No. 14-16326, No. 14-16779

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Defendants-Appellants,

v.

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

Plaintiffs-Appellees.

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

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INTRODUCTION

Plaintiffs-Appellees urge this Court to adopt an interpretation of 8 U.S.C. § 1226(c) that has been rejected by every other appellate court to have considered the issue: that the statute unambiguously provides that the Department of Homeland Security ("DHS") must detain criminal aliens immediately, at the very moment they are released from criminal custody. On this view, two criminal aliens who are placed in removal proceedings after committing the same crimes would be treated differently if DHS could immediately detain one but not the other—no matter how short the delay, no matter the reason for it, and no matter the severity of the alien's crimes. Congress did not intend for Section 1226(c) to produce such disparate outcomes, and this Court should join its sister circuits in rejecting this extreme position.

Crucially, in *Matter of Rojas*, 23 I. & N. Dec 117 (BIA 2001), the Board of Immigration Appeals interpreted Section 1226(c)'s text, structure, and purpose to conclude that criminal aliens do not become exempt from mandatory detention simply because they are not taken into immigration custody the moment they are released from criminal custody. Indeed, as *Matter of Rojas* recognized, it would be impossible to take all criminal aliens into immigration detention the moment they are released. This Court should accord *Chevron* deference to *Matter of Rojas*, which reasonably interprets the ambiguity in Section 1226(c).

Plaintiffs-Appellees argue that this Court should not defer to *Matter of Rojas* because the phrase "when … released" in Section 1226(c)(1) must "mean what it says." Their premise is false, because the word "when" has multiple meanings. But even if "when … released" unambiguously required immediacy, Plaintiffs-Appellees would still be wrong. Section 1226(c)(1) creates a duty for the Government to take criminal and terrorist aliens into custody; the requirement that criminal and terrorist aliens not be released comes from Section 1226(c)(2). And the Board correctly concluded in *Matter of Rojas* that the phrase "when … released" establishes when the Government's duty to take criminal aliens into custody arises—but has no bearing on Section 1226(c)(2)'s prohibition against releasing criminal aliens who are in custody. Accordingly, a criminal alien does not become exempt from mandatory custody under Section 1226(c)(2) simply because of the happenstance that he was detained some time after he was released. Moreover, even if the statute unambiguously required immigration custody for criminal and terrorist aliens to begin immediately upon release from criminal custody, settled case law would require the Government to hold criminal and terrorist aliens without bond even if the Government fails to meet the deadline to take them into mandatory custody.

Plaintiffs-Appellees also argue that the Court must construe Section 1226(c) to avoid alleged Due Process concerns that they believe arise from the mandatory

detention of aliens who are taken into immigration custody some time after their release from criminal custody. But the Supreme Court has already held that detention under Section 1226(c) is consistent with Due Process and Plaintiffs-Appellees' claims to the contrary are unfounded. Plaintiffs-Appellees' arguments arise from misunderstandings about the purpose and effect of the statute and from misinterpretations of Supreme Court opinions on Section 1226(c). Plaintiffs-Appellees ask the Court to impose an interpretation that would subdivide the class of criminal and terrorist aliens that Congress directed should not be released because of their demonstrated recidivism and heightened flight risk during their removal proceedings as a class, based on a wholly arbitrary and unrelated factor – the timing of their release from criminal custody and detention by the Government. The Court, therefore, should find Section 1226(c) ambiguous and defer to the Government's reasonable interpretation of the statute under the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Quite simply, Section 1226(c)(2) contains no "immediacy" exception to mandatory detention. It contains only one exception—for witness protection—that

is inapplicable here. This Court therefore should reverse the District Court's orders.[1]

I. Section 1226(c) Is Ambiguous.

This Court should defer to *Matter of Rojas* because it reasonably construes ambiguity in Section 1226(c). Under traditional rules of grammar and statutory interpretation, Section 1226(c) does not unambiguously exempt criminal aliens from mandatory detention simply because they were not taken into immigration custody immediately upon their release from criminal custody. In addition, it has been undisputed for many that the word "when" has multiple meanings. *See, e.g.*, *United States v. Willings*, 8 U.S. 48, 55 (1807) (finding ambiguity in the word "when"). The fact that Plaintiffs-Appellees may prefer one definition over another is not enough to render the word "when" unambiguous in the context of Section 1226(c).

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[1] This is a consolidated appeal of the initial district court order granting Plaintiffs-Appellees' motion for a preliminary injunction on May 15, 2014, and the later July 21, 2014 order imposing the preliminary injunction. Both orders were imposed under the same legal issues that Defendants-Appellants raise in this consolidated appeal, and both should be reversed under the same legal arguments raised by Defendants-Appellants. Plaintiffs-Appellees contend that the Government "presents no arguments regarding the July 21 order." Appellees' Br. at 17. In fact, the two orders resulted in one preliminary injunction, and the Government's entire consolidated appeal challenges the district court's grounds for both granting and imposing the preliminary injunction.

