by taking criminal aliens into immigration custody before they completed their terms of criminal custody. *See* Gov't Br. at 30. But, as the government acknowledges, other portions of the INA already state this explicitly. *See* Gov't Br. at 30-31 (citing 8 U.S.C. s. 1228(a)(3); 8 U.S.C. s. 1231(a)(4)(A)). The government's reading thus renders an entire statutory phrase into surplusage, which cannot be right.

(iv) The government's remaining arguments fail to demonstrate that "when" should be ascribed something other than its plain meaning.

The government cites dictionary definitions in an attempt to demonstrate that "when" as used in Section 1226(c) is ambiguous. But the existence of multiple dictionary definitions for a commonly used word does not mean that word is ambiguous in a specific context. Gov't Br. at 23-24. This ignores the principle that "a word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). The term "when" may mean different things in different statutes, but here, the natural meaning of when,

combined with the fact that "when" is used in a command, tells us that "when…released" means immediately upon release. ER 024.

The government's reliance on *Lagandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004) and *United States v. Willings*, 8 U.S. (4 Cranch) 48 (1807) is misplaced. In *Lagandaon*, this Court did not find that "when" means "any time after" but instead rejected the BIA's construction of the word "when" to mean "*before*." 383 F.3d at 988. *Id.* If anything, *Lagandaon* supports Plaintiffs because the dictionary definitions cited there describe "when" in terms of immediacy: *e.g.*, "at or during which time," "just at the moment that" "[a]t the (or a) time at which," "at what time," "at the time that," "as soon as." *Id.* at 988 (citations omitted). Similarly, *Willings* emphasized that the mere fact that "when" may be used in multiple ways does not mean it is ambiguous. Rather, "the context must decide in which sense ['when'] is used in the law under consideration." 8 U.S. (4 Cranch) at 48. Here, it is plain that "when" means immediately upon.

The government's reliance on the Fourth Circuit in *Hosh v. Lucero* further reveals the infirmity of its position. In *Hosh*, the Fourth Circuit purported to base its holding on *Chevron* principles, 680 F.3d at 380, but it did not analyze whether the phrase "an alien described in paragraph (1)"—where *Rojas* found its ambiguity—was ambiguous. Instead, it provided a cursory review of dictionary definitions of "when," without examining the word in context, and determined that

the "when…released" clause could have multiple meanings. *Id.* at 379-80. It is not surprising that the vast majority of courts have rejected *Hosh*'s approach. *See Castaneda v. Souza*, 952 F. Supp. 2d 307, 316 (D. Mass. 2013) ("[T]he *Hosh* court determined only whether "when" could have multiple dictionary meanings, not whether clear congressional intent exists. This lack of analysis in *Hosh* is startling and likely the reason why the *Hosh* decision has had little impact as a persuasive precedent outside of the Fourth Circuit."); *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) ("Presumably because of the inadequacy of the analysis in *Rojas* and the dearth of analysis in *Hosh* itself, *Hosh* has had little persuasive impact beyond the Fourth Circuit, where it is binding precedent.").

b. An "alien described in paragraph (1)" refers to a noncitizen who has committed an enumerated offense and who was apprehended by DHS "when…released."

The government argues that it is not clear whether "an alien described in paragraph (1)" means what it says or instead should be interpreted to mean "an alien described in paragraph (1)(A)-(D)." Gov't Br. at 21-22. It asserts that "treating the 'when…released' clause as part of the 'definition' of qualifying aliens…would not make sense in the broader context of the INA." Gov't Br. at 33. This argument fails.

Section 1226(c)(1) consists of only ***one sentence***. If Congress had intended to bar the release of any alien who had committed an enumerated offense

regardless of when they were released, Congress would have used the phrase "an alien described in paragraphs (1)(A)-(D)," rather than the phrase it did use: "an alien described in paragraph (1)." Congress knew how to identify specific parts of a section to clarify its meaning when necessary, as demonstrated throughout the remainder of the INA.[7] "[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal citations and quotations omitted).[8]

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[7] *See, e.g.,* 8 U.S.C. § 1160(b)(3)(B)(iii) (referring to "the work described in subsection (a)(1)(B)(ii)" rather than to Section 1160(a), or even Section 1160(a)(1)(B), as a whole); 8 U.S.C. § 1187(a)(1) (referring to "a nonimmigrant visitor . . . described in section 1101(a)(15)(b)" rather than to Section 1101(a)(15) as a whole); 8 U.S.C. § 1186b(a)(2)(B) (referring to "the 90-day period described in subsection (d)(2)(A) of this section" rather than to Section (d)(2) as a whole).

[8] When Congress uses more general citations in the INA to refer only to specific subsections (as it does occasionally), it does not do so opaquely—it does so in a manner that clearly conveys its intent. For example, 8 U.S.C. § 1101(a)(43)(N) ("Bringing in and harboring certain aliens") reads: "The terms aggravated felon means…a person described in paragraph (1)(A) or (2) of section 1324(a)." An aggravated felon, however, is defined only by section 1324(a)(1)(A)(i)-(v). This is evident because that is the only interpretation of Section 1101 that makes logical sense. Section 1324(a)(1)(B), for instance, explicitly applies to "[a] person who violates subparagraph (a);" i.e., not to the noncitizen a is an aggravated felon, but an individual who illegally brings in or harbors the aforementioned noncitizen. Similarly, section 1324(a)(2) explicitly applies to "[a]ny person who…brings to or attempts to bring to the United States" a noncitizen described in Section 1324(a)(1)(A)(i)-(v). In enacting section 1101, Congress did not need to specify which subparagraphs it intended to reference to define an aggravated felon,

Regardless of whether the INA places relevance on timing in other places (it does),[9] Congress clearly had timing of release in mind when it enacted Section 1226(c). The first piece of evidence of Congress' intent to premise mandatory detention on whether a noncitizen is apprehended immediately is the "when…released" clause itself. Congress chose to put the clause into the statute—it did not have to. Further, it chose to place the clause directly before "without regard to whether the alien is released on parole, supervised release, or probation," forms of conditional release that arise simultaneously with physical release from criminal custody. *See* ER 024.

Additional evidence that Congress did consider the timing of individuals' release to be relevant to who constituted "an alien described in paragraph (1)" comes from the Transition Period Custody Rules ("TPCR"). *See* IIRIRA, Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. at 3009-586. Acknowledging that there might be "insufficient detention space and…personnel available" to carry out the newly-enacted mandatory-detention provisions, the transition rules gave the

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because the relevant subparagraphs were abundantly clear from context.

[9] *See, e.g.,* 8 U.S.C. § 1229b (providing for the cancellation of removal for noncitizens who, *inter alia*, have resided continuously in the United States for ***seven years***) (emphasis added); 8 U.S.C. § 1427 (describing requirements for naturalization, which include continuously residing in the United States and demonstrating good moral character for the ***five years*** prior to naturalization application) (emphasis added); 8 U.S.C. § 1227(a)(2)(A)(i) (rendering deportable "any alien who is convicted of a crime involving moral turpitude within ***five years***…after the date of admission") (emphasis added).

Attorney General one year (which could be extended an additional year) to defer the application of Section 1226(c). *Id.*; *In re Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997) (citing 142 Cong. Rec. S11838-01, S11839, (daily ed. Sept. 30, 1996), available in 1996 WL 553814 (statement of Sen. Hatch)). The grace period created by the TPCR would have been unnecessary if the government were permitted to delay until whatever time it deemed feasible to apprehend a noncitizen who had committed an enumerated offense. A court can properly look to statutes passed together to divine the meaning of the one before it. *See K Mart Corp.*, 486 U.S. at 291. When Section 1226(c) is considered together with the TPCR, it becomes clear that "an alien described in paragraph (1)" means what it says—that a noncitizen must have committed an enumerated offense ***and*** have been transferred directly into DHS custody in order to be held in detention under Section 1226(c).

2. The structure of Section 1226 confirms that Plaintiffs and their class members do not fall within the ambit of Section 1226(c).

Mandatory detention is an exception to "§ 1226(a)'s general detention provision." ER 025. Exceptions to general rules must be narrowly construed. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). Accordingly, Section 1226(c) "does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the

ordinary procedures for release on bond at the discretion of the [IJ] should not apply." *Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009); *cf. INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (citing the rule of lenity's "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (internal quotation marks and citation omitted). Specifically, with the "when . . . released" clause, Congress demonstrated an intention that individuals who have completed their sentences should immediately be detained pending removal proceedings, with no break in the chain of custody. Thus, "the 'when released' language serves [the]…limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses." *Saysana*, 590 F.3d at 17. Section 1226(c) does not govern the situation here, where Plaintiffs and their class members have ***already*** returned to their homes, in some instances for a decade and more. This Court should not expand Section 1226(c)'s limited reach.

3. The canon of constitutional avoidance also precludes the expansion of Section 1226(c) beyond what its plain language contemplates.

While the district court found the use of this canon unnecessary to reach its decision, the canon of constitutional avoidance also aids in the first step of the *Chevron* analysis as "a means of giving effect to congressional intent." *Diouf*, 634 F.3d at 1090 n.11 (citation omitted). Under the canon, when a court must decide

which of two plausible statutory constructions to adopt, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Rodriguez*, 715 F.3d at 1133-34 (applying canon of constitutional avoidance and citing cases). In the *Chevron* context, the court must adopt the construction that avoids constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575 (internal quotations omitted)); *Diouf*, 634 F.3d at 1090 (citing *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001)); *Williams v. Babbitt*, 115 F.3d 657, 663-64 (9th Cir. 1997)). This stems from the "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority" without a clear indication to the contrary. *Solid Waste Agency*, 531 U.S. at 172-73.

Rojas' construction of Section 1226(c) threatens the "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint [that] lies at the heart of the liberty that [the Due Process] Clause protects." *Rodriguez*, 715 F.3d at 1134 (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)); *see Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (quoting

Addington v. Texas, 441 U.S. 418, 425, 427 (1979) ("The Supreme Court . . . 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty.'")). By blessing the categorical mandatory detention of individuals who have long since returned to the community, *Rojas*' interpretation runs afoul of the due-process limitations that protect Plaintiffs and their class members. *Demore*, 538 U.S. at 523 (due process protections extend to noncitizens in removal proceedings).[10]

Under *Rojas*, the government may wait up to ***16 years*** (and counting) before plucking an individual out of his or her community and holding him or her in detention with no recourse. In the intervening period of time, Plaintiffs and their class members may have led productive and non-threatening lives. *See* SER 28 (Preap Decl. ¶8); SER 72-73 (Padilla Decl. ¶¶72-73); SER 77 (Magdaleno Decl. ¶¶ 5, 9-10, 12). Regardless of whether the application of Section 1226(c) to the respondent in *Rojas*—an individual who was released on parole only two days before he taken into immigration custody, 23 I. & N. Dec. at 118—should be permissible for due process purposes, applying it to individuals like Plaintiffs, who

[10] Though mandatory detention has been held not to be *per se* unconstitutional, *Demore*, 538 U.S. at 527-28, its application under various circumstances has been limited to avoid due-process concerns. *See, e.g., Rodriguez*, 715 F.3d at 1137 (holding that Section 1226(c) could not authorize prolonged mandatory detention as that would be "constitutionally doubtful").

have been out of custody for years, "raise[s] a multitude of constitutional problems[.]" *Clark*, 543 U.S. at 380-81.

In short, *Rojas*' holding also makes no sense. As this Court has previously recognized, "not all criminal convictions conclusively establish that an alien presents a danger to the community, even where the crimes are serious enough to render the alien removable." *Singh*, 638 F.3d at 1206 (citing *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992)). And as the First Circuit recognized, it only "stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be." *Saysana*, 590 F.3d at 17-18. The Plaintiffs and the class they represent, individuals who were not taken into immigration custody immediately upon release, are not categorically suspect.

The BIA's majority opinion in *Rojas* did not address the constitutional concerns raised by applying mandatory detention regardless of how long ago a noncitizen was released from criminal custody. *See* 22 I. & N. at 117-27. Decisions that afford deference to *Rojas* without studied consideration of its constitutional consequences are thus unpersuasive.

B. The district court correctly found that even if Section 1226(c) were ambiguous, the holding in *Rojas* is unreasonable and merits no deference.

Even if Section 1226(c) were ambiguous, the BIA's interpretation of the statute in *Rojas* would be impermissible because it leads to arbitrary and capricious results unconnected to the statute's purpose. No circuit court has adopted *Rojas*' reasoning. The government provides no persuasive arguments as to why the Court should do so here.

1. The justifications for Section 1226(c) do not apply to Plaintiffs.

Congress enacted Section 1226(c) for the purpose of (i) ensuring the presence of criminal aliens at their removal proceedings, (ii) facilitating their removal, and (iii) protecting the public from dangerous noncitizens. *Demore*, 538 U.S. at 518-20; *see id.* at 531 (Kennedy, J., concurring) ("[T]he justification for 8 U.S.C. § 1226(c) is based upon the government's concerns over the risks of flight and danger to the community… ."). The government's categorical subjection of Plaintiffs and their class members to mandatory detention under *Rojas* does not serve these purposes.

Justifications (i) and (ii) are premised on the assumption that criminal aliens are likely to be deported based on their offenses, and consequently have little to no incentive to appear for hearings ordering their deportation. However, as demonstrated by Mr. Preap's successful application for cancellation of removal, for instance, Plaintiffs and members of their class may have strong grounds for requesting relief from removal. *See* SER 81-85, Declaration of Anoop Prasad in

support of Motion for Preliminary Injunction ("Prasad Decl.") ¶¶ 4-5; *see also* 8 U.S.C. § 1427 (describing requirements for naturalization, which include continuously residing in the United States for the previous five years while demonstrating he or she "is a person of good moral character"). Their entire families and livelihoods may be in the United States, which is more likely to be the case the longer an individual has been returned to his or her community. *See* SER 24-29, 68-79 (Preap Decl. ¶¶ 2, 4-6, 8; Padilla Decl. ¶¶ 2-3, 5, 8-9; Magdaleno Decl. ¶¶ 2, 5-6, 9-10, 12); *see also Saysana*, 590 F.3d at 17-18 ("[T]he more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.") (citing cases). Individuals with strong community ties have every incentive to appear for their immigration hearings to fight for their ability to remain in their community. Categorically denying them bond hearings is arbitrary and capricious.

As to justification (iii), *Rojas* permits the government to wait indefinitely before taking a noncitizen into immigration custody, and then subject him or her to mandatory detention. In the intervening period of time (up to sixteen years, and counting, since October of 1998 when Section 1226(c) went into effect), the government has entirely failed its purpose of shielding the public from these supposedly dangerous individuals. It is implausible that Congress both intended to make detention mandatory for a class of individuals and yet granted the

government unfettered discretion to leave these very same individuals free for an indefinite period of time beforehand. *See* ER 025-24, 031.

It is precisely those individuals who have been returned to the community since their release from the criminal justice system who are most likely to have accumulated the equities that warrants discretionary immigration relief, and who thus are more likely to appear for proceedings. *See United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) (holding that "as a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk"). It is inconsistent with the statutory purpose and unreasonable to read Section 1226(c) to "sweep in individuals who have been living peacefully in their communities for many years." *Snegirev v. Asher*, No. C12-1606, 2013 WL 942607, at *3 (W.D. Wash. Mar. 11, 2013). This is all the more true because an IJ may consider the length of time between release and apprehension when deciding whether to grant a bond under Section 1226(a), as it directly relates to the noncitizen's community ties. *See, e.g., Matter of Shaw*, 17 I. & N. Dec. 177, 178 (BIA 1979) (IJ may consider community ties when deciding whether to set a bond). The BIA's decision in *Rojas* deserves no deference.

2. The "practical difficulties" that allegedly attach to implementing Section 1226(c) do not allow the BIA to re-write the statute.

