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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**MONY PREAP, EDUARDO VEGA PADILLA,  
AND JUAN LOZANO MAGDALENO,**

**Plaintiffs-Petitioners,**

**v.**

**JEH JOHNSON, Secretary, United States  
Department of Homeland Security, et al.,**

**Defendants-Respondents.**

**Case No.: 13-CV-5754 YGR**

**ORDER GRANTING PETITIONERS' MOTION  
FOR PRELIMINARY INJUNCTION, DENYING  
DEFENDANTS' MOTION TO DISMISS, AND  
GRANTING PETITIONERS' MOTION FOR  
CLASS CERTIFICATION**

Plaintiffs-Petitioners Mony Preap, Eduardo Vega Padilla, and Juan Lozano Magdaleno (“Petitioners”) bring this immigration habeas corpus class action against Jeh Johnson, Secretary of the United States Department of Homeland Security, et al. (the “Government”) and challenge their detention without bond under Section 236(c) of the Immigration and Nationality Act (“INA”), Title 8 U.S.C. § 1226(c) (“Section 1226(c)"). In subsection (a) of the same statute, the INA affords individuals a bond hearing in order to be detained pending removal proceedings. In contrast, Section 1226(c) requires mandatory detention pending removal proceedings for a specifically defined subset of individuals. Petitioners argue that they do not fall within the category defined in Section 1226(c), and therefore cannot be subject to mandatory detention. They seek injunctive and declaratory relief that they, and members of the class, must be afforded a bond hearing so that an immigration judge can determine whether they should be released during the pendency of their removal proceedings.

1 Now before the Court are three motions: (1) Petitioners’ Motion for Preliminary Injunction  
2 (Dkt. No. 23); (2) the Government’s Motion to Dismiss (Dkt. No. 24); and (3) Petitioners’ Motion  
3 for Class Certification (Dkt. No. 8). On March 18, 2014, the Court heard oral argument on these  
4 motions and on April 1, 2014, the parties provided supplemental briefing. (Dkt. Nos. 45, 46, 47.)  
5 The parties concede that the first two motions – Plaintiff’s Motion for Preliminary Injunction and  
6 Defendant’s Motion to Dismiss – center on a pure issue of statutory interpretation; granting one  
7 motion necessarily requires denial of the other. Thus, the Court begins with that purely legal issue  
8 and will then address the Motion for Class Certification.

9 Having carefully considered the parties’ arguments, relevant statutes, case law, and for all  
10 the reasons stated herein, the Court finds that Section 1226(c) unambiguously requires mandatory  
11 detention for individuals who are detained immediately upon release from custody. Thus, as  
12 Petitioners do not fall within that category, the Court **GRANTS** Petitioners’ Motions for Preliminary  
13 Injunction and **DENIES** the Government’s Motion to Dismiss. The Court also **GRANTS** Petitioners’  
14 Motion for Class Certification, as the class action mechanism easily and efficiently establishes the  
15 right of all class members to a bond hearing pursuant to Section 1226(a).

16 **I. JURISDICTION**

17 Federal district courts may grant writs of habeas corpus if the petitioner is “in custody in  
18 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3).  
19 Though some immigration decisions, including bond determinations, are not subject to judicial  
20 review, see, e.g., 8 U.S.C. § 1226(e), courts may hear the habeas petitions of immigration detainees  
21 raising “constitutional claims or questions of law.” *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir.  
22 2011) (citations omitted). Here, Petitioners argue that the Government’s practice of subjecting  
23 them, and members of the class, to mandatory detention pursuant to Section 1226(c) is  
24 unauthorized by the language of the statute itself. Thus, Petitioners present a pure question of law.  
25 The Government does not contest the Court’s jurisdiction to hear the case.<sup>1</sup>

26  
27 <sup>1</sup> The Court notes that in the parties’ Joint Submission following oral argument, the Government  
28 for the first time, in two sentences, challenged the Court’s authority to order injunctive relief in this  
action. (See Dkt. No. 46 at 2.) The Government’s argument is as untimely as it is unfounded.  
Section 1226(e) does not bar the relief Petitioners seek. See *Demore v. Kim*, 538 U.S. 510, 516–17

1           **II. FACTUAL BACKGROUND**

2           The factual predicate giving rise to this action stems from the Immigration and Customs  
3 Enforcement Agency’s (“ICE”) treatment of each of the three Petitioners in this action. Each  
4 Petitioner was convicted of a crime enumerated in Section 1226(c), and thereafter charged with  
5 removal from the United States and detained by ICE. It is undisputed that the predicate offenses  
6 for which Petitioners were detained are offenses enumerated in Section 1226(c)(1)(A)-(D).  
7 However, ICE’s detention of each Petitioner did not commence at the time each Petitioner was  
8 released from custody. Rather, ICE detained Mr. Preap seven years after his relevant misdemeanor  
9 convictions; Mr. Padilla, over ten years after his relevant convictions; and Mr. Magdaleno over five  
10 years later. Because the Government determined that each petitioner could be detained pursuant to  
11 Section 1226(c), none was afforded a bond hearing. The ultimate issue is not whether the  
12 Government can detain Petitioners pending such proceedings – Petitioners contend that such  
13 detention is proper if evidence adduced at a bond hearing establishes that they present a risk of  
14 flight or public danger. Rather, the ultimate issue for resolution is whether the Government was  
15 statutorily authorized under Section 1226(c) to detain Petitioners mandatorily and without a  
16 regularly-scheduled bond hearing.

17           **A. PETITIONER MONY PREAP**

18           Petitioner Mony Preap is thirty-two years old. (Dkt. No. 8, Ex. A (“Preap Decl.”) ¶ 2.) He  
19 was born in a refugee camp and is a native of Cambodia. (Id.) Preap entered the United States as  
20 an infant in 1981 and is a lawful permanent resident. (Id.) He is a single father to his son, who is a  
21 United States citizen, and a caretaker for his mother, who is in remission from cancer and suffers  
22 from seizures. (Id. ¶ 4.)

23           In 2006, Preap was convicted of two misdemeanor counts of possession of marijuana in  
24 violation of California Health and Safety Code section 11357(a) and sentenced to time served. (Id.  
25 ¶ 7; Dkt. No. 26, Ex. 28 (“Preap DHS Record”) at 3.) In 2013, Preap was arrested for inflicting  
26 corporal injury on a spouse in violation of California Penal Code section 273.5. (Preap Decl. ¶ 7;  
27 (2003). Nor does Title 8 U.S.C. section 1252(f) bar said relief. See *Rodriguez v. Hayes*, 591 F.3d  
28 1105, 1120 (9th Cir. 2009). The argument was not raised in the Government’s Motion, nor was it  
briefed.

1 Preap DHS Record at 3.) On September 9, 2013, Preap pleaded guilty to battery in violation of  
2 California Penal Code section 242 and was sentenced to ninety days of incarceration in the Sonoma  
3 County Detention Facility. (Dkt. No. 26, Ex. 27.)

4 On September 11, 2013, upon his release from the Sonoma County Detention Facility, ICE  
5 officers arrested and charged Preap with being removable as a result of his 2006 misdemeanor  
6 convictions for possession of marijuana. (Preap Decl. ¶ 3; Preap DHS Record.) Preap was  
7 detained at an ICE detention facility pending removal proceedings. (Preap Decl. ¶ 3.) On  
8 December 9, 2013, Preap requested a bond hearing, which was denied on December 10, 2013.  
9 (Preap Decl. ¶ 6.) While Preap was initially found to be removable as charged, on December 17,  
10 2013, after three months of detention and after the filing of this action, an immigration judge  
11 granted Preap a Cancellation of Removal. (Mot. to Dismiss at 3; Dkt. No. 26, Ex. 29.) The  
12 Government did not oppose the grant of cancellation of removal and waived its right of appeal.<sup>2</sup>  
13 (See Dkt. No. 26, Ex. 29.)

14 **B. PETITIONER EDUARDO VEGA PADILLA**

15 Petitioner Eduardo Vega Padilla is forty-eight years old. (Dkt. No. 8, Ex. B (“Padilla  
16 Decl.”) ¶ 2.) He came to the United States in 1966 from Mexico when he was sixteen months old  
17 and became a lawful permanent resident that same year. (Id.) Padilla has five children, all of  
18 whom are United States citizens. (Id. ¶ 3.) He also has six grandchildren and three siblings who  
19 are also United States citizens and live in the Sacramento area. (Id.) Prior to detention, Padilla  
20 lived with his mother, his daughter, and his grandson. (Id.)