A. Grammar principles and the structure of Section 1226(c) render the statute ambiguous.

Plaintiffs-Appellees contend the text and structure of Section 1226(c) unambiguously limit the statute's application to criminal aliens taken immediately into immigration detention. (Appellee's Br. 21-39.) But as the Government has previously explained, the sentence structure of Section 1226(c) does not clearly indicate whether Congress intended the "when . . . released" clause to constitute part of the mandate for Government action or the description of the alien class. When paragraph 2 of Section 1226(c) prescribes mandatory detention for aliens "described in" paragraph (1), that limitation could consist of the four classes of aliens enumerated in subparagraphs (A) through (D), or could consist of aliens who qualify under those four classes *and* who were taken into immigration custody immediately following their release from criminal custody.

Plaintiffs-Appellees argue that Section 1226(c) limits mandatory detention to "noncitizens with convictions for offenses enumerated under Section 1226(c)(1)(A)-(D) *and* who were transferred directly to immigration custody immediately upon release from predicate criminal custody."[2] (Appellee Br. 7

[2] Whether or not an alien must be convicted of a crime to be subject to detention under 8 U.S.C. § 1226(c) is not at issue in this litigation. *See* Transcript of July 11, 2014 Hearing, ECF No. 64, at 4:19-20. However, the Government does not agree with Plaintiffs-Appellees' statement. For example, it is well-established that removability based on the illicit trafficking of controlled substances under 8 U.S.C. § 1182(a)(2)(C)(i) does not require a conviction to establish the respondent's

(underline added).) But paragraph (1) does not "describe" aliens subject to mandatory detention as those "who are detained immediately by Immigration and Customs Enforcement." *See* 8 U.S.C. § 1226(c)(1). Instead, it contains the adverbial clause "when . . . released." As an adverbial clause, "when . . . released" is more naturally read to modify the verb phrase at the beginning of the Section 1226(c)(1): "The Attorney General shall take into custody. . . ." *See* Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 10.49(a) (3d ed. 2013) (identifying dependent clauses, introduced by conjunctions such as "when," as adverbial clauses modifying when a main clause takes effect); Morton S. Freeman, *The Grammatical Lawyer* 303, 304 (1979) (describing "when" as a subordinate conjunction and describing clauses that begin with subordinate conjunctions as normally serving as adverbial clauses).

Paragraph (1) contains only one adjectival clause that unambiguously describes aliens subject to mandatory detention. That clause begins "any alien who" and concludes with their description in subparagraphs (A) through (D). *See*

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inadmissibility for the criminal activity. *Alarcon-Serrano v. Immigration & Naturalization Servs.*, 220 F.3d 1116, 1119 (9th Cir. 2000). Inadmissibility under Section 1182(a)(2)(C)(i) is enveloped by subparagraph 1226(c)(1)(A) and would subject an alien to mandatory detention under Section 1226(c). This fact further supports the ambiguity of the "when . . . released" clause because some aliens who commit criminal and terrorist activity described in one of the inadmissibility or removability grounds enumerated in subparagraphs 1226(c)(1)(A)-(D) may never have been in criminal custody.

8 U.S.C. § 1226(c)(1). Congress visually set off the "when . . . released" clause in a flush paragraph, after these subparagraphs. If Congress had wanted "when . . . released" to define the set of aliens "described" in (c)(1) and thus subject to mandatory detention under (c)(2), Congress would have to reword it from an adverbial clause into the following adjectival clause: "The Attorney General shall take into custody any alien who is inadmissible or deportable as enumerated in subparagraphs (A) through (D) and who was detained when released . . . ." But the "when released" phrase, even in this more direct rewording, is still ambiguous, and Section 1226(c)(1) does not contain that language. The "when . . . released" clause, therefore, does not unambiguously form part of the definition of the aliens subject to mandatory detention. *See Flora v. United States*, 362 U.S. 145, 150 (1960) (holding that grammar can be relevant to statutory interpretation).

B. The multiple meanings of "when" compound Section 1226(c)'s ambiguity.

The Supreme Court has held that "when" can mean both "at any time after" and "immediately upon." *See Willings*, 8 U.S. at 55. "The existence of alternative dictionary definitions of [a word], each making some sense under the statute, itself indicates that the statute is open to interpretation" and that the word is ambiguous as between the two meanings. *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992).

Here, the statute is ambiguous because "when" makes sense in the statute as meaning either "immediately upon" or "at any time after."[3] *See Hosh v. Lucero*, 680 F.3d 375, 379-80 (4th Cir. 2012) ("To be sure, 'when' in § 1226(c) can be read, on one hand, to refer to action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun. On the other hand, 'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that . . . .'") (internal quotations and citations omitted). As the Government previously explained, the word 'when' can be read as meaning "at any time after," given the plain text of the statute as a whole, the congressional intent behind Section 1226(c), and practical and logistical issues in the execution of Section 1226(c). (Appellants' Br. 24-38.)