The government repeatedly asserts that detaining all noncitizens with enumerated offenses when they are released from predicate criminal custody

would be "impractical" or "logistically difficult," and argues that *Rojas*' interpretation of Section 1226(c) is reasonable as a result. Gov't Br. at 37, 41-44. But the government cites no authority—and Plaintiffs are aware of none—for the proposition that an agency may alter its governing statute because it finds its mandate challenging. As discussed above, *see supra* Section V.A.1.b, Congress considered the practicalities of implementing Section 1226(c) when the statute was enacted, and it responded to them by putting in place the Transition Period Custody Rules. These gave DHS a two-year grace period before it was required to effect direct transfers under Section 1226(c). That DHS still finds it difficult to do what Section 1226(c) requires is not a problem that can be solved through statutory interpretation, but one that must be addressed with greater bureaucratic vigor, by Congress, or both. *See* ER 031-32.

The government further argues that recent state legislation like California's TRUST Act makes it even harder to implement Section 1226(c) as interpreted by the district court, and that state legislation like this thus supports *Rojas*' reasonableness. But California's TRUST Act was enacted a decade and a half after Section 1226. Gov't Br. at 42-43. Congress could not have taken the TRUST Act into consideration when drafting Section 1226(c). Similarly, the government asserts that other jurisdictions are "increasingly disregarding DHS requests" to share release dates, but it makes no representations as to the state of affairs when

Section 1226 was enacted in 1996. *Id.* That alleged challenges to implementing Section 1226(c) have arisen since it was passed cannot change the government's obligations under the statute. These alleged difficulties are in any event properly addressed to Congress.

C. The district court correctly held that the "loss of authority" line of cases is inapplicable to mandatory detention because the government retains the power to detain individuals who poses flight risks or dangers to the public.

The government's final argument is that, *Chevron* deference aside, this Court should apply the "loss of authority" doctrine to conclude that that DHS does not have to act immediately to hold an individual in mandatory detention. The doctrine provides that delay—even when it is not permitted by the relevant statute—does not necessarily strip the executive branch of its authority to act if stripping that authority would severely prejudice the public. The "loss of authority" doctrine does not apply here.

The government does not lose any authority under the district court's interpretation of Section 1226(c). To the contrary, the district court's interpretation returns to the government the discretionary authority to detain Plaintiff and their class members as it sees fit, subject to a bond hearing and other statutory oversight.

Nor does the district court's interpretation of Section 1226(c) negatively affect the public interest. Unlike the cases the government cites, Section 1226 provides a clear framework for protecting the public interest if DHS fails to effect

a direct transfer from criminal to immigration custody: the framework created by Section 1226(a). Under that framework, an individual still must persuade the executive branch that he or she does not pose a flight risk or danger to the public ***before*** he or she is eligible to have a bond set and the possibility of release arises. Particularly because under this Court's *Rodriguez* decision, class members would receive a bond hearing within six months of detention anyway, the district court's ruling is not a drastic remedy this Court should be wary of endorsing.

1. The "loss of authority" doctrine applies only when ruling against the government would extinguish a fundamental executive power to the public's detriment.

The Supreme Court established the modern "loss of authority" doctrine in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). In *Montalvo-Murillo*, the Supreme Court addressed whether the government lost the ability to seek pretrial detention of an individual pending his criminal trial if it did not timely request a hearing. *Id.* at 713-14. The Bail Reform Act of 1984 provided that to seek pre-trial detention, the government had to request a detention hearing that "shall be held immediately upon the person's first appearance before the judicial officer." 18 U.S.C. § 3142(e)-(f) (West 1990). In *Montalvo-Murillo*, the government sought a detention hearing eleven days after the defendant's first appearance before a judicial officer. 495 U.S. at 716. Both the district court and the Tenth Circuit found that the defendant "posed a risk of flight and a danger to the community,"

yet held nevertheless that "that Montalvo-Murillo must be released because there had been a failure to observe the Act's directions for a timely hearing." *Id.* at 713.

The Supreme Court reversed, holding that automatic release was too drastic of a remedy for the government's eleven-day delay in seeking a hearing, when "no condition or combination of conditions reasonably would assure respondent's appearance or the safety of the community." *Id.* "Automatic release," it found, "contravenes the object of the statute, to provide fair bail procedures while protecting the safety of the public and assuring the appearance at trial of defendants found likely to flee." *Id.* at 720. Presented with the dilemma of sanctioning the government's failure to follow the statutory deadline or permitting release of potentially dangerous suspects regardless of the risk to the community, the Court chose the former.

The remaining cases the government cites present factual scenarios analogous to *Montalvo-Murillo*. In each case, the court had to decide whether to find for the government or to foreclose executive power completely and deprive the public of a particular benefit. For instance, in *Brock v. Pierce County*, the Supreme Court held that a missed deadline for making a final determination as to misuse of federal grant funds does not preclude later recovery of those misused funds. 476 U.S. 253, 260 (1986). In *Barnhart v. Peabody*, the Supreme Court held that a missed deadline for assigning industry retiree benefits did not prohibit a later

award of those benefits. 537 U.S. 149, 170-71 (2003). And in *Montana Sulphur & Chemical Co. v. U.S. E.P.A.*, the Ninth Circuit held that the EPA was authorized to promulgate a federal implementation plan after a two-year statutory deadline imposed by the Clean Air Act. 666 F.3d 1174, 1190 (9th Cir. 2012).[11] Like in *Montalvo-Murillo,* in each of these cases the court was presented with the stark choice of forgiving a missed deadline or stripping the executive of its power to act in a given area and eliminating a public benefit. That is not the case here.

2. This case does not present the dilemma of forgiving the government's failure or eliminating an important public benefit.

Section 1226 provides a clear framework for the detention of an individual if he or she is not transferred directly into immigration custody—the default system laid out in Section 1226(a). Under Section 1226(a), the government has broad

[11] *See also Dolan v. United States*, 571 F.3d 1022, 1027 (holding that sentencing court's missed deadline to make restitution determination under Victims Restitution Act's 90-day deadline did not strip government of power to order restitution at later date); *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 114 (3d Cir. 1997) (holding EPA did not lose power to act with respect to the Clean Air Act if it missed the statutorily imposed 18-month deadline); *Cyberworld Enterprise Technologies, Inc. v. Napolitano*, 602 F.3d 189, 196-200 (3d Cir. 2010) (holding agency's failure to determine whether to sanction business for employing undocumented workers was appropriate by statutory deadline did not eliminate agency's of power to impose sanction on employer at later date).

Liesegang v. Sec'y of Veterans Affairs, 312 F.3d 1368 (Fed. Cir. 2002) amended on reh'g in part, 65 F. App'x 717 (Fed. Cir. 2003) presents a different factual pattern from both the cases above and the situation here. There, the question was not whether the government had the power to issue the regulations at issue, but when they took effect. *Id.* at 1370. *Liesegang* thus has no applicability here.

discretionary authority to detain or release individuals as it deems appropriate. These decisions are absolutely within the executive branch's authority, and cannot be reviewed by Article III courts. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008) ("The alien may appeal the IJ's bond decision to the BIA . . . but discretionary decisions granting or denying bond are not subject to judicial review.") (citing 8 U.S.C. § 1226(e)). The government thus has ample power to detain noncitizens without resorting to the unauthorized use of mandatory detention.

And no one will be released under the district court's holding unless there is an affirmative finding by the government that release would not negatively impact the public. The noncitizen bears the burden of demonstrating at his or her bond hearing that he or she should be released. *Guerra*, 24 I. & N. Dec. at 37. To meet his or her burden, an individual must show that he or she is not a flight risk or a danger to the public. *Id.* at 3. The structure of Section 1226, consequently, inherently provides for the protection of the public even if an individual is not apprehended "when…released." This case is thus fundamentally distinguishable from *Montalvo-Murillo* and the remaining "loss of authority" cases the government cites.

3. The government's remaining scatter-shot arguments do not further its case.

The government proposes a number of additional piecemeal arguments for why the "loss of authority" doctrine should be applied to this case, despite the fact that the established preconditions for the doctrine do not exist here. Each of the government's arguments, however, misconstrues the nature of detention or executive power under Section 1226.

The government proposes that the "when…released" clause should be considered a "directory" rather than "jurisdictional" deadline, and thus it is only aspirational. Gov't Br. at 45-47. It points to cases that have found that the word "shall" juxtaposed with a deadline, "without more," does automatically "'preclud[e] [executive] action later.'" Gov't Br. at 46 (quoting *Barnhart*, 537 U.S. at 161). But the distinction between "directory" and "jurisdictional" deadlines does not apply here for the same reason the "loss of authority" doctrine is inapposite: the government loses no power under the district court's interpretation of Section 1226(c). Its authority to act is not rendered "ineffectual," as Section 1226(a) exists and encompasses all relevant noncitizens who are not apprehended "when…released." Further, the "when…released" clause is not simply a "deadline," it is part of the definition of an "alien described in paragraph (1)," and hence by its very nature jurisdictional. 8 U.S.C. § 1226(c)(2); *see* Section V.A.1.b, *supra*. This is not a case of a statute containing the word

"shall…standing alone" and "without more." Gov't Br. at 46, 48 (internal citations and quotations omitted). The distinction between "directory" and "jurisdictional" deadlines has no bearing on how this Court should construe Section 1226(c).

For the same reasons, upholding the district court's interpretation of Section 1226(c) would not constitute a "sanction" against the government. Gov't Br. at 48-50. An individual is not properly subject to mandatory detention in the first instance if he or she has returned to his community before he or she is apprehended by DHS under Section 1226. And allowing the government to use the framework set out by Section 1226(a) is not a "'coercive'" penalty, as it does not prevent the government from ultimately detaining anyone. Gov't Br. at 48 (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). Under the district court's holding, the government only has to ***consider*** whether release should be granted in any particular case.

Similarly, characterizing a bond hearing as a "windfall" is inapt. A bond hearing does not guarantee ***anything***. Indeed, an IJ may consider how recently a noncitizen was released in making its determination, i.e., whether he or she only "made it as far as the adjacent parking lot," Gov't Br. at 37 (quoting *Hosh*, 680 F.3d at 380 n.6). *See, e.g., Guerra*, 24 I. & N. Dec. at 39 (Section 1226(a) does not limit discretionary factors IJ may consider). Further, as Justice Kennedy discussed at length in his *Demore* concurrence, immigration detention is not intended to be

punitive. 538 U.S. at 532-33. Section 1226(c)'s purpose is to protect the public and increase the efficiency of our immigration system. *Id.* at 532. Increased process during removal proceedings can only be viewed as a "windfall" for noncitizens if Section 1226's purpose is to "incarcerate for other reasons," which is "not a proper inference…from the statutory scheme[.]" *Id.* at 532-33.

Finally, the government argues that "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" made up by Plaintiffs and their class members. Gov't Br. at 58. But the class the district court certified is not random. Each individual spent time in his or her community—without committing any further enumerated offenses—before he or she was detained by DHS. The class members are more likely to have stronger community ties than those who are directly transferred from criminal to immigration custody, and are consequently less likely to flee if released than those who are transferred directly. And, as their time in the community demonstrates, they are less likely to pose dangers to the public. It is DHS, not the district court, who is introducing arbitrariness into the system by transferring some individuals directly into immigration detention, while allowing others to return home only to disruptively apprehend them at an unknowable future date. This is the definition of arbitrary and capricious governmental behavior.

VIII. CONCLUSION

The district court ruled correctly. Section 1226(c)'s plain text, statutory purpose, and logic all demonstrate that mandatory detention applies only to noncitizens apprehended immediately upon their release from custody. This Court must AFFIRM the district court's grant of preliminary injunction to Plaintiffs and the class members.

Respectfully submitted,

DATED: February 2, 2015

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IX. STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs notify the Court of the following related case currently pending before the Court, which raises similar legal issues as those raised in the instant appeal:

Khoury v. Asher, No. 14-35483 (9th Cir. docketed June 5, 2014).

DATED: February 2, 2015

/s/ Ashok Ramani

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X. CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,653 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2010 in 14 point Times New Roman font.

DATED: February 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 2, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Ashok Ramani
ASHOK RAMANI

Case No. 14-16326, 14-16779

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEH JOHNSON, Secretary of Homeland Security, et al.,

Defendants-Appellants,

v.

MONY PREAP, EDUARDO VEGA PADILLA, and JUAN MAGDALENO,

Plaintiffs-Appellees.

Consolidated Appeals from the United States District Court
Northern District of California
The Honorable Yvonne Gonzalez Rogers, Presiding
Case No. 4:13-cv-05754-YGR

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

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

MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

Date Filed: December 12, 2013

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on February 18, 2014[1] at 2:00 p.m. at 1301 Clay Street; Oakland, California, in the Ronald V. Dellums Federal Building, Courtroom 5, Second Floor, before the Honorable Yvonne Gonzalez Rogers, Plaintiffs-Petitioners will, and hereby do move the Court, pursuant to Fed. R. Civ. P. 23, for an order certifying the class described in the accompanying memorandum of points and authorities. Plaintiffs-Petitioners will also move the Court to appoint the law firm of Keker & Van Nest LLP, Asian Americans Advancing Justice – Asian Law Caucus, and American Civil Liberties Union Foundation of Northern California as class counsel. Plaintiffs-Petitioners' motion is based on this submission, the accompanying declarations and exhibits, the pleadings and other documents on file in this case, and any argument presented to the Court.

RELIEF REQUESTED (CIVIL L.R. 7-2(B)(3))

Through this motion, Plaintiffs-Petitioners request that the Court certify as a class the individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 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 (the "Proposed Class"). Plaintiffs-Petitioners further request that they be named as representative plaintiffs for the Proposed Class, and that their counsel be appointed as class counsel.

[1] Plaintiffs-Petitioners and other members of their proposed class comprise an inherently transitory class and have accordingly filed this motion shortly after filing their complaint. Because Defendants-Respondents have not yet appeared in this case, the Plaintiffs-Petitioners have noticed the motion hearing date to accommodate Defendants-Respondents' time to appear. Plaintiffs would be amenable to a modest adjustment to the briefing schedule for this motion if they and Defendants-Respondents may obtain leave of the Court to do so under Standing Order Rule 3. Plaintiffs propose to do so by stipulation with the Defendants-Respondents after they have appeared.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. § 1226 ("Section 1226") governs the Attorney General's[2] authority to detain noncitizens while deportation proceedings against them are pending. Under Section 1226, noncitizens who are detained pending their proceedings are typically afforded individualized bond hearings where they may attempt to prove that their release would not create a risk of flight or a danger to the public. The statute at issue here creates an exception to this framework. Section 1226(c) defines a category of individuals ineligible for bond hearings, and for whom continued, uninterrupted detention is mandatory. These noncitizens remain in detention for months on end, and are not allowed to plead for their release to a neutral arbiter. Although categorical, mandatory detention is an extraordinary legal concept with few, if any, parallels in our justice system, the express terms of Section 1226(c) are actually quite limited. On its face, the statute applies only to a narrow category of individuals—noncitizens who are taken into custody by the Government immediately upon their release from criminal custody for specific triggering offenses enumerated in Section 1226(c)(1) ("Section 1226(c)(1) offenses").

This case involves a class of noncitizens who were not in custody for Section 1226(c)(1) offenses when they were apprehended by immigration authorities, but are nonetheless being held in mandatory detention under Section 1226(c). Their offenses include crimes that occurred many years ago, some of which were never severe enough to warrant incarceration in the criminal justice system. Many individuals in this class have clear and compelling records of rehabilitation and redemption. They and their loved ones anguish over their draconian, excessive and unnecessary—yet uncontestable—imprisonment during the pendency of deportation proceedings. And for all of the individuals in this class, the opportunity to prepare a case against removal is severely undermined by the isolating circumstances of their unconditional detention.