21 In 1997, Padilla was convicted for possession of a controlled substance (methamphetamine),  
22 a misdemeanor, in violation of California Health and Safety Code section 11377(a). (Id. ¶ 7; Dkt.  
23 No. 26, Ex. 3 (“Padilla Records I.”).) Padilla was sentenced to thirty days. (Padilla Records I.) In  
24 2000, Padilla was convicted of felony possession of methamphetamine in violation of California  
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26 <sup>2</sup> Although the Government contends that Preap’s claim is mooted by his recent Cancellation of  
27 Removal, the Court finds that he may properly remain a named plaintiff in this action because of  
28 the inherently transitory nature of his claim, and because it is capable of repetition, yet evading  
review. See *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 398–99 (1980); *Gerstein v. Pugh*,  
420 U.S. 103, 110 n.11 (1975).

1 Health and Safety Code section 11377(a) and was sentenced to 180 days of confinement. (Dkt. No.  
2 26, Ex. 4 (“Padilla Records II”) at 6.) While on probation for the second offense, police officers  
3 searching Padilla’s home discovered a firearm in a shed behind his home. (Padilla Decl. ¶ 7.)  
4 Padilla was convicted of being a felon in possession of a firearm in violation of California Penal  
5 Code section 12021(a)(1) and was sentenced to 180 days in jail. (Padilla Decl. ¶ 7; Dkt. No. 26,  
6 Ex. 5 (“Padilla Records III”) at 7.) Padilla was released in 2002. (Padilla Decl. ¶ 7.)

7 Over ten years after Padilla’s release from his sentence from the firearms conviction, on  
8 August 15, 2013, ICE charged Padilla with being removable from the United States based on his  
9 controlled substances and firearm convictions. (Dkt. No. 26, Exs. 9, 10.) ICE agents went to  
10 Padilla’s home and he turned himself over voluntarily. (Padilla Decl. ¶ 4.) On October 15, 2013,  
11 an immigration judge found that Padilla was lawfully detained under Title 8 U.S.C. section  
12 1226(c); thus, he was not eligible for a bond hearing despite the fact that he was not detained upon  
13 his release in 2002. (Dkt. No. 26, Ex. 13.)

14 On December 3, 2013, an immigration judge ordered Padilla removed from the United  
15 States under Title 8 U.S.C. section 1227(a)(2)(A)(iii) as an alien convicted of a controlled  
16 substance offense. (Dkt. No. 26, Ex. 11.) On December 26, 2013, Padilla appealed the removal  
17 order to the Board of Immigration Appeals (“BIA”) where it remains pending. (Dkt. No. 26, Ex.  
18 12.) On February 14, 2014, having been held for six months, Padilla became eligible for a bond  
19 hearing in accordance with the Ninth Circuit’s preliminary injunction in *Rodriguez v. Robbins*.<sup>3</sup>  
20 See *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013) (“*Rodriguez II*”). On March 7,  
21 2014, Padilla received his six-month *Rodriguez* hearing and was released on bond. (Dkt. No. 38,  
22 Ex. B.)

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25 \_\_\_\_\_  
26 <sup>3</sup> Under the Ninth Circuit’s ruling in *Rodriguez v. Robbins*, once an alien detained under Title 8  
27 U.S.C. section 1226(c) has been subject to detention for six months, the statutory authorization for  
28 detention converts to Title 8 U.S.C. section 1226(a) and the Government is obligated to provide an  
individualized bond hearing. See *Rodriguez II*, 715 F.3d at 1138. Effectively, an individual can  
only be held pursuant to Section 1226(c)—and thus be denied the opportunity for a bond hearing—  
for six months. See *id.*

1           **C. PETITIONER JUAN LOZANO MAGDALENO**

2           Petitioner Juan Lozano Magdaleno is a fifty-seven year old native of Mexico. (Dkt. No. 8,  
3 Ex. C (“Magdaleno Decl.”) ¶ 2.) Magdaleno came to the United States in 1974 and has been a  
4 lawful permanent resident for thirty-nine years. (Id.) Prior to detention, Magdaleno lived with his  
5 wife, two of his four children, his son-in-law, and one of his ten grandchildren, all of whom are  
6 United States citizens. (Id. ¶ 4.)

7           On October 13, 2000, Magdaleno was convicted as a felon in possession of a firearm in  
8 violation of California Penal Code section 12021(a)(1). (Dkt. No. 26, Ex. 16 (“Magdaleno  
9 Records”)) According to Magdaleno, he earned a living by purchasing storage units at auctions  
10 and selling the contents of the units at his thrift store. (Magdaleno Decl. ¶ 9.) Bidders on storage  
11 units do not know the contents of the units prior to purchase, and one of the units that Magdaleno  
12 purchased contained an old rifle. (Id.) When police officers came to Magdaleno’s thrift store on an  
13 unrelated matter, they arrested him for possessing the rifle. (Id.) Magdaleno was sentenced to 147  
14 days of confinement and 3 years of probation. (Magdaleno Records.)

15           On August 21, 2007, Magdaleno was convicted of driving on a suspended license/driving  
16 under the influence in violation of California Vehicle Code section 14601.2(a), a misdemeanor, and  
17 possession of a controlled substance (methamphetamine), a felony, in violation of California Health  
18 and Safety Code section 11377(a). (Dkt. No. 26, Ex. 18.) He was sentenced to six months of  
19 confinement and released in January 2008. (Id.; Magdaleno Decl. ¶ 10.)

20           Five years after his release, on July 17, 2013, ICE arrested Magdaleno at his residence and  
21 charged him with removal based upon his October 2000 and May 2007 convictions. (Dkt. No. 26,  
22 Ex. 22.) Magdaleno was detained that same day at the West County Detention Center in  
23 Richmond, California. (Magdaleno Decl. ¶ 3.)

24           Magdaleno challenged ICE’s charges of removability, but the immigration judge denied his  
25 application for relief from removal and ordered that he be removed. (Dkt. No. 26, Ex. 24 at 7–8.)  
26 On December 26, 2013, Magdaleno appealed the removal to the BIA. (Dkt. No. 26, Ex. 25.) This  
27 appeal remains pending. (Mot. to Dismiss at 6; Dkt. No. 34 (“Petitioners’ Traverse”) at 5.)  
28

1 On December 9, 2013, Magdaleno requested a bond hearing and challenged his detention  
2 before an immigration judge. (Magdaleno Decl. ¶ 3.) That judge found that Magdaleno was  
3 lawfully detained under Title 8 U.S.C. section 1226(c) despite not having been detained by ICE  
4 upon release from custody and was not due an individualized bond hearing. (Dkt. No. 26, Ex. 23.)

5 On February 14, 2014, Magdaleno was provided a Rodriguez hearing, and he was denied  
6 release due to the determination that he was a flight risk. (Dkt. No. 28 ¶¶ 2, 3.) The immigration  
7 judge based this determination in part on the fact that Magdaleno was appealing his removal order.  
8 (Id. ¶ 3.)

### 9 III. MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS

10 The parties agree that resolution of Petitioners' Motion for Preliminary Injunction and  
11 Defendant's Motion to Dismiss turns on a question of pure statutory interpretation: what is the  
12 meaning of the phrase "when the alien is released" in Section 1226(c)?<sup>4</sup> Accordingly, the Court  
13 resolves this question first.<sup>5</sup>

#### 14 A. STATUTORY OVERVIEW

15 Congress has enacted a multi-layered statutory scheme that provides for civil detention of  
16 aliens during removal proceedings. See Prieto-Romero v. Clark, 534 F.3d 1053, 1065 (9th Cir.  
17 2008). Section 1226 is one such provision. Where an alien falls within Section 1226 determines  
18 whether his detention is discretionary (as provided in Section 1226(a)) or mandatory (as provided  
19 in Section 1226(c)).

20  
21 <sup>4</sup> If Petitioners' interpretation of Section 1226(c) prevails, they will have established all four prongs  
22 of the preliminary injunction test: a likelihood of success on the merits, that the balance of equities  
23 tips in their favor, the likelihood of irreparable harm in the absence of injunctive relief, and that  
24 granting an injunction will serve the public interest. If Petitioners' interpretation fails and the  
25 Government's succeeds, Petitioners will have failed to state a claim and the Government's Motion  
26 to Dismiss will be granted.

27 <sup>5</sup> Petitioners alternatively argue that the Government's practice of subjecting them to mandatory  
28 detention pursuant to Section 1226(c) long after "when [they were] released" from state custody  
violates the Due Process Clause of the Fifth Amendment to the United States Constitution.  
Because the Court finds that Petitioners' claim is conclusively resolved on statutory interpretation  
grounds, the Court need not, and therefore does not, address the merits of Petitioners' Due Process  
argument.

