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21 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
22 OAKLAND DIVISION

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

24 Plaintiffs-Petitioners,

25 v.

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

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

Date: March 18, 2014

1 JEH JOHNSON, Secretary, United States
Department of Homeland Security¹; ERIC
2 H. HOLDER, JR., United States Attorney
General; TIMOTHY S. AITKEN, Field
3 Office Director, San Francisco Field Office,
United States Bureau of Immigration and
4 Customs Enforcement; GREGORY J.
ARCHAMBEAULT, Field Office Director,
5 San Diego Field Office, United States
Bureau of Immigration and Customs
6 Enforcement; DAVID MARIN, Field Office
Director, Los Angeles Field Office, United
7 States Bureau of Immigration and Customs
Enforcement,

8 Defendants-Respondents.

Time: 2:00 p.m.
Ctm: 5
Judge: Hon. Yvonne Gonzalez Rogers
Date Filed: December 12, 2013
Trial Date: Not Set

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27 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
28 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’s² 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.”

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

2 Section 1226 governs the Government’s authority to detain non-citizens while their
 3 removal proceedings are pending. Under Section 1226(a), the Department of Homeland Security
 4 (“DHS”) may release these noncitizens on bond if it determines that they are unlikely to abscond
 5 and do not pose a threat to the community at large. Where DHS refuses to do so, the noncitizen
 6 may request a hearing before the Immigration Judge (“IJ”) in order to seek release from custody.
 7 8 U.S.C. § 1226(a). Only a narrow exception to the Government’s discretionary authority to
 8 release noncitizens on bond or on their own recognizance exists. Individuals taken into
 9 immigration detention “when [they are] released” from criminal custody for certain statutorily-
 10 enumerated offenses may *not* be released on bond. *See* 8 U.S.C. § 1226(c)(1) (listing offenses,
 11 hereinafter “Section 1226(c)(1) Offenses”). Congress had been presented with information
 12 demonstrating that certain of these individuals might pose a heightened threat to public safety or
 13 would be likely to abscond to avoid deportation. It enacted Section 1226(c) to require DHS to
 14 mitigate this risk through the continued, uninterrupted detention of those individuals.

15 Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Magdaleno (the
 16 “Plaintiffs”) and their proposed class members³ form a group of individuals whom the
 17 Government did not take into immigration custody “when [they were] released” from criminal
 18 custody for a Section 1226(c)(1) Offense, but whom the Government has nonetheless subjected
 19 (or will subject) to mandatory detention under Section 1226(c). Mr. Preap, for example, enjoyed
 20 *seven years* of civilian life following his release from custody for a Section 1226(c)(1) Offense
 21 before the Government suddenly took him into custody and give him no opportunity to be
 22 released on bond. Similarly, Mr. Magdaleno and Mr. Padilla had been living in their
 23 communities for *five years* and *eleven years*, respectively, before being taken into custody and
 24 held in mandatory detention.

25 ////

26 ³ As explained in their Motion for Class Certification, ECF No. 8, Plaintiffs request that the Court
 27 certify their proposed class of individuals as all individuals in the state of California who are or
 28 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.

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

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

16 **II. STATEMENT OF ISSUES TO BE DECIDED**

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

- 19 a) Their likelihood of demonstrating that the Government’s application of Section 1226
20 violates the statute;
- 21 b) The irreparable harm they will suffer in the absence of preliminary injunctive relief;
- 22 c) The balancing of the hardships favoring them; and
- 23 d) The public interest served by their requested injunction.

24 **III. STATEMENT OF FACTS**

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

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

2 **A. Mony Preap**

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

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

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

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

27
28 ⁴ Mr. Preap was transferred into immigration detention from custody for a non-Section 1226(c)(1)
Offense.