[2] For convenience unless the context requires more specificity, the Secretary of the Department of Homeland Security, the Attorney General and all other named defendants will be referred to below as the "Government."

The central question presented here is whether the Government's mandatory detention power extends to this class of noncitizens. Relying on a strained interpretation of Section 1226(c), the Government claims that it does. Throughout the state of California, the Government routinely tracks down and detains thousands of noncitizens with records of past criminal conviction, locking them up without notice, severing their established social ties, and initiating lengthy removal proceedings against them without providing any way for these individuals to challenge their detention while they try to fight from behind bars for the right to stay in this country. To justify this breathtakingly coercive power—faced with it, some detainees simply give up and agree to deportation without ever knowing that they were not, in fact, deportable—the Government must ignore, and is ignoring, the express terms of Section 1226(c)(1). That statute, on its face, exposes noncitizens to mandatory detention only ***"when [they are] released"*** from custody for a Section 1226(c)(1) offense.

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Jose Magdaleno (the "Named Plaintiffs") seek a ruling in this case that the Government's application of Section 1226(c) is unlawful and unconstitutional. On behalf of themselves and all of those similarly situated in the state of California, the Named Plaintiffs respectfully request that this Court certify their proposed class of plaintiffs and approve their counsel as counsel for the class.

II. STATEMENT OF FACTS

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

Section 1226 controls the Government's authority to detain noncitizens while their deportation proceedings are pending. Section 1226(a) gives the Government discretion to release an individual on his own recognizance or on a bond if it determines that release would not create a risk or flight or a danger to the community. 8 U.S.C. § 1226(a). If the Government decides not to release an individual or conditions release upon a bond amount the individual is unwilling or unable to pay, the individual is entitled to have the Government's decision reviewed by an Immigration Judge at a bond redetermination hearing. At that hearing, the individual has the opportunity to demonstrate that he should be released. *See* 8 C.F.R. §§ 1003.19, 1236.1(d)(1) (2013).

Section 1226(c) is an exception to the system created by Section 1226(a). It defines a category of individuals to whom the individualized determinations of Section 1226(a) are not afforded. It applies to noncitizens described in paragraph (1):

> (1) Custody
>
> The Attorney General shall take into custody ***any alien who***--
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) ["Multiple criminal convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled substances"], (C) ["Certain firearms offenses"], or (D) ["Miscellaneous crimes"] of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral turpitude"] of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist activities"] of this title or deportable under section 1227(a)(4)(B) ["Terrorist activities"] of this title,
>
> ***when the alien is released***, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c) (emphasis added). Section 1226(c)(2) further states that the Government is prohibited from releasing certain noncitizens "described in paragraph [1226(c)(1)]" except in limited circumstances. 8 U.S.C. § 1226(c)(2). On its face, Section 1226(c)(1) covers only individuals who are taken into custody by immigration authorities *immediately upon* the individual's release from criminal custody for a crime described by Section 1226(c)(1), subsections (A)-(D).

Read in its entirety, 8 U.S.C. § 1226 provides the Government with discretionary authority to arrest, detain, and release immigrants pending removal proceedings, except for a specified class of noncitizens whom the Government must detain at the time they are released from custody. Despite the tightly circumscribed scope of Section 1226(c) —which is evident from the plain language and the structure of the statute—the Board of Immigration Appeals (the "BIA"), in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), construed Section 1226(c) to require mandatory detention for individuals who were *not* taken into immigration custody "when . . . released" from

custody for a Section 1226(c)(1) offense. The BIA instead decided that the "when [] released" language does not limit the class of the individuals subject to mandatory detention, but instead merely describes the Attorney General's duty to act promptly. 23 I&N at 121. In effect, in *Rojas* the BIA impermissibly excised the "when . . . released" statutory language from Section 1226(c)(1) in determining which individuals are "described in paragraph [c](1)" and subject to mandatory detention.

The absence of any textual support for the BIA's interpretation in Section 1226(c) is a glaring error, but the effect of the BIA's construction of the statute is even more disturbing. The BIA's decision in *Rojas* dramatically expands the reach of Section 1226(c), exposing people who are living free to mandatory detention, thereby depriving them of basic procedural protections. What the Government is doing with mandatory detention in California under color of *Rojas* exceeds its statutory authority and violates the due process rights of those who are wrongfully detained. The construction of Section 1226(c) that the Named Plaintiffs will advance in this case is the only correct and reasonable reading of the statute, and the Named Plaintiffs will ask that the Court to adopt it for that reason alone, but the Court should also adopt it to avoid the more fundamental questions of due process that *Rojas* raises.

B. Representative plaintiffs

1. Mony Preap

Mony Preap is 32 years old. He came to the United States as an infant in 1981 as a refugee from Cambodia. *See* Ex. A (Declaration of M. Preap) ¶ 2. In 2006, Mr. Preap was released from custody for a Section 1226(c)(1) offense. *Id.* ¶ 7. In September of 2013, Mr. Preap was taken into immigration custody as the Government initiated removal proceedings against him.[3] Mr. Preap is a lawful permanent resident of the United States, a status he has enjoyed since he entered. *Id.* ¶ 2. He is the single father of an 11-year-old son. *Id.* ¶ 4. Before his detention, Mr. Preap lived with and was the primary caretaker of his son and his elderly mother, who has breast cancer and requires extensive care. *Id.*

[3] Mr. Preap was transferred into immigration detention from custody for a non-Section 1226(c)(1) offense. Ex. A ¶¶ 3, 7.

Mr. Preap is currently being held at West County Detention Facility in Richmond, California under Section 1226(c). *Id.* ¶ 3.

2. Eduardo Vega Padilla

Eduardo Vega Padilla is 48 years old. *See* Ex. B (Declaration of E. Padilla) ¶ 2. He came from Mexico as an infant in 1966, and became a legal permanent resident before he turned two. *Id.* He completed a six-month sentence for a Section 1226(c)(1) offense in 2002. *Id.* ¶ 7. Eleven years later—after a period of redemption, quiet enjoyment of civilian life, and caretaking for loved ones—ICE officials appeared at Mr. Padilla's front door. *Id.* ¶ 4. They asked him to accompany them to the immigration office, which Mr. Padilla did, voluntarily. *Id.* He was then handcuffed and taken into immigration custody, where he has remained for the past four months. *Id.*

Mr. Padilla's entire family resides in the United States. *Id.* ¶ 3. His family members include an elderly mother, three siblings, five children, and seven grandchildren. *Id.* All of them are United States citizens. *Id.* His last grandchild was born while Mr. Padilla was in detention. *See id.* ¶ 5. Prior to his detention, Mr. Padilla lived with and cared for his elderly mother, his youngest daughter, and grandson. *Id.* ¶ 3. He ran a small business, making a living by repairing electronics and automotive parts, and doing remodeling work. *Id.* ¶ 5.

Mr. Padilla is currently being held at Rio Cosumnes Correctional Center in Elk Grove, California under Section 1226(c). *Id.* ¶ 4.

3. Juan Magdaleno

Juan Magdaleno is 57 years old. *See* Ex. C (Declaration of J. Magdaleno) ¶ 2. He has lived in the United States as a lawful permanent resident since 1974, when he came here from Mexico as a teenager. *Id.* He was released from custody for a Section 1226(c)(1) offense in January 2008. *Id.* ¶ 10. In July of 2013, he was detained by the Government at his home. *Id.* ¶ 3. Prior to being taken into immigration detention, Mr. Magdaleno lived with his wife, two of his four children, his son-in-law, and his grandchild, all of whom are United States citizens. *Id.* ¶ 4. He is very close to his family. *Id.* ¶¶ 4, 6. Last month, one of his daughters got married. *Id.* ¶ 6. Although he was unable to attend because he was in immigration detention, his family arranged

to have him call and make a speech at the reception over the speaker system. *Id.* Before he was detained, Mr. Magdaleno took care of four of his grandchildren every day, taking them to school, picking them up and watching them after school until their parents returned from work. *Id.* Because of his detention, one of his daughters has had to close her nail salon early each day to watch her children. *Id.*

Mr. Magdaleno is currently being held West County Detention Facility in Richmond, California under Section 1226(c). *Id.* ¶ 3.

III. STATEMENT OF THE ISSUES TO BE DECIDED

Named Plaintiffs suffer the Government's unlawful and unconstitutional detention practices along with many others in the California immigration detention population. Like Mr. Preap, Mr. Padilla, and Mr. Magdaleno, these other individuals were released from custody for an offense enumerated by Section 1226(c)(1), and the Government did not detain them for immigration-enforcement purposes until sometime after they were released. Nevertheless, the Government has now subjected them to mandatory detention under Section 1226(c) and *Rojas*. As a result, hundreds, if not thousands, of individuals in California have been or will be uniformly denied the individualized determinations for which Section 1226 otherwise provides. As Named Plaintiffs seek the very same relief that those potential claimants would themselves seek—declaratory and injunctive relief to stop the Government's illegal and unconstitutional application of the law—this action is ripe for class certification.

The Named Plaintiffs respectfully request that the Court decide the following issues:

1. That a class should be certified under Federal Rule of Civil Procedure 23(a) and (b)(2) that consists of all individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 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; [4]

2. That Mony Preap, Eduardo Vega Padilla, and Juan Magdaleno are appropriate class representatives of the Proposed Class; and

3. That Keker & Van Nest (KVN), Asian Americans Advancing Justice – Asian Law Caucus (AAAJ-ALC), and American Civil Liberties Union Foundation of Northern California (ACLU-NC) are qualified counsel for the Proposed Class.

IV. ARGUMENT

A. The Proposed Class satisfies all requirements of Rule 23(a).

1. The number of current and future proposed class members renders joinder impracticable.

To meet Rule 23(a)(1)'s numerosity requirement, plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not allege the exact number or specific identity of class members [5] "so long as 'general knowledge and common sense indicate that it is large.'" *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 598 (N.D. Cal. 1986) (citing *Perez-Funez v. INS*, 611 F.Supp. 990, 995 (C.D.Cal 1984)). For that reason, Rule 23(a)'s numerosity requirement does not impose absolute numerical limitations, but rather entails an examination of the specific facts of each case. *General Tel. Co.*

[4] In the alternative, Plaintiff-Petitioners seek certification of a habeas corpus class of detainees in the State of California pursuant to Federal Rule of Civil Procedure 81(a)(4). It is well-established that, in appropriate circumstances, a petition for habeas relief may proceed on a representative or class-wide basis. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 404 (1980) (holding that class representative could appeal denial of nationwide class certification of habeas and declaratory judgment claims); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) ("the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus"); *Ali v. Ashcroft*, 346 F.3d 873, 886-91 (9th Cir. 2003) (affirming certification of nationwide habeas and declaratory class), *overruled on other grounds by Jama v. ICE*, 543 U.S. 335 (2005); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (holding that "under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions"); *Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 620 (E.D. Pa. 1996) (certifying habeas class action challenging state's status under Antiterrorism and Effective Death Penalty Act). *See also Yang You Yi v. Reno*, 852 F. Supp. 316, 326 (M.D. Pa. 1994) (noting that "class-wide habeas relief may be appropriate in some circumstances.").

[5] 1 William B. Rubenstein, *Newberg on Class Actions* § 3.13 (5th ed. 2011).

of the Northwest v. EEOC, 446 U.S. 318, 329 (1980); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). For example, this court has certified a class of 27 members. *Tietz v. Bowen*, 695 F. Supp. 441, 445 (N.D. Cal. 1987); *aff'd*, 892 F.2d 1046 (9th Cir. 1990). Plaintiffs easily meet Rule 23's numerosity requirement.

On any given day, the Government holds an estimated 3,500 individuals in immigration detention in the state of California. Over the twelve-month period ending November 2013, the Government held an estimated 4,410 individuals in mandatory detention in California.[6] Proposed class counsel identified twenty individuals as members of the proposed class in select facilities over only a four-month period. *See* Ex. E (Decl. of A. Pennington) ¶¶ 4-26. Another three likely members of the proposed class were identified over the course of only one week in facilities near Los Angeles. *See* Ex. E (Decl. of J. Pollock) ¶¶ 4-6.[7] The identified individuals represent only a small fraction of the estimated number of class members, as identified individuals are more likely than the population in immigration detention to have counsel, more likely to have affirmatively sought out assistance from AAAJ-ALC or through legal orientation programs, and less likely to have language or other barriers that interfere with their ability to seek out assistance. Ex. D ¶¶ 4-5, 26.[8] The number of current class members therefore, is assuredly large.

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[6] TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts by Nationality, Geographic Location, Year and Type of Charge*, fiscal year ending November 2013, criminal charges in California, (Dec. 16, 2013), http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php. Additionally, immigration detainers placed on individuals by the Government are oftentimes based on stale offenses. *See* TRAC Immigration, *Few ICE Detainers Target Serious Criminals* (Dec. 16, 2013), http://trac.syr.edu/immigration/reports/330/ (reporting that for over 80% of immigration detainers issued by the Government to state and local prisons and jails in the state of California, the most serious conviction serving as the basis for the detainer was over a year old, and for almost 50% of the detainers, the most serious conviction was over 5 years old). Thus, one of the primary mechanisms for identifying individuals for removal proceedings (and by extension, detention), depends on old qualifying offenses to justify mandatory detention.

[7] These twenty-three individuals were identified through observing immigration court hearings, visiting detention facilities, giving legal orientation programs, and being in contact with a handful of practitioners representing immigration detainees. Ex. D ¶ 26; Ex. E ¶¶ 4-6.

[8] Immigration records are not readily available to the public, *e.g.*, 8 C.F.R. § 236.6 (2013), which renders it difficult to identify and locate potential class members, further supporting a finding of the impracticability of joinder. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982) (difficulty in identifying or locating class members supported finding of impracticability).

Putting aside the sheer number of existing class members, the Government's unlawful application of Section 1226(c) will continue to injure future class members—individuals who are, by definition, unknown and therefore impossible to join in the present lawsuit. *See Nat'l Ass'n of Radiation Survivors*, 111 F.R.D. at 599. Relatedly, as the individual cases for members of this inherently-transitory class conclude their removal proceedings, voluntarily depart, or are permitted to stay in the United States, the composition of the proposed class will fluctuate. *See Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) (holding that rotating population of detention center established sufficient numerosity to make joinder impracticable).

Joinder of the proposed class members is also impracticable as the current proposed class members, confined to immigration detention yet spread across the State of California, lack regular access to phones and email, and have no access to the internet, and are thus inhibited in their ability to join and actively participate in a lawsuit. *See Jordan*, 669 F.2d at 1319, *vacated on other grounds*, 459 U.S. 810 (1982) (geographic diversity of class members favors impracticability of joinder); *Tietz*, 695 F. Supp. at 445 (same), *aff'd*, 892 F.2d 1046 (9th Cir. 1990).

Moreover, the vast majority of proposed class members lack the resources to bring an individual suit demanding a bond hearing. *Jordan*, 669 F.2d at 1319. While detained, members of the proposed class are unable to work, and consequently do not have the financial resources to pay for counsel. *See* Nina Siulc, et al., Vera Institute of Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program* (2008) (projecting that an estimated 84% of immigrant detainees nationwide do not have lawyers). Moreover, many detainees may lack familiarity with the English language or with the American legal system, rendering it unlikely they would institute separate suits. 5 James W.M. Moore, *Moore's Federal Practice* § 23.22[1][e] (3d ed. 2013).

Finally, where, as here, Named Plaintiffs seek declaratory and injunctive relief, speculative or even conclusory allegations regarding numerosity would suffice to permit class certification. *Sueoka v. United States*, 101 Fed. Appx. 649, 653 (9th Cir. 2004) (citation

omitted)); 5 *Moore's Federal Practice* § 23.22[3]. The Named Plaintiffs have presented much more than speculative allegations here.

Accordingly, the Named Plaintiffs' proposed class easily satisfies Rule 23(a)(2)'s numerosity requirement.