1 Pursuant to Section 1226(a), when an alien is charged with removal, ICE may seek to have  
2 that individual detained pending removal proceedings. Section 1226(a) affords the Government  
3 discretion to release an individual on his own recognizance or on bond while his removal case is  
4 pending if the Government determines that release would not present a risk of flight or a danger to  
5 the community. 8 U.S.C. § 1226(a). However, if the alien falls within the category of individuals  
6 defined in Section 1226(c), Congress requires mandatory detention while removal proceedings are  
7 pending. This case stems from the parties' disagreement on the legal interpretation and application  
8 of Section 1226(c), which reads in pertinent part as follows:

9 **(c) Detention of criminal aliens. (1) Custody.** The Attorney General **shall take**  
10 **into custody** any alien who—

11 (A) is inadmissible by reason of having committed any offense  
12 covered in section 1182(a)(2) ["Inadmissible aliens"] of this title,

13 (B) is deportable by reason of having committed any offense  
14 covered in section 1227(a)(2)(A)(ii) ["Multiple criminal  
15 convictions"], (A)(iii) ["Aggravated felony"], (B) ["Controlled  
16 substances"], (C) ["Certain firearms offenses"], or (D)  
17 ["Miscellaneous crimes"] of this title,

18 (C) is deportable under section 1227(a)(2)(A)(i) ["Crimes of moral  
19 turpitude"] of this title on the basis of an offense for which the  
20 alien has been sentenced to a term of imprisonment of at least 1  
21 year, **or**

22 (D) is inadmissible under section 1182(a)(3)(B) ["Terrorist  
23 activities"] of this title or deportable under section 1227(a)(4)(B)  
24 ["Terrorist activities"] of this title,

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

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



1 procedure that considers the severity of the offense committed by the  
2 alien.

3 8 U.S.C. § 1226(c) (brackets and emphasis supplied). Thus, the mandatory detention provision of  
4 Section 1226(c) admits of only one exception as set forth in subsection (2), i.e., where the need for  
5 witness protection exists. This exception is of no relevance to the instant case.

6 **B. SUMMARY OF THE PARTIES' COMPETING INTERPRETATIONS**

7 Petitioners argue that Section 1226(c) is plain in its mandate that “the Attorney General  
8 shall take into custody” an individual who has committed an enumerated offense “when the alien is  
9 released,” not at some later date, but quite simply, at the moment of his or her release. Said  
10 differently, the Government is required to apprehend such individuals “when [they are] released,”  
11 thus effecting a seamless transition from state to federal custody and ensuring their detention  
12 pending removal proceedings. Petitioners contend that because they were not apprehended by the  
13 Government when they were released from state custody, they do not fall within the scope of  
14 Section 1226(c)'s mandatory detention provision because they are not aliens “described in  
15 paragraph (1).” See 8 U.S.C. § 1226(c)(2). Rather, aliens “described in paragraph (1)” and  
16 consequently denied bond hearings are only those who: (i) commit a predicate offense, and (ii) are  
17 taken into custody “when [they are] released.”

18 The Government advances a different interpretation of Section 1226(c), relying on *Matter of*  
19 *Rojas*, 23 I&N Dec. 117 (BIA 2001). There, in a split decision, the BIA acknowledged that Section  
20 1226(c) does require that custody occur “immediately upon [] release.” *Rojas*, 23 I&N Dec. at 122.  
21 The BIA nonetheless ignored that mandate and determined that Section 1226(c)'s mandatory  
22 detention provision applies to any individuals who commit an offense enumerated in Section  
23 1226(c)(1)(A)–(D) regardless of when the individual is apprehended. The Government argues that  
24 the BIA's interpretation of Section 1226(c) should be granted deference because the statute admits  
25 of ambiguity that the agency reasonably resolved. As further evidence that the statute is  
26 ambiguous, the Government posits that the term “when” can be understood to mean “at any time  
27 after” as well as “immediately upon.” (Def't. Mot. to Dismiss at 15.) Thus, Government asserts  
28

1 that its practice of apprehending individuals at any point after they are released complies with  
2 Congress’s directive.

3 **C. ANALYSIS**

4 **1. Standard of Review**

5 When Petitioners seek judicial review of the interpretation of a statute by an administrative  
6 agency, a court must apply the deferential test for evaluating an agency decision set forth in  
7 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a  
8 court must first inquire whether “the statute is silent or ambiguous with respect to the specific  
9 issue.” *Chevron*, 467 U.S. at 843. If the statute is unambiguous the inquiry ends, for a court need  
10 not defer to an agency’s interpretation of a statute “[i]f the intent of Congress is clear.” *Id.* at 842.  
11 If the statute is found to be ambiguous or silent with respect to the specific issue, the court then  
12 evaluates “whether the agency’s answer is based on a permissible construction of the statute.” *Id.*  
13 at 843.

14 The parties’ dispute centers on the meaning of the phrase “when . . . released” as used in  
15 Section 1226(c). The Government asserts that the term “when” can be understood to mean “at any  
16 time after” as well as “immediately upon.” Petitioners contend that the term can be read to mean  
17 only “immediately upon” or “at the moment of release.” Thus, the Court first turns to the question  
18 of what the phrase “when . . . released” as set forth in Section 1226(c) means and whether it is  
19 ambiguous.

20 **2. Whether Section 1226(c) is Ambiguous**

21 When interpreting a statute, the Court must begin with the language of the statute itself. A  
22 fundamental canon of statutory construction is that, unless otherwise defined, words will be  
23 interpreted as taking their ordinary, contemporary, common meaning. See *Perrin v. United States*,  
24 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580–81 (1975); see also *Leocal v.*  
25 *Ashcroft*, 543 U.S. 1, 9 (2004) (to interpret a statute, a court must give words their “ordinary or  
26 natural” meaning) (citation omitted). “The plainness or ambiguity of statutory language is  
27 determined by reference to the language itself, the specific context in which that language is used,  
28 and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341

1 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v.  
2 Bronson, 500 U.S. 136, 139 (1991)).

3 Section 1226(c)(1) consists of one relevant and long sentence that, when read in a  
4 condensed form, provides clarity:

5 The Attorney General **shall** take into custody any alien who – [has committed an  
6 enumerated offense], **when the alien is released**, without regard to whether the  
7 alien is released on parole, supervised release, or probation, and without regard to  
8 whether the alien may be arrested or imprisoned again for the same offense.

9 8 U.S.C. § 1226(c) (brackets and emphasis supplied). The primary question presented is whether  
10 “when . . . released” means immediately upon release or at any time after release. For three  
11 reasons, the Court finds that the former meaning controls.

12 First, the language itself establishes a mandate with an inherent immediacy requirement. By  
13 including the language “[t]he Attorney General **shall**” in Section 1226(c), Congress issued a  
14 command that the Government take into custody such individuals at the moment they are released  
15 (“when . . . released”) from state custody, not at some undefined time in the future. Such is the  
16 meaning of the term “when” as used in this manner. If one is commanded to do something “when”  
17 another event occurs, the term “when” cannot reasonably be read to permit potentially unbounded  
18 delay. The fact that there is a command, which admits of no discretion by its very nature, does not  
19 support the notion that the action commanded can be undertaken at the leisure of the subordinate  
20 party. Had Congress intended to provide the Government discretion as to when Section 1226(c)’s  
21 mandatory detention commences, it would not have used mandatory language. Instead, it would  
22 have enacted language such as “at any point after the alien is released” or “after the alien is  
23 released.” The fact that no such language appears in the statute cannot be ignored. The Court  
24 cannot, and will not, strain to “read into” Section 1226(c) language that is simply not there, for to  
25 do so would be to contrive rather than to interpret. As it is written in Section 1226(c), “when . . .  
26 released” can be read only to mean at the time of release.

27 Second, reading Section 1226(c) as a single, cohesive sentence reveals that Congress had  
28 timing in mind when it enacted Section 1226(c). The “when . . . released” clause immediately

1 precedes the clause “without regard to whether the alien is released on parole, supervised release, or  
2 probation.” The nature of the individual’s release — whether he or she is released on parole,  
3 supervised release, or probation — manifests at the moment of release. That Congress explicitly  
4 acknowledged events that occur simultaneously with an individual’s release and stated that said  
5 events shall not bear on the Government’s obligation to apprehend such individuals makes clear  
6 that said apprehension must occur at the moment the individual is released. Furthermore, the  
7 “when . . . released” command exists not only “without regard” to events that occur at the moment  
8 of release, such as the nature of that non-custodial release, but “without regard” to possible future  
9 events that have yet to manifest (“whether the alien may be arrested or imprisoned again for the  
10 same offense”). In this one sentence, Congress acknowledged both present and future possibilities  
11 and nonetheless required that the Attorney General “take into custody” such individuals “when  
12 [they are] released.” Thus, by specifically choosing the word “when,” as opposed to other terms  
13 such as “at any time after” or simply “after release,” Congress emphasized that the directive was  
14 time-sensitive: the person must be taken into custody at the time of release from state custody and  
15 not at any point in time thereafter.