Plaintiffs-Appellees dispute the ambiguity arising from the multiple meanings of when by stating that there must only be one meaning because of the context of the adverbial phrase in the sentence. (Appellee's Br. 22.) But it is that exact context of one long sentence setting out both the Government's mandate and

[3] In discussing the meaning of the "when . . . released" clause and several other issues in the Opening Brief, Defendants-Appellants cited *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014), which squarely rejected the "immediacy" interpretation Plaintiffs-Appellees press here, but instead required that detention begin with a "reasaonble time" of release. As Plaintiffs-Appellees noted in their Answering Brief, (Appellees' Br. 9, n.4), the First Circuit recently granted the Government's petition for rehearing en banc in *Castenada* and withdrew the panel opinion. *Castaneda v. Souza*, No. 13-1994, Order (1st Cir. Jan. 23, 2015).

the description of the aliens subject to the mandate that makes the phrase ambiguous. Again, the phrase may describe the aliens, it may describe the timing of the mandate on the Government, or it may describe both.

The two different meanings of the word "when" that both make sense in the context of this provision also render the provision ambiguous. *See Nat'l R.R. Passenger Corp.*, 503 U.S. at 418 ("The existence of alternative dictionary definitions [. . .], each making some sense under the statute, itself indicates that the statute is open to interpretation."). It makes as much sense that Congress wanted the Government to take aliens into custody immediately upon their release from criminal custody as it makes sense that Congress was directing the Government to take aliens into custody no earlier than when they are released from criminal custody as mandated by other statutes that prohibit the Government from reducing a criminal sentences solely to remove the alien. *See infra*, Section I.D.2.

Plaintiffs-Appellees' related argument that *Matter of Rojas* never addressed the context of Section 1226(c) is incorrect. *Matter of Rojas*, concededly, consists of multiple parts and multiple opinions, but, properly read, *Matter of Rojas* indicates that the Board considered the multiple meanings of "when" in context with the rest of the INA in ruling on the ambiguity of Section 1226(c). The majority in *Matter of Rojas*, for example, held that even if "an alien described in paragraph (1)" included the "when . . . released" clause in the definition of an alien

subject to mandatory detention, the statute would still be ambiguous because "it is not clear where the line would be drawn under [t]his reading of the statute." *Matter of Rojas*, 23 I. & N. Dec. at 124. The Board then asked whether mandatory detention would apply only if an alien were "literally taken into custody 'immediately' upon release," or would also be taken into custody even with "a greater window of perhaps 1 minute, 1 hour, or 1 day?" *Id.* In his concurrence, Board Member Moscato also found, "It is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of the Service to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Id.* at 128 (Moscato, Bd. Mem., concurring in part). These statements indicate that the Board, in *Matter of Rojas*, discussed the multiple interpretations of the "when . . . released" language in 1226(c) and sought to resolve this ambiguity in a manner that comported with Congressional intent.

C. Constitutional avoidance does not require the Court to find that Section 1226(c) unambiguously requires immediate immigration detention.

In rebuttal, Plaintiffs-Appellees raise several arguments for reading Section 1226(c) as unambiguously requiring a criminal or terrorist alien's immediate immigration detention following his release from criminal custody in order to apply the statute's mandatory detention requirement. Primarily, however, Plaintiffs-Appellees invoke the doctrine of constitutional avoidance to argue that

Section 1226(c) cannot be ambiguous. (Appellees' Br. 32.) Specifically, Plaintiffs-Appellees claim that the mandatory detention of a criminal or terrorist alien who has been released from custody does not serve the purpose of Section 1226(c) because Congress did not intend mandatory detention for aliens who had already returned to the community. (Appellee's Br. 35-38.) However, Plaintiffs-Appellees' arguments are flawed because criminal and terrorist aliens remain flight risks no matter when they were released from criminal custody.

As the Government discussed in its Opening Brief, Congress had a reason to apply mandatory detention to all criminal and terrorist aliens, regardless of how recently they were released: The criminal histories of aliens subject to Section 1226(c)(1), no matter how old, render relief from removal less likely and create an incentive for them to abscond once removal proceedings begin. (Appellants' Br. 32.)[4] Plaintiffs-Appellees attempt to discount the unlikelihood of relief for aliens

[4] For example, lawful permanent residents convicted of crimes involving moral turpitude may not qualify for cancellation of removal, because commission of a crime of moral turpitude stops the accrual of the seven years of residence required for cancellation. *See* 8 U.S.C. § 1229b(d)(1). Other aliens convicted of a crime involving moral turpitude may not qualify for cancellation and adjustment to lawful permanent resident status. 8 U.S.C. § 1229b(b)(1)(C). There are additional bars to relief for aggravated felons. They may not receive cancellation of removal, 8 U.S.C. § 1229b(a); may not receive asylum, 8 U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i); may not receive persecution-based withholding of removal if they have been sentenced to five years or more in prison, 8 U.S.C. § 1231(b)(3)(B); may not receive voluntary departure, 8 U.S.C. § 1229c(a)(1), (b)(1)(C); are permanently inadmissible to the United States after removal, 8 U.S.C. §

falling within Section 1226(c)(1) by arguing that Petitioner Preap found relief in removal proceedings. (Appellees' Br. 36.) An individual criminal alien's hope for relief, however, cannot discount the fact that criminal aliens, as a class, are more likely to be removed and, therefore, more likely to abscond once their removal proceedings begin. *See Demore v. Kim,* 538 U.S. 510, 527-28 (2003); *Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996) (recognizing that a released alien "may not be so easy to find once his litigation options are exhausted").