2. The claims of the proposed class members share common questions of law and fact.

To meet Rule 23(b)(2)'s commonality requirement, plaintiffs must "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Moreover, "'[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis in original)). In deciding the issue of commonality, a "court must determine whether the claims of the proposed class 'depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Wang v. Chinese Daily News, Inc.*, No. 08-55483, --- F.3d ----, 2013 WL 4712728 (9th Cir. Sept. 3, 2013) (quoting *Wal-Mart*, 131 S. Ct. at 2551). Commonality exists where claims retain a common core of factual or legal issues, even if the circumstances of each particular claim member vary. *Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008) (holding commonality requirement met where plaintiffs sought common legal remedy for common wrong).

Here, Mr. Preap, Mr. Padilla, and Mr. Magdaleno, along with the other members of the Proposed Class, share both a common injury and a common legal contention central to their claims. *First*, all have suffered the same injury: through the Government's misapplication of Section 1226(c) under *Rojas*, each is subject to mandatory detention and ineligible for a bond hearing, even though each individual was not taken into immigration custody immediately upon release from custody for a Section 1226(c)(1) offense. *See* Ex. A ¶¶ 3-7; Ex. B ¶¶ 3-4, 7; Ex. C ¶¶ 3, 9-10; Ex. E ¶¶ 5-26; Ex. G ¶¶ 3-7; Ex. H (Decl. of D. Rosche) ¶¶ 3-5. As a result, each

proposed class member is denied the opportunity to make his case to an Immigration Judge, who would otherwise make an individualized determination of whether detention is warranted. The Government's practice of following the BIA's *Rojas* decision violates the statute Section 1226 itself, as well as the Fifth Amendment's Due Process guarantees. *Second*, whether Section 1226(c) applies to individuals like those in the Proposed Class forms the central question for each proposed class member's case. This is a question of law, and a question that is dispositive on whether each and every proposed class member is entitled to the relief they seek.

Accordingly, the Proposed Class satisfies the commonality requirement. Fed. R. Civ. P. 23(a)(2).

3. The claims of the Named Plaintiffs are typical of those of the proposed class members.

Mr. Preap, Mr. Padilla, and Mr. Magdaleno bring claims "typical of the claims or defenses of the class," satisfying Rule 23(a)'s typicality requirement. Fed. R. Civ. P. 23(a)(3). As the Ninth Circuit recently explained, the typicality requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez*, 591 F.3d at 1124 (internal quotation marks omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The test is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 539 (N.D. Cal. 2012) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). As one leading treatise observes, "[c]ivil rights cases that challenge uniform practices or policies that have allegedly injured the class representative as well as other class members satisfy the typicality requirement." 5 *Moore's Federal Practice* § 23.24[8][f]. This case presents no exception.

Here, as explained above, Mr. Preap, Mr. Padilla, and Mr. Magdaleno were each, at some

time in the past, held in custody for an offense enumerated by Section 1226(c)(1).[9] Each was then released from that custody.[10] It was only following some period of time after that release that the Government then took each of them into immigration detention in a California facility and deemed them ineligible for a bond hearing under Section 1226(c). The same holds true for each proposed class member. Because Plaintiffs and members of the proposed class share the same claim and have all been injured by the same practice of the Government's, their interests are co-extensive and aligned. *Hanon*, 976 F.2d at 508. Accordingly, their claims satisfy Rule 23(a)'s typicality requirement.

4. The Named Plaintiffs and their counsel will adequately protect the interests of the Proposed Class.

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "In making this determination, courts must consider two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020). "Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Rodriguez*, 591 F.3d at 1125 (internal quotation marks omitted). The Named Plaintiffs and their counsel easily meet this requirement.

a. Named Plaintiffs

As with all current and future members of the proposed class, the Government keeps Mr. Preap, Mr. Padilla, and Mr. Magdaleno detained in immigration detention facilities in the state of California, and denies them bond hearings, based on the Government's incorrect and unlawful interpretation of Section 1226(c). Mr. Preap, Mr. Padilla, and Mr. Magdaleno seek declaratory and injunctive relief establishing that the Government's application of Section

[9] *See* Ex. A ¶ 7; Ex. B ¶ 7; Ex. C ¶¶ 9-10.

[10] *See* Ex. A ¶ 7; Ex. B ¶ 7; Ex. C ¶ 10.

1226(c) violates the Section 1226 and the Constitution. Because this is the same relief that the proposed class members would also seek, Mr. Preap, Mr. Padilla, and Mr. Magdaleno's interests are entirely aligned with those of the proposed class members. For the same reason, they have no conflict of interest with the proposed class members. Moreover, Mr. Preap, Mr. Padilla, and Mr. Magdaleno are eager to bring this class action on behalf of those similarly situated and will therefore prosecute the action vigorously. *See* Ex. A ¶ 9; Ex. B ¶ 9; Ex. C ¶ 11.

b. Counsel

Class counsel must be "qualified, experienced, and generally able to conduct the proposed litigation." *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 541, 545 (N.D. Cal. 2005). KVN, AAAJ-ALC, and ACLU-NC jointly represent the Named Plaintiffs. Together, counsel for the Named Plaintiffs have significant experience in complex and class action litigation, including on civil rights and immigration issues. *See* Ex. D (Decl. of J. Streeter) ¶¶ 2-12; Ex. E (Decl. A. Pennington) ¶¶ 1-26; Ex. F (Decl. J. Mass) ¶¶ 2-5.

Jon Streeter has over thirty years of experience litigating complex actions, including class actions. His associates, Stacy Chen, Betny Townsend, and Theresa Nguyen also have significant experience litigating complex cases. Mr. Streeter has represented many clients pro bono, and has specific experience litigating civil rights issues in a state-wide class action brought under Rule 23 in this District. He and the law firm Keker & Van Nest LLP have undertaken representation of Named Plaintiffs and the proposed class on a pro bono basis.

Julia Harumi Mass and Jingni (Jenny) Zhao represented habeas petitioner Bertha Mejia Espinoza in her successful habeas petition challenging her detention without a bond hearing under the same statute at issue in this case, 8 U.S.C. § 1226. *Espinoza v. Aitken*, 2013 WL 1087492 (N.D. Cal. 2013). Ms. Mass also represents the class certified in civil rights case *De Abadia-Peixoto v. U.S. Department of Homeland Security*. 277 F.R.D. 572 (N.D. Cal. 2011). There, the class certified consisted of "all current and future adult immigration detainees who have or will have proceedings in immigration court in San Francisco." *Id.* at 577.

Alison Pennington and Anoop Prasad of Asian Americans Advancing Justice-Asian Law Caucus represented petitioner Abner Eugenio Dighero-Castaneda in his successful habeas petition

challenging the government's detention of him under Section 1226 as well. *Dighero-Castaneda v. Napolitano*, 2013 WL 1091230 (E.D. Cal. 2013).

None of the proposed counsel has any conflict of interest with members of the proposed class and each is committed to vigorously prosecuting this action.

B. Plaintiffs request that the Court certify their class under Rule 23(b)(2).

Named Plaintiffs request that the Proposed Class be certified under Rule 23(b)(2). Under Rule 23(b)(2), a court looks "at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. Accordingly, Rule 23(b)(2) has two requirements: (1) that "the party opposing the class has acted or refused to act on grounds that apply generally to the class," such that (2) "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Proposed Class and requested relief meet both requirements.

First, the Government's misapplication of Section 1226(c) subjects the Named Plaintiffs and members of the Proposed Class to detention without the possibility of individualized hearings. The Government's practice by definition applies generally to the Proposed Class, which consists of individuals being unlawfully held without the possibility of release because of the practice. *See IV.A., supra.*

Second, the Named Plaintiffs seek declaratory and injunctive relief to uniformly bar defendants from their unlawful application of Section 1226(c). The requested relief "would provide relief to each member of the class." *Wal-Mart*, 131 S.Ct. at 2557 (explaining also that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture"). If the requested relief is granted, each class member would be entitled to a bond hearing. No individualized determinations need to be made by this Court—the actual grant or denial of bond would be left to the discretionary authority of the Department of Homeland Security or the Attorney General, as provided by Section 1226(a) and its implementing regulations.

C. Keker & Van Nest, AAAJ-ALC, and ACLU-NC respectfully request that the Court appoint them jointly as counsel for the Proposed Class.

Keker & Van Nest, AAAJ-ALC, and ACLU-NC respectfully request that the Court appoint them jointly as counsel for the Proposed Class. As explained above, and as required by Rule 23(g)(1)(A), counsel have significant experience litigating complex cases, including litigating civil rights class actions and the questions of statutory interpretation and Constitutional law on which the Named Plaintiffs' and proposed class members' claims are based. Moreover, counsel have extensive experience litigating claims involving the immigration laws and habeas challenges to detention. *See* Ex. D (Decl. of J. Streeter) ¶¶ 3-12; Ex. E (Decl. of A. Pennington) ¶¶ 2-4, 26; Ex. F (Decl. of J. Mass) ¶¶ 3-6. Collectively, counsel for the Named Plaintiffs have spent extensive time investigating the potential claims in this action, that includes time speaking with the class representatives and investigating the Government's practices. *See* Ex. D ¶ 9; Ex. E ¶¶ 3, 5-26; Ex. F ¶¶ 4-5.

As required by Fed. R. Civ. P. 23(g)(4), and as explained above in Section IV.A.4.b above, *supra*, KVN, AAAJ-ALC, and ACLU-NC will "fairly and adequately represent the interests of the class." Counsel have undertaken to represent Named Plaintiffs and members of the Proposed Class on a pro bono basis, and are committed to devote the required time and financial resources necessary to litigate this case and represent the interests of the Named Plaintiffs and proposed class members.

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V. CONCLUSION

Named Plaintiffs accordingly request that the Court certify their proposed class of plaintiffs and appoint KVN, AAAJ-ALC, and ACLU-NC as class counsel. In the alternative, Named Plaintiffs request class discovery to further demonstrate the ripeness of this action for class certification.

Dated: December 16, 2013

KEKER & VAN NEST LLP

By: */s/ Jon Streeter*
JON STREETER
STACY CHEN

Dated: December 16, 2013

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

By: */s/ Julia Harumi Mass*
JULIA HARUMI MASS
JINGNI (JENNY) ZHAO

Dated: December 16, 2013

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By: */s/ Alison Pennington*
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EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

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

DECLARATION OF MONY PREAP

Judge: Hon. Yvonne Gonzalez Rogers

Date Filed: December 12, 2013

Trial Date: Not Set

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

I, MONY PREAP, declare the following:

1. I make this declaration from my personal knowledge and, if called to testify to these facts, could and would do so competently. This declaration is made in support of Plaintiffs' Motion for Class Certification.

2. My name is Mony Preap. I was born on June 16, 1981, and I am 32 years old. I was born in a refugee camp. I was always told the refugee camp was in Malaysia, but ICE tells me that it was in Indonesia. I have no memory of my life before coming here. My family is from Cambodia. They fled the Khmer Rouge. My mother was arrested and tortured by the Khmer Rouge. I came to the United States in 1981, when I was an infant. I came to the United States with my entire family, which includes my father, my mother and my older sister. I have been a lawful permanent resident of the United States since my entry. Since coming to the United States, I have always lived in California.

3. I have been in immigration custody at the West County Detention Center in Richmond, California since September 11, 2013. At the time, I was serving a 72 day sentence for simple battery at Sonoma County Detention Facility, and was transferred directly from criminal to immigration custody. I have been told that my conviction for simple battery does not alone make me removable.

4. Prior to being taken into detention, I lived with my eleven-year-old son and my mother. I am a single father to my son, whose mother left us when my son was three months old, and I retain sole custody of him. My son is a United States citizen. My mother is in remission for breast cancer and also suffers from seizures. Her medical conditions have slowed her down, she tires easily and needs to rest in bed more. Prior to being taken into detention, I spent my days caring for her, helping her cook, cleaning the house and taking out the trash. My mother also doesn't drive so I would run errands for her and I would pick up her prescriptions.

5. Things have been difficult for my family since I have been detained. Phone calls are extremely expensive here, so I have tried to keep in touch with my family, especially my son, by writing letters at least once per week. Before I was detained, I picked up my son from school every day, helped him with homework, and attended all of his school events. Luckily, my sister

lives five minutes away and has been able to help with my son and my mom, but she works and it is not a permanent solution. Before I was detained, I was also able to help our family financially by working part-time as an auto mechanic at a smog shop.

6. I am very close to my family. I would be able to pay a reasonable bond if granted one through a bond hearing because of my family's financial support. I requested a bond hearing on December 9, 2013. My request was denied on December 10, 2013. I have been informed that I am not eligible for a bond hearing because of two criminal convictions that took place in 2004.

7. In 2004, I was arrested for possession of a small amount of marijuana in two separate incidents. My court proceedings for those incidents did not take place until June 2006. The first incident resulted in a misdemeanor conviction, for which I was given credit for the few weeks of time that I had served. The second incident also resulted in a misdemeanor conviction, and a fine. I was released from custody for those incidents on June 29, 2006. On September 9, 2013, I was convicted of simple battery. My ex-girlfriend and I got into an argument. She punched me, cutting my lip. She also bit my arm leaving a large cut. I pushed her off of me after she bit me. She was not injured. She called the police. I waited for them to come and I was arrested. This was this incident that led to my simple battery sentence in the Sonoma County Detention Facility and transferred to ICE custody, referenced above in paragraph 4.

8. Other than my convictions for possession of marijuana, I have no other drug convictions. I have never had problems with alcohol or drug abuse. I try my best to be a good role model for my son. Being able to be with my son and my mother is very important to me, especially since I am the sole caregiver for both of them.

9. I would like to fight for the rights of all immigrants detained under 8 U.S.C. § 1226(c) who were not taken into immigration custody upon release from an offense that qualifies for mandatory detention, including people like me who were arrested on a nonmandatory detention qualifying offense and subsequently transferred from criminal custody to immigration custody. I would like to represent the class and ask that we be allowed the opportunity to demonstrate our eligibility for release on bond or on our own recognizance. I intend to vigorously pursue the claims that have been asserted in the lawsuit on behalf of all

similarly situated persons and I will participate in this litigation as counsel and I determine is appropriate. I intend to remain involved with this case and to represent the proposed class of detained immigrants if I am released from custody and allowed to remain in the United States.

10. I have never served as a class representative in any prior action.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct to the best of my knowledge and understanding.

This declaration was executed on this 15th day of December, 2013 in Richmond, California.

Mony Preap

Mony Preap

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

PLAINTIFFS-PETITIONERS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Date: March 18, 2014

JEH JOHNSON, Secretary, United States Department of Homeland Security[1]; ERIC H. HOLDER, JR., United States Attorney General; TIMOTHY S. AITKEN, Field Office Director, San Francisco Field Office, United States Bureau of Immigration and Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

Time: 2:00 p.m.
Ctrm: 5
Judge: Hon. Yvonne Gonzalez Rogers

Date Filed: December 12, 2013

Trial Date: Not Set

[1] Jeh Johnson was sworn in as Secretary of the U.S. Department of Homeland Security on December 23, 2013. Pursuant to Federal Rule of Civil Procedure 25(d), he is substituted as a defendant in place of Rand Beers, Acting Secretary of the U.S. Department of Homeland Security.

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NOTICE OF MOTION

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on March 18, 2014 at 2:00 p.m. at 1301 Clay Street; Oakland, California, in the Ronald V. Dellums Federal Building, Courtroom 5, Second Floor, before the Honorable Yvonne Gonzalez Rogers, Plaintiffs-Petitioners will, and hereby do move the Court for an order enjoining the Government from subjecting themselves and members of their proposed class to mandatory detention under 8 U.S.C. § 1226(c) because they were not (or will not have been) taken into immigration custody immediately upon release from criminal custody for an offense enumerated by 8 U.S.C. § 1226(c)(1). Plaintiffs-Petitioners' motion is based on this submission, the accompanying declarations and exhibits, the pleadings and other documents on file in this case, and any argument presented to the Court.