16 Third, that Section 1226(c) sets forth an immediacy requirement is further reinforced by  
17 assessing how Section 1226(c) interacts with the rest of Congress’s statutory scheme. In Section  
18 1226, Congress set forth a statutory framework for the detention of noncitizens pending removal  
19 proceedings. Section 1226(c)’s mandatory detention provision is an exception within that broader  
20 scheme. The more generally applicable provision, Section 1226(a), affords the Government both  
21 deference and discretion as to whether an individual is either detained pending removal proceedings  
22 or released on bond. In contrast, the language of 1226(c) eliminates that discretion where a certain  
23 class of individuals are concerned. To find that the Attorney General has potentially boundless  
24 discretion as to when it discharges its obligations under Section 1226(c) runs counter to the  
25 language and structure of Section 1226. Indeed, it is illogical: both the language and structure of  
26 Section 1226 establish that Congress’s directive to the Government regarding apprehension of  
27 certain criminal aliens was both time-sensitive and non-discretionary.

28

1           Given the interplay between Sections 1226(a) and (c), it makes sense that the plain language  
2 of the statute commands the Attorney General to apprehend specified criminal aliens “when [they  
3 are] released,” and no later. The individuals defined in Section 1226(c)(1)(A) through (D) are those  
4 who have committed criminal offenses and for whom removal was Congress’s priority. Congress  
5 enacted a statutory scheme that contemplated immediate apprehension of these individuals upon  
6 release from state custody, thus effecting a seamless transition and ensuring effective and efficient  
7 removal. Reading Section 1226(c) in a manner that credits its plain meaning serves this logical,  
8 sensible purpose.

9           The Government’s three arguments to the contrary are unpersuasive. First, the Government  
10 proposes that the meaning of the phrase “when the alien is released” is ambiguous because it can be  
11 read to establish the point in time when the Government’s duty to apprehend a criminal alien  
12 begins. (See Dkt. No. 24 at 14; Dkt No. 32 at 11.) Under the Government’s reading of the statute,  
13 its authority to “take into custody” an individual contemplated in Section 1226(c) begins at the  
14 moment the individual is released from state custody and may be discharged at the Government’s  
15 discretion. That reading of the statute strains credulity. It runs counter to both the plain meaning of  
16 the term “when” as used in Section 1226(c)(1) and the structure of Section 1226 as a whole. As set  
17 forth above, Congress chose the word “when,” not the word “after” or something similar. If the  
18 Government’s duty merely begins at the point of release, the Government is free to ignore Section  
19 1226(c)’s mandate indefinitely. This interpretation finds no support in Section 1226(c)’s language  
20 or Section 1226 generally. Indeed, it appears that the Government’s argument is motivated by the  
21 fact the Government finds it difficult to comply with Congress’s directive. This concern is  
22 unavailing. Practical difficulties cannot change or undermine the statute’s plain language.

23           Second, the Government argues that the meaning of “when” is imprecise, citing dictionaries  
24 to show that the term can take on various meanings. (See Dkt. No. 24 at 15; Dkt. No. 32 at 12.) To  
25 support this argument, the Government points to cases in which other courts have found that the  
26 term “when” has at least two possible meanings, such as “at any time after” and “immediately  
27 upon.” Although a term may potentially possess two meanings in other circumstances, it does not  
28 follow that the term therefore must be ambiguous as used in Section 1226(c). Such myopia has no

1 place in statutory interpretation. A court must read the words of a statute “in their context and with  
2 a view to their place in the overall statutory scheme.” See *FDA v. Brown & Williamson Tobacco*  
3 *Corp.*, 529 U.S. 120, 132-33 (2001) (citations omitted); see also *United States v. Morton*, 467 U.S.  
4 822, 828 (1984) (“[W]e do not . . . construe statutory phrases in isolation; we read statutes as a  
5 whole.”) (citations omitted).

6 Courts have long employed the canon of looking to the words surrounding the term at issue  
7 and the statutory structure in which the term is used to discern meaning, for “a word is known by  
8 the company it keeps.” This canon, also known as *noscitur a sociis*, prevents a court from  
9 “ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus  
10 giving ‘unintended breadth to the Acts of Congress.’” *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561,  
11 575 (1995) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Taking a full view of  
12 Section 1226(c), with particular attention to the structure of the sentence at Section 1226(c)(1) and  
13 the relationship between Sections 1226(a) and (c), it is evident that “when” can mean only “at the  
14 moment” of release. To hold otherwise would read “unintended breadth” into Section 1226(c) by  
15 sanctioning the Government’s practice of delaying apprehension of criminal aliens for months,  
16 years, or even decades after they are released from state custody.

17 Third, as an alternative argument, the Government submits that the phrase “when . . .  
18 released” cannot bear on the category of individuals subject to mandatory detention because those  
19 contemplated in subsection 1226(c)(1)(D) specifically would never have been subject to predicate  
20 custody. (Dkt. No. 32 at 13; Dkt. No. 45 at 1–2.). By extension, the Government posits that if the  
21 “when . . . released” requirement cannot apply literally to individuals falling within the scope of  
22 subsection (D), this Court should find that the “when . . . released” requirement applies to no  
23 individual contemplated in the entirety of Section 1226(c)(1)(A), (B), or (C). The argument does  
24 not convince, for it would have the effect of reading the “when . . . released” requirement out of the  
25 statute entirely. Moreover, the Government’s suggestion that reading Section 1226(c) to require  
26 immediate apprehension would hamstring the Government’s ability to detain individuals suspected  
27 of terrorist activity is unavailing as a practical matter. Section 1226(c) does not operate in a  
28 vacuum; there are other statutes that enable the Government to apprehend specifically individuals

1 suspected of terrorist activities. See, e.g., 8 U.S.C. § 1226(A) (entitled “Mandatory detention of  
2 suspected terrorists; habeas corpus; judicial review”). There is thus no practical concern that  
3 reading Section 1226(c) for what it says would render the Government unable to apprehend  
4 individuals contemplated by subsection (D).<sup>6</sup> In addition, it is not clear that reading Section  
5 1226(c) for what it says presents an inherent contradiction by referring to subsection (c)(1)(D)  
6 individuals and requiring that there be predicate custody. Ostensibly, individuals falling within the  
7 ambit of subsection (D) could be subject to custody for an unrelated offense, serve time in state  
8 custody for that non-subsection (D) offense, and “when . . . released,” be apprehended by the  
9 Government for activities falling under subsection (D). Thus, the Government’s suggestion that  
10 there can be no sensible reconciliation of “when released” with the individuals contemplated by  
11 subsection (D) falls flat.

12 In sum, the Court finds that the plain reading of the statute supports Petitioners’  
13 interpretation. “When . . . released” means what it says: an individual falls within Section 1226(c)  
14 if detained at the time he or she is released from state custody. In so holding, the Court is in good  
15 company. Although the Ninth Circuit has yet to rule on this question, “[t]he majority of district  
16 courts in this [] circuit[] hold that the ‘when . . . released’ language is unambiguous,” and that the  
17 mandatory detention provision applies to only individuals who have both committed an enumerated  
18 offense and are detained upon their release. *Deluis-Morelos v. ICE Field Office Dir.*, 2013 WL  
19 1914390, at \*4 (W.D. Wash. May 8, 2013); see, e.g., *Khoury v. Asher*, No. 13-cv-1367, Dkt. No. 44  
20 (W.D. Wash. Mar. 11, 2014); *Espinoza v. Aitken*, 2013 WL 1087492, at \*6 (N.D. Cal. Mar. 13,  
21 2013) (holding “when . . . released” language limits scope of mandatory detention provision to  
22 criminal aliens detained when released where detainee was arrested by ICE six months after  
23 conviction and sentence of probation and time served); *Bumanlag v. Durfor*, 2013 WL 1091635  
24

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25 <sup>6</sup> The Government’s suggestion that reading the statute for what it says would in some way hinder  
26 its ability to detain individuals for subsection (D) offenses pursuant to Section 1226(c) appears  
27 disingenuous in light of the fact that in response to the Court’s order that the Government provide  
28 figures on the size of the potential class, the Government responded with data concerning  
individuals held pursuant to offenses enumerated in only subsections (A) through (C). The  
Government did not provide any figure reflecting the number individuals currently held under  
Section 1226(c) for subsection (D) offenses. (See Dkt. No. 46 (“Joint Submission”) at 10.)