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

4 **B. Eduardo Vega Padilla**

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

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

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

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

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

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

6 **C. Juan Magdaleno**

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

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

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

1 On December 9, 2013, Mr. Magdaleno requested a bond hearing. Three days later, his
2 request was denied. *Id.* ¶ 3. He has been held in immigration detention at the West County
3 Detention Facility in Richmond, California, since July 17, 2013. He will be eligible for a bond
4 following six months of detention, and is scheduled for a *Rodriguez* hearing on February 14,
5 2014.⁶ *Id.*

6 **D. Proposed class members**

7 Like Mr. Preap, Mr. Padilla, and Mr. Magdaleno, members of their proposed class are
8 individuals in the state of California who are or will be subjected to mandatory detention under
9 Section 1226(c) even though they were not (or will not have been) taken into custody by the
10 Government immediately upon their release from criminal custody for a Section 1226(c)(1)
11 Offense. The Government's practice has injured many people who are being or have been held in
12 mandatory detention, even though they do not fall within Section 1226(c)'s scope. If permitted to
13 continue, the Government's practice guarantees continued injury to those currently held
14 unnecessarily in mandatory detention, as well as to individuals in the future who will not have
15 been taken into immigration custody upon their release from criminal custody for a Section
16 1226(c)(1) Offense, but that the Government will nonetheless subject to mandatory detention
17 under Section 1226(c).

18 **IV. ARGUMENT**

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

26
27 ⁶ *See Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2009) (granting class-wide injunctive relief
28 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)).

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

4 As demonstrated below, Plaintiffs and their proposed class members will likely succeed
 5 on the merits of their claims, they will very likely suffer irreparable harm in the absence of
 6 preliminary injunctive relief, the balance of equities tips heavily in their favor, and granting their
 7 requested injunction serves the public interest. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1133
 8 (9th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). All of
 9 these factors counsel in favor of granting Plaintiffs' requested relief.

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

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

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

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

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

////

1 (1) Custody

2 The Attorney General *shall* take into custody *any alien who--*

3 (A) is inadmissible by reason of having committed any offense covered in
4 section 1182(a)(2) [“Inadmissible aliens”] of this title,

5 (B) is deportable by reason of having committed any offense covered in
6 section 1227(a)(2)(A)(ii) [“Multiple criminal convictions”], (A)(iii)
7 [“Aggravated felony”], (B) [“Controlled substances”], (C) [“Certain firearms
8 offenses”], or (D) [“Miscellaneous crimes”] of this title,

9 (C) is deportable under section 1227(a)(2)(A)(i) [“Crimes of moral turpitude”]
10 of this title on the basis of an offense for which the alien has been sentence to
11 a term of imprisonment of at least 1 year, or

12 (D) is inadmissible under section 1182(a)(3)(B) [“Terrorist activities”] of this
13 title or deportable under section 1227(a)(4)(B) [“Terrorist activities”] of this
14 title,

15 *when the alien is released*, without regard to whether the alien is released on
16 parole, supervised release, or probation, and without regard to whether the alien
17 may be arrested or imprisoned again for the same offense.

18 (2) Release

19 The Attorney General may release *an alien described in paragraph (1)* only if the
20 Attorney General decides pursuant to section 3521 of Title 18 that release of the
21 alien from custody is necessary to provide protection to a witness [...], and the
22 alien satisfies the Attorney General that the alien will not pose a danger to the
23 safety of other persons or of property and is likely to appear for any scheduled
24 proceeding. A decision relating to such release shall take place in accordance
25 with a procedure that considers the severity of the offense committed by the alien.

26 8 U.S.C. § 1226(c) (emphasis and square brackets added). In a single sentence, Section
27 1226(c)(1) mandates the detention of a noncitizen falling under categories enumerated in Sections
28 (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...