RELIEF REQUESTED (CIVIL L.R. 7-2(B)(3))

Plaintiffs-Petitioners request that this Court issue a preliminary injunction enjoining the Government from subjecting to mandatory detention individuals in the state of California under 8 U.S.C. § 1226(c) who were not (or will not have been) taken into immigration detention by the Government immediately upon their release from criminal custody for an offense enumerated by 8 U.S.C. § 1226(c)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Countless times over, the issue presented in this case—the legality of the Government's[2] application of Section 236 of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1226 ("Section 1226")—has been decided in Plaintiffs' favor. Yet the Government refuses to change its practice of subjecting to mandatory detention individuals who should have the opportunity for individual bond hearings. Instead, the Government structures its practices according to a decision by the Board of Immigration Appeals in *In re Rojas*, 23 I&N Dec. 117 (BIA 2001), that has been

[2] Unless the context requires more specificity, the Secretary of the Department of Homeland Security, the Attorney General and all other named defendants will be referred to below as the "Government."

held unworthy of *Chevron* deference by courts across the country.

Section 1226 governs the Government's authority to detain non-citizens while their removal proceedings are pending. Under Section 1226(a), the Department of Homeland Security ("DHS") may release these noncitizens on bond if it determines that they are unlikely to abscond and do not pose a threat to the community at large. Where DHS refuses to do so, the noncitizen may request a hearing before the Immigration Judge ("IJ") in order to seek release from custody. 8 U.S.C. § 1226(a). Only a narrow exception to the Government's discretionary authority to release noncitizens on bond or on their own recognizance exists. Individuals taken into immigration detention "when [they are] released" from criminal custody for certain statutorily-enumerated offenses may *not* be released on bond. *See* 8 U.S.C. § 1226(c)(1) (listing offenses, hereinafter "Section 1226(c)(1) Offenses"). Congress had been presented with information demonstrating that certain of these individuals might pose a heightened threat to public safety or would be likely to abscond to avoid deportation. It enacted Section 1226(c) to require DHS to mitigate this risk through the continued, uninterrupted detention of those individuals.

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Magdaleno (the "Plaintiffs") and their proposed class members[3] form a group of individuals whom the Government did not take into immigration custody "when [they were] released" from criminal custody for a Section 1226(c)(1) Offense, but whom the Government has nonetheless subjected (or will subject) to mandatory detention under Section 1226(c). Mr. Preap, for example, enjoyed ***seven years*** of civilian life following his release from custody for a Section 1226(c)(1) Offense before the Government suddenly took him into custody and give him no opportunity to be released on bond. Similarly, Mr. Magdaleno and Mr. Padilla had been living in their communities for ***five years*** and ***eleven years***, respectively, before being taken into custody and held in mandatory detention.

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[3] As explained in their Motion for Class Certification, ECF No. 8, Plaintiffs request that the Court certify their proposed class of individuals as all individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 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.

The language of Section 1226(c) is unambiguous—by its terms, it does not apply to individuals in Mr. Preap's, Mr. Padilla's, and Mr. Magdaleno's circumstances. Moreover, the Government's erroneous application of Section 1226(c) to Plaintiffs and their proposed class members denies them the opportunity to make an individualized case for release to a neutral arbiter, which poses serious constitutional concerns.

On their own behalf and on behalf of their proposed class, Plaintiffs seek an order from this Court that enjoins the Government from denying bond hearings to individuals who were not taken directly into immigration custody immediately following their release from criminal custody for a Section 1226(c)(1) Offense. This requested injunction would permit Plaintiffs and their proposed class members to have an individualized hearing before a neutral arbiter to determine whether or not they may be released on bond under Section 1226(a)—a basic procedural protection currently denied to them. Not only will Plaintiffs and their proposed class members likely succeed on the merits of their claim, but they will also suffer irreparable harm in the absence of an injunction. The balance of the hardships favors granting their requested injunction and doing so will serve the public interest.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether Plaintiffs and their proposed class members' requested preliminary injunction should be granted in view of the following:

a) Their likelihood of demonstrating that the Government's application of Section 1226 violates the statute;

b) The irreparable harm they will suffer in the absence of preliminary injunctive relief;

c) The balancing of the hardships favoring them; and

d) The public interest served by their requested injunction.

III. STATEMENT OF FACTS

Plaintiffs and their proposed class members share a common attribute: they have been (or will be) subjected to mandatory detention under Section 1226(c), even though the Government did not take them into immigration detention immediately following their release from criminal custody for a Section 1226(c)(1) Offense. Facts salient to their stories are presented in Plaintiffs'

Motion for Class Certification, ECF No. 8. The most relevant are highlighted here.

A. Mony Preap

Mr. Mony Preap is a 32-year old single parent to an 11-year-old son, who is a United States citizen. He is a lawful permanent resident of the United States. *See* Decl. of M. Preap ISO Mot. for Class Certification, Ex. A ("Preap Decl.") ¶ 2, ECF No. 8-1. In 2004, Mr. Preap was arrested for two minor drug offenses, which led to two misdemeanor convictions. *Id.* ¶ 7. For those convictions, Mr. Preap served only a few weeks of time in jail and paid a fine. *Id.* He was released from jail on June 29, 2006. *Id.* ***Seven years later***, in September of 2013, the Government took Mr. Preap into immigration custody as it initiated removal proceedings against him.[4] *Id.* ¶ 3. Because of his 2004 misdemeanor convictions, the Government deemed Mr. Preap ineligible for a bond hearing and subjected him to mandatory detention.

Before he was taken into mandatory detention, Mr. Preap served as the primary caretaker for his mother and for his son. *Id.* ¶ 5. Both relied on him as such. *Id.* Mr. Preap picked his son up from school each day, helped him with school work, and attended all of his school functions. *Id.* His son's mother lives in the Bay Area, but eleven years ago, she abandoned both Mr. Preap and their three-month old son. *Id.* ¶ 4. In addition to caring for his son, Mr. Preap ran errands, helped with preparing meals, and picked up prescriptions for his elderly mother. *Id.* She relied heavily on him as her health was and continues to be fragile, she suffered seizures, and has been recovering from treatment for breast cancer, which is now in remission. *Id.* To provide for his family, Mr. Preap worked part time in a smog shop. *Id.* ¶ 5.

The Government deemed Mr. Preap ineligible for a bond hearing under Section 1226(c) during his stay in immigration detention. *Id.* ¶ 6. Consequently, he had no opportunity to demonstrate to an IJ that he would not be a flight risk or danger to the community. For the duration of his detention, he was unable to work, to care for his mother, or to care for his son.

On December 17, 2013, a hearing was held on Mr. Preap's application for cancellation of removal. Ex. A, Decl. of A. Prasad regarding Plaintiff-Petitioner Mony Preap ("Prasad Decl. re:

[4] Mr. Preap was transferred into immigration detention from custody for a non-Section 1226(c)(1) Offense.

Preap") ¶ 5. After he submitted evidence in support of his application, DHS indicated that it did not oppose a grant of cancellation of removal, and would waive appeal if Mr. Preap's application were granted. Mr. Preap was released from custody that same day.[5] *Id.* ¶ 6.

B. Eduardo Vega Padilla

Mr. Eduardo Vega Padilla came to the United States from Mexico in 1966 when he was an infant. Ex. B, Decl. of E. Vega Padilla ISO Plaintiff-Petitioners' Mot. for Prelim. Inj. ("Padilla Decl.") ¶ 2. He became a legal permanent resident of the United States before he turned two years old. *Id.* In the late 1990's and early 2000's, Mr. Padilla faced a series of personal challenges: his marriage had fallen apart, his grandmother had fallen seriously ill, and his father died of a sudden heart attack after returning to Mexico to care for her. *Id.* ¶ 6. To cope with these circumstances, Mr. Padilla used methamphetamine, resulting in two convictions for drug possession. *Id.* While he was on probation for those offenses, police officers found an unloaded shotgun in the trunk of his son's non-operative car, and an unloaded pistol in the shed behind his house, resulting in his conviction for possessing a firearm with a prior felony conviction. *Id.* Mr. Padilla received a six-month prison sentence, which he completed in 2002. *Id.* Since then, Mr. Padilla has been free of contact with law enforcement. *Id.*

In 2013—***eleven years*** after his last contact with the criminal justice system—the Government appeared at Mr. Padilla's home and took him into immigration detention. *Id.* ¶¶ 4-6. Because of his prior offenses—all over a decade old—the Government denied Mr. Padilla a bond hearing, taking the position that he was subject to mandatory detention under Section 1226(c).

Prior to being taken into immigration detention, Mr. Padilla lived with and cared for his mother and helped take care of his grandchildren. *Id.* ¶ 9. He is highly trained in construction and electrical work and regularly helped his family with repairs on their homes, cars, and appliances. *Id.* This work included re-wiring his mother's house to avoid fire hazards and re-modeling her kitchen. *Id.* His mother, who is starting to forget things as she ages, relied on him to maintain the house, help with grocery shopping, and handle anything heavy. *Id.* His children

[5] Mr. Preap had been held at the West County Detention Facility in Richmond, California, until December 17, 2013, when an IJ issued a summary order granting his application for cancellation of removal.

also relied on him to watch their children when there was no school or when they got out of school early. *Id.* No one else in his family is in a position to care for his mother or his grandchildren in the way that he did. *Id.*

Mr. Padilla has been held in immigration detention at Rio Cosumnes Correctional Center in Elk Grove, California, since August 15, 2013. *Id.* ¶ 4.

C. Juan Magdaleno

Mr. Juan Magdaleno has lived in the United States as a lawful permanent resident since he arrived here from Mexico as a teenager in 1974. Ex. C, Decl. of J. Magdaleno ISO Plaintiff-Petitioners' Mot. for Prelim. Inj. ("Magdaleno Decl.") ¶ 2. He is now 57 years old, married, and is both a father and grandfather. *Id.* ¶ 5. Mr. Magdaleno was last released from custody for a Section 1226(c)(1) Offense in January 2008. *Id.* ¶ 8. Over ***five years later***, in July of 2013, the Government appeared at his home and took him into immigration detention. *Id.* ¶ 3. He was held there under Section 1226(c), where the Government denied him any opportunity for a bond hearing. *Id.*

Prior to being taken into immigration detention, Mr. Magdaleno lived with his wife, two of his four children, his son-in-law, and one of his grandchildren, all of whom are United States citizens. *Id.* ¶ 5. He supported his family through his work restoring and selling antiques. *Id.* ¶ 6. He also looked after four of his grandchildren each day, taking them to school, picking them up and watching them after school until their respective parents finished work. *Id.* ¶ 9. Because he had been detained in immigration custody, Mr. Magdaleno was unable to attend his daughter's wedding. *Id.* Mr. Magdaleno's family arranged for him to call them at the wedding reception and make a speech over the speaker system. *Id.*

Mr. Magdaleno has also faced difficulties in detention because he has no teeth. He had been scheduled for a denture refitting on July 18, 2013, but the Government detained him the day before his appointment. *Id.* ¶ 11. He has been toothless through the duration of his detention, which has made it challenging for him to eat and to communicate. *Id.* Despite his repeated requests (and submission of proof of dental insurance), he has not yet been permitted to see a dentist. *Id.*

On December 9, 2013, Mr. Magdaleno requested a bond hearing. Three days later, his request was denied. *Id.* ¶ 3. He has been held in immigration detention at the West County Detention Facility in Richmond, California, since July 17, 2013. He will be eligible for a bond following six months of detention, and is scheduled for a *Rodriguez* hearing on February 14, 2014.[6] *Id.*

D. Proposed class members

Like Mr. Preap, Mr. Padilla, and Mr. Magdaleno, members of their proposed class are individuals in the state of California who are or will be subjected to mandatory detention under Section 1226(c) even though they 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. The Government's practice has injured many people who are being or have been held in mandatory detention, even though they do not fall within Section 1226(c)'s scope. If permitted to continue, the Government's practice guarantees continued injury to those currently held unnecessarily in mandatory detention, as well as to individuals in the future who will not have been taken into immigration custody upon their release from criminal custody for a Section 1226(c)(1) Offense, but that the Government will nonetheless subject to mandatory detention under Section 1226(c).

IV. ARGUMENT

Mr. Preap, Mr. Padilla, and Mr. Magdaleno request that this Court issue an injunction ordering the Government to comply with Section 1226 by ceasing to subject to mandatory detention individuals who fall outside of Section 1226(c)'s scope. Specifically, Plaintiffs request that this Court enjoin the Government from holding in mandatory detention individuals who were not taken into immigration detention "when released" from criminal custody—in other words, at the time of their release—for a Section 1226(c)(1) Offense. These individuals are subject to detention pursuant to Section 1226(a) and are therefore entitled to an individualized bond hearing

[6] *See Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2009) (granting class-wide injunctive relief enjoining the government from subjecting to mandatory detention individuals detained for more than six months under Section 1226(c), when detention then becomes discretionary such that detainees are entitled to a bond hearing under Section 1226(a)).

to determine whether they may be released on bond while their removal proceedings move forward. The Government's *Rojas*-based mandatory definition practice violates Section 1226 and raises serious constitutional concerns.

As demonstrated below, Plaintiffs and their proposed class members will likely succeed on the merits of their claims, they will very likely suffer irreparable harm in the absence of preliminary injunctive relief, the balance of equities tips heavily in their favor, and granting their requested injunction serves the public interest. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). All of these factors counsel in favor of granting Plaintiffs' requested relief.

A. Plaintiffs will likely prevail on the merits of their claims.

Plaintiffs' reading of Section 1226 rests on a natural reading of the statute, is consistent with the structure of the statute and the context in which it was enacted, and mitigates serious due process problems associated with the Government's contrary interpretation.

1. The majority of courts to have addressed the issue presented agree that Plaintiffs and their proposed class members fall outside the scope of Section 1226(c).

Congress structured a framework for the detention and release of noncitizens awaiting the outcome of their removal proceedings in Section 1226 of Title 8 of the United States Code ("Section 1226"). Specifically, "[e]xcept as provided in subsection (c) of [Section 1226]," Section 1226(a) grants the Government authority to arrest and detain individuals "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). If DHS at the initial custody determination, or an IJ at the custody redetermination hearing, determines that an individual does not pose a danger to the community and is not likely to abscond if released, the Government may then release the individual on bond. *Id.*

Section 1226(c), however, is a narrow exception to the Government's broad discretionary authority to release noncitizens. It defines a specific category of individuals who are ***not*** entitled to the individualized bond hearings contemplated by Section 1226(a). Section 1226(c) provides as follows:

////

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

8 U.S.C. § 1226(c) (emphasis and square brackets added). In a single sentence, Section 1226(c)(1) mandates the detention of a noncitizen falling under categories enumerated in Sections (c)(1)(A)-(D) when the noncitizen is released from criminal custody. *Id.*

Section 1226(c)(2) confirms this reading of the statute. It references "***an alien*** described in paragraph (1)." *Id.* (emphasis added). In other words, Section 1226(c)(1) describes "an alien"—an individual who has ***both*** (i) committed an offense enumerated by Section 1226(c)(1)(A)-(D); ***and*** (ii) been taken into immigration custody "***when… released***" from criminal custody for that offense. *Id.* (emphasis added).