1 (E.D. Cal. Mar. 15, 2013) (holding same where detainee was arrested by ICE seven years after  
2 release from prison); *Dighero-Castaneda v. Napolitano*, 2013 WL 1091230, at \* 6 (E.D. Cal. Mar.  
3 15, 2013) (“8 U.S.C. § 1226(c) does not apply unless the petitioner is taken into custody  
4 immediately or very shortly following his or her release from custody on the underlying removable  
5 offense.”); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1229–30 (W.D. Wash. 2004) (holding  
6 same). Many courts outside this circuit have similarly found that the language “when . . . released”  
7 unambiguously requires an individual to have been detained upon release from criminal custody for  
8 an offense enumerated by Section 1226(c)(1) in order to be subject to mandatory detention under  
9 Section 1226(c). See e.g., *Gordon v. Johnson*, 2013 WL 6905352 (D. Mass. Dec. 31, 2013);  
10 *Castaneda v. Souza*, 952 F. Supp. 2d 307, 317–318 (D. Mass. 2013); *Valdez v. Terry*, 874 F. Supp.  
11 2d 1262, 1264 (D. N.M. 2012) (collecting cases demonstrating that the “majority of federal district  
12 courts that have ruled on this issue have agreed that the language ‘when the alien is released’ in §  
13 1226(c) unambiguously means immediately after their release” and have rejected the BIA’s  
14 interpretation of § 1226(c) in *Matter of Rojas*) (emphasis in original); *Ortiz v. Holder*, 2012 WL  
15 893154, \*3 (D. Utah Mar. 14, 2012) (joining the “vast majority of federal courts that have  
16 addressed this issue” and holding that because petitioner was not taken into immigration custody  
17 when he was released, Section 1226(c) does not apply).

18       Accordingly, for the reasons set forth above, the Court finds that Section 1226(c)  
19 unambiguously requires that individuals be detained immediately upon release from custody in  
20 order to be subject to Section 1226(c)(2)’s mandatory detention provision. If individuals are not  
21 detained “when [they are] released” from state custody, the Government may detain them pending  
22 removal proceedings pursuant to Section 1226(a), which requires that they be afforded a bond  
23 hearing.

### 24               **3. Section 1226(c)’s Legislative History Confirms Its Plain Meaning**

25       Although the Court’s analysis can end at this juncture, it bears noting that the political  
26 context in which Section 1226 was enacted confirms that the plain language of the statute requires  
27 apprehension at the time of release and no later. In *Demore v. Kim*, 538 U.S. 510 (2003), the  
28 Supreme Court considered the constitutionality of Section 1226(c)’s mandatory detention provision



1 and provided a fulsome explication of the statute’s origin. There, the Supreme Court found that  
2 Congress enacted Section 1226(c) “against a backdrop of wholesale failure by the [Immigration and  
3 Naturalization Service (“INS”)]<sup>7</sup> to deal with increasing rates of criminal activity by aliens.”  
4 Demore, 538 U.S. at 518 (citing Criminal Aliens in the United States: Hearings before the  
5 Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs,  
6 103d Cong., 1st Sess. (1993); S. Rep. No. 104–48, p. 1 (1995) (confinement of criminal aliens  
7 alone cost \$724 million in 1990)). Having undertaken to determine how to ensure that such  
8 individuals would assuredly be deported, Congress’s investigations revealed infirmities in INS’s  
9 processes. For example, Congress learned that “the INS could not even identify most deportable  
10 aliens, much less locate them and remove them from the country.” Demore, 538 U.S. at 518  
11 (emphasis in original) (citation omitted). The result was not simply a monetary cost on the Nation,  
12 but also a cost on other potential immigrants who sought to enter the United States and on the  
13 public due to the crimes such individuals committed before being removed. *Id.* The Supreme  
14 Court further noted that “deportable criminal aliens who remained in the United States often  
15 committed more crimes before being removed. One 1986 study showed that, after criminal aliens  
16 were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were  
17 arrested multiple times before their deportation proceedings even began.” *Id.* at 518–19 (citing  
18 Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law  
19 of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989)). Given this  
20 context, it makes sense that Congress wanted to ensure that certain criminal aliens would not be  
21 released following time served for certain offenses. Reading Section 1226(c) for what it says  
22 furthers that goal by ensuring a seamless transition from state to federal immigration custody and  
23 ensuring efficient removal proceedings for certain offenders.

24 Cognizant that Section 1226(c)’s new seamless transition mandate would require the INS to  
25 change considerably its policies and procedures, Congress passed the Transition Period Custody  
26 Rules (“TPCR”) concurrently with Section 1226(c). See *Illegal Immigration Reform and*

27 \_\_\_\_\_  
28 <sup>7</sup> On March 1, 2003, the INS ceased to exist as an independent agency within the Department of  
Justice, and ICE, an agency within DHS, assumed INS’s detention and removal authority.

1 Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(2), 110  
2 Stat. 3009, 3009-586 (Sept. 30, 1996). The TPCR suspended the implementation of the mandate in  
3 Section 1226(c) for one year to provide the INS time to implement necessary changes. See Matter  
4 of Garvin-Noble, 21 I&N Dec. 672, 675, 678 (BIA 1997) (“Congress evidently preferred  
5 mandatory detention pending deportation but understood that detention space and other practical  
6 limitations temporarily stood in the way of that preference.”)

7 In light of Congress’s objectives in enacting Section 1226(c), specifically remedying the  
8 Government’s failure to detain and remove a subset of criminal aliens, it is illogical to read Section  
9 1226(c) as permitting potentially limitless delay in their apprehension. Doing so would have the  
10 practical effect of rendering the detention contemplated by Section 1226(c) discretionary in the first  
11 instance, for the Government could simply choose to delay apprehension indefinitely. Taken to its  
12 extreme, this reading of Section 1226(c) would effectively sanction the Government’s “wholesale  
13 failure” to deal effectively with and remove criminal aliens. See *Demore*, 538 U.S. at 518. The  
14 one-year suspension of Section 1226(c) suggests all the more that Congress intended to require  
15 seamless transition from state to federal custody “when” such individuals are released from state  
16 custody.<sup>8</sup> Congress’s intent, evident from the plain language of the statute and reinforced by the  
17 context in which it was passed, was that Section 1226(c) would function as a mandate, effecting  
18 seamless transitions from custody to immigration detention for a select class of deportable persons  
19 for whom removal was Congress’s priority.<sup>9</sup> The Government’s inability to follow this mandate

20 \_\_\_\_\_  
21 <sup>8</sup> The Government argues that the TPCR provided the Government time to implement the processes  
22 required for Section 1226(c)’s mandatory detention requirement, not to perfect that process. The  
23 Government further argues that practical considerations, such as sanctuary city ordinances and  
24 limited federal resources, render seamless transition from state to federal custody difficult. These  
25 arguments are unavailing. As explained above, Congress made clear that the Government “shall  
26 take into custody” the individuals in question “when [they are] released.” The fact that the  
27 Government fails to comply with this mandate is not a reason for this Court to interpret Congress’s  
28 language as sanctioning such noncompliance.

<sup>9</sup> Indeed, after enacting Section 1226(c), Congress remained apprised the INS’s efforts to identify  
and remove criminal aliens. To that end, the General Accountability Office provided reports and  
testimony. In 1997, the GAO provided to the House Committee on the Judiciary a report, entitled  
“Criminal Aliens: INS’ Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved.”  
GAO/T-GGD-97-154 (July 15, 1997). The GAO provided a follow-up to that report in 1998,

1 does not change the statute’s plain language nor can it be a basis for broadening the Government’s  
2 authority. To hold otherwise would not only do violence to the statute, it would have the perverse  
3 effect of validating the Government’s failure to comply.

4 **4. The Government’s Remaining Arguments Do Not Persuade**

5 **a. Matter of Rojas does not merit any deference**

6 Having found that Section 1226(c) is unambiguous, it thus follows that the BIA’s decision  
7 upon which the Government relies, Matter of Rojas, merits no deference under Chevron. However,  
8 in the interest of clarity and completeness, the Court will now address the myriad other reasons why  
9 Rojas cannot stand.

