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.

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

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

BRIEF FOR RESPONDENTS-APPELLANTS

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JURISDICTIONAL STATEMENT

On August 8, 2013, Appellee Clayton Richard Gordon ("Gordon") filed a petition for a writ of habeas corpus and a class action complaint in federal district court in the District of Massachusetts. On October 23, 2013, the district court granted Gordon a writ of habeas corpus, and ordered that he receive an individualized bond hearing within thirty days of the date of that order. The court also denied the Government's motion to dismiss the class action complaint. On December 31, 2013, the district court issued a memorandum and order further expanding on the reasoning of its October 23, 2013 order. On December 16, 2013, Appellants Jeh Johnson, *et al.* timely filed a Notice of Appeal of the district court's order granting Gordon's habeas corpus petition.[1] This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[1] As clarified by Appellants in response to an order from this Court, this appeal is intended to include the portions of both the October 23, 2013, and December 31, 2013 orders of the district court that address, and grant, Gordon's habeas petition. The appeal does not include the court's denial of the Government's motion to dismiss, which is part of the ongoing proceedings in this case. To the extent that the district court, in denying the Government's motion to dismiss, addressed collateral matters that relate to the ongoing putative class action case in the district court, the Government agrees that those issues are not currently before this Court. *See* Doc. No. 00116653532, at 2.

STATEMENT OF THE ISSUES

This case raises the same issues that are currently pending before this Court in *Castaneda v. Souza*, Case No.13-1994 (1st Cir.), namely:

1. Whether the Board of Immigration Appeals is entitled to deference under *Chevron USA, Inc. v. Nat. Resources Def. Counsel, Inc.*, 467 U.S. 837 (1983), with respect to its determination in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), that 8 U.S.C. §1226(c), which mandates detention of certain criminal aliens pending removal, applies to an alien who was not taken into immigration custody immediately following his release from criminal custody.

2. If 8 U.S.C. § 1226(c) is read to require the Government to detain an alien immediately following his release from criminal custody, whether the Government may still detain an alien under this provision after a period of delay because, under *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), and similar cases, the Government's failure to fulfill its duty does not deprive the Government of its power to act.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The U.S. Department of Homeland Security ("DHS") has discretionary authority to take an alien into custody pending his removal proceedings. 8 U.S.C. § 1226(a). In some circumstances, Congress has made detention pending removal mandatory. Specifically, in 1996 Congress determined that prior laws had not been effective in ensuring that criminal aliens were removed, and that criminal aliens who were not detained pending removal posed a danger to the community because they often committed more crimes before they were removed. *Demore v. Kim*, 538 U.S. 510, 518-20 (2003); S. Rep. No. 104-48 (1995). Accordingly, Congress decided that aliens who have been convicted of certain crimes must be detained pending removal. *See* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. 309, 586 (Sept. 30, 1996).

To fulfill this purpose, Congress enacted 8 U.S.C. § 1226(c), which provides that the Government "shall take into custody any alien who" is deportable or inadmissible because he committed certain crimes, and that the Attorney General "may release" such an alien who is subject to detention under this provision only in

certain specific circumstances. 8 U.S.C. § 1226(c)(1)-(2).[2] The statute further provides that the Attorney General shall take the alien into immigration custody "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). In full, section 1226(c) provides:

> (1) Custody
>
> The Attorney General shall take into custody any alien who-
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) Release.

[2] None of the exceptions in section 1226(c)(2) that permit an alien to be released from mandatory detention are at issue in this case.

> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary [to protect a witness in a criminal matter, provided that other conditions are met].

8 U.S.C. § 1226(c).

If an alien is detained under section 1226(c), but believes he does not fall within the mandatory detention provision, he may request a hearing before an immigration judge (called a *Joseph* hearing) who will determine whether he is inadmissible or deportable because of a qualifying offense, and therefore properly detained. *See Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999), *clarified*, *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999); *see also Demore* v. *Kim*, 538 U.S. at 514 (recognizing that alien may challenge his detention under section 1226(c) through a *Joseph* hearing).

In *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), the Board of Immigration Appeals ("BIA") considered whether section 1226(c)(1) applies where an alien has been convicted of a qualifying crime under the statute, but DHS did not take the alien into custody immediately after his release from criminal custody. The BIA concluded that section 1226(c)(1) does apply in those circumstances. The BIA explained that the language "when the alien is released" describes the earliest point when DHS's duty to take a criminal alien into custody

may arise, not the exclusive point at which an alien can be taken into immigration custody. *See* 23 I. & N. Dec. 117, 120 (BIA 2001). The BIA recognized that the statutory text is ambiguous on this point, but determined that the better reading of the statute is that "the statutory language impose[s] a duty" on DHS "to assume the custody of certain aliens, and specifies[]s the point in time at which that duty arises." *Id.* at 120-21. Thus, the BIA "read the phrase 'when the alien is released' . . . as modifying the command that the 'Attorney General shall take into custody' certain criminal aliens by specifying that it be done 'when the alien is released' from criminal incarceration." *Id*.