The majority of district courts within this Circuit agree that this statutory mandate is clear and unambiguous. *See Sanchez Gamino v. Holder*, No. CV 13-5234 RS, 2013 WL 6700046, *4 (N.D. Cal. Dec. 19, 2013) (granting petitioner's habeas corpus petition and holding that "when…

released" unambiguously means at the time of the alien's release from custody); *Espinoza v. Atken*, No. 5:13-cv-00512 EJD, 2013 WL 1087492, *6 (N.D. Cal. Mar.13, 2013) (same); *Dighero–Castaneda v. Napolitano*, No. 12–CV–2367–DAD, 2013 WL 1091230, *6 (E.D. Cal. Mar. 15, 2013) (same); *Bumanlag v. Durfor*, No. 12-CV-2824-DAD, 2013 WL 1091635, *6 (E.D.Cal. Mar. 15, 2013) (same); *Snegirev v. Asher*, No. C12-1606-MJP, 2013 WL 942607, *4 (W.D.Wash. Mar.11, 2013) (same); *Bogarin–Flores v. Napolitano*, No. 12-CVO-399 JAH(WMc), 2012 WL 3283287, *3 (S.D. Cal. Aug. 10, 2012) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004) (same); *see also Martinez-Herrera v. Crawford*, No. CV07-0267PHX NVW DKD, 2007 WL 2023469, *1-*2 & n.1 (D. Ariz. June 20, 2007) (adopting Magistrate Judge's recommendation noting that petitioner's five-year gap between release from criminal custody and issuance of DHS's Notice to Appear provided a "strong argument" that Section 1226(c) did not apply); *but see Gutierrez v. Holder*, No. 13-cv-05478-JST, 2014 WL 27059, *4-*5 (N.D. Cal. Jan 2, 2014) (acknowledging that the majority of courts hold that Section 1226's language is unambiguous but declining to decide the issue); *Mora-Mendoza v. Godfrey*, 3:13-CV-01747-HU, 2014 WL 326047 (D. Or. Jan. 29, 2014).

Many courts outside of the Ninth Circuit similarly agree that Section 1226(c)'s "when… released" language requires an individual to have been detained upon release from criminal custody for an offense enumerated by Section 1226(c)(1) in order to fall within the scope of Section 1226(c). *See Gordon v. Johnson*, No. 13-cv-30146-MAP, 2013 WL 6905352 (D. Mass. Dec. 31, 2013); *Castaneda v. Souza*, 952 F. Supp. 2d 307, 317-318 (D. Mass. 2013); *Valdez v. Terry*, 874 F. Supp. 2d 1262, 1264 (D.N.M. 2012) (collecting cases demonstrating that the "majority of federal district courts that have ruled on the issue have agreed that the language 'when the alien is released' in § 1226(c) means immediately after their release" and have rejected the BIA's interpretation of § 1226(c) in *Matter of Rojas*); *Ortiz v. Holder*, No. 2:11CV1146 DAK, 2012 WL 893154, *3 (D. Utah Mar. 14, 2012); *see also Saysana v. Gillen*, 590 F.3d 7, 14 (1st Cir. 2007) ("The 'when released' provision immediately follows the list of enumerated offenses, indicating that the former modifies the latter.") (internal citation omitted); *but see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Sylvain v. Attorney General of the United States*,

714 F.3d 150 (3d Cir. 2013).

These courts correctly recognize that "when released" means exactly what it states: a noncitizen falls within Section 1226(c) if detained at "the time when the [individual] is actually released from state custody." *Espinoza*, 2013 WL 1087492, at *6; *see Sanchez-Gamino*, 2013 WL 6700046, at *4 (finding persuasive *Espinoza's* conclusion that Section 1226(c) is not ambiguous); *Bumanlag*, 2013 WL 1091635, at *7; *Dighero-Castaneda*, 2013 WL 1091230, at *6-*7; *Bogarin-Flores*, 2012 WL 3283287, at *3, *Rosciszewski v. Adducci*, No. 13-14394, 2013 WL 6098553, *5 (E.D. Mich. Nov. 14, 2013); *Nabi v. Terry*, 934 F. Supp. 2d 1245, 1247-48 (D.N.M. 2012); *Valdez*, 874 F. Supp. 2d at 1265; *Khodr v. Adduci*, 697 F. Supp. 2d 774, 776-77 (E.D. Mich. 2010); *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999); *see also Zabadi v. Chertoff*, No. C 05-03335 WHA, 2005 WL 3157377 *4–5 (N.D. Cal. Nov. 22, 2005) (addressing predecessor to Section 1226(c)).

In short, the majority of courts that have decided the issue presented here agree that Section 1226(c)'s mandatory detention requirement applies only to individuals who have committed an offense enumerated by Section 1226(c)(1) who are detained by the Government immediately upon their release from criminal custody for that crime.

2. The Government's application of Section 1226(c) to Plaintiffs and the proposed class members violates Section 1226.

Despite the weight of authority holding that the Government's practice violates Section 1226, the Government continues to subject to mandatory detention individuals who were not taken into immigration custody "when … released" from custody for a Section 1226(c)(1) Offense.[7] The Government's practice is based on a Board of Immigration Appeals' (the "BIA")

[7] According to the U.S. Department of Justice Executive Office for Immigration Review, "[a] criminal alien who is released from criminal custody . . . is subject to mandatory detention pursuant to section 236(c) of the Act *even if the alien is not immediately taken into custody by INS or DHS authorities when released from incarceration*." Bonds, Immigration Judge Benchbook, U.S. Department of Justice Executive Office for Immigration Review (citing *Matter of Rojas*), http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm (last visited Feb. 5, 2014); *see also* Charles A. Wiegand, III, Fundamentals of Immigration Law, Immigration Judge Benchbook, U.S. Department of Justice Executive Office for Immigration Review (Oct. 2011) at 9, http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf (last visited Feb. 5, 2014) (same).

decision: *In re Rojas*, 23 I&N Dec. 117 (BIA 2001).[8] In *Rojas*, even though the BIA acknowledged that "[Section 1226(c)] does direct the Attorney General to take custody of aliens *immediately upon their release from criminal confinement*," *id.* at 122 (emphasis added), it proceeded to conclude that "the statute as a whole is focused on the removal of criminal aliens in general." *Id.* Consequently, *Rojas* held that the "when released" clause did *not* limit the category of individuals subject to mandatory detention. *Id.* at 125. The Government has read *Rojas* as a free pass to categorically deny bond hearings to *anyone* taken into immigration custody who has a Section(c)(1) Offense on his or her record, even if the person has been free from custody for days, months, or even *years*.

Rojas, and the Government's application of *Rojas*, plainly run afoul of the statute's own language. As explained above, Section 1226's words, read as they naturally flow, apply mandatory detention to those who have committed an offense enumerated by Section 1226(c)(1) *and* whom the government has taken into immigration custody immediately upon their release from custody. *See, supra*, Section IV.A.1.

The BIA in *Rojas*, however, strained to avoid this natural and uncomplicated reading of the statute. *See Rojas*, 23 I&N Dec. at 122, 125. *Rojas* construed Section 1226(c)(2)'s reference to the "alien described in paragraph (1)" as "including *only those aliens described in subparagraphs (A) through (D) of section 236(c)(1) of the Act*, and as *not* including the 'when released' clause." *Id.* at 125 (emphasis added). But Section 1226(c)(2) does not say that the Government may release "an alien described in paragraph [c](1)(A)-(D),"—it refers to "an alien described in paragraph [(c)](1)." 8 U.S.C. § 1226(c)(2) (square brackets added). Had Congress wanted to say the former, it could have specified the (c)(1) subsections; it knew how to do so, as demonstrated throughout the remainder of the INA.[9] By the very words and statutory structure devised by Congress, the "when released" clause describes "the alien" subject to Section 1226(c).

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[8] *Id.*

[9] *E.g.*, 8 U.S.C. § 1160(b)(3)(B)(iii) (referring to "the work described in subsection (a)(1)(B)(ii)" rather than to Section 1160(a), or even Section 1160(a)(1)(B), as a whole); 8 U.S.C. § 1187(a)(1) (referring to "a nonimmigrant visitor . . . described in section 1101(a)(15)(b)" rather than to Section 1101(a)(15) as a whole); 8 U.S.C. § 1186b(a)(2)(B) (referring to "the 90-day period described in subsection (d)(2)(A) of this section" rather than to Section (d)(2) as a whole).

Those words must be given effect. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (internal citation omitted).

a. Congress clearly provided that mandatory detention under Section 1226(c) does not apply to Plaintiffs and their proposed class members.

Despite the flaws with *Rojas*, some courts have accorded it *Chevron* deference. *See, e.g.*, *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012). As explained below, however, *Chevron* deference does not apply to *Rojas*. Before reaching the merits of an agency interpretation of its governing statute, courts must ***first*** determine "whether Congress has directly spoken to the precise question at issue," using the ordinary tools of statutory interpretation starting with the text of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). If Congress has spoken clearly, that unambiguous language must be given effect, and the analysis ends. Only "if the statute is silent or ambiguous with respect to the specific issue" does a court then determine "whether the agency's answer is based on a permissible construction of the statute." *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (citing *Chevron*, 467 U.S. at 843) (internal quotations omitted).

Additionally, where an agency's interpretation of a statute raises substantial constitutional questions, these concerns inform the court's reading of the language Congress used. *Id.* (citations omitted); *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Chamber of Commerce of U.S. v. Fed. Election Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995) (declining to extend *Chevron* deference in view of "serious constitutional difficulties" presented by agency interpretation).

(i) The text, structure, and context of Section 1226(c) clearly demonstrate that Section 1226(c) does not apply to Plaintiffs and their proposed class members.

Under the first step of the *Chevron* analysis, a review of the text, structure, and context in

which Section 1226(c) was enacted evidences Congress's intent that mandatory detention should apply to an individual who *both* committed an offense enumerated by Section 1226(c)(1) *and* was taken into immigration detention "when released" from criminal custody for that offense. *See supra*, Section IV.A.1; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (proper statutory construction begins with the words used by Congress). Put together, Section 1226(c) "requires that an alien be taken into immigration custody at the time the alien is released from criminal custody in order for the mandatory detention provisions of subsection (c)(2) to apply, not at some time in the future…" *Espinoza*, 2013 WL 1087492 at *6. "Had Congress intended for mandatory detention to apply to aliens at any time after they were released, it easily could have used the language 'after the alien is released' or 'regardless of when the alien is released,' or other words to that effect." *Zabadi*, 2005 WL 3157377, at *4 (citations omitted). It did not.

Under cover of *Rojas*, however, the Government has granted itself free license to subject individuals to mandatory detention *regardless* of the time elapsed since their release date from custody for a Section 1226(c)(1) Offense. As in the cases of Mr. Preap, Mr. Padilla, and Mr. Magdaleno, and many of the class members identified in several detention facilities,[10] *years* may pass after an individual's release from custody for a Section 1226(c)(1) Offense, at which time the Government may sweep in and decide to detain an individual without any possibility for a bond hearing for purportedly posing a flight risk or danger to the community. *See* Preap Decl., ¶ 3; Padilla Decl., ¶¶ 4-6; Magdaleno Decl., ¶ 3. This practice, and the BIA's interpretation from which it derives, renders Section 1226(c)'s "when released" clause superfluous, violating the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1995) ("give effect, if possible, to every clause and word of a statute"); *Rojas*, 117 I&N at 134 (Rosenberg, J., dissenting) (citing *Menasche*).

The structure of Section 1226(c) confirms that to be subject to Section 1226(c), a noncitizen must both have committed an offense enumerated in Section (c)(1) and be taken into

[10] *See* Motion for Class Certification, Ex. E (Decl. of A. Pennington) ¶¶ 6-25, ECF No. 8-5.

immigration custody "when released." The "when released" clause aligns flush with the margin of Section 1226(c)(1), indicating that it applies to all of subparagraph (1) and therefore modifies each of subparagraphs (A)-(D) immediately preceding it. *See Sherwin-Williams Co. Employee Health Plan Trust v. C.I.R.*, 330 F.3d 449, 454 n.4 (6th Cir. 2003) (citing *Snowa v. Comm'r*, 123 F.3d 190, 196 n.10 (4th Cir. 1997) (The phrase ''flush language'' refers to language that is written margin to margin, starting and ending ''flush'' against the margins. Flush language applies to "the entire statutory section or subsection…")). Accordingly, *Rojas's* divorcing the "when released" clause from subparagraphs (A)-(D) to find that the latter describes an "alien" but the former does not, artificially separates statutory provisions meant to be read together.

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

Section 1226(c)'s language and structure, and the context in which it was enacted, make clear that Congress intended mandatory detention to apply only to those individuals detained "when released" from criminal custody for a Section 1226(c)(1) Offense.

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

The canon of constitutional avoidance also aids in the first step of the *Chevron* analysis as "a means of giving effect to congressional intent." *Diouf*, 634 F.3d at 1090 n.11 (citation omitted). Under the canon, when a Court must decide which of two plausible statutory constructions to adopt, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Robbins*, 715 F.3d at 1133-34 (applying canon of constitutional avoidance and citing cases).[11] In the *Chevron* context, the court must adopt the construction that avoids constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575 (internal quotations omitted)); *Diouf*, 634 F.3d at 1090 (citing *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001)); *Williams v. Babbitt*, 115 F.3d 657, 663-64 (9th Cir. 1997)). This stems from the "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency*, 531 U.S. at 172-73.

Rojas' construction of Section 1226(c) threatens the "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint [that] lies at the heart of the liberty that [the Due Process] Clause protects." *Robbins*, 715 F.3d at 1134 (internal quotation omitted); *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (quoting *Addington v. Texas*, 441 U.S. 418, 425, 427 (1979) ("The Supreme Court . . . 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty.'")). By blessing the categorical mandatory detention of individuals who have returned to the community, *Rojas's* interpretation runs afoul of the due process limitations that protect Plaintiffs and their proposed class members. *Demore v. Kim*, 538 U.S. 510, 523 (2003) (due process protections extend to

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

noncitizens in removal proceedings); *Reno v. Flores*, 507 U.S. 292, 306 (1993).[12] Under *Rojas*, the Government may wait indefinitely before taking a noncitizen into immigration custody and then subject him or her to mandatory detention. The individual's release from prison for a Section 1226(c)(1) Offense may date all the way back to October 8, 1998—Section 1226's effective date. In the intervening period of time, Plaintiffs and members of their proposed class may have led productive and non-threatening lives. Yet, the Government may, at any time, take the individual into immigration detention and deny him or her a bond hearing, under the categorical assumption that he or she is a flight risk or danger to the community. This makes no sense. And it creates serious constitutional concerns. For that reason, the doctrine of constitutional avoidance applies here.

As the Ninth Circuit has recognized, "not all criminal convictions conclusively establish that an alien presents a danger to the community, even where the crimes are serious enough to render the alien removable." *Singh*, 638 F.3d at 1206 (citing *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992)). Plaintiffs and their proposed class members, who were not taken into immigration custody immediately upon release, are not categorically suspect. Indeed, "[b]y any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be." *See Sanchez Gamino*, 2013 WL 6700046, at *4 (quoting *Saysana*, 590 F.3d at 17-18). Accordingly, the Government's presumptive treatment of all individuals as dangerous or likely to abscond, even if they have not done so in their years since their release from custody for a Section 1226(c)(1) Offense, is constitutionally questionable.[13]

The BIA's majority opinion in *Rojas* did not address the constitutional concerns raised by

[12] Though mandatory detention has been held not to be *per se* unconstitutional, *Demore*, 538 U.S. at 527-28, its application under various circumstances has been limited to avoid due process concerns. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001) (prohibiting indefinite detention after an alien has been adjudicated removable); *Robbins*, 715 F.3d at 1137 (holding that Section 1226(c) could not authorize indefinite mandatory detention of criminal aliens as that would be "constitutionally doubtful").

[13] In deciding whether to grant a preliminary injunction, the Court need not reach the merits of the Plaintiffs' due process claim. This motion is based only on Plaintiffs' likelihood of success on their Section 1226(c) statutory interpretation claim. All that is necessary to trigger the doctrine of constitutional avoidance is for the Court to conclude that the due process claim presents a genuine but avoidable question—just as it would at trial—if Plaintiffs' interpretation is adopted.

its holding. *See In re Rojas*, 22 I&N at 117-127; *see also id.* at 139 (Rosenberg, J., dissenting) (concluding that its dissent "avoids some of the difficult constitutional questions" raised by the majority opinion). Decisions that afford deference to *Rojas* without studied consideration of its constitutional consequences should be found unpersuasive.