10 As an initial matter, the BIA’s framing of the question presented in Rojas differed from the  
11 question before this Court. In Rojas, the dispositive question was not whether the language “when  
12 the alien is released” in Section 1226(c) is ambiguous. To the contrary, BIA expressly concluded  
13 that the “when . . . released” language was not ambiguous: Section 1226(c) “does direct the  
14 Attorney General to take custody of aliens **immediately upon their release** from criminal  
15 confinement.” Rojas, 23 I. & N. Dec. at 122 (emphasis supplied). Instead, the BIA focused on the  
16 language of Section 1226(c)(2), which defines the category of persons to whom the mandatory  
17 detention provision applies, i.e., as those “alien[s] described in paragraph (1).” Thus, the BIA  
18 sought to determine whether the “alien described in paragraph (1)” referred to: (1) individuals who  
19 have committed offenses enumerated in paragraphs (1)(A) through (1)(D), or (2) those same

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20  
21 entitled “Criminal Aliens: INS’ Efforts to Identify and Remove Imprisoned Aliens Continue to  
22 Need Improvement.” GAO/GGD-99-3 (October 1998). And in 1999, the GAO provided testimony  
23 to the same effect. See GAO/T-GGD-99-47 (February 25, 1999) (“1999 Testimony”). Although  
24 these reports concerned primarily the INS’s effectuation of Institutional Hearing Program  
25 procedures, whereby removal proceedings would be initiated and completed for criminal aliens  
26 while in state or federal custody, the reports are notable for their consistent acknowledgement of  
27 INS’s chronic failure to even identify criminal aliens while they are in state custody in the first  
28 place, and furthermore, for INS’s failure to take said individuals into custody “upon their release  
from prison.” (See 1999 Testimony at 2 (“As was the case when we reported to this Subcommittee  
in July 1997, we again found that INS . . . did not fully comply with the legal requirements that it . .  
. (2) take [criminal aliens who had committed aggravated felonies] into custody upon their release  
from prison”); id. at 6 (“INS still is not doing all it should to ensure that it is initiating removal  
proceedings for aggravated felons and taking them into custody upon their release from prison.”)  
(See also Dkt. No. 39.)

1 individuals but who were also detained “when . . . released” from state custody. See Rojas, 23 I. &  
2 N. Dec. at 125. The Rojas court opted for the former. Id. (“We construe the phrasing ‘an alien  
3 described in paragraph (1),’ as including only those aliens described in subparagraphs (A) through  
4 (D) of section 236(c)(1) of the Act, and as not including the ‘when released’ clause.”).

5 A closer look at the analysis presented in Rojas reveals its infirmity. It is a “‘cardinal  
6 principle of statutory interpretation’ [] that ‘a statute ought, upon the whole, to be so construed that,  
7 if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”  
8 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citation omitted); see also United States v.  
9 Menasche, 348 U.S. 528, 538–39 (1995) (“It is our duty to give effect, if possible, to every clause  
10 and word of a statute”) (internal quotation marks omitted); Rojas, 23 I&N at 134 (Rosenberg, J.,  
11 dissenting) (citing Menasche, 348 U.S. 528). While the Rojas majority recognized that the phrase  
12 “when . . . released” created an immediacy requirement, it then read that requirement out of the  
13 statute entirely. See Rojas, 23 I. & N. Dec. at 125. In so doing, the BIA rendered the “when . . .  
14 released” clause entirely superfluous.

15 As explained above, the structure of Section 1226(c) does not support the notion that the  
16 “when . . . released” clause is an excisable part of the statute. “Paragraph 1” is only one sentence  
17 long; “when . . . released” is an inextricable part of the sentence. The task of interpreting a statute  
18 does not present an opportunity for a reviewing body to determine which of Congress’s words are  
19 necessary and which may be ignored. All of Congress’s words are assumed to serve a purpose; it is  
20 the Court’s role to determine what those words mean. Where, as here, the BIA found the terms  
21 “when . . . released” to have one clear meaning – to provide a mandate that the Attorney General  
22 apprehend a class of individuals **immediately upon their release** from criminal confinement – the  
23 BIA was not free to find the “when released” language unnecessary and thereby administratively  
24 eviscerate Congress’s mandate.

25 For good reason, the cases that rely upon Rojas are few. The most prominent of these is the  
26 Fourth Circuit decision, Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012). There, in a short decision, the  
27 Fourth Circuit referred to a dictionary definition of the word “when” and concluded that because the  
28 term in isolation can be read to have different meanings, it therefore was ambiguous as used in Section

1 1226(c). See Hosh, 680 F.3d at 379–80 (“‘[W]hen’ in § 1226(c) can be read, on one hand, to refer  
2 to ‘action or activity occurring ‘at the time that’ or ‘as soon as’ other action has ceased or begun.’”  
3 *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) (citing 20 *The Oxford English*  
4 *Dictionary* 209 (2d ed. 1989); *The American Heritage Dictionary of the English Language* (4th ed.  
5 2000)). On the other hand, ‘when’ can also be read to mean the temporally broader ‘at or during  
6 the time that,’ ‘while,’ or ‘at any or every time that. . .’ *Free Merriam–Webster Dictionary*,  
7 available at <http://www.merriam-webster.com/dictionary/when> (last visited April 30, 2012).”) It  
8 therefore deferred to the BIA’s interpretation.

9 The Fourth Circuit decision did not examine the structure of Section 1226(c) and the  
10 meaning of the word “when” in that context, or the relationship between the mandatory detention  
11 requirements set forth in Section 1226(c) and the permissive detention requirements set forth in  
12 Section 1226(a). Cf. *Brown & Williamson*, 529 U.S. at 132-33. Nor did the Fourth Circuit evaluate  
13 the nature of the BIA’s reasoning in *Rojas*, its application of canons of statutory interpretation, or  
14 its concession that the term “when . . . released” was not ambiguous. See *Bogarín-Flores v.*  
15 *Napolitano*, 2012 WL 3283287, at \*3 (S.D. Cal. Aug. 10, 2012) (finding Hosh unpersuasive as it  
16 failed to “present any independent reasoning or statutory construction”); *Baquera v. Longshore*,  
17 948 F. Supp. 2d 1258, 1263 (D. Colo. 2013) (“Presumably because of the inadequacy of the  
18 analysis in *Rojas* and the dearth of analysis in Hosh itself, Hosh has had little persuasive impact  
19 beyond the Fourth Circuit . . .”).

20 Accordingly, the Court declines to accord persuasive weight to Hosh, and rejects *Rojas* as  
21 inconsistent with Section 1226(c)’s plain language and as an unreasonable application of the canons  
22 of statutory construction.

23 **b. The “loss of authority” doctrine does not apply**

24 Other courts have reached the same practical conclusion as *Rojas* but on different grounds.  
25 The Third Circuit’s ruling in *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) is the  
26 most prominent. There, citing the Supreme Court’s decision in *United States v. Montalvo-Murillo*,  
27 495 U.S. 711 (1990), the Third Circuit avoided the need to determine whether Section 1226(c)  
28 contained any ambiguity by relying on the “loss of authority” doctrine to find that the Government

1 does not lose its authority to detain individuals under Section 1226(c) even if it fails to detain them  
2 “when . . . released.” See *Sylvain*, 714 F.3d at 157 (“We need not take a stand on this issue. Even  
3 if the statute calls for detention ‘when the alien is released,’ and even if ‘when’ implies something  
4 less than four years, nothing in the statute suggests that immigration officials lose authority if they  
5 delay.”); see also *Hosh*, 680 F.3d at 381–82 (noting that although the statute was ambiguous and  
6 the BIA’s decision correctly decided, even were it not so, the Government would retain its authority  
7 to apprehend an individual long after the date of release from custody under the “loss of authority”  
8 doctrine). Thus, these courts have found that the Government’s obligation to apprehend an  
9 individual who has committed an offense enumerated in Section 1226(c)(1)(A)–(D) may be  
10 discharged at any point after the individual is released.

11 As an initial matter, it bears noting that the application of this doctrine effectively “reads  
12 out” of the statute the “when . . . released” language, which for all the reasons explained above is an  
13 undesirable result. But beyond that, the case upon which the Government relies, *Montalvo-Murillo*,  
14 is distinguishable and therefore inapplicable to the question at hand. In *Montalvo-Murillo*, the  
15 Supreme Court addressed whether the Government lost authority to seek pretrial detention of an  
16 individual pending his criminal trial if it did not timely request a hearing. 495 U.S. at 713–14.  
17 There, a magistrate judge ordered the criminal suspect released on bond. After a *de novo* detention  
18 hearing, the district court disagreed and found that the suspect was a flight risk. The district court  
19 nevertheless ordered the suspect released because the detention hearing had not been held “upon  
20 the person’s first appearance,” as required by the Bail Reform Act of 1984. 18 U.S.C. § 3142(f)  
21 (West 1990).<sup>10</sup> The Tenth Circuit affirmed, and the Supreme Court reversed.

22 \_\_\_\_\_  
23 <sup>10</sup> The relevant language from the Bail Reform Act at issue in *Montalvo-Murillo* was as follows:

24 **(e) Detention.** If, after a hearing pursuant to the provisions of subsection (f) of this section, the  
25 judicial officer finds that no condition or combination of conditions will reasonably assure the  
26 appearance of the person as required and the safety of any other person and the community, such  
27 judicial officer shall order the detention of the person before trial.