The BIA further explained that its view is consistent with the statute's purposes, because the timing of when the alien is released from custody has no impact on whether the alien is removable or inadmissible. 23 I. & N. Dec. at 121-122 ("[T]here is no connection in the Act between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien by the Service, and the applicability of any of the criminal charges of removability."). Congress's concern was expediting "the removal of criminal aliens in general," not only those aliens who were immediately taken into immigration custody. *Id*. at 122. The BIA also recognized that its view was consistent with the prior version of the statute that prohibited the release of criminal aliens and did not depend on

when these aliens came into immigration custody. *Id.* at 122-23 (discussing former 8 U.S.C. § 1252(a)(2)(B)).

Finally, the BIA recognized that it would be impractical to expect that immigration officials could always immediately take qualifying criminal aliens into custody at the expiration of their criminal sentences. *Id*. at 124.

II. FACTS AND PROCEEDINGS BELOW

A. Gordon's Detention by the Immigration Authorities

Gordon is a native and citizen of Jamaica who was admitted to the United States as a lawful permanent resident in 1982. Class Action Complaint and Petition for Writ of Habeas Corpus, Aug. 8, 2013 ("Petition"), ¶ 19, Ex. A. In 2008, he was arrested and taken into criminal custody after police found cocaine in his home. Petition ¶ 23, Ex. D. He was released from criminal custody later that day. Petition, Ex. D. Gordon was convicted of possessing narcotics with intent to sell them, in violation of Connecticut General Statute § 21a-277(a). *Id.* On September 30, 2009, he received a prison sentence of seven years, execution suspended, and a three year probationary term. *Id.* He completed his probation on October 28, 2012. Petition, Ex. E.

On June 20, 2013, Gordon was stopped by U.S. Immigration and Customs Enforcement ("ICE") officers. Petition ¶ 24. ICE determined that Gordon was

removable as a convicted aggravated felon under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA") based on his conviction for a controlled substance violation, and that he therefore was subject to detention pending removal under 8 U.S.C. § 1226(c)(1)(B). *See* Petition, Ex. I. Accordingly, on June 20, 2013, ICE officers took Gordon into custody and served him with a Notice to Appear. Petition, Ex. A.

Gordon was given a *Joseph* hearing at which he challenged the basis for his detention under section 1226(c). The immigration judge determined that Gordon is subject to mandatory detention because the crime for which he was convicted is described in 8 U.S.C. § 1226(c)(1)(B). *See* Petition, Ex. I.

B. Relevant District Court Proceedings and Briefing

On August 8, 2013, Gordon filed a petition for a writ of habeas corpus and a class action complaint in federal district court in the District of Massachusetts. Gordon challenged his pre-removal order detention by ICE under 8 U.S.C. § 1226(c), and also sought to serve as the named plaintiff for putative class action claims on behalf of others similarly situated. Gordon asserted that he was not subject to mandatory detention under section 1226(c) because he was not taken into immigration detention immediately upon his release from criminal custody for the relevant offenses. To remedy the allegedly unlawful detention, Gordon, on

behalf of himself and others similarly situated, sought an injunction requiring that he be given a bond hearing before an immigration judge.

On August 26, 2013, the Government moved to dismiss the complaint and petition. On October 23, 2013, the district court issued an order granting Gordon a writ of habeas corpus and directing ICE to provide Gordon with an individualized bond hearing within thirty days of the date of the order.[3] Addendum at A001. The court stated that it was persuaded by the district court's decision in *Castaneda v. Souza*, No. 1:13-cv-10874, 2013 WL 3353747 (D. Mass. July 3, 2013), and indicated that it would set out its views more fully in a memorandum opinion. Addendum at A004. On October 23, 2013, based on the district court's order that Gordon be provided with a bond hearing, Gordon was ordered released on a bond of $25,000 by an immigration judge. *Id.* at A012-13 n.4. He was released from detention on November 18, 2013. *Id.*

On December 31, 2013, the district court issued a memorandum and order explaining its decision. *Id.* at A006. The court decided that "no deference to the BIA opinion is appropriate" because the statute unambiguously "sets forth an immediacy requirement." *Id.* at A014. In the court's view, the "most natural

[3] The order also denied the Government's motion to dismiss the class action complaint, but as noted above that denial is not before this Court in this interlocutory appeal.

construction of the phrase 'when the alien is released' is 'at the time of release.'" *Id.* at A017. Rather than give weight to the BIA's understanding of what would further Congress's purposes and reflect the realities of removal proceedings, the court conducted its own analysis of the statute's purposes and concluded that Congress required "*immediate* immigration detention" for qualifying aliens in order to "ensure the *direct* transfer of potentially dangerous and elusive" criminal aliens. *Id.* at A022. In the court's view, "Congress's goal in enacting [section] 1226(c) simply does not apply when a person has re-integrated into society" after his release from criminal custody. *Id*. at A024. The court also expressed concern that, unless DHS was required to take an alien into immigration custody immediately following his release from criminal custody, there would be no "temporal limitation on the [E]xecutive's ability to act." *Id.* at A028.

Finally, the court analyzed the "loss of authority" line of cases and concluded that those cases are inapplicable in evaluating DHS's authority under section 1226(c) because if an alien is not subject to mandatory detention under section 1226(c), the Government may detain the alien, subject to a bond hearing, under section 1226(a). *Id.* at A033-34. The court therefore rejected the holdings of the only two courts of appeals that have addressed this issue. *See id*.