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

In view of Congress' clear intent that mandatory detention apply only to those taken into immigration custody "when released" from criminal custody for a Section 1226(c)(1) offense, as evidenced by the way Congress drafted the statute and the context in which it was enacted, this Court need not reach step two of the *Chevron* inquiry. Nonetheless, were the Court to find any ambiguity in Congress's intent as to the scope of Section 1226(c) (there is not), *Rojas* does not provide a permissible construction of the statute and should not be granted deference. *See Chevron*, 467 U.S. at 844; *Judulang v. Holder*, 132 S.Ct. 476, 483 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance.").

Rojas's interpretation of Section 1226(c) must be rejected because it leads to arbitrary and capricious results "unmoored from the purposes and concerns of the immigration laws." *Judulang*, 132 S. Ct. at 490. Congress enacted Section 1226(c) for the purpose of (i) ensuring the presence of criminal aliens at their removal proceedings, (ii) facilitating their removal, and (iii) protecting the public from dangerous noncitizens. *Demore*, 538 U.S. at 518-520; *see id.* at 531 (Kennedy, J., concurring) ("[T]he justification for 8 U.S.C. § 1226(c) is based upon the Government's concerns over the risks of flight and danger to the community…"). The Government's categorical subjection of Plaintiffs and their proposed class members to mandatory detention under *Rojas* does not serve these purposes.

Justifications (i) and (ii) are premised on the assumption that criminal aliens are likely to be deported based on their offenses, and consequently have little to no incentive to appear for hearings ordering their deportation. However, as demonstrated by Mr. Preap's successful application for cancellation of removal and those of other proposed class members, Plaintiffs and members of their proposed class may have strong grounds for requesting relief from removal.

Prasad Decl. re: Preap, ¶¶ 2-6, Ex. D, Decl. of A. Prasad ISO Mot. For Prelim. Inj. ("Prasad Decl. ISO MPI) ¶ 4. Their entire families and livelihoods may be in the United States, which would likely be the case the longer an individual had been returned to the community. *See* Preap Decl., ¶¶ 2, 4-6, 8; Padilla Decl., ¶¶ 2-3, 5, 8-9; Magdaleno Decl., ¶¶ 2, 5-6, 9-10, 12; *see also Saysana*, 590 F.3d at 17-18 ("the more remote in time a conviction an individual spends in the community, the lower his bail risk is going to be.") (citing cases). These individuals have every incentive to appear for their immigration hearings to fight for their ability to remain in the United States. Categorically denying them bond hearings is arbitrary and capricious.

As to justification (iii), *Rojas* permits the Government to wait indefinitely before taking a noncitizen into immigration custody, and then subject him or her to mandatory detention. In the intervening period of time (up to over fifteen years since October 1998 when Section 1226(c) went into effect), the Government has entirely failed its purpose of shielding the public from these supposedly dangerous individuals. It is implausible that Congress both intended to make detention mandatory for a class of individuals and yet granted the Government unfettered discretion to leave these very same individuals free for an indefinite period of time. *See Gordon v. Johnson*, 2013 WL 6905352, *8 (D. Mass. Dec. 31, 2013).[14] Additionally, during that time, Plaintiffs and members of their proposed class may have led productive and non-threatening lives. Denying individualized bond hearings to these individuals because they categorically pose a safety threat to the community at large is also arbitrary and capricious.

Courts that nonetheless apply *Chevron* deference to *Rojas* do so erroneously. *See Hosh*, 680 F.3d at 379; *c.f. Sylvain*, 714 F.3d at 155-57 (acknowledging question regarding applicability of *Chevron* deference to *Rojas*, but declining to decide it). For example, the Fourth Circuit (the only circuit to grant deference to *Rojas*) found ambiguity in Section 1226(c) without analysis of its statutory language, its structure, its legislative history, or the context of its enactment. *See*

[14] As the District of Massachusetts recently held in *Gordon*: "This outcome is not only patently unreasonable, but is inconsistent with a fundamental principle underlying our system of justice: except in the rarest of circumstances, the state may not postpone action to deprive an individual of his or her liberty indefinitely. Time limits 'promote repose by giving security and stability to human affairs,' thus allowing a defendant to move on with his life. 2013 WL 6905352, at *8 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L.Ed. 807 (1879)).

Bogarin-Flores, 2012 WL 3283287, at *3 (finding *Hosh* unpersuasive as it failed to "present any independent reasoning or statutory construction."); *Baquera v. Longshore*, 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) ("[p]resumably because of the inadequacy of the analysis in *Rojas* and the dearth of analysis in *Hosh* itself, *Hosh* has had little persuasive impact beyond the Fourth Circuit…."). *Hosh's* deference to *Rojas* results in an interpretation contrary to Section 1226(c)'s own language by effectively excising from the statute the temporal requirement imposed by the "when released" clause. This violates the fundamental directive of statutory interpretation "to give effect, if possible, to every clause and word of a statute." *Menasche*, 348 U.S. at 538-39.

c. Plaintiffs' interpretation of the "when released" clause does not limit the Government's authority to detain noncitizens.

Chevron deference aside, other courts have reached the same result as *Rojas* on different grounds. Citing the Supreme Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), these courts hold that the Government does not lose its authority to mandatorily detain individuals under Section 1226(c) by failing to detain them "when released." *See Gutierrez*, 2014 WL 27059 (Tigar, J.); *Sylvain*, 714 F.3d 150. These cases construe Section 1226(c) as granting authority to the Government to act and eschew the plain language of the statute as defeating that grant of authority. They are wrongly decided.

In *Montalvo-Murillo*, the Supreme Court addressed whether the government lost authority to seek pretrial detention of an individual pending his criminal trial if it did not timely request a hearing. 495 U.S. at 713-14. The then-effective Bail Reform Act of 1984 provided that to seek pre-trial detention, the government had to request a detention hearing which "shall be held immediately upon the person's first appearance before the judicial officer." 18 U.S.C. § 3142(e)-(f) (West 1990). In *Montalvo-Murillo*, the government sought a detention hearing thirteen days after the defendant's first appearance before a judicial officer. 495 U.S. at 716. After the defendant successfully challenged the timeliness of the government's request, the district court ordered the defendant's release from custody as the appropriate remedy. 713 F. Supp. 1407, 1414-15 (D.N.M. 1989). The Tenth Circuit affirmed. 876 F.2d 826, 832 (10th Cir. 1989). The Supreme Court reversed, holding that the government's "failure to comply with the first

appearance requirement does not defeat the Government's authority to seek detention of the person charged." *Montalvo-Murillo*, 495 U.S. at 717.

Montalvo-Murillo does not apply to this case. Here, unlike in *Montalvo-Murillo*, the Government's authority to detain noncitizens pending removal is not at issue. The Government may still detain individuals who pose flight risks or dangers to the community, it simply must afford them a bond hearing first. 8 U.S.C. § 1226(a). Thus, the "critical component" or "essential governmental power at issue" of detention in *Montalvo-Murillo* is missing in the case at hand. *Gordon*, 2013 WL 6905352, at *10; *Valdez*, 874 F. Supp. 2d at 1266; *Nabi*, 934 F. Supp. 2d at 1250; *see also Castaneda v. Souza*, 952 F. Supp. 2d at 317-320, ("[S]ection 1226(c) … requires their immediate detention upon completion of their criminal sentence. If members of this group do return to the community, however, then the calculus must change."). Even under the relief requested by Plaintiffs, the Government ***retains*** its authority to detain noncitizens during the pendency of their removal proceedings under Section 1226(a).[15] *Gordon*, 2013 WL 6905352, at *10 (the authority to detain "has its genesis in [Section] 1226(a)."). Accordingly, Plaintiffs' requested relief has no impact on the Government's authority to detain them.

B. Plaintiffs and their proposed class will suffer irreparable harm in the absence of a preliminary injunction.

If granted, Plaintiffs' request for injunctive relief would result in Plaintiffs and their proposed class members receiving bond hearings. Following those individualized hearings, it is likely that at least some of Plaintiffs and their proposed class members would be granted conditional release. Categorical denial of that prospect renders irreparable harm likely. *Robbins*, 715 F.3d at 1144-45 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). In the absence of preliminary injunctive relief, however, Plaintiffs and their proposed class members will continue to suffer irreparable injury. *See Winter*, 555 U.S. at 7. As explained above, *supra*, Section IV.A.1, the Government's continued application of Section 1226(c) under *Rojas* raises serious constitutional concerns. This unnecessary detention, without

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

individualized custody review based on facts related to flight risk and threat to community, "unquestionably constitutes irreparable injury." *Robbins*, 715 F.3d at 1144-45 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

C. The balance of the hardships favors Plaintiffs and their class over the Government.

The balance of hardships tips decidedly in favor of granting Plaintiffs' requested injunction. The Government would suffer no (or minimal) hardship. Its authority to detain criminal aliens would remain intact were the Court to issue Plaintiffs' requested injunction. *Castaneda*, 952 F. Supp. 2d at 319-320. The Government would need only to provide bond hearings to those currently held under Section 1226(c) who were not taken into immigration detention immediately upon their release from criminal custody for a Section 1226(c)(1) Offense. As the Government already has this infrastructure in place because it is required by Section 1226(a), this requirement would be one the Government is well-equipped to handle.

Plaintiffs and their proposed class members, on the other hand, bear the entire burden of the Government's denial of individualized custody assessments. As demonstrated by facts attendant to Plaintiffs, they are unable to work and provide for their families while they remain in mandatory detention.[16] Plaintiffs' families, who have depended on them financially and emotionally, have a sudden gap to fill. *Id.* For detainees with children, studies have shown that when a parent is held in immigration detention, "[c]hildren experience emotional trauma, safety concerns, economic instability, and diminished overall well-being."[17] Moreover, the unnecessary

[16] *See* Preap Decl., ¶ 5; Padilla Decl., ¶ 9; Magdaleno Decl., ¶ 6; Amicus Brief of 26 Professors and Researchers of Sociology, Criminology, Anthropology and Law as Amici Curiae in support of Petitioners-Appellees and Urging Affirmance, *Robbins v. Rodriguez*, Case No. 12-56736 (9th Cir.) (filed Nov. 26, 2012) 12-14, 22 ("Immigrants in extended detention almost invariably lose their jobs, and thus income for necessities, including food and shelter for their families.") (internal citation omitted).

[17] Amy Bess, *Human Rights Update: The Impact of Immigration Detention on Children and Families* (National Association of Social Workers 2011) at*1-2, http://www.socialworkers.org/practice/intl/2011/hria-fs-84811.immigration.pdf (last visited Feb. 5, 2014); *see also* Ajay Chaudry, et al., Facing Our Future: Children in the Aftermath of Immigration Enforcement (Urban Institute Feb 2010) at *27-39, http://www.urban.org/uploadedpdf/412020_FacingOurFuture_final.pdf (last visited Feb. 5, 2014) (recounting the effects of detention and deportation on family economic well-being, specifically in relation to food and housing security).

detention of parents further infringes upon their fundamental liberty interest in maintaining custody of their children. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982); *Little v. Streater*, 452 U.S. 1 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Studies have shown that those in immigration detention are less likely to have access to counsel or obtain representation because of their limited ability to locate and pay for counsel, the limited resources of legal aid organizations to represent them, restrictive phone policies in detention facilities, and oftentimes their being located in remote geographical areas.[18] Lacking representation and being in detention have been cited as the two most important variables in obtaining relief from removal or termination of removal proceedings.[19] The conditions of immigration detention are often so deplorable that even individuals with valid claims to relief will nonetheless self-deport.[20]

The balance of the hardships disproportionately falls on Plaintiffs, weighing strongly in favor of granting their requested injunction.

[18] *E.g.*, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* 3-4, 7-10 (National Immigrant Justice Center Sept. 2010), at 3-4, 7-10, https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf (last visited Feb. 5, 2014).

[19] *See, e.g.*, Katzmann Immigrant Representation Study Group and the Vera Institute for Justice, *The New York Immigrant Representation Study (NYIRS), Preliminary Findings*, http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf (last visited Feb. 5, 2014) (based on study of New York's immigration detainee population from October 2005 through July 2010); *Isolated in Detention* at 4, *supra* note 18 (citing a 2005 Migration Policy Institute study finding that having legal representation correlated significantly with a detained individual's success in applying to become lawful permanent residents and in obtaining asylum).

[20] *See* Prasad Decl. ISO MPI ¶¶ 5, 7-9; *see also* Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, *Deportation without Due Process* (Western States University College of Law, Mills Legal Clinic of Stanford Law School, and National Immigration Law Center Sept. 2011) at *6-9, http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf (last visited Feb. 5, 2014); Grussendorf, Paul, "Immigration Judges Need Discretion," S.F. Chron. Apr. 11, 2013, available at http://www.sfgate.com/opinion/openforum/article/Immigration-judges-need-discretion-4428406.php ("Thousands of detainees accept deportation rather than trying to stay in the United States because they can no longer endure the months and years in detention without even the most basic judicial safeguards. Many of these individuals would have qualified for refugee status; others would have had other legal means to remain in the country. The vast majority would have posed no danger to the community or public safety.").

D. Granting Plaintiffs' requested preliminary injunction serves the public interest.

Granting Plaintiffs' requested preliminary injunction serves the public interest. First, correct application of the law serves the public interest. *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011). Moreover, granting Plaintiffs' request for individualized determinations for them and their proposed class members would serve the purpose of efficiently using resources to serve the goals of the immigration laws. In the fiscal year 2013, taxpayers in the United States spent an estimated $1.9 billion on immigration detention.[21] Each day, taxpayers pay $122 per detainee to house noncitizens facing removal.[22] It is in the public interest not to waste resources and taxpayer dollars requiring the incarceration of individuals without an individualized bond hearing to determine whether they, in fact, need to be there. Lastly, no harm will result from granting Plaintiffs' requested injunction. Individuals who pose flight risks or safety threats will be denied bond—only after a hearing before a neutral arbiter.

V. CONCLUSION

Because the Government's application of Section 1226 does violence to the statute and raises an avoidable question under the Due Process Clause, Plaintiffs respectfully request that this Court issue an injunction enjoining the Government from subjecting to mandatory detention any individual who has committed an offense under Section 1226(c) who was not taken into immigration custody immediately following his or her release from criminal custody.

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[21] DHS, Congressional Budget Justification: FY 2013, (2013) at *1066-1067, http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf (last visited Feb. 5, 2014).

[22] *Id.*

Dated: February 7, 2014

KEKER & VAN NEST LLP

By: *s/Jon Streeter*
JON STREETER
STACY CHEN
BETNY TOWNSEND
REESE NGUYEN

Dated: February 7, 2014

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By: *s/Julia Harumi Mass*
JULIA HARUMI MASS
JINGNI (JENNY) ZHAO

Dated: February 7, 2014

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

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

DECLARATION OF ANOOP PRASAD REGARDING PLAINTIFF-PETITIONER MONY PREAP

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

I, ANOOP PRASAD, declare and state as follows:

I am duly licensed to practice law in the State of California and am a staff attorney in the Immigrant Rights Program at Asian Americans Advancing Justice – Asian Law Caucus. I have knowledge of the facts set forth herein, and if called upon to testify as a witness thereto, I could and would competently do so under oath.

1. As a staff attorney, I provide free legal services to detained immigrants in Northern California. I have served as a staff attorney at the Asian Law Caucus for the past three and a half years. I have exclusively practiced immigration law, with a focus on detention and deportation defense, for the past eight years.