1 released” unambiguously means at the time of the alien’s release from custody); *Espinoza v.*
 2 *Atken*, No. 5:13-cv-00512 EJD, 2013 WL 1087492, *6 (N.D. Cal. Mar.13, 2013) (same);
 3 *Dighero–Castaneda v. Napolitano*, No. 12–CV–2367–DAD, 2013 WL 1091230, *6 (E.D. Cal.
 4 Mar. 15, 2013) (same); *Bumanlag v. Durfor*, No. 12-CV-2824-DAD, 2013 WL 1091635, *6
 5 (E.D.Cal. Mar. 15, 2013) (same); *Snegirev v. Asher*, No. C12-1606-MJP, 2013 WL 942607, *4
 6 (W.D.Wash. Mar.11, 2013) (same); *Bogarín–Flores v. Napolitano*, No. 12-CVO-399
 7 JAH(WMc), 2012 WL 3283287, *3 (S.D. Cal. Aug. 10, 2012) (same); *Quezada-Bucio v. Ridge*,
 8 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004) (same); *see also Martinez-Herrera v. Crawford*,
 9 No. CV07-0267PHX NVW DKD, 2007 WL 2023469, *1-*2 & n.1 (D. Ariz. June 20, 2007)
 10 (adopting Magistrate Judge’s recommendation noting that petitioner’s five-year gap between
 11 release from criminal custody and issuance of DHS’s Notice to Appear provided a “strong
 12 argument” that Section 1226(c) did not apply); *but see Gutierrez v. Holder*, No. 13-cv-05478-
 13 JST, 2014 WL 27059, *4-*5 (N.D. Cal. Jan 2, 2014) (acknowledging that the majority of courts
 14 hold that Section 1226’s language is unambiguous but declining to decide the issue); *Mora-*
 15 *Mendoza v. Godfrey*, 3:13-CV-01747-HU, 2014 WL 326047 (D. Or. Jan. 29, 2014).

16 Many courts outside of the Ninth Circuit similarly agree that Section 1226(c)’s “when...
 17 released” language requires an individual to have been detained upon release from criminal
 18 custody for an offense enumerated by Section 1226(c)(1) in order to fall within the scope of
 19 Section 1226(c). *See Gordon v. Johnson*, No. 13-cv-30146-MAP, 2013 WL 6905352 (D. Mass.
 20 Dec. 31, 2013); *Castaneda v. Souza*, 952 F. Supp. 2d 307, 317-318 (D. Mass. 2013); *Valdez v.*
 21 *Terry*, 874 F. Supp. 2d 1262, 1264 (D.N.M. 2012) (collecting cases demonstrating that the
 22 “majority of federal district courts that have ruled on the issue have agreed that the language
 23 ‘when the alien is released’ in § 1226(c) means immediately after their release” and have rejected
 24 the BIA’s interpretation of § 1226(c) in *Matter of Rojas*); *Ortiz v. Holder*, No. 2:11CV1146
 25 DAK, 2012 WL 893154, *3 (D. Utah Mar. 14, 2012); *see also Saysana v. Gillen*, 590 F.3d 7, 14
 26 (1st Cir. 2007) (“The ‘when released’ provision immediately follows the list of enumerated
 27 offenses, indicating that the former modifies the latter.”) (internal citation omitted); *but see*
 28 *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Sylvain v. Attorney General of the United States*,

1 714 F.3d 150 (3d Cir. 2013).

2 These courts correctly recognize that “when released” means exactly what it states: a
 3 noncitizen falls within Section 1226(c) if detained at “the time when the [individual] is actually
 4 released from state custody.” *Espinoza*, 2013 WL 1087492, at *6; *see Sanchez-Gamino*, 2013
 5 WL 6700046, at *4 (finding persuasive *Espinoza*’s conclusion that Section 1226(c) is not
 6 ambiguous); *Bumanlag*, 2013 WL 1091635, at *7; *Dighero-Castaneda*, 2013 WL 1091230, at *6-
 7 *7; *Bogarin-Flores*, 2012 WL 3283287, at *3, *Rosciszewski v. Adducci*, No. 13-14394, 2013 WL
 8 6098553, *5 (E.D. Mich. Nov. 14, 2013); *Nabi v. Terry*, 934 F. Supp. 2d 1245, 1247-48 (D.N.M.
 9 2012); *Valdez*, 874 F. Supp. 2d at 1265; *Khodr v. Adduci*, 697 F. Supp. 2d 774, 776-77 (E.D.
 10 Mich. 2010); *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999); *see also Zabadi v.*
 11 *Chertoff*, No. C 05-03335 WHA, 2005 WL 3157377 *4-5 (N.D. Cal. Nov. 22, 2005) (addressing
 12 predecessor to Section 1226(c)).