28 \* \* \*

**(f) Detention hearing.** The judicial officer shall hold a hearing to determine whether any  
condition or combination of conditions set forth in subsection (c) of this section will reasonably  
assure the appearance of the person as required and the safety of any other person and the  
community—

1           The Supreme Court found that although there was a “vital liberty interest” at stake, “the Act  
2 is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements  
3 nor any other part of the Act can be read to require, or even suggest, that a timing error must result  
4 in release of a person who should otherwise be detained.” *Montalvo-Murillo*, 495 U.S. at 716–17.  
5 Accordingly, the Court held that “a failure to comply with the first appearance requirement does  
6 not defeat the Government’s authority to seek detention of the person charged.” *Id.* at 717. In so  
7 holding, the Court relied on the ““great principle of public policy, applicable to all governments  
8 alike, which forbids that the public interests should be prejudiced by the negligence of the officers  
9 or agents to whose care they are confided.”” *Id.* at 718 (quoting *Brock v. Pierce County*, 476 U.S.  
10 253, 260 (1986) (quotation marks omitted)).

11           Unlike the facts of the instant case, the circumstances of *Montalvo-Murillo* created a stark  
12 choice: finding that the government’s authority to detain expired if the statutory timeline was  
13 missed would result in release of an individual who had been deemed a flight risk. The public  
14 would bear the cost of the Government’s delay, and that cost would be substantial. But unlike the  
15 Bail Reform Act provision in *Montalvo-Murillo*, Section 1226 does not lack for a remedy in the  
16 event that the Government fails to apprehend an individual “when [he or she is] released” from  
17 state custody as required under Section 1226(c). In the event that the Government fails to  
18 apprehend an individual promptly, the individual does not automatically become “immune from  
19 detention.” Compare *Montalvo-Murillo*, 495 U.S. at 722. Rather, the individual remains subject to  
20 detention pursuant to Section 1226(a), which entitles him or her to a bond hearing. Thus, the  
21 Government retains its ability to detain individuals like Petitioners, it simply has to afford them a  
22 bond hearing as required by Section 1226(a). If determined to be a flight risk or a threat to public  
23 safety, detention pending removal proceedings remains proper; there is no “threat that we must  
24 embarrass the system by releasing a suspect certain to flee from justice.” See *id.* at 721.

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\* \* \*

26           The hearing shall be held immediately upon the person’s first appearance before the judicial  
27 officer unless that person, or the attorney for the Government, seeks a continuance.

28           18 U.S.C. § 3142(e)–(f) (West 1990)); see *Gutierrez v. Holder*, 2014 WL 27059, at \*5–6.





1           **IV. MOTION FOR CLASS CERTIFICATION**

2           Petitioners seek to certify as a class:

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

7 (See Dkt. No. 8 at 1; Dkt. No. 47 at 9–10.)<sup>12</sup> Petitioners also ask that they be named as  
8 representative plaintiffs and that their counsel be appointed class counsel.

9           **A. LEGAL STANDARD**

10           “The class action is an exception to the usual rule that litigation is conducted by and on  
11           behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550  
12           (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)) (internal quotation marks  
13           omitted). The party seeking class certification bears the burden of demonstrating by a  
14           preponderance of the evidence that all four requirements of Rule 23(a)—numerosity, commonality,  
15           typicality, and adequacy—and at least one of the three requirements under Rule 23(b) are met.  
16           *Wal-Mart*, 131 S.Ct. at 2551 (“A party seeking class certification must affirmatively demonstrate  
17           his compliance with the Rule—that is, he must be prepared to prove that there are in fact  
18           sufficiently numerous parties, common questions of law or fact, etc.”); *Amchem Products, Inc. v.*  
19           *Windsor*, 521 U.S. 591, 620 (1997). While the Court retains broad discretion to certify a class, the  
20           Court must conduct a “rigorous analysis” to confirm that the plaintiff has in fact established the  
21           requirements of Rule 23 to ensure that a departure from the general rule of individual litigation is  
22           justified. *General Tel. Co. v. Falcon*, 457 U.S. 147, 160–61 (1982). “While ordinarily disfavored,  
23           the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus.”  
24           *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (“*Rodriguez I*”) (citations omitted).

25 \_\_\_\_\_  
26 <sup>12</sup> The proposed class does not include individuals in custody for Section 1226(c) offenses who  
27           were transferred to criminal custody outside the state of California, nor does it include individuals  
28           held outside the state of California under the authority of ICE field directors in the state of  
          California, because such individuals are not, or have not yet been, detained in immigration custody  
          in California pursuant to Section 1226(c). (Dkt. No. 47 at 9–10.) Nor does it include individuals  
          detained pursuant to Section 1226(c) who were not apprehended immediately upon release from  
          custody but who have already been afforded bond hearings.

1 In order to certify a proposed class, the Court must find that the moving party has complied  
2 with the prerequisites of both subparts (a) and (b) of Fed. R. Civ. P. Rule 23. The Court addresses  
3 each part in turn.

4 **B. APPLICATION OF RULE 23(A)**

5 **1. Numerosity**

6 Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement if "the class is so large that joinder  
7 of all members is impracticable." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal.  
8 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); see also *Davis v.*  
9 *Astrue*, 250 F.R.D. 476, 485 (N.D. Cal. 2008) ("As a general rule, classes numbering greater than  
10 41 individuals satisfy the numerosity requirement.") (citing 5 JAMES WM. MOORE ET AL., *MOORE'S*  
11 *FEDERAL PRACTICE* § 23.22 [1] [b] (3d ed.2004)).

12 The numerosity requirement has been met in this case. The Government concedes that ICE  
13 currently detains between 200 and 300 individuals in California pursuant to Section 1226(c) who  
14 were not detained by ICE immediately upon release from criminal custody for their 1226(c)(1)  
15 offenses. (See Joint Submission at 10.) Thus, the Court finds that Petitioners have satisfied Rule  
16 23(a)(1)'s numerosity requirement. See *Californians for Disability Rights, Inc. v. Cal. Dep't of*  
17 *Transp.*, 249 F.R.D. 334, 346 (N.D.Cal.2008) (finding numerosity requirement satisfied where  
18 plaintiffs only identified 22 potential class members); *Santillan v. Ashcroft*, 2004 WL 2297990, at  
19 \*9 (N.D. Cal. Oct. 12, 2004).

20 **2. Commonality**

21 "Commonality requires that the class members' claims depend upon a common contention  
22 such that determination of its truth or falsity will resolve an issue that is central to the validity of  
23 each claim in one stroke." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)  
24 (citation and quotation marks omitted). "Rule 23(a)(2) has been construed permissively." *Hanlon*  
25 *v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[T]he key inquiry is not whether the  
26 plaintiffs have raised common questions . . . but rather, whether class treatment will 'generate  
27 common answers apt to drive the resolution of the litigation.'" *Abdullah*, 731 F.3d at 957 (quoting  
28 *Wal-Mart*, 131 S.Ct. at 2551). "This does not, however, mean that every question of law or fact

1 must be common to the class; all that Rule 23(a)(2) requires is ‘a single significant question of law  
2 or fact.’” *Id.* (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 582, 589 (9th Cir. 2012)).

3         The Court finds that Petitioners have demonstrated sufficient commonality to satisfy Rule  
4 23(a)(2) because the resolution of one single question—whether Section 1226(c) requires  
5 immediate detention by ICE or whether Section 1226(c) permits the Government’s practice of  
6 delaying apprehension—will resolve “in one stroke” all class members’ claims. See *Rodriguez I*,  
7 591 F.3d at 1122–24 (finding commonality even though class members were detained pursuant to  
8 different statutes and under different factual circumstances because a single question—whether a  
9 bond hearing was required for individuals detained longer than six months—was “posed by the  
10 detention of every member of the class and their [individual claims would] largely be determined  
11 by its answer”). As Petitioners argue, and as the Government conceded at the hearing on these  
12 motions, this Court’s decision on the merits of Petitioners’ statutory interpretation claim would  
13 effectively and efficiently resolve the claims of all potential class members “in one stroke.”  
14 Further, in keeping with the purpose of class action litigation, settling this common question would  
15 “render management of [proposed members’] claims more efficient for the courts” and “would also  
16 benefit many of the putative class members by obviating the severe practical concerns that would  
17 likely attend them were they forced to proceed alone.” *Rodriguez I*, 591 F.3d at 1123.