2. In 2013, I represented Mr. Mony Preap in his removal proceedings before the Executive Office for Immigration Review. Mr. Preap, a permanent resident, was charged with being removable because he had been convicted of a crime related to a controlled substance. The Department of Homeland Security filed conviction records showing that Mr. Preap had a conviction for possession of a small amount of marijuana.

3. As relief from removal, Mr. Preap applied for cancellation of removal for permanent residents under 8 U.S.C. § 1229b(a). Cancellation of removal for permanent residents is a form of discretionary relief available to permanent residents who have resided in the United States for at least seven years before their removable offense, have been permanent residents for at least five years, and have not been convicted of an aggravated felony.

4. Beyond demonstrating statutory eligibility, applicants must also demonstrate that they warrant a favorable exercise of discretion. In exercising discretion, immigration judges weigh positive and negative discretionary factors against one another. Positive factors include family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. Adverse factors include the nature and underlying circumstances of the grounds

of removal that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

5. A hearing was held on Mr. Preap's cancellation of removal application in the San Francisco immigration court on December 17, 2013. Mr. Preap testified at his hearing in support of his application and also submitted documentary evidence in support of his application. The evidence submitted corresponded to the facts presented in Mr. Preap's declaration in support of the motion for class certification in this case. Specifically, the evidence of positive factors included evidence that Mr. Preap is a single father to an 11-year-old United States citizen son and that he is the primary caretaker of his elderly mother who is recovering from breast cancer and suffers seizures. Mr. Preap assisted her with activities of daily living prior to being taken into custody. Mr. Preap had also been assisting his son with school work, picking him up from school each day, and attending school functions prior to being taken into custody. While he was in custody, Mr. Preap's sister took over raising her nephew and caring for her mother but had difficulty managing the additional duties with a full time job.

6. After Mr. Preap's testimony, the Department of Homeland Security indicated that it did not oppose a grant of cancellation of removal and would waive appeal if cancellation of removal was granted. The immigration judge issued a summary order granting cancellation of removal, thus finding that Mr. Preap's positive equities outweighed his negative discretionary factors. Mr. Preap was released from custody later the same day.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on February 7, 2014, at San Francisco, California.

Anoop Prasad

EXHIBIT B

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MONY PREAP, EDUARDO VEGA PADILLA, and JUAN LOZANO MAGDALENO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs-Petitioners,

v.

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

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

DECLARATION OF EDUARDO VEGA PADILLA IN SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. Yvonne Gonzalez Rogers

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

I, EDUARDO VEGA PADILLA, declare the following:

1. I make this declaration from my personal knowledge and, if called to testify to these facts, could and would do so competently. This declaration is made in support of Plaintiffs' Motion for a Preliminary Injunction.

2. My name is Eduardo Vega Padilla and I am 48 years old. I was born in Mexico. I came to the United States in 1966, when I was sixteen months old. I became a lawful permanent resident of the United States in the same year, before I turned two years old. Since then, I have always lived in California.

3. Prior to being taken into immigration detention, I lived with my elderly mother, my youngest daughter, and my grandson. They are all United States citizens. I have five children who are United States citizens. Four are adults and all of my children live in California. I also have six grandchildren. My three siblings are all United States citizens and live in the Sacramento area.

4. I have been in immigration detention at the Rio Cosumnes Correctional Center since August 15, 2013. On that day, immigration officers came to my home and knocked on the door. They asked me to come to the immigration office to clear something up. I was having some personal medical issues that made it difficult for me to walk. My daughter had to help me put on my shoes to leave with the immigration officers. I voluntarily went with them and was taken into custody. I have not been given the opportunity for a bond hearing.

5. I am very close to my family and I would be able to pay a reasonable bond if granted one through a bond hearing because of my family's financial support. I have been informed that I am being held without bond because of several criminal convictions that took place within a period in the late 1990s and early 2000s.

6. I went through a rough period in the late 1990s. My marriage had fallen apart, my grandmother in Mexico was very ill, my parents left to care for her, and then my father suddenly died of a heart attack while in Mexico. I began using methamphetamine to cope with everything that I was going through. In 1997 and 1999, I was arrested for possession of methamphetamine. The first case resulted in a misdemeanor conviction and the second in a felony conviction. I was

not using methamphetamine often or heavily but was not coping with how I was feeling in a healthy way. While I was still on probation, officers searched my house. They found an unloaded pistol in a shed behind my house and an unloaded shotgun in the trunk of my son's non-working car. I was convicted of owning a firearm with a prior felony conviction. I was sentenced to six months in jail. I was released from jail in 2002. I know that I am not permitted to own guns and I no longer own any. I have not been arrested for a crime again since I was released from jail in 2002.

7. After my release from jail, I was put on five years of probation. I never missed a parole check in.

8. Since 2002, I have turned my life around. I began to take better care of myself and my family. Being able to be with my grandchildren and family is very important to me. I am heartbroken that I missed the birth of one of my grandchildren, which took place after I was taken into immigration custody.

9. Things have been difficult for my family since I have been detained. Prior to being taken into immigration detention, I was living with and caring for my mother, helping with and taking care of my grandchildren, and helping to support my family in a variety of other ways. I have been doing construction work since I was eighteen, when I joined my father at the construction company he worked for. I have training in cement and roadwork, plumbing, carpentry, and electronics. I regularly helped my family with repairs on their homes, cars, and appliances. I re-wired my mother's house, which contained multiple fire hazards, and re-modeled the kitchen. I watched my grandchildren when there was no school or when they got out early. I saw my children and grandchildren nearly every day. My mother relied on me to help with the grocery shopping, move anything heavy, take care of the outside of the house, maintain our sewer system, paint, and help with other household chores. My father's and grandmother's deaths took

a toll on her, and she is starting to show signs of forgetting basic things as she ages. There is no one else in my family in a position to take care of her like I used to be able to.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct to the best of my knowledge and understanding. This declaration was executed on this 4th day of February, 2014, in Elk Grove, California.

Eduardo Vega Padilla

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MONY PREAP, EDUARDO VEGA PADILLA, and JUAN LOZANO MAGDALENO, Plaintiffs-Petitioners, v. JEH JOHNSON, Secretary, United States Department of Homeland Security ; ERIC H. HOLDER, JR., United States Attorney General; TIMOTHY S. AITKEN, Field Office Director, San Francisco Field Office, United States Bureau of Immigration and	Case No. 4:13-cv-05754-YGR **DECLARATION OF JUAN LOZANO MAGDALENO IN SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION** Judge: Hon. Yvonne Gonzalez Rogers

Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

I, JUAN MAGDALENO, declare the following:

1. I make this declaration from my personal knowledge and, if called to testify to these facts, could and would do so competently. This declaration is made in support of Plaintiffs' Motion for a Preliminary Injunction.

2. My name is Juan Lozano Magdaleno and I am 57 years old. I was born in Mexico. I came to the United States in 1974, when I was a teenager, and have been a lawful permanent resident of the United States for 39 years. Since coming to the United States, I have always lived in California.

3. I have been in immigration custody since July 17, 2013. I am detained at the West County Detention Center in Richmond, California. I was arrested by ICE agents at home. I was held in mandatory detention because of a firearm conviction from 2000 and a controlled substance conviction from 2007. I requested a bond hearing on December 9, 2013. My request was denied on December 12, 2013.

4. My removal proceedings are currently on appeal at the Board of Immigration Appeals. I understand that there is a legal issue regarding my eligibility for cancellation of removal because of a recent Supreme Court decision. Also, I have been set for a bond hearing on February 14, 2014, because I have been detained for more than six months.

5. Prior to being detained, I lived with my wife, who is a United States citizen, and to whom I have been married for ~~24~~ 33 years. I also lived with two of my children, my son-in-law, and one of my grandchildren. I have four United States citizen children total, and I have 10 United States citizen grandchildren, all of whom live nearby my home in Northern California. I also have one brother and two sisters in California, all of whom are United States citizens or lawful permanent residents.

6. Before being detained, I worked restoring and selling antiques at antique stores and flea markets to support my family. I have been doing this work since the late 1980s, and throughout my career, I have owned an antique refinishing store, an antique store and a thrift store.

7. In 2000 , I was convicted of possession of a firearm while having a prior felony conviction, due to a DUI conviction from the 1980s that is not a removable offense. At the time, I owned a thrift store. Part of my business was buying storage units at auctions and reselling the contents at my store. The units were auctioned off by the owners of the storage units] after the renters of the storage units had failed to pay rent. Bidders on the storage units do not know what the contents of the units are. I would not know what was in the units when I bid. One of the units that I bought contained an old rifle. Police officers came to the store for an unrelated matter and arrested me for possessing the rifle.

8. In October 2007, I was convicted of simple possession of a controlled substance and sentenced to six months in state custody. I did not serve the full sentence and believe I was released in January 2008. I used to struggle with alcohol and substance abuse issues, especially as a younger man. However, as I got older, I realized that my children and grandchildren were the most important things to me. I have not had a drink, used drugs, or smoked a cigarette in over five and a half years. I feel very strong and disciplined in my desire to remain sober.

9. Things have been difficult for my family since I have been detained. I provided financially for my wife and also helped my children and grandchildren. Before being detained, I would take four of my grandchildren to school every day, pick them up from school and take care of them after school until their parents got off of work. Since I've been detained, my daughter has had to close her nail salon for several hours each day to take care of the grandchildren. My grandchildren particularly miss me. Last year, one of my daughters got married. Although I could not attend her wedding because I am detained, I called my family on their cell phone and they asked me to make a speech at her reception over the speaker system. It has been hard for us all having me away from my family.

10. My two youngest daughters are both pregnant and due to give birth in May. I know they need my support right now. I also would be heartbroken to not be there to see them born. My daughter Vanessa, who is thirty years old, has been engaged for some time but has held off because she does not want to get married without me there. It has become a bigger problem more recently. Doctors recently found a lump near Vanessa's thyroid. However, she does not

have health insurance. Once she gets married, she would be covered by her husband's insurance. As a mother, she is really worried about her children.

11. Things also have been difficult for me in detention because I currently have no teeth and no dentures. I had all of teeth pulled in December 2012 because they were in bad shape. I then got fitted for dentures but my first pair of dentures did not fit properly. I was scheduled to get a new mold for a second pair of dentures on July 18, 2013, but I was detained the previous day. I have been toothless while in detention, which has been difficult because there a lot of foods I cannot eat and because my pronunciation is impaired so people have a harder time understanding me. My attorney and I have made requests to ICE to transport me to my dentist's office and submitted proof that I have dental insurance, but I have not been taken to the dentist.

12. I am very close to my family and I would be able to pay a reasonable bond if granted one through a bond hearing because of my family's financial support. I have been informed that I have been held without bond because of my prior firearm conviction and controlled substance conviction.

This declaration was executed on this 6 day of February, 2014 in Richmond, California.

Juan Magdaleno

Juan Magdaleno

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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MONY PREAP, EDUARDO VEGA PADILLA, and JUAN LOZANO MAGDALENO,

Plaintiffs-Petitioners,

v.

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

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

DECLARATION OF ANOOP PRASAD IN SUPPORT OF PLAINTIFF-PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

United States Bureau of Immigration and Customs Enforcement; GREGORY J. ARCHAMBEAULT, Field Office Director, San Diego Field Office, United States Bureau of Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office, United States Bureau of Immigration and Customs Enforcement,

Defendants-Respondents.

I, ANOOP PRASAD, declare and state as follows:

1. I am duly licensed to practice law in the State of California and am a staff attorney in the Immigrant Rights Program at Asian Americans Advancing Justice – Asian Law Caucus. I have knowledge of the facts set forth herein, and if called upon to testify as a witness thereto, I could and would competently do so under oath.

2. As a staff attorney, I provide free legal services to detained immigrants in Northern California. I have served as a staff attorney at the Asian Law Caucus for the past three and a half years. I have exclusively practiced immigration law, with a focus on detention and deportation defense, for the past eight years.

3. Our legal services include conducting consultations with immigrants in detention. I staff seven clinics each month in Sacramento and San Francisco providing consultations to family members of individuals in removal proceedings. I also regularly take part in Legal Orientation Programs (LOPs) at detention centers in Northern California. During the LOPs, we provide basic background information regarding removal proceedings to detainees and also conduct individual consultations. I also exchange letters with detainees advising them of their options in removal proceedings. Frequently, immigration judges also contact me requesting consultations or representations for detained immigrants.

4. Through my extensive work with detainees in Northern California, I regularly encounter members of the proposed class. A very large percentage of class members are statutorily eligible for relief from removal and have strong claims for relief. I have personal knowledge of five class members who were recently granted relief from removal. On December 17, 2013, Mony Preap was granted cancellation of removal. Additionally, the following individuals referenced as class members in my colleague's, Alison Pennington, declaration in support of plaintiff-petitioners' motion for class certification were granted relief from removal: A.M. was granted cancellation of removal on December 19, 2013; D.V. was granted cancellation of removal on January 24, 2014; A.K. was granted cancellation of removal on February 4, 2014; and P.M. was granted cancellation of removal on February 4, 2014. Lastly, class members, J.O., P.E., and J.M., all referenced in Alison Pennington's declaration as well, are in the process of

applying for cancellation of removal.

5. Despite the strong claims of relief for many detained immigrants, every month, I encounter detained immigrants with valid claims to relief or strong claims on appeal but who chose to accept deportation rather than remain in detention for several months. In effect, they are forced to choose between liberty and procedural due process. The reasons why individuals are unable to remain in detention vary but frequently are related to the emotional trauma of separation from family, the grim reality and isolation of detention and lack of access to visitors or phone calls, poor medical treatment, and mental health issues including depression.

6. The following three narratives are representative of individuals that I regularly encounter who wish to remain in the United States and have strong claims but are unable to spend months in detention.

7. I represented a senior citizen from Afghanistan in removal proceedings. He was detained while gardening outside of his home by immigration officers. He was held in mandatory detention because of an aggravated felony conviction. He had been released from criminal custody over a year before being taken into immigration custody. At the time of his detention, he had begun showing early signs of Alzheimer's disease, hearing loss, and issues with his vision. The immigration judge ruled that he was ineligible for a waiver under 8 U.S.C. § 1182(h). Rather than appeal the immigration judge's ruling and remain in detention, he chose to waive appeal and accept a removal order. After he was ordered removed, the Ninth Circuit held in another case that he in fact had been eligible for the waiver. *See Negrete-Ramirez v. Holder*, __ F.3d __, No. 10-71322 (9th Cir. January 21, 2014).

8. I represented an asylum seeker from Eritrea in removal proceedings. He was held under mandatory detention as an arriving alien. His claim for asylum was denied by the immigration judge. Initially, he filed an appeal of the decision. However, he became depressed in detention and decided to withdraw his appeal rather than remain in detention. The Department of Homeland Security was unable to obtain travel documents to effect his removal to Eritrea. Eventually, he was released on a writ of habeas corpus. After being released, he was able to gather new evidence in support of his asylum claim. The same immigration judge that denied his

asylum application, reopened his application based on the new evidence. He was later granted asylum status.

9. I consulted with a permanent resident from Laos who was transferred to immigration custody from criminal custody on a dismissed charge. He was held in mandatory detention because of a conviction for simple possession of a controlled substance from several years before. He was statutorily eligible for cancellation of removal. He also appeared to have extremely strong equities as a parent of a minor citizen child and a primary wage earner in the family. However, when informed that applying for cancellation of removal would require spending three to four months in detention, he chose to accept a removal order instead. He explained that his family would not be able to survive without his income for four months. As Laos does not have a repatriation agreement with the United States, he was released from custody soon after accepting a removal order and was able to return to his job. He is no longer a permanent resident, is barred from regaining his status, and will be deported if Laos signs a repatriation agreement with the United States.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on February 7, 2014, in San Francisco, California.

Anoop Prasad

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 2, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Ashok Ramani
ASHOK RAMANI