Congress imposed mandatory detention upon criminal and terrorist aliens, as a class, after finding them more likely, as a class, to reoffend or abscond after their removal proceedings begin if released on bond. *See Demore*, 538 U.S. at 522, 527-28. As the Supreme Court emphasized in reviewing the Congressional intent underlying Section 1226(c), "one in four criminal aliens released on bond absconded prior to the completion of removal proceedings" and Congress had evidence that "even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id.* Congress, therefore, properly excluded criminal and terrorist aliens, as a class, from bond hearings. *See id.* at 521-22; *see also Reno v. Flores*, 507 U.S. 292, 313 (1993) (recognizing that "reasonable presumptions and generic rules" relating to aliens are

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1182(a)(9)(A)(ii); and face criminal penalties of twenty years in prison if they reenter without permission. 8 U.S.C. § 1326(b)(2).

permissible exercises of Congress's traditional power over immigration). That rationale for mandatory detention of criminal and terrorist aliens, even after their release from criminal custody, vitiates Plaintiffs-Appellees' constitutional avoidance claim and justifies the detention of Plaintiffs-Appellees and the entire certified class.

The Supreme Court has already held that Section 1226(c) permits mandatory detention even absent an individualized determination of flight risk or dangerousness. *Demore*, 538 U.S. at 527-28. Plaintiffs-Appellees' discussion of the purposes served by mandatory detention pending removal proceedings conflicts with *Demore*'s holding that mandatory detention is constitutional even absent an individualized determination of either dangerousness or flight risk. *See Demore*, 538 U.S. at 523-24 (citing *Carlson v. Landon*, 342 U.S. 524, 538 (1952)). In discussing *Carlson*, *Demore* rejected the argument that release from detention was dictated by due process "if [the alien] did not pose a flight risk, explaining '[d]etention is necessarily part of this deportation procedure.'" *Id.* at 524 (quoting *Carlson*, 342 U.S. at 538). Furthermore, immigration officials may deny bail to detainees "'by reference to the legislative scheme' even without any finding of flight risk." *Id.* at 524 (quoting *Carlson*, 342 U.S. at 543).

Plaintiffs-Appellees' reasoning also directly conflicts with *Demore's* finding that mandatory detention under Section 1226(c) is not predicated on underlying

policy considerations relating to the typical bond hearing but purely "by reference to the legislative scheme." *See Demore*, 538 U.S. at 524.[5] In affirming the constitutionality of Section 1226(c), *Demore* found that mandatory detention is permissible because it ensures the presence of criminal and terrorist aliens at their removal proceedings. The Supreme Court approved of that detention, even if another, less burdensome statute would have met the goal. *See Demore*, 538 U.S. at 521-22.

D. Section 1226(c) is ambiguous despite Plaintiffs-Appellees' flawed arguments to the contrary.

In addition to the doctrine of constitutional avoidance, Plaintiffs-Appellees raise several other claims to argue that Section 1226(c) unambiguously requires immediate immigration detention following release from criminal custody. Plaintiffs-Appellees argue, first, that the statute is unambiguous because Congress could have used language that more clearly supported the Board's interpretation of the statute. But the fact that Congress could have been clearer merely indicates the ambiguity of the words it did employ. Plaintiffs-Appellees also argue that finding an ambiguity in Section 1226(c) renders the "when . . . released" clause surplusage. That argument, however, ignores the purpose the clause serves in the

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[5] *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), cited by Plaintiffs-Appellees (Appellees' Br. 33), is distinguishable because it discussed policy considerations relating to the typical bond hearing under Section 1226(a). *Singh*, 638 at 1206.

Government's interpretation of the statute: to notify the Government of the moment when its duty to detain arises. Plaintiffs-Appellees argue that as an exception to a broader detention scheme, mandatory detention should be construed narrowly. But that canon of interpretation does not apply because the statute is ambiguous and because the Board has resolved the ambiguity in *Matter of Rojas*. Plaintiffs, finally, argue that Section 1226(c)'s anti-retroactivity principle and the temporary rules in effect before Section 1226(c)'s effective date support an unambiguous requirement of immediate immigration detention. Neither provision, however, supports Plaintiffs-Appellees' claims. The Court, therefore, should find Section 1226(c) ambiguous.

1. The fact that Congress could have used different language in drafting Section 1226(c) does not mean that this provision is unambiguous.