### 18                   **3. Typicality**

19         “The typicality requirement looks to whether the claims of the class representatives are  
20 typical of those of the class, and is satisfied when each class member’s claim arises from the same  
21 course of events, and each class member makes similar legal arguments to prove the defendant’s  
22 liability.” *Rodriguez I*, 591 F.3d at 1124 (citation and internal quotation marks omitted). “The  
23 purpose of the typicality requirement is to assure that the interest of the named representative aligns  
24 with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).  
25 “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably  
26 co-extensive with those of absent class members; they need not be substantially identical.” *Hanon*,  
27 150 F.3d at 1020. The test of typicality “is whether other members have the same or similar injury,  
28 whether the action is based on conduct which is not unique to the named plaintiffs, and whether

1 other class members have been injured by the same course of conduct.” Hanon, 976 F.2d at 508  
2 (quotation omitted). “Where the challenged conduct is a policy or practice that affects all class  
3 members . . . the cause of the injury is the same”; thus, the analysis requires “comparing the injury  
4 asserted in the claims raised by the named plaintiffs with those of the rest of the class.” Davis, 275  
5 F.3d at 868–69.

6 The Court finds the typicality requirement satisfied. All class members were detained  
7 pursuant to Section 1226(c) and therefore denied individualized bond hearings despite the existence  
8 of a gap between their release from state custody and federal detention. (Dkt. No. 8 at 12–13.)  
9 Petitioners’ claims are typical of those of the potential class members, as both Petitioners’ claims as  
10 well as those of the proposed class result from the Government’s alleged misapplication of Section  
11 1226(c). The injury alleged—detention without a bond hearing pursuant to Section 1226(c) despite  
12 the fact that Petitioners were not detained immediately upon release—is the same injury suffered by  
13 all of the proposed class members. The remedy sought—a declaration by this Court that Section  
14 1226(c) requires immediate detention and an order granting bond hearings for class members—is a  
15 remedy all class members share.

16 The Government’s counterarguments are unavailing. The differences in each Petitioner’s  
17 gap between release and detention, legal non-citizen status, and challenges each class member may  
18 face in a bond hearing are irrelevant to the analysis because “[t]he particular characteristics of the  
19 Petitioner[s] or any individual detainee will not impact the resolution of [the] general statutory  
20 question and, therefore, cannot render Petitioners’ claim atypical.” Rodriguez I, 591 F.3d at 1124;  
21 see also Santillan, 2004 WL 2297990, at \*11 (noting that the relative differences in time that class  
22 members had to wait for the Government to process immigration status updates were “immaterial  
23 for purposes of class typicality, which is concerned with the class members’ shared interests and  
24 harms”) (citing Falcon, 457 U.S. at 156).

#### 25 **4. Adequacy of Class Representation**

26 “To satisfy constitutional due process concerns, absent class members must be afforded  
27 adequate representation before entry of a judgment which binds them.” Hanlon, 150 F.3d at 1020.  
28 “To determine whether named plaintiffs will adequately represent a class, courts must resolve two

1 questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other  
2 class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously  
3 on behalf of the class?” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)  
4 (citation and quotation marks omitted). “A class representative must be part of the class and  
5 possess the same interest and suffer the same injury as the class members.” *Amchem Products*, 521  
6 U.S. at 625–26 (internal quotation marks omitted).

7         The Government does not contest that Petitioners and their counsel will prosecute the action  
8 vigorously. Rather, the Government focuses on the first prong and argues that Petitioners are not  
9 adequate representatives because their interests conflict with those of potential class members.  
10 (Dkt. No. 25 at 12.) The Court disagrees.

11         Typically, conflicts of interest arise in situations where one group of class members seeks  
12 relief that would not benefit, or would be to the detriment of, other class members. See *Amchem*  
13 *Products*, 521 U.S. at 625–27 (finding a conflict of interest where a single class included one group  
14 of class members who sought immediate settlement payments to be derived from the same fund that  
15 would provide for other members who sought future payments). Here, despite the Government’s  
16 assertions that the hypothetical differences between Petitioners and potential class members, the  
17 Court finds that there is no conflict of interest that would prevent Petitioners from adequately  
18 representing the class. Petitioners’ statutory interpretation claim does not depend on the length of  
19 time between Petitioners’ release and detention; Petitioners’ claim concerns pure statutory  
20 interpretation. Petitioners here seek injunctive and declaratory relief that would benefit all  
21 proposed class members. See *Santillan*, 2004 WL 2297990, at \*12. A decision on the merits that  
22 the Government’s interpretation of Section 1226(c) is incorrect and that the class members are  
23 entitled to bond hearings would benefit all proposed class members. See also *Rodriguez I*, 591 F.3d  
24 at 1125 (certifying class consisting of aliens indefinitely detained without bond hearings pursuant to  
25 several immigration laws). Accordingly, the Court finds that Petitioners have satisfied Rule  
26 23(a)(4).

27  
28

1           **C. APPLICATION OF RULE 23(b)**

2           In addition to satisfying the Rule 23(a) requirements, Petitioners must establish that the  
3 proposed class meets the requirements of one class type described in Rule 23(b). FED. R. CIV. P.  
4 23(b)(1)–(3). Petitioners seek certification as a Rule 23(b)(2) class.

5           To certify a 23(b)(2) class, the Court must find that “the party opposing the class has acted  
6 or refused to act on grounds that apply generally to the class, so that final injunctive relief or  
7 corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P.  
8 23(b)(2). Ordinarily, it follows that there is no need “to undertake a case-specific inquiry into  
9 whether class issues must predominate or whether class action is the superior method of  
10 adjudicating the dispute” as necessary for the other subsections of Rule 23(b). *Wal-Mart*, 131 S.Ct.  
11 at 2558. Rather, “[p]redominance and superiority are self-evident.” *Id.*

12           The Government does not contest that it has acted or refused to act on grounds that apply  
13 generally to the class. Nor does the Government contend that the Rule 23(b)(2) class-type is  
14 inappropriate in this action. Nonetheless, the Court has undertaken a “rigorous analysis” to ensure  
15 the requirement is met.

16           The Court finds that the proposed class meets the Rule 23(b)(2) requirements. Petitioners  
17 and proposed class members have been detained and held without bond hearings pursuant to  
18 Section 1226(c) despite the fact that they were not detained immediately “when . . . released” from  
19 state custody. Thus, there is no question that Petitioners challenge a uniform Government policy  
20 that applies generally to the class, thereby satisfying the first part of Rule 23(b)(2). See *Rodriguez*  
21 *I*, 591 F.3d at 1126 (certifying 23(b)(2) class seeking to challenge government policy of indefinite  
22 detention of aliens, finding it sufficient that “class members complain of a pattern or practice that is  
23 generally applicable to the class as a whole”) (citation omitted). As for relief, Petitioners seek a  
24 declaration that Section 1226(c) requires immediate detention upon release from predicate custody  
25 and injunctive relief in the form of bond hearings for class members. Because Petitioners seek only  
26 injunctive and declaratory relief and a single remedy would provide relief for each class member,  
27 the proposed class is appropriate for 23(b)(2) certification. See *Wal-Mart*, 131 S. Ct. at 2557  
28 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief

1 to each member of the class.”); Rodriguez I, 591 F.3d at 1126 (“[A]ll class members seek the exact  
2 same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude  
3 that the proposed class meets the requirements of Rule 23(b)(2).”). Thus, the Court finds that  
4 Petitioners satisfy the requirements of Rule 23(b)(2).

5 **V. CONCLUSION**

6 For all the reasons set forth above, the Court finds that the Government’s practice of  
7 subjecting to mandatory detention individuals who have committed an offense enumerated at  
8 Section 1226(c)(1)(A)–(D) but who were not apprehended “when released” from state custody  
9 violates the plain language of Section 1226(c). Petitioners’ Motion for Preliminary Injunction is  
10 **GRANTED**. The Government’s Motion to Dismiss is **DENIED**. Furthermore, Petitioners’ Motion for  
11 Class Certification is **GRANTED**.

12 Accordingly, the Court **ORDERS** as follows:

13 Within 7 days of the entry of this Order, the parties shall provide to the Court either: (1) a  
14 joint proposed Redetermination Notice form, or (2) their individual proposed Redetermination  
15 Notice forms. Such proposed notices shall include a statement in plain language that the individual  
16 has been reevaluated and is no longer subject to mandatory detention pursuant to Title 8 U.S.C.  
17 section 1226(c). The notices shall further include in plain language the result of the non-citizen’s  
18 custody reevaluation and whether the Department of Homeland Security (“DHS”) has determined  
19 that the individual should be released on his own recognizance, on Intensive Supervision  
20 Appearance Program, or on bond, and if on bond, the amount of the bond that DHS has set. Such  
21 notices shall be accompanied by an I-286 Form as well as instructions for requesting a hearing to  
22 challenge DHS’s custody reevaluation through a bond hearing pursuant to Title 8 U.S.C. section  
23 1226(a), and also notify the individual that should he or she not specifically request a bond hearing,  
24 one will be automatically scheduled unless he or she affirmatively declines to have a bond hearing.

25 **IT IS SO ORDERED.**

26  
27 Date: **May 15, 2014**

28  
  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE