**No. 13-2509**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

**CLAYTON RICHARD GORDON, on behalf of himself and others similarly situated, et al.,**

**Petitioner-Appellee**

**v.**

**ERIC H. HOLDER, JR., U.S. Attorney General, et al.,**

**Respondents-Appellants.**

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On appeal from the United States District Court for the District of Massachusetts

District Court No. 3:13-cv-30146-MAP

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# REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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## INTRODUCTION

The two courts of appeals that have considered the issues in this case have concluded that the Government may detain an alien under 8 U.S.C. § 1226(c), even if the Government does not take the alien into immigration custody immediately following his release from criminal custody. *See Hosh v. Lucero*, 680 F.3d. 375 (4th Cir. 2012); *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013). Gordon fails to address that fact. Instead, he urges this Court to uphold the district court's contrary decision. This Court should decline to do so.

Section 1226(c) is ambiguous regarding whether an alien must be taken into immigration custody immediately following his release from criminal custody to be subject to mandatory detention. In *Matter of Rojas*, the Board of Immigration Appeals ("BIA") resolved this ambiguity and concluded that it would ignore the statutory context, thwart Congress's purposes, and make no sense to say that a criminal alien who indisputably has been convicted of a qualifying crime is only subject to mandatory detention if DHS takes him into custody immediately following his release from his criminal custody. Because the BIA's determination is a permissible view of the statute, *Chevron USA, Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1983), dictates that this Court should defer to the BIA's interpretation.

This Court's decision in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), does not require otherwise because that decision did not address the question that is currently before this Court. Moreover, Gordon's suggestion that the structure and text of section 1226(c) unambiguously requires immediate detention is contrary to basic rules of grammar, and ignores the persuasive reasoning of the Third Circuit and the BIA. In fact, the interpretation of the statute by the district court, which Gordon urges this Court to adopt, yields absurd and arbitrary results, which are contrary to the clear intent of Congress in enacting section 1226(c). Finally, even if this Court declines to afford *Chevron* deference to the BIA's decision, it should still uphold DHS's detention authority under section 1226(c) because the statute contains no sanction for the Department of Homeland Security's ("DHS") failure to meet that deadline, and to hold otherwise would bestow a windfall on criminal aliens for such a failure.

## ARGUMENT

### I. This Court's Decision in *Saysana* Does Not Require Immediate Detention of Criminal Aliens.

Gordon seeks to resolve this case by arguing that this Court's decision in *Saysana* is inconsistent with *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), and that it supports the district court's conclusion that the "when . . . released" provision is not ambiguous and requires immediate action by U.S. Immigration and

Customs Enforcement ("ICE"). However, *Saysana* does not support this proposition because *Saysana* did not involve the issue currently before this court.

The *Saysana* Court dealt with another issue altogether, namely, the application of section 1226(c) to aliens who were convicted of offenses described in section 1226(c)(1)(A)-(D) *before* the effective date of section 1226(c), but arrested and detained for non-removable offenses *after* the effective date. Specifically, in *Saysana*, the court was charged with deciding whether an alien could be mandatorily detained under section 1226(c) even though his only "release" from criminal incarceration after mandatory detention had become effective related to a criminal offense not described in section 1226(c)(1)(A)-(D), and the criminal offense that rendered him removable (and subject to mandatory detention) occurred prior to section 1226(c)'s effective date.

Put even more simply, *Saysana* addresses the retroactive application of the mandatory detention statute. While the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") made clear that its detention provisions applied only to aliens "released after" the effective date, *see* IIRIRA § 303(b)(2), this did not resolve the retroactivity problem presented by Saysana's case: Saysana had been "released after" 8 U.S.C. § 1226(c) had gone into effect on October 8, 1998, but his conviction for indecent assault had occurred several years prior. This Court

thus had the task of determining whether a release from criminal custody must be tied to a basis for detention under section 1226(c)(1) to trigger mandatory detention, or whether release from any criminal custody, regardless of the reason for that detention, was sufficient. It held that "a natural reading of the statutory provision from top to bottom makes clear that the congressional requirement of mandatory detention is addressed to the situation of an alien who is released from custody *for one of the enumerated offenses*." 590 F.3d at 13 (emphasis added).