SUMMARY OF THE ARGUMENT

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). This Court should do the same. 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. The language of the statute could mean that the only point at which DHS is allowed to take an alien into immigration custody is the moment when the alien is released from criminal custody, or it could mean that the earliest point at which DHS's duty to take the alien into custody arises is when the alien is released from criminal custody.

In its precedential decision in *Matter of Rojas*, the BIA resolved this ambiguity by reviewing the statute's text and context, history, and purposes. The BIA 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* dictates that this Court should defer to the BIA's interpretation.

In the event that this Court declines to afford *Chevron* deference to the BIA's decision, it should still uphold DHS's detention authority under section 1226(c). Even if section 1226(c) imposes a deadline on DHS for apprehending aliens subject to mandatory detention, that deadline reflects Congress's intention that such aliens be removed from the country as promptly as possible, and the statute contains no sanction for DHS's failure to meet that deadline. The Supreme Court has long recognized that "a provision that the Government 'shall' act within a specified time, without more, [is not] a jurisdictional limit precluding action later." *Barnhart* v. *Peabody Coal Co*., 537 U.S. 149, 161 (2003). Instead, the Supreme Court has explained, there is a background "principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Montalvo-Murillo*, 495 U.S. at 717-18.

Applying these principles to section 1226(c), both the Third and Fourth Circuits have recognized that the Government retains the authority to detain an alien under section 1226(c) even if the statute requires immediate detention and

there has been a period of delay. For all these reasons, the district court's decision should be reversed.

ARGUMENT

STANDARD OF REVIEW

This appeal presents a question of law regarding the interpretation of 8 U.S.C. § 1226(c). The Court reviews questions of statutory construction *de novo*. *See Simpson v. Matesanz,* 175 F.3d 200, 205 (1st Cir. 1999). Nevertheless, the BIA's interpretation of ambiguous language in the INA must be given controlling weight unless those interpretations are "arbitrary, capricious, or manifestly contrary to the statute." *See Mosquera-Perez v. INS*, 3 F.3d 553, 555 (1st Cir. 1993) (quoting *Chevron*, 467 U.S. at 844); *accord INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (explaining that where a Court of Appeals confronts questions implicating the BIA's construction of a statute it administers, the court should apply principles of *Chevron* deference).

I. The BIA's Interpretation of 8 U.S.C. § 1226(c) in *Matter of Rojas* is Entitled to *Chevron* Deference.

The BIA explained in *Matter of Rojas* that section 1226(c) is ambiguous as to whether an alien must be taken into immigration custody immediately following his release from criminal custody to be subject to mandatory detention. The BIA then considered the statute's text and context, the reasons that Congress enacted

the statute, Congress's prior efforts to detain criminal aliens, and the effects of the different possible interpretations on the administration of the immigration laws. As a result of this comprehensive analysis, the BIA concluded that section 1226(c) should be understood *not* to require DHS to take a qualifying alien into immigration custody at the exact moment he is released from criminal custody.

Rather than defer to that reasonable analysis, the district court found the statute unambiguous based on its view that its reading of the statute was the "most natural" one, and then conducted its own analysis of how that interpretation might further Congress's purposes. Addendum at A017. That approach constituted error. The statute is ambiguous, and the court should have given weight to the BIA's analysis of how its interpretation of the statute would further Congress's purposes, rather than substituting its own analysis.

A. Section 1226(c) is ambiguous.

Under *Chevron*, the Court first should consider "whether Congress has directly spoken to the precise question at issue," and whether "the intent of Congress is clear." *Chevron,* 467 U.S. at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. To determine whether a statute is "clear," a court must often take more than a cursory review of the statute's text

because the inherent ambiguity of certain terms may not be evident until viewed in the greater context. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context").

In 8 U.S.C. § 1226(c), Congress provided that qualifying criminal aliens are subject to detention during the pendency of removal proceedings. In particular, paragraph (1) provides that the Government "shall take into custody" any aliens who qualify for detention under this provision because of their criminal activities, and paragraph (2) provides that the Government may only "release an alien described in paragraph (1)" under certain specified circumstances not applicable here. 8 U.S.C. § 1226(c)(1)-(2). The statute therefore evidences Congress's intent that qualifying aliens be detained during removal proceedings to avoid the risk of them absconding or committing further crimes during the pendency of those proceedings. Thus, detention pending removal is mandatory for certain aliens, including aliens who are removable or inadmissible because they have committed a qualifying offense.

But as the BIA acknowledged in *Matter of Rojas*, the language that DHS should take a qualifying alien into custody "when the alien is released" injects some interpretive ambiguity into the provision. On the one hand, the provision

could require the immediate apprehension and detention of a qualifying alien upon release from qualifying criminal custody. On the other hand, the provision could mean that the earliest point at which DHS's duty to take a qualifying alien into custody arises is when he is released from criminal custody, and DHS should not attempt to apprehend the alien any sooner.

With respect to the phrase "when the alien is released," "when" could mean that DHS must act at the precise moment that the alien is released, or it could mean that DHS may detain the alien starting at the point when the alien has been released from criminal custody. *Hosh*, 680 F.3d at 379-380. Further, the language in paragraph (2) providing that DHS generally must detain "an alien described in paragraph (1)" also creates some ambiguity about what portions of paragraph (1) constitute the "descri[ption]." That is, 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. Because "[t]he meaning of § 1226(c) is not plain," *Hosh*, 680 F.3d at 379, the question becomes whether the BIA's interpretation is a permissible one under *Chevron*.