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

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

19 Despite the weight of authority holding that the Government’s practice violates Section
 20 1226, the Government continues to subject to mandatory detention individuals who were not
 21 taken into immigration custody “when ... released” from custody for a Section 1226(c)(1)
 22 Offense.⁷ The Government’s practice is based on a Board of Immigration Appeals’ (the “BIA”)

23 ⁷ According to the U.S. Department of Justice Executive Office for Immigration Review, “[a]
 24 criminal alien who is released from criminal custody . . . is subject to mandatory detention
 25 pursuant to section 236(c) of the Act *even if the alien is not immediately taken into custody by*
 26 *INS or DHS authorities when released from incarceration.*” Bonds, Immigration Judge
 27 Benchbook, U.S. Department of Justice Executive Office for Immigration Review (citing *Matter*
 28 *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).

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

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

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

25 ⁸ *Id.*

26 ⁹ *E.g.*, 8 U.S.C. § 1160(b)(3)(B)(iii) (referring to “the work described in subsection (a)(1)(B)(ii)”
 27 rather than to Section 1160(a), or even Section 1160(a)(1)(B), as a whole); 8 U.S.C. § 1187(a)(1)
 28 (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).

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

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

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

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

27 **(i) The text, structure, and context of Section 1226(c)**
 28 **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

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

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

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

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

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

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

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

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

4 The canon of constitutional avoidance also aids in the first step of the *Chevron* analysis as
 5 “a means of giving effect to congressional intent.” *Diouf*, 634 F.3d at 1090 n.11 (citation
 6 omitted). Under the canon, when a Court must decide which of two plausible statutory
 7 constructions to adopt, “[i]f one of them would raise a multitude of constitutional problems, the
 8 other should prevail—whether or not those constitutional problems pertain to the particular
 9 litigant before the court.” *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Robbins*, 715 F.3d at
 10 1133-34 (applying canon of constitutional avoidance and citing cases).¹¹ In the *Chevron* context,
 11 the court must adopt the construction that avoids constitutional problems “unless such
 12 construction is plainly contrary to the intent of Congress.” *Solid Waste Agency of N. Cook Cnty.*
 13 *v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575
 14 (internal quotations omitted)); *Diouf*, 634 F.3d at 1090 (citing *Kim Ho Ma v. Ashcroft*, 257 F.3d
 15 1095, 1105 n.15 (9th Cir. 2001)); *Williams v. Babbitt*, 115 F.3d 657, 663-64 (9th Cir. 1997)).
 16 This stems from the “prudential desire not to needlessly reach constitutional issues and our
 17 assumption that Congress does not casually authorize administrative agencies to interpret a statute
 18 to push the limit of congressional authority.” *Solid Waste Agency*, 531 U.S. at 172-73.

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

28 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).

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

11 As the Ninth Circuit has recognized, “not all criminal convictions conclusively establish
 12 that an alien presents a danger to the community, even where the crimes are serious enough to
 13 render the alien removable.” *Singh*, 638 F.3d at 1206 (citing *Foucha v. Louisiana*, 504 U.S. 71,
 14 82-83 (1992)). Plaintiffs and their proposed class members, who were not taken into immigration
 15 custody immediately upon release, are not categorically suspect. Indeed, “[b]y any logic, it
 16 stands to reason that the more remote in time a conviction becomes and the more time after a
 17 conviction an individual spends in a community, the lower his bail risk is likely to be.” See
 18 *Sanchez Gamino*, 2013 WL 6700046, at *4 (quoting *Saysana*, 590 F.3d at 17-18). Accordingly,
 19 the Government’s presumptive treatment of all individuals as dangerous or likely to abscond,
 20 even if they have not done so in their years since their release from custody for a Section
 21 1226(c)(1) Offense, is constitutionally questionable.¹³

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

23 ¹² Though mandatory detention has been held not to be *per se* unconstitutional, *Demore*, 538 U.S.
 24 at 527-28, its application under various circumstances has been limited to avoid due process
 25 concerns. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (prohibiting indefinite detention
 26 after an alien has been adjudicated removable); *Robbins*, 715 F.3d at 1137 (holding that Section
 27 1226(c) could not authorize indefinite mandatory detention of criminal aliens as that would be
 28 “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.