Plaintiffs-Appellees argue that if Congress had not intended immediate immigration detention, it would have used the term "after the alien is released" or "regardless of when the alien is released." (Appellees' Br. 22.) Plaintiffs-Appellees also argue that the placement of the "when . . . released" clause in "only one sentence" indicates that Section 1226(c)(1) must be read to define aliens. (Appellee's Br. 22.)

These arguments would turn established rules of statutory construction on their head. The fact that Congress could have imposed one interpretation over

another, had it used clearer language, does not remove latent ambiguities. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1179 (2014) (Sotomayor, J., dissenting) ("that Congress could have spoken with greater specificity in both directions only underscores that the words Congress actually chose are ambiguous").

Moreover, when Congress meant to reference specific subparagraphs or clauses in the Immigration and Nationality Act, it did, on occasion, cite larger paragraphs instead. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(N) (citing 8 U.S.C. § 1324(a)(1)(A) but referring only to the inset clauses (i)-(v) of Section 1324(a)(1)(A)); 8 U.S.C. § 1153(b)(5)(B)(i) (citing 8 U.S.C. § 1153(b)(5)(A) but referring only to the inset clauses (i)-(iii) of Section 1153(b)(5)(A)). These examples demonstrate that Congress, contrary to Plaintiffs-Appellees' claims, does not always draft cross references to explicitly name the most specific subparagraphs or clauses to which it is referring.

Finally, not every word or phrase in the single sentence constituting paragraph (1) unambiguously describes an alien because the sentence does more than just define a type of alien. The sentence also empowers the Government to institute mandatory immigration detention. When Section 1226(c)(2) requires mandatory detention for "aliens described in" Section 1226(c)(1), there is no explicit language directing to which part – or all – of paragraph (1) to find the description. Thus, the clause "[t]he Attorney General shall take into custody,"

does not define an alien but instead empowers the Government to act. The "when . . . released" clause could similarly modify the Government's power to act, as opposed to defining the aliens subject to mandatory detention. The mandate imposed in paragraph (2) that "[t]he Attorney General may release an alien described in paragraph (1) [only for witness protection purposes]" provides no guidance as to whether Congress intended that all aliens who were inadmissible or removable under subparagraphs 1226(c)(1)(A)-(D) should be detained without bond, or only those who are detained immediately upon their release from criminal custody. Highlighting the "when . . . released" clause's location in the one sentence of Section 1226(c)(1) does not answer whether the clause defines the covered aliens or modifies the mandate for Government action.

2. The Government's reading of "when . . . released" does not reduce it to mere surplusage.

Plaintiffs-Appellees are also incorrect when they claim that the Government's interpretation of the "when . . . released" clause reduces it to mere surplusage. (Appellee's Br. 26.) The Government's interpretation of "when . . . released" establishes an alien's release from criminal custody as the earliest – rather than the only – point at which the Government has a duty under Section 1226(c)(1) to take a criminal or terrorist alien into detention. The Government's interpretation thus requires criminal aliens to serve their entire criminal sentences

before Immigration and Customs Enforcement ("ICE") must take them into immigration custody. *See Matter of Rojas*, 23 I. & N. Dec. at 121-24. That interpretation comports with provisions in other statutes restricting immigration officials from taking custody of a criminal alien "before the alien's release from incarceration." 8 U.S.C. § 1228(a)(3); *see also* 8 U.S.C. § 1231(a)(4)(A); 8 U.S.C. § 1231(a)(4)(D). Section 1226(c) may, arguably, replicate these other statutory provisions. But redundancy or repetitiveness from one statute to another is not surplusage. *See Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws, a court must give effect to both.") (internal quotations and citation omitted)).

3. The duty to construe exceptions narrowly does not render Section 1226(c) unambiguous.

Plaintiffs-Appellees characterize the mandatory detention provisions of Section 1226(c) as an exception to the general detention scheme permitting bond in Section 1226(a). (Appellees' Br. 4.) Plaintiffs-Appellees then argue that exceptions must be construed narrowly. (Appellees' Br. 31.) But that interpretative cannon cannot erase the ambiguity from a statute. *See Comm'r v. Clark*, 489 U.S. 726, 739 (1989) ("[W]e should not eviscerate that legislative judgment through an expansive reading of a *somewhat ambiguous* exception.")

(emphasis added). Courts interpret exceptions narrowly to prevent an "exemption to other than those plainly and unmistakably within its terms and spirit" that would "frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Here, however, criminal aliens with a gap in custody are not "plainly and unmistakably" outside the scope of Section 1226(c). *See supra*, Section I.A-B. Plaintiffs-Appellees' characterization of Section 1226(c) as an "exception," therefore, does not resolve whether that exception includes all aliens who fall within Section 1226(c)(1)(A)-(D), or only aliens who fall within Section 1226(c)(1)(A)-(D) and who entered immigration detention immediately upon their release from criminal custody.