The district court erred when it failed to recognize that the statute is ambiguous. The district court focused on the phrase "when the alien is released" and concluded that "[t]he plain language of the statute sets forth an immediacy requirement." Addendum at A014. Yet the court seemed to recognize that there are multiple possible interpretations of the statute, when it described its view as "[t]he most natural construction of the phrase." *Id.* at A017. The court then went on to find that the purposes and structure of the statute supported this reading of the language, thus rendering the statute unambiguous. *Id.* at A022-27.

The district court overlooked the fact that the word "when" – in the phrase "when the alien is released" – is ambiguous. "'[W]hen' in § 1226(c) can be read, on the one hand, to refer to 'action or activity occurring 'at the time that' or 'as soon as' other action has ceased or begun." *Hosh*, 680 F.3d at 379-80 (citations omitted). But "[o]n the other hand, 'when' can also be read to mean the temporally broader 'at or during the time that,' 'while,' or 'at any or every time that . . . .'" *Id.* (citations omitted). The Fourth Circuit cited dictionary definitions that supported both meanings, and concluded that it is not clear which meaning Congress intended. *Id.* The BIA similarly recognized that "when" could mean "'immediately' upon release," or it could mean at or after the specified point in time. *Matter of Rojas*, 23 I. & N. Dec. at 124

Numerous dictionaries confirm that "when" can mean "at any time after" as well as "immediately upon." *See, e.g.*, *20 The Oxford English Dictionary* 209 (2d ed. 1989) (defining "when" in definition 8.a as "In the, or any, case or circumstances in which; sometimes nearly = if"); *The American Heritage Dictionary of the English Language* 1958, (4th ed. 2000) (defining "when" in definition 3 as "whenever"); *Webster's Third New International Dictionary* 2602 (3d ed. 1976) (defining "when" in entry 2, definition 2 as "in the event that; on condition that"). Indeed, the Supreme Court has recognized that the term "when" could mean different things (such as "at any time after" and "immediately upon") depending upon the context. *See United States v. Willings*, 8 U.S. 48, 55 (1807) ("That the term may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted."). Other federal circuits likewise have recognized, in the immigration context, that "when" could mean either "immediately" or "while." *See Lagandaon v. Ashcroft*,

383 F.3d 983, 988 (9th Cir. 2004).[4] These alternative dictionary definitions of "when," each of which could possibly be read into this statute, demonstrate that the district court erred when it found the statute unambiguous. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (holding that a statute is ambiguous if its "plain terms admit of two or more reasonable ordinary usages"); *see also Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions [. . .], each making some sense under the statute, itself indicates that the statute is open to interpretation.").

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[4] Many other courts have reached the same conclusion. *See, e.g.*, *Mora-Mendoza v. Godfrey*, No. 3:13-cv-01747, 2014 WL 326047, at *3 (D. Or. Jan. 29, 2014) ("'[W]hen' has two different usages that suggest different answers to this question."); *Serrano v. Estrada*, No. 01-cv-1916, 2002 WL 485699, *3 (N.D. Tex. Mar. 6, 2002) ("The Court agrees that the phrase "when released" is ambiguous . . . ."); *Saucedo-Tellez v. Perryman*, 55 F. Supp. 2d 882, 844-85 (N.D. Ill. 1999) ("I do not read § 236(c)'s plain language as unequivocally clear."); *Khetani v. Petty*, No. 12-0215-CV-W-ODS, 2012 WL 1428927, at *2 (W.D. Mo. Apr. 24, 2012) ("[Section 1226(c)] is vague as to the meaning of "when" and . . . deference is due to the BIA's interpretation. . . ."); *Santana v. Muller*, No. 12-cv-430, 2012 WL 951768, at *4 (S.D.N.Y. Mar. 12, 2012) (holding that section 1226(c) is ambiguous; the language "could mean at the moment of release, or it could mean at any time following release"); *Guillaume v. Muller*, No. 11-cv-8819, 2012 WL 383939, at *4 (S.D.N.Y. Feb 7, 2012) (finding that the phrase "when the alien is released" is ambiguous because it can be reasonably construed in different ways); *Mendoza v. Muller*, No. 11-cv-7857, 2012 WL 252188, at *3 (S.D.N.Y. Jan. 25, 2012); *see also United States v. Willings*, 8 U.S. 48, 55 (1807) (recognizing that "when" in a statute has two possible meanings: "at any time after" and "immediately upon").

Nonetheless, the district court found it "flatly implausible to read 'when . . . released' as suggesting anything other than 'at the time of release.'" Addendum at A020.[5] The court apparently took the view that Congress must use unambiguously clear language to require mandatory detention, otherwise such detention would not be required. *Id.* at A018 (reasoning that if Congress intended the alternate readings of the statutory language suggested by the Government it was required to use "far more precise language" such as at "'any time after' release from custody"). However, sometimes a statute Congress enacts is susceptible to more than one meaning. And in such cases, the answer is not for a court to substitute its own view as to the better view of the statute; rather, in circumstances where Congress has delegated interpretative authority to an agency (as Congress indisputably has here), the court should ask whether the agency's interpretation is a permissible one

[5] The district court found that this Court's decision in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), supports its conclusion as to the unambiguous meaning of "when . . . released." Addendum at A023-25. But *Saysana* did not examine whether section 1226(c) required immigration detention immediately after release from criminal detention. *Saysana* addressed an entirely different and discrete legal issue in a different factual context than the one before this Court, *i.e.*, the potential retroactive application of section 1226(c) in the context of two releases from criminal custody, one prior to the effective date of section 1226(c) and one after. The Court concluded that section 1226(c) required immigration custody "upon" an alien's release from criminal custody after the effective date of section 1226(c), and *only* for an offense enumerated in Section 1226(c)(1)(A) through (D). *Saysana*, 590 F.3d at 14. *Saysana* did not address the situation at hand. *See Sylvain*, 714 F.3d at 156 n.7 (Saysana "does not address the question at hand.").

under *Chevron*. *Chevron* deference allows the agency, not the district court, to fill interpretive gaps such as the one created by the use of this imprecise term.

The district court's analysis also gave short shrift to the structure of section 1226(c)(1). Addendum at A026-27. The court takes the view that the "when . . . released" clause is necessarily part of the definition of aliens who are subject to the mandatory detention provision of section 1226(c)(2) – that is, that an alien may be detained without bond only if he or she fits into one of the classes of aliens enumerated in subparagraphs (1)(A) through (1)(D) *and* was detained by DHS at the moment he or she was released from state custody. *Id.* at A026. But the placement of the "when released" language in the statute belies that view. Congress carefully and specifically enumerated the classes of qualifying aliens in subparagraphs (A) through (D).

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"). As the BIA explained, the language before and after those subparagraphs ("The Attorney shall take into custody an alien . . . when the alien is released") defines what the Government is supposed to do (take the qualifying aliens into custody); it does not define which aliens qualify for detention under the statute. *See Matter of Rojas*, 23 I. & N. Dec at 120, 121, 126; *see also Sulayao v. Shanahan*, No. 09-cv-7347, 2009 WL 3003188, at *4-5 (S.D.N.Y. Sept. 15, 2009); *Saucedo-Tellez v. Perryman*, 55 F. Supp. 2d 882, 844-85 (N.D. Ill. 1999). At the very least, the statute is ambiguous for this reason.[6]

Thus there are many reasons for this Court to find that the statute as a whole is ambiguous. Accordingly, the question becomes whether the BIA's interpretation of the statute in *Matter of Rojas* is entitled to *Chevron* deference. It

[6] The disagreement among various courts as to the interpretation of section 1226(c) further supports the conclusion that it is ambiguous. *See Diaz v. Muller*, No. 11-cv-4029, 2011 WL 3422856, at *3 (D.N.J. Aug. 4, 2011) ("The fact that courts have disagreed so in interpreting [section 1226(c)] supports the conclusion that it is ambiguous."); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (disagreement among courts suggests ambiguity); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004) ("Judicial decisions that differ on the proper interpretation of [a statute] reflect this ambiguity."); *see also Sanchez Gamino v. Holder*, --- F. Supp. 2d ---, 2013 WL 6700046, at *3 (N.D. Cal. Dec. 19, 2013) (recognizing split in district court decisions on whether section 1226(c) is ambiguous); *Bumanlag v. Durfor*, No. 2:12-cv-2824, 2013 WL 1091635 (E.D. Cal. Mar. 15, 2013) (same).

is, because the BIA's interpretation is not only a permissible interpretation, it is the correct one.

B. The Court should defer to the BIA's permissible and reasonable interpretation of section 1226(c) in *Matter of Rojas*.

Once a court has concluded that a statute is ambiguous, the question becomes "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see also Harvey v. Veneman*, 396 F.3d 28, 33-34 (1st Cir. 2005). An agency interpretation of a statute it is charged with administering must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Thus, the Court must defer to the agency's construction of the statute so long as that construction is reasonable. *See Lattab v. Ashcroft*, 384 F.3d 8, 17 (1st Cir. 2004); *see also Mosquera-Perez,* 3 F.3d at 555.

a. Text and Context

As the BIA explained in *Matter of Rojas*, the more natural reading of the statute's text is that the language "when the alien is released" specifies the earliest point at which the Government's duty to detain arises, not the only point at which DHS may take a qualifying criminal alien into custody. 23 I. & N. Dec. at 121 ("[T]his statutory language imposed a duty on the Service to assume the custody of

certain criminal aliens and specified the point in time at which that duty arises."). The statute says that DHS must take certain aliens into custody when they are released from non-DHS custody, and that there is only a limited exception (not relevant here) where detention is not mandatory.

In this context, "when" means "after." The provision signifies that Congress did not want DHS to preempt state and federal law enforcement officials by trying to take criminal aliens into immigration custody before they vompleted their term of non-DHS criminal custody, but it did want DHS to take them into custody once that custody was complete. Congress also provided that it did not want DHS to hold off on immigration detention because the "alien [wa]s released on parole, supervised release, or probation" or because "the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1). In this context, the "when . . . released" language serves a valuable function: it instructs DHS as to the earliest point at which its duty to taken aliens into custody may arise. And the BIA's interpretation is consistent with other parts of the INA, such as provisions directing authorities not to take custody of a criminal alien "before the alien's release from incarceration." 8 U.S.C. § 1228(a)(3); *see also* 8 U.S.C. § 1231(a)(4)(A) & (D).

The district court believed that the BIA's reading would make the "when . . . released" language superfluous, because in the court's view, "[i]t is physically impossible for ICE to detain an individual *before* he is released from criminal custody." Addendum at A020. But to the contrary, such an interpretation comports with provisions in other statutes not to take custody of a criminal alien "before the alien's release from incarceration." 8 U.S.C. § 1228(a)(3); *see also* 8 U.S.C. §§1231(a)(4)(A) & (D). In the context of section 1226(c), Congress simply is making clear that a criminal alien should not be taken into immigration custody until he has served his sentence for the crimes that qualify him for removal and detention pending removal. This reading of "when" as designating a starting point, rather than a single point in time, is reasonable in light of legislative history suggesting that Congress intended mandatory detention to apply "whenever such an alien is released from imprisonment." House Conf. Report 104-828 at 210-11; *see also Webster's Third New International Dictionary* 2602 (1986) ("whenever" entry 1, definition 1: "at any or all times that."). Thus, the BIA reasonably interpreted "when" to designate a starting point.

The BIA's reading also is the more natural way of reading the two parts of the statute -- paragraph (1) and paragraph (2) -- together. Paragraph (1) specifies that qualifying aliens must be detained pending removal, and paragraph (2) says

that "an alien described in paragraph (1)" shall not be released except in certain circumstances. "An alien described in paragraph (1)" is an alien who qualifies for mandatory detention because he falls into one of the four categories specified in subparagraphs (A) through (D). The language of these sections is descriptive (it identifies aliens who are deportable or inadmissible because they have committed certain crimes), and it is set off from the rest of the text in subparagraphs, to show that Congress intended the statute to cover these four categories of aliens. As the BIA has explained, one would not naturally understand the opening or concluding clauses in paragraph (1) to be part of the "description" of aliens subject to mandatory detention; instead, it specifies what actions DHS should take. *Matter of Rojas*, 23 I. & N. Dec. at 121. The language "when the alien is released "modif[ies] the command that the 'Attorney General shall take into custody' certain criminal aliens;" it does not describe the aliens who qualify for detention in the first place. *Id.*

Finally, the BIA's reading of the statute is reasonable in the context of the INA as a whole. As the BIA explained, "[t]here is no connection in the [INA] between the timing of an alien's release from criminal incarceration, the assumption of custody over the alien . . ., and the applicability of any of the criminal charges of removability," and the INA "does not tie an alien's eligibility

to any form of relief from removal to the timing of the alien's release from custody and the assumption of custody" by DHS. 23 I. & N. Dec. at 122. Put simply, when an alien is released from criminal custody "is irrelevant for all other immigration purposes." *Id.* The BIA noted that numerous provisions in the INA are directed at expediting the removal of criminal aliens, and they generally "cover criminal aliens regardless of when they were released from criminal confinement." *Id.* The BIA also recognized that its view was consistent with the statute's history, because a prior version of the statute contained a prohibition on release for criminal aliens that did not depend on when these aliens came into immigration custody. *Id.* at 122-23 (discussing former 8 U.S.C. § 1252(a)(2)(B)).[7] Thus, treating the "when . . . released" language as part of the "definition" of qualifying aliens would not make sense in the broader context of the INA.

[7] The BIA also noted that looking even further back at the statutory history, "the statute has contained different phrases over the years," some of which were ambiguous, and some of which clearly indicated that "the groups of criminal aliens subject to mandatory detention were not affected by the timing of their release from criminal custody or the timing of the Service's acquisition of custody." 23 I. & N. Dec. at 124. The BIA concluded that this prior language is further strong evidence that "Congress was not attempting to restrict mandatory detention to criminal aliens taken immediately into Service custody at the time of their release from a state or federal correctional institution." *Id.*

b. Congressional Intent and Purposes

The BIA's conclusion in *Matter of Rojas* was informed by its understanding of Congress's intent and purposes with regard to immigration, and its long experience in administering the immigration laws. The BIA recognized that reading section 1226(c) to require a criminal alien to be taken into immigration custody immediately following his release from criminal custody would thwart Congress's purposes. Congress enacted this provision because it was concerned that criminal aliens were not being removed and were committing crimes and endangering the public while their removal proceedings were pending. *See Demore*, 538 U.S. at 518.

As the Supreme Court explained, "Congress' investigations showed . . . that the INS could not even identify most deportable aliens, much less locate them and remove them from the country," and "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Id.* at 518-19. "Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 519. When section 1226(c) was enacted, the Attorney General already had the discretion to detain criminal aliens pending removal, but Congress determined that authority was

insufficient and detention must be mandatory. *Id*. (noting that bond hearings were often afforded to criminal aliens and "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings").

The BIA's interpretation of section 1226(c) in *Matter of Rojas* furthers Congress's purposes with regard to the detention and removal of criminal aliens. 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 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.

As the Fourth Circuit has explained, 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." *Hosh*, 680 F.3d at 380 n.6. Congress wanted criminal aliens to be detained so that they would be removed and so that they could not endanger the public while removal proceedings are pending, and those purposes apply equally to aliens who were detained just after they were released from serving their criminal sentences, and to those who were detained at some later time. 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." *Id.* at 381.

Similarly, in *Matter of Noble* – a prior decision upon which the BIA relied in *Matter of Rojas* – the BIA found it "incongruous" that Congress would have enacted a new rule to create stricter detention standards, but under that same rule, "permit the release of a subgroup of criminal aliens (based on the wholly fortuitous date of release from incarceration) under a more lenient standard." *Matter of Noble*, 21 I. & N. Dec. at 681; *see also Matter of Rojas*, 23 I. & N. Dec. at 124 (relying on *Matter of Noble*). Thus, courts have reasonably concluded that if an alien is deportable or inadmissible because of his criminal conviction, he should not receive a windfall if he "was released from state custody and got as far as the

adjacent parking lot before being detained by federal authorities." *Hosh*, 680 F.3d at 380 n.6.

Indeed, 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 authorities in advance of their release. *See* S. Rep. No. 104-48, at 1. The BIA also has recognized that it can be logistically difficult for DHS 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 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").

The district court's interpretation of the statute thwarts Congress's intentions with respect to some aliens. Aliens who indisputably are deportable or

inadmissible because of their crimes will not be detained, and will be allowed to remain in the community or to abscond pending removal. "[A] dangerous alien would be eligible for a hearing – which could lead to his release – merely because an official missed the deadline. This reintroduces discretion into the process and bestows a windfall upon dangerous criminals." *See Sylvain*, 714 F.2d at 160-161 ("[G]overnment officials are neither omniscient nor omnipotent. 'Assessing the situation in realistic and practical terms, it is inevitable that, despite the most diligent efforts of the Government and the courts, some errors in the application of the time requirements . . . will occur.'") (citing *Montalvo-Murillo*, 495 U.S. at 720).

Thus, the very concerns identified by the district court – the disparate treatment of two individuals based on capricious and unrelated factors and the reintroduction of discretion into the mandatory detention process – are in fact heightened under the interpretation urged by the court. *See* Addendum at A028-30. Tying mandatory detention to the timing of DHS detention means that whether a criminal alien is mandatorily detained turns on multiple factors, some of which are arbitrary and many of which are outside the control of DHS. Two aliens who are removable because they were convicted of the exact same crimes could be treated differently based on when DHS took each of them into immigration

custody. And an alien who qualifies for detention under section 1226(c) based on his crimes would receive a windfall if DHS did not arrive at his place of criminal confinement at the exact time he was released. But these arbitrary concerns are taken out of the equation if the BIA's interpretation is applied.

The district court stated that its view of the statute would further Congress's purposes because Congress wanted to "ensure the *direct* transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities." *Id.* at A022. But, even if the court was correct that direct transfer would best serve Congress's purposes for the statute, that does not provide a reason to do away with mandatory detention altogether if direct transfer cannot be accomplished for logistical reasons.

Contrary to the district court's suggestion (*id.* at A028-29), Congress did not decide to exempt some aliens who are deportable or inadmissible based on their crimes if the aliens became reintegrated into the community. Instead, Congress made a judgment that all such aliens were subject to mandatory detention unless Congress specifically provided otherwise (as it did in paragraph (2)). Indeed, Congress recognized that because certain criminal aliens face near "certain" removal, *INS v. St. Cyr*, 533 U.S. 289, 325 (2001), they possess a strong incentive to flee after – but not necessarily before – immigration agencies turn their attention

to them. *See Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996) (recognizing that a released alien "may not be so easy to find once his litigation options are exhausted"). Thus, Congress rejected the view that the more time an individual spends in a community, the lower his bail risk is likely to be. And the fact that Congress included some limited exceptions to mandatory detention – but not the exception fashioned by the district court – makes clear that the BIA's decision not to recognize additional exceptions was a reasonable one. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). The district court erred by substituting its judgment for that of the agency. Even if the agency's interpretation is not "the reading the court would have reached if the question had arisen in a judicial proceeding," the court should have deferred to it. *Chevron*, 467 U.S. at 843 n.11.

c. Practical and Logistical Issues

The district court's interpretation of the statute also raises serious practical and logistical difficulties. DHS may not know when a qualifying alien will be released from criminal custody or have the resources to appear at every place a qualifying alien is being released at the moment of release. Once one recognizes

that requiring DHS to be present at the exact moment of release is unrealistic, difficult line-drawing questions emerge. As the BIA asked, "Would mandatory detention apply only if an alien were literally taken into custody 'immediately' upon release, or would there be a greater window of perhaps 1 minute, 1 hour, or 1 day?" *Matter of Rojas*, 23 I. & N. Dec. at 124.[8]

And the district court's view does not make sense in light of some of the types of qualifying aliens. For example, section 1226(c)(1)(D) requires detention of aliens who engage in terrorist activity, and aliens may fall under that section even without a criminal conviction. *See* 8 U.S.C. § 1182(a)(3)(B). Some of those individuals therefore may never be in criminal custody. Yet by specifically identifying those aliens in subparagraph (D), it is clear that Congress wanted those aliens to be detained pending removal. Also, some aliens are convicted for qualifying crimes but do not serve time in criminal custody because they are sentenced to probation or to time already served or their sentences of incarceration are suspended. The inclusion of such individuals within the mandatory detention provisions of section 1226(c)(1) provides another reason to doubt that Congress