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

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

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

15 *Rojas*’s interpretation of Section 1226(c) must be rejected because it leads to arbitrary and
16 capricious results “unmoored from the purposes and concerns of the immigration laws.”
17 *Judulang*, 132 S. Ct. at 490. Congress enacted Section 1226(c) for the purpose of (i) ensuring the
18 presence of criminal aliens at their removal proceedings, (ii) facilitating their removal, and
19 (iii) protecting the public from dangerous noncitizens. *Demore*, 538 U.S. at 518-520; *see id.* at
20 531 (Kennedy, J., concurring) (“[T]he justification for 8 U.S.C. § 1226(c) is based upon the
21 Government’s concerns over the risks of flight and danger to the community...”). The
22 Government’s categorical subjection of Plaintiffs and their proposed class members to mandatory
23 detention under *Rojas* does not serve these purposes.

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

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

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

20 Courts that nonetheless apply *Chevron* deference to *Rojas* do so erroneously. *See Hosh*,
21 680 F.3d at 379; *c.f. Sylvain*, 714 F.3d at 155-57 (acknowledging question regarding applicability
22 of *Chevron* deference to *Rojas*, but declining to decide it). For example, the Fourth Circuit (the
23 only circuit to grant deference to *Rojas*) found ambiguity in Section 1226(c) without analysis of
24 its statutory language, its structure, its legislative history, or the context of its enactment. *See*

25
26 ¹⁴ As the District of Massachusetts recently held in *Gordon*: “This outcome is not only patently
27 unreasonable, but is inconsistent with a fundamental principle underlying our system of justice:
28 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)).

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

9 **c. Plaintiffs’ interpretation of the “when released” clause does not**
 10 **limit the Government’s authority to detain noncitizens.**

11 *Chevron* deference aside, other courts have reached the same result as *Rojas* on different
 12 grounds. Citing the Supreme Court’s decision in *United States v. Montalvo-Murillo*, 495 U.S.
 13 711 (1990), these courts hold that the Government does not lose its authority to mandatorily
 14 detain individuals under Section 1226(c) by failing to detain them “when released.” *See*
 15 *Gutierrez*, 2014 WL 27059 (Tigar, J.); *Sylvain*, 714 F.3d 150. These cases construe
 16 Section 1226(c) as granting authority to the Government to act and eschew the plain language of
 17 the statute as defeating that grant of authority. They are wrongly decided.

18 In *Montalvo-Murillo*, the Supreme Court addressed whether the government lost authority
 19 to seek pretrial detention of an individual pending his criminal trial if it did not timely request a
 20 hearing. 495 U.S. at 713-14. The then-effective Bail Reform Act of 1984 provided that to seek
 21 pre-trial detention, the government had to request a detention hearing which “shall be held
 22 immediately upon the person’s first appearance before the judicial officer.” 18 U.S.C. § 3142(e)-
 23 (f) (West 1990). In *Montalvo-Murillo*, the government sought a detention hearing thirteen days
 24 after the defendant’s first appearance before a judicial officer. 495 U.S. at 716. After the
 25 defendant successfully challenged the timeliness of the government’s request, the district court
 26 ordered the defendant’s release from custody as the appropriate remedy. 713 F. Supp. 1407,
 27 1414-15 (D.N.M. 1989). The Tenth Circuit affirmed. 876 F.2d 826, 832 (10th Cir. 1989). The
 28 Supreme Court reversed, holding that the government’s “failure to comply with the first

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

3 *Montalvo-Murillo* does not apply to this case. Here, unlike in *Montalvo-Murillo*, the
4 Government’s authority to detain noncitizens pending removal is not at issue. The Government
5 may still detain individuals who pose flight risks or dangers to the community, it simply must
6 afford them a bond hearing first. 8 U.S.C. § 1226(a). Thus, the “critical component” or
7 “essential governmental power at issue” of detention in *Montalvo-Murillo* is missing in the case
8 at hand. *Gordon*, 2013 WL 6905352, at *10; *Valdez*, 874 F. Supp. 2d at 1266; *Nabi*, 934 F. Supp.
9 2d at 1250; *see also Castaneda v. Souza*, 952 F. Supp. 2d at 317-320, (“[S]ection 1226(c) ...
10 requires their immediate detention upon completion of their criminal sentence. If members of this
11 group do return to the community, however, then the calculus must change.”). Even under the
12 relief requested by Plaintiffs, the Government *retains* its authority to detain noncitizens during
13 the pendency of their removal proceedings under Section 1226(a).¹⁵ *Gordon*, 2013 WL 6905352,
14 at *10 (the authority to detain “has its genesis in [Section] 1226(a).”). Accordingly, Plaintiffs’
15 requested relief has no impact on the Government’s authority to detain them.

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

18 If granted, Plaintiffs’ request for injunctive relief would result in Plaintiffs and their
19 proposed class members receiving bond hearings. Following those individualized hearings, it is
20 likely that at least some of Plaintiffs and their proposed class members would be granted
21 conditional release. Categorical denial of that prospect renders irreparable harm likely. *Robbins*,
22 715 F.3d at 1144-45 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
23 Cir. 2011)). In the absence of preliminary injunctive relief, however, Plaintiffs and their
24 proposed class members will continue to suffer irreparable injury. *See Winter*, 555 U.S. at 7. As
25 explained above, *supra*, Section IV.A.1, the Government’s continued application of Section
26 1226(c) under *Rojas* raises serious constitutional concerns. This unnecessary detention, without

27 ¹⁵ Plaintiffs do not concede, on their own behalf, or on behalf of members of their proposed class,
28 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).

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

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

6 The balance of hardships tips decidedly in favor of granting Plaintiffs’ requested
 7 injunction. The Government would suffer no (or minimal) hardship. Its authority to detain
 8 criminal aliens would remain intact were the Court to issue Plaintiffs’ requested injunction.
 9 *Castaneda*, 952 F. Supp. 2d at 319-320. The Government would need only to provide bond
 10 hearings to those currently held under Section 1226(c) who were not taken into immigration
 11 detention immediately upon their release from criminal custody for a Section 1226(c)(1) Offense.
 12 As the Government already has this infrastructure in place because it is required by Section
 13 1226(a), this requirement would be one the Government is well-equipped to handle.

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

21 _____
 22 ¹⁶ See Preap Decl., ¶ 5; Padilla Decl., ¶ 9; Magdaleno Decl., ¶ 6; Amicus Brief of 26 Professors
 23 and Researchers of Sociology, Criminology, Anthropology and Law as Amici Curiae in support
 24 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).

25 ¹⁷ Amy Bess, *Human Rights Update: The Impact of Immigration Detention on Children and*
 26 *Families* (National Association of Social Workers 2011) at*1-2,
 27 <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*
 28 *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).

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

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

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

17 ¹⁸ *E.g.*, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention*
 18 *Facilities Jeopardizes a Fair Day in Court* 3-4, 7-10 (National Immigrant Justice Center
 19 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).

20 ¹⁹ *See, e.g.*, Katzmann Immigrant Representation Study Group and the Vera Institute for Justice,
 21 *The New York Immigrant Representation Study (NYIRS), Preliminary Findings*,
<http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf> (last visited Feb. 5,
 22 2014) (based on study of New York's immigration detainee population from October 2005
 23 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).

24 ²⁰ *See* Prasad Decl. ISO MPI ¶¶ 5, 7-9; *see also* Jennifer Lee Koh, Jayashri Srikantiah, and Karen
 25 C. Tumlin, *Deportation without Due Process* (Western States University College of Law, Mills
 26 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
 27 Feb. 5, 2014); Grussendorf, Paul, "Immigration Judges Need Discretion," *S.F. Chron.* Apr. 11,
 28 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.").

1 **D. Granting Plaintiffs’ requested preliminary injunction serves the public**
 2 **interest.**

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

14 **V. CONCLUSION**

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

20 ////

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26 _____
 27 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
 28 visited Feb. 5, 2014).

²² *Id.*

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Dated: February 7, 2014

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