4. Temporary rules in place before Section 1226(c)'s effective date do not render the statute unambiguous.

Plaintiffs-Appellees also propound a faulty argument relating to the Transition Period Custody Rules ("TPCR") to argue that the structure and purpose of Section 1226(c) precludes its ambiguity. Plaintiffs-Appellees claim that Section 1226(c) unambiguously requires immigration detention to begin immediately upon release from criminal custody, because if it did not, the TPCR's two-year grace period for the Government to do so was unnecessary. (Appellee's Br. 30-31.)

Congress, however, enacted the TPCR because it understood that immigration officials lacked sufficient detention space to satisfy Congress's

mandate to take into mandatory custody both aliens still in criminal custody and the potentially much larger group of aliens already released from criminal custody. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1110 (BIA 1999). If the Government could defeat its mandatory detention mandate merely by failing to show up at the jailhouse door, it would not have needed the accommodation of the TPCR. That is why the Board, in *Matter of Garvin-Noble*, 21 I. & N. Dec. 672 (BIA 1997), found that mandatory detention under the TPCR applied to criminal aliens regardless of any gap between criminal and immigration custody. *See id.* at 677-81. *Matter of Garvin-Noble*, which Plaintiffs-Appellees cite (Appellee's Br. 35), demonstrates that the TPCR did not conflict with the Government's reading of the "when . . . released" clause.

II. *Matter of Rojas* Reasonably Interprets Ambiguity In Section 1226(c).

Plaintiffs-Appellees argue that even if Section 1226(c) is ambiguous, *Matter of Rojas* is an unreasonable interpretation because it leads to "arbitrary and capricious results." (Appellee's Br. 35.) In support of that claim, Plaintiffs-Appellees urge the Court to disregard the Board's interpretation of the statute because the justifications of Section 1226(c) do not apply to Plaintiffs, and the difficulties the Government might encounter in detaining all criminal aliens immediately upon their release should not allow the Government to mandatorily detain the aliens with some gap in custody, no matter the reason. But Plaintiffs-

Appellees' justification that Section 1226(c) should not apply to the class because it should not apply to Plaintiffs-Appellees' extended gaps between criminal custody and immigration detention is without merit. Plaintiffs-Appellees' claim regarding the Government's post-hoc arguments ignores the Congressional interests and policies behind Section 1226(c) that the Board considered in deciding *Matter of Rojas*. The Court has no basis to find the Board's interpretation of the ambiguity in Section 1226(c) unreasonable.

A. The fact that Petitioner Preap and some other criminal aliens may have extended gaps in custody or find relief in removal proceedings is no basis for allowing all class members to receive bond hearings.

As discussed above, the Supreme Court affirmed Section 1226(c) in finding that Congress had a valid reason to apply mandatory detention to all criminal and terrorist aliens, regardless of how recent their release. *See supra*, Section I.C. As evidenced by the legislative history of Section 1226(c), the criminal histories of aliens subject to Section 1226(c)(1), no matter how old, render relief from removal less likely and create an incentive for them to abscond once removal proceedings begin. *Demore*, 538 U.S. at 527-28. Plaintiffs-Appellees attempt to discount the unlikelihood of relief for aliens falling within Section 1226(c)(1) by arguing that Petitioner Preap found relief in removal proceedings. (Appellees' Br. 36.) An individual criminal alien's hope for relief, however, cannot discount the fact that

criminal aliens, as a class, are more likely to be removed and, therefore, more likely to abscond once their removal proceedings begin. *Demore*, 538 U.S. at 527-28; *see also Ofosu*, 98 F.3d at 700 (recognizing that a released alien "may not be so easy to find once his litigation options are exhausted"). Again, as discussed in Section I.C., Congress imposed mandatory detention upon criminal and terrorist aliens, as a class, after finding them more likely, as a class, to reoffend or abscond after their removal proceedings begin if released on bond. *See Demore*, 538 U.S. at 522, 527-28. Congress, therefore, properly excluded criminal and terrorist aliens, as a class, from bond hearings. *See id.* at 521-22.

The gap between criminal custody and immigration detention for the three named Plaintiffs-Appellees is irrelevant to whether the Board's decision was arbitrary or capricious as their gaps are not representative of the class covered by the preliminary injunction here. The district court certified a class of all California aliens who were detained under Section 1226(c) but who were not immediately detained upon their release from criminal custody and who had not received a bond hearing. The Government identified 596 such aliens in Department of Homeland Security ("DHS") custody as of July 21, 2014, the date of the final order imposing the preliminary injunction. *See* Status Report, ECF No. 82 (Oct. 19, 2014). Although Defendants did not collect the dates the aliens were taken into immigration detention, it did collect and provide the dates of aliens' convictions

for the predicate offenses that qualified them for mandatory detention under Section 1226(c). The status report indicates that over half of the certified class members (310 of 589) had been convicted of the offense for which they were mandatorily detained within one year of July 21, 2014 order, and more than three-fourths (455 of 589) had been convicted within three years of the order.[6] These time periods do not account for any time that the aliens served in criminal custody *after* they were convicted of their crimes and, thus, do not reflect the actual gaps in custody between criminal custody and immigration detention, which may well be even less than these conviction statistics suggest.