Consequently, *Saysana* does not, as Gordon asserts, run counter to *Rojas*. *See Melero Valdez v. Terry*, 874 F. Supp. 2d 1262, 1267 (D. N. Mex. 2012) (internal citations omitted).[1] To the extent that this Court held that the "when released" clause was unambiguous, it did so exclusively regarding the issue of whether that language encompassed releases for any offenses, or just those listed in section 1226(c)(1)(A)-(D). The Court's holding that the "when released" clause was unambiguous with respect to the effective date does not establish that it is also unambiguous with regards to other issues, such as the temporal scope of DHS's

[1] Gordon asserts that the BIA has recognized that *Saysana* runs contrary to *Rojas*. Brief of Petitioner-Appellee at 24 (citing *Garcia Arreola*, 25 I&N Dec. at 270-71 n.4). But this is a strained reading of the BIA's reference to *Rojas* in *Garcia Arreola*, which served only to point out that the BIA was not retreating from its *Rojas* holding, even in light of *Saysana*.

authority to mandatorily detain, the issue in this case. It is well-established that *Chevron* analysis is issue-specific. *See Chevron*, 467 U.S. at 843.

Moreover, given that there was a gap in time between Saysana's release from his second arrest and his detention by immigration authorities, it seems telling that the *Saysana* Court could have squarely addressed this issue, but chose not to do so. If the statute was plain that "when released" means "immediately," then this Court could have resolved the case on that basis without delving into its effective date analysis. Thus, *Saysana* is unpersuasive on the issue at hand in this case, and it is clear that *Saysana* provides no direct support for the immediacy requirement adopted by the district court.

## II. The Text and Structure of Section 1226(c) Do Not Unambiguously Require Immediate Detention.

Gordon contends that the text and structure of section 1226(c), even if read without reference to legislative history or subsequent interpretations, unambiguously require immediate detention. Brief of Petitioner-Appellee at 28-34. But as the Government has already explained, the sentence structure of section 1226(c) in fact does not clearly indicate Congress's intent as to whether the "when . . . released" clause should be considered a part of the mandatory detention provision. Aliens "described in" paragraph (1) could be the four classes of aliens enumerated in subparagraphs (A) through (D), or it could be aliens who qualify

under the four enumerated classes *and* were taken into immigration custody immediately following their release from criminal custody. The statute does not expressly resolve these interpretative issues, and it is therefore ambiguous.

Gordon's contention that the "flush" text of section 1226(c)(1), and other rules of sentence structure, resolve the issue is unavailing. Brief of Petitioner-Appellee at 29. In fact, standard rules of structure and grammar support the BIA's reading of the statute in *Matter of Rojas*. For example, in finding that the "when . . . released" clause is a starting point for triggering mandatory detention rather than a limit on the categories of aliens subject to mandatory detention, the BIA applied common rules of grammar. The "when . . . released" clause in section 1226(c) is set off by commas, indicating that it is a subordinate clause. *See* Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 1.6(d) (3d ed. 2013); Morton S. Freeman, *The Grammatical Lawyer* 303 (1979). Subordinate clauses beginning with the subordinating conjunction "when" normally serve as adverbs – meaning that they modify a verb. *The Grammatical Lawyer 304*; *see also The Redbook* § 10.49(a) ("A dependent (or *subordinate*) clause typically stands at the beginning or end of the sentence and serves an adverbial function by specifying when, where, or why the main clause takes effect") (emphasis added); *Kidd v. Cox*, No. 06-cv-997, 2006 WL 1341302, at *12 (N.D. Ga. May 16, 2006) ("[T]he word 'when' is used

as a subordinating conjunction [modifying the action of redistricting] . . . . 'When,' in this context, means 'just after the moment that,' 'at any and every time that,' or 'on condition that.'").

In line with these rules of grammar, the BIA reasonably determined that "when . . . released" serves as an adverbial clause and modifies the verb clause "The Attorney General shall take into custody any alien [who is described in subsections A through D] when the alien is released . . . ." at the beginning of section 1226(c)(1). As a subordinate clause, the "when . . . released" language appropriately appears toward the conclusion of subsection 1226(c)(1) and modifies the Government action appearing at the beginning of the paragraph. *See The Redbook* § 10.49(a).

This construction is further supported by the indenting of subparagraphs 1226(c)(1)(A) through (D). This indentation signals that the definition of an alien subject to mandatory detention referenced in subsection 1226(c)(2) is limited to subparagraphs 1226(c)(1)(A) through (D), and not all of the text within subsection (c)(1). Indeed, not every word or phrase in the flush text of subsection 1226(c)(1) can be read to "describe[ ]" an alien because subsection 1226(c)(1) is not merely a definitional section. It is also a statute directing action by the Attorney General. For instance, the clause "[t]he Attorney General shall take into custody," does not

define an alien but instead directs the Government to act. Similarly, the clause "when the alien is released" directs the Government to act, as opposed to defining the aliens subject to detention during the pendency of removal proceedings. Thus, as the BIA reasonably held, subsection (c)(1) both defines a type of alien and directs the Government to take certain action.

Finally, Gordon is incorrect in his assertion that section 1226(c)(2)'s reference to aliens "described in paragraph (1)" unambiguously references the entirety of section 1226(c)(1). As the Third Circuit reasoned, based on the placement of the "when . . . released" clause outside the enumerated list of aliens to whom the section is intended to apply, it is more plausible that Congress intended aliens "described in paragraph (1)" to include only those aliens described in sections 1226(c)(1)(A) through (D), and intended the "when . . . released" language to specify the earliest point in time when the Government's duty to take the alien into custody may arise. *See Sylvain*, 714 F.3d at 159 (Section 1226(c)(1) does not "explicitly tie[] the government's authority to the time requirement" and "[a]s a result, the government retains authority . . . despite any delay"). This is a reasonable interpretation of the statute, and all the more reason to find that section 1226(c)'s structure makes it ambiguous.

## III. Contrary to Gordon's Assertion, it is the District Court' Reading of the Statute Yields Absurd and Arbitrary Results.

Arguing in favor of the district court's interpretation of section 1226(c), Gordon contends that the Government's proposed interpretation of section 1226(c) yields absurd results. Brief of Petitioner-Appellee at 34-38. But in fact it is the district court's position that yields arbitrary and absurd results with regard to which aliens are subject to mandatory detention.

Gordon relies on *Saysana* to support his contention that the Government's position, and the decision of the Board of Immigration Appeals ("BIA") in *Rojas*, are unreasonable because of the "complete absence of any temporal limitation" on the time between an alien's release from criminal custody and detention by ICE. Brief of Petitioner-Appellee at 49. But Gordon's argument, and his reliance on this Court's statement in *Saysana* that "the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be," *Saysana*, 590 F.3d at 18, ignore an important consideration regarding the statutory history of section 1226(c). In enacting Section 1226(c), Congress's concern was not that criminal aliens would lack connections to their community given their service of prison time; it was that those criminal aliens would evade removal proceedings and ultimately removal in an attempt to remain in the United States undetected. *See Demore v. Kim*, 538 U.S. 510, 531 (2003). *Rojas* aliens are free during a period

when removal proceedings have not yet been initiated against them and, consequently, they do not face a threat of removal. Upon initiation of removal proceedings, however, the threat of removal becomes real, and the likelihood that a criminal alien will flee to evade proceedings only begins at that moment. Thus, the length of time an alien spends out of detention may have no bearing on the likelihood that he will be a flight risk once he has been located by the immigration authorities and placed in removal proceedings.[2]

Moreover, Gordon's position would appear to contend that the length of the period of release, and the integration of the alien into the community, are relevant considerations for interpreting the statute. He suggests that his five year period of release and his position in the community are good reasons to find that Congress's purposes in enacting section 1226(c) are not met by his own mandatory detention. Brief of Petitioner-Appellee at 37. But even if those considerations are

[2] For these same reasons, Gordon's contention that mandatory detention of these criminal aliens raises constitutional concerns is misplaced. *See* Brief of Petitioner-Appellee at 37-38. The Supreme Court in *Demore* noted that "the statutory provision at issue governs detention of deportable criminal aliens pending their removal proceedings. Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-28. The Court concluded that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 531. Here, ICE is seeking to detain criminal aliens that it has placed into removal proceedings, and thus the *Demore* Court's conclusion that such detention is constitutional is not affected by any gap in custody.

emotionally compelling in support of Gordon's position in this case, they are not actually relevant to consideration of the question of *Chevron* deference before the Court. Additionally, it does not take into account the fact that the statute is designed to not only ensure that the alien appears for the removal hearings but also "increase[s] the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 527-28. As the Government has extensively argued, the BIA's decision in *Rojas* carefully considered Congress's intentions in enacting 1226(c), and reasonably interpreted the statute in light of those considerations.

As the BIA explained, when it enacted section 1226(c) in 1996, "Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Matter of Rojas*, 23 I. & N. Dec. at 122. The BIA then explained that it would be "inconsistent with our understanding of the statutory design to construe [8 U.S.C. § 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by the [Government]." *Id.* at 124; *see also Hosh*, 680 F.3d at 380 n.6 (It is difficult to imagine that "Congress would, on one hand, be so concerned with criminal

aliens committing further crimes, or failing to appear for their removal proceedings, or both, that Congress would draft and pass the mandatory detention provision, but on the other hand, decide that if, for whatever reason, federal authorities did not detain the alien immediately upon release, then mandatory detention no longer applies."); *see also id.* at 381 (In light of Congress's purposes in enacting section 1226(c), it is implausible to believe that Congress would want to "exempt a criminal alien from mandatory detention and make him eligible for release on bond if the alien is not *immediately* taken into federal custody."). In ignoring this position, it is the district court's decision that yields arbitrary results.

When it enacted section 1226(c), Congress chose to treat criminal aliens who had committed certain crimes as a defined group, because it was concerned about the problems faced by the Government in identifying and removing criminal aliens. *See* S. Rep. No. 104-48, at 1 ("America's immigration system is in disarray and criminal aliens (non-U.S. citizens residing in the U.S. who commit serious crimes for which they may be deportable) constitute a particularly vexing part of the problem.) When it included mandatory detention as part of its solution to this problem, Congress chose not to include language in section 1226(c) that would allow for variation or discretion based on the individual alien's rehabilitation or connections to the community. Indeed, those concerns may come into play when

DHS decides whether to pursue removal proceedings in the first instance. *See* Memorandum of John Morton, June 17, 2011, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf).

But once removal proceedings are commenced Congress, understanding that the primary goal was to ensure removal, applied mandatory detention to the entire

class of criminal aliens defined in section 1226(c)(1)(A)-(D),[3] and the BIA determined that congressional intent was best met by applying the statute whether or not the alien was detained immediately upon release. Thus, while facts such as whether an alien is released for 48 hours, or several years, or is a homeowner and productive member of his community may be taken into account by DHS in determining whether to initiate removal proceedings, those facts are not relevant to the Court's consideration here once the Government has determined that removal is called for, even if those facts may be emotionally compelling with regard to any individual petitioner. Congress enacted section 1226(c) to apply to all aliens who committed crimes described in sections 1226(c)(1)(A)-(D), and the BIA

[3] Appellees argue that the BIA "requires physical custody—and 'release' from that custody—as a predicate for applying §1226(c)." Brief of Petitioner-Appellee at 53-54 (citing *Matter of West*, 22 I&N Dec. 1405, 1409-10 (BIA 2000) ; *Matter of Kotliar*, 22 I&N Dec. 124, 125-126 (BIA 2007)). *Kotliar* and *West*, however, do not reach that far. Those decisions addressed discrete issues involving criminal aliens in those cases who had been in custody, and only subsection § 1226(c)(1)(B) was at issue. Any other discussion in those cases was dicta, and they should not be read to require release from prior custody in all cases, including where the statute authorizes the detention (and removal) for activities that do not require a prior conviction and thus do not necessarily involve prior custody. *See* 8 U.S.C. § 1226(c)(1)(D) (referencing terrorist activities) and (B) (referencing aliens who come to the United States solely to engage in prostitution or commercialized vice, 8 U.S.C. §1227(a)(2)(D); foreign government officials who have committed particularly severe violations of religious freedom, 8 U.S.C. § 1227(a)(2)(G); significant human traffickers, 8 U.S.C. § 1227(a)(2)(H), and aliens engaged in money laundering, 8 U.S.C. § 1227(a)(2)(I)).

recognized Congress's intent when it interpreted the statute. That interpretation therefore is entitled to deference.

Finally, to the extent this argument presumes that any gap in custody would be because of a delay or act of discretion on the part of the Government, it ignores the reality of the challenges ICE faces in identifying and taking criminal aliens into custody following their release by local officials. There are many factors, most notably Trust Act legislation that recently has been passed in Connecticut[4] – with similar legislation proposed in Massachusetts and several other states – that reflect recent trends by state and local governments to refuse to honor immigration detainers or share information on aliens in criminal custody. *See* H.R. 6659, Pub. Act No. 13-155 (Conn. 2013).[5] This legislation minimizes the effectiveness of Secure Communities, a program designed to assist ICE in identifying and removing convicted criminal aliens from the United States through the use of an existing federal information-sharing partnership between ICE and the Federal Bureau of Investigation.[6] Thus, ICE faces –and has always faced – many

[4] This legislation is very similar to legislation recently passed in California. 2013 Cal. A.B. 4 (codified at Cal. Gov't Code §§ 7282-7282.5 (2014).

[5] The Connecticut Trust Act can be found at http://www.cga.ct.gov/2013/ACT/PA/2013PA-00155-R00HB-06659-PA.htm

[6] *See* http://www.cga.ct.gov/2013/JUDdata/Tmy/2013HB-06659-R000322-ACLU-TMY.PDF. This legislation limits ICE's ability to use immigration detainers to

challenges in its attempts to take criminal aliens into custody, and a gap in custody cannot not always be attributed to ICE's discretion or by a simple failure of ICE to act.

In enacting section 1226(c), Congress recognized that it can be impractical to require the immediate detention of aliens due to local law enforcement officials' failure and/or unwillingness to identify these aliens or to notify the immigration authority in advance of their release. *See* S. Rep. No. 104-48, at 1 ("To make matters even more difficult for immigration officials, some local communities have adopted official policies of non-cooperation with the INS. Public employees in these communities are prohibited from providing information to the INS or cooperating with INS in most circumstances."). The BIA has also recognized that it can be logistically difficult for ICE to assume custody of every removable alien immediately upon release from criminal custody. *See Matter of Rojas*, 23 I. & N. Dec. at 124; *Matter of Adeniji*, 22 I. & N. Dec 1102, 1110 (BIA 1999). In light of these difficulties facing immigration officials, the BIA's interpretation of section 1226(c) in *Matter of Rojas* is reasonable because it is consistent with Congress's intent in enacting section 1226(c): "to keep dangerous aliens off the streets" and to

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track and detain pre-order criminal aliens upon their release from state and local criminal custody, and has great potential to impact ICE's ability to identify criminal aliens in state and local criminal custody and to take them into immigration custody immediately when they are released by local authorities.

prevent them from absconding during removal proceedings. *Sylvain*, 714 F.3d at 160; *see also Demore*, 538 U.S. at 513 (finding Congress "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers").

## IV. Even if the Court Concludes that Section 1226(c) Contains an Immediacy Requirement, the Government Is Not Deprived of Its Detention Authority for a Failure to Satisfy That Requirement.

Gordon disputes the Government's argument that DHS's failure to act immediately does not preclude DHS from acting according to the authority conferred at a later time. *See Sylvain*, 714 F.3d at 157-58; *Hosh*, 680 F.3d at 381-82. He contends that the principle of statutory construction urged by the Government should not apply because when the Government misses the "immediacy" deadline, the statute provides the alternative option of detention under section 1226(a). But this argument fails, because "although the Government would retain the ability to detain criminal aliens after a bond hearing" under the district court's reading, "Congress intended those aliens to be mandatorily detained *without* a bond hearing." *Hosh*, 680 F.3d at 382. "Congress's intent with respect to criminal aliens "is clear, and [t]he negligence of officers, agents, or other administrators, or any other natural circumstances or human error" that would prevent an alien from immediately being taken into immigration custody "cannot

be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate." *Id.* at 382. That is especially true because, as the Supreme Court has explained, Congress was aware of DHS's ability to detain aliens subject to a bond hearing, and it determined that that type of detention (under § 1226(a)) was insufficient to respond to its concerns about criminal aliens. *See Demore*, 538 at 518-19. Thus, Congress and the Supreme Court already have rejected the view that detention subject to a bond hearing under section 1226(a) is adequate for specified criminal aliens.

Gordon also contends that the district court's decision does not tie the Government's hands, but rather that in seeking to apply mandatory detention to all criminal aliens regardless of the immediacy of detention, "the government is *asking* this Court to tie them." Brief of Petitioner- Appellee at 59. But this argument inaccurately portrays the role of mandatory detention in the immigration process. The simple fact is, under the district court's interpretation of the statute, "a dangerous alien would be eligible for a hearing -- which could lead to his release -- merely because an official missed the deadline." *Sylvain*, 714 F.3d at 161-162. This "reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *Id.* at 162. It also introduces uncertainty for DHS as to their ability to detain that alien, and to ensure his presence throughout removal

proceedings, and ultimately for removal. It is therefore incorrect to suggest that DHS would gain authority if it misses the statutory deadline that is imposed by the district court. Because the loss-of-authority line of cases does apply to the situation at hand, the district court's decision should be reversed.

## CONCLUSION

Gordon was lawfully detained under the mandatory detention provisions of 8 U.S.C. § 1226(c), even though he was not transferred to immigration custody immediately upon his release from criminal custody. This Court should therefore reverse the district court's opinion and order and permit Gordon's detention without bond pursuant to section 1226(c) pending the completion of his removal proceedings.

June 5, 2014,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service on Appellees' counsel of record will be accomplished by the CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, I certify that this Brief:

(1) complies with the type-volume limitations of Fed. R. Appx. P. 32(a)(7)(B) because the brief contains fewer than 4,785 words; and

(2) complies with the typeface requirements of Fed. R. Appx. P. 32(a)(5) and the requirements of Fed. R. Appx. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

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

Dated: June 5, 2014

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