Plaintiffs-Appellees also argue that since Section 1226(c) took effect, "the government has entirely failed its purpose of shielding the public from these supposedly dangerous individuals." (Appellees' Br. 37.) Thus, Plaintiffs-Appellees allege that all class members have "accumulated equities" since their release from criminal custody that makes them more likely to receive relief from removal and more likely to appear for removal proceedings. However, this is not supported by the evidence gathered in the status reports, which indicate that more than one in five (121 of 596) of the class members were ordered removed and/or removed from the country but only 32 found relief from removal in the few months that the Government collected the reports between July and October 2014. The

[6] The data only included conviction dates for 589 of the 596 class members.

fact that Petitioner Preap found relief in removal proceedings is not representative of the fate of most criminal or terrorist aliens detained under one of the enumerated inadmissibility and removability grounds in subparagraphs 1226(c)(1)(A)-(D). *See supra*, Section I.3, n.4. Thus, Plaintiffs-Appellees' gaps in detention and the relief Petitioner Preap found in removal proceedings are not representative of the class and are no basis for finding the Board's interpretation of Section 1226(c) unreasonable, arbitrary, or capricious. The Board's interpretation of Section 1226(c) aptly applies to all criminal and terrorist aliens, no matter whether there was a gap in their detention, and should be affirmed by this Court.

B. The Government's defense of *Matter of Rojas* reflects the Board's reasonable concerns about immigration enforcement.

Finally, Plaintiffs-Appellees incorrectly argue the Government's interpretation of Section 1226(c) is arbitrary and capricious because it relies on post-hoc rationales involving immigration enforcement that post-date the enactment of Section 1226(c). (Appellees Br. 38.) The Court's *Chevron* analysis, however, does not turn on whether the Government's concerns about the "practical difficulties" in immigration enforcement post-date the enactment of Section 1226(c). The Court, instead, must inquire whether the Board reasonably took those concerns into account when interpreting the ambiguity inherent in Section 1226(c). *See Chevron*, 467 U.S. at 843 n. 11 (directing courts to uphold reasonable

administrative decisions, even if the agency's interpretation is not the only possible one, or even if it is not the one the court would have chosen).

In *Matter of Rojas*, the Board rejected the alien's interpretation of Section 1226(c) because perfect immigration enforcement is impossible, and under the alien's view mandatory dention would hinge upon whether there was a gap in custody of "1 minute, 1 hour, or 1 day." *Matter of Rojas*, 23 I. & N. Dec. at 124. In a concurring opinion, Board member Moscato tied those concerns about immigration enforcement to the Congressional intent and policy behind Section 1226(c): "It . . . does not seem likely that Congress would have based the success of its newly created scheme on a requirement that the Service perform at a very high level of efficiency. Nor do I believe that Congress did so." *Matter of Rojas*, 23 I. & N. Dec. 128. Because the Board properly considered the congressional intent and policy of Section 1226(c), its conclusions were not unreasonable, even if the Plaintiffs-Appellees disagree with those conclusions. *Cf. Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997) (stating that deference is not owed to an agency decision if it construes a statute in a way that is contrary to congressional intent or frustrates congressional policy).

The Board's analysis is consistent with circuit courts that have analyzed Congress's intent. In *Hosh*, the Fourth Circuit held that "We cannot deem it clear that Congress would, on one hand, be so concerned with criminal aliens

committing further crimes, or failing to appear for their removal proceedings, or both, that Congress would draft and pass the mandatory detention provision, but on the other hand, decide that if, for whatever reason, federal authorities did not detain the alien immediately upon release, then mandatory detention no longer applies." *Hosh*, 680 F.3d at 380 n.6. The Government's reference to the Board's analysis does not constitute a post-hoc rationalization but demonstrates the reasonableness of the Board's concerns about immigration enforcement that led, in part, to *Matter of Rojas*. For that reason, the Board's interpretation is entitled to deference. *See Chevron*, 467 U.S. at 843 n.11.

III. The Government retains its ability to detain Plaintiffs-Appellees even if it missed a deadline to do so.

In its opening brief, Appellants argued that even if Section 1226(c) required the Government to take criminal and terrorist aliens into mandatory immigration custody immediately upon their release from criminal custody, the Government did not lose its ability to do so because it had missed that immediacy deadline. (Appellants' Br. 47 (quoting *Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150, 158 (3d Cir. 2013) ("Bureaucratic inaction – whether the result of inertia, oversight, or design – should not rob the public of statutory benefits.") Plaintiffs-Appellees respond that this principle has no application to the present case because the

principle applies only if the statutory deadline would "extinguish a fundamental executive power to the public's detriment." (Appellees' Br. 41.)

There is no statutory or logical basis for this argument. Section 1226(c) contains what both the district court (ER 24) and Plaintiffs-Appellees describe as a "mandate" (Appellees' Br. 20). Section 1226(c) is "exceedingly similar" to the Bail Reform Act ("BRA") provision at issue in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). *Gutierrez v. Holder*, 6 F. Supp. 3d. 1035, 1042 (N.D. Cal. 2014). In *Montalvo-Murillo*, the BRA permitted then, as it does now, the pretrial release of a criminal defendant subject to certain findings concerning risk of flight and danger to the community. *See* 18 U.S.C. § 3142(b)–(d) (West 1990). The defendant argued that the statutory timing requirement for a custody hearing defined what type of bond hearing could subject him to mandatory detention provision. *Montalvo-Murillo*, 495 U.S. at 713. In other words, the alien argued that because the bond hearing did not occur in the required time period, it could not be the type of bond hearing that could result in his detention without bond. *Id.* The Supreme Court, however, applied the no-loss-of-authority principle even though the statutory deadline helped define what type of hearing could result in mandatory detention. *Montalvo-Murillo*, 495 U.S. at 717 ("We reject the contention that if there has been a deviation from the time limits of the statute, the

hearing necessarily is not one conducted 'pursuant to the provisions of subsection (f).'").

The BRA is also exceedingly similar to what Plaintiffs-Appellees argue is the correct interpretation of Section 1226(c) because if the Court accepts that interpretation of the statute, then both statutes contain potential treatment under different prongs of the statute if the Government failed to take action by a deadline. *See Gutierrez*, 6 F. Supp. 3d at 1043 (comparing the BRA and Section 1226(c)). Under the BRA, a pretrial detainee could be provided conditional release or release on personal recognizance should he not receive a bond hearing. The Supreme Court was not persuaded that Congress intended to apply one of these other prongs to pretrial detainees whose bond hearings were not held on their first appearance before the Court. *Montalvo-Murillo*, 495 U.S. at 717. Similarly, this Court should not presume that Section 1226(a), which makes no reference to criminal or terrorist aliens, should apply to class members should the Government fail to detain the aliens immediately upon their release from criminal custody. The BRA was intended to protect the public from the release of dangerous pretrial detainees. *Id.* Likewise here, to protect the public, Congress enacted Section 1226(c) to limit the Government's discretion to release criminal or terrorist aliens.

Allowing a bond hearing for criminal and terrorist aliens who are inadmissible or removable under one of the grounds enumerated in subparagraphs

1226(c)(1)(A)-(D) would extinguish the Government's mandate to detain these aliens and would be a detriment to the public. The legislative history is clear that Congress enacted mandatory detention on criminal and terrorist aliens because the Government's failure to effect their removal was "a monetary cost to the Nation." *Demore*, 510 U.S. at 518 (citing S. Rep. No. 104-249, p. 7 (1996)). Congress also recognized that these aliens were "taking immigration opportunities that might otherwise be extended to others." *Id.* Most importantly, Congress stressed that these aliens who remained in the United States committed more crimes before being removed. *Id.* Congress recognized that the reason these aliens were not being removed – to the public detriment – is because one in four were provided a bond hearing, released on bond, and then absconding. *Id.* The Supreme Court determined that Section 1226(c) only deserved rational basis review, and based on Congress's rational basis for the mandatory detention of all criminal aliens, the Court upheld Section 1226(c).

The petitioner in *Demore* was not detained immediately upon his release from criminal custody, but one day after. *Kim v. Ziglar*, 276 F.3d 523, 525 (9th Cir. 2002), *rev'd*, *Demore v. Kim*, 538 U.S. 510 (2003). Although this Court recognized the delay in Demore's custody, the delay did not appear to be a factor in this Court's consideration of whether he should be detained under Section 1226(c). Admittedly, the issue raised in this appeal was not raised by Demore, and

no court directly addressed the apparent fact. But the Supreme Court did uphold Section 1226(c), and found that the Government had a rational basis to mandate the detention of criminal aliens, which was reflected in the legislative history of Congress's intent to protect the public from this class of criminal and terrorist aliens who were absconding at high rates and committing multiple crimes before they were removed from the country. *Demore*, 538 U.S. at 527-28. The Court should not subdivide this class of criminal and terrorist aliens and provide bond hearings contrary to the clear congressional intent of Section 1226(c) when the Government is not able to detain them immediately upon their release from criminal custody.

CONCLUSION

This Court should defer to *Matter of Rojas* or find that DHS does not lose the authority to detain criminal or terrorist aliens under 8 U.S.C. § 1226(c) if they are not taken into DHS custody immediately upon release from criminal custody, and reverse the District Court's orders.

DATED: February 17, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, and Circuit Rule 32-1, I certify that this Brief: (1) complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point Times New Roman font.

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

Dated: February 17, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2015, I filed the foregoing APPELLANTS-RESPONDENTS' REPLY BRIEF with the Clerk of the Court through the Court's ECF system and that Court's ECF system will serve the foregoing document electronically upon the registered participants identified on the Court's Notice of Electronic Filing.

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