[8] The district court also recognized this problem, noting that its reading of the language could be reduced "to absurdity by contracting the permissible time frame." Addendum at A020 n.6 ("Is the court suggesting that an alien must be detained within an hour of release? Within thirty seconds?").

would have intended the statute only to require mandatory detention of individuals taken into DHS detention directly from criminal custody. In contrast, the BIA's interpretation of the statute provides consistency in the face of these concerns since it allows for *all* aliens identified within subsections 1226(c)(1)(A) through (D) to be mandatorily detained as Congress intended. This consistency is a compelling reason to find that the BIA's interpretation of the statute is a permissible one.

The district court erroneously concluded that, even if the statute at issue here were ambiguous, deference to the BIA would not be appropriate because the BIA's interpretation contains no "temporal limitation on the executive's ability to act" and gives DHS the "discretion to select who will be detained immediately upon release and who will be allowed to return to the community indefinitely." Addendum at A028-30. But there is a temporal limitation on DHS's detention authority – the conclusion of removal proceedings. As the Supreme Court has explained, detention under section 1226(c) is detention in aid of removal, and it ends when removal proceedings end. *See Demore*, 538 U.S. at 528-529 (section 1226(c) "governs detention of deportable criminal aliens pending their removal proceedings," and this detention "ha[s] a definite termination point"). The Supreme Court has long "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process," because "deportation

proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)); *see also Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (distinguishing post-removal proceeding detention under 8 U.S.C. § 1231 from "detention pending a determination of removability").

It is thus the district court's interpretation – not the BIA's – that leads to arbitrary results. Under the district court's view, aliens who are not immediately taken into immigration custody following their criminal sentences would not be subject to mandatory detention, even though they remain subject to removal, and they are no less dangerous or less likely to abscond. Moreover, the court had no basis to suggest that DHS exercises its prosecutorial judgment when it does not take a criminal alien immediately into mandatory detention. The fact that DHS is not immediately able to carry out its mandate to detain criminal aliens at the precise moment of each alien's release from criminal custody – a situation that

may occur for a variety of reasons, many outside of DHS's control – does not mean DHS is making arbitrary distinctions among criminal aliens.[9]

Finally, the district court's decision encompasses its own value judgment that it is more important to exclude from mandatory detention those who have a lengthy time gap between release from criminal custody and their detention by DHS, than it is to ensure the mandatory detention of those who are released for only days or weeks, or even months, before DHS is able to take them into custody. But the BIA's alternative rationale – to consistently require detention during the pendency of removal proceedings to those who are subject to removal on the same bases – is not only a permissible value judgment, but the judgment Congress made.

[9] The district court assumed that when ICE does not immediately take an individual into custody upon his or her release from criminal custody that this is done in an exercise of discretion, rather than for reasons outside of ICE's control. But there are many factors that influence when ICE is able to take an alien into immigration custody. For example, Trust Act legislation that recently has been passed in Connecticut – with similar legislation proposed in Massachusetts and several other states – reflects 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); Connecticut Trust Act, http://www.cga.ct.gov/2013/ACT/PA/2013PA-00155-R00HB-06659-PA.htm; see also 2013 Cal. A.B. 4 (codified at Cal. Gov't Code §§ 7282-7282.5 (2014). Thus, ICE continues to face increased 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 the face of statutory ambiguity, the BIA's judgment is controlling. *Chevron* teaches that the district court should not be allowed to substitute its judgment for that of the agency, even if the agency's interpretation is not "the reading the court would have reached if the question had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. As long as the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). Here, the BIA's interpretation is not only a permissible reading of the statute, but it is the better reading. This Court therefore should defer to that interpretation under *Chevron*.

II. 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.

Even if this Court declines to afford *Chevron* deference to the BIA's interpretation of section 1226(c), it should nonetheless reverse. As both the Third and Fourth Circuits have recognized, 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. This conclusion follows

from a long line of Supreme Court cases establishing that statutes providing "that the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 161 (2003), and that courts should avoid interpretations in which "public interests [are] prejudiced by the negligence of the officers or agents to whose care they are confided." *Montalvo-Murillo*, 495 U.S. at 717-18.

A. Statutes requiring the Government to act by a certain time generally do not take away the Government's ability to act after that time.

Congress creates statutory deadlines to urge the Executive to take prompt action. *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009), *aff'd*, 130 S. Ct. 2553 (2010) ("Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches the chance to avoid their obligations just by dragging their feet."). Statutes that provide guidance on how quickly a government official should discharge his duties "are usually construed as 'directory, whether or not worded in the imperative.'" *Ralpho v. Bell*, 569 F.2d 607, 627 (D.C. Cir. 1977) (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871)). "Directory" deadlines are "hortatory or advisory" guidelines for agency action, which do not affect an agency's authority to act after the deadline

has passed, as opposed to "jurisdictional" deadlines, beyond which action is proscribed. *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997); *see also Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1377 (Fed. Cir. 2002) (noting that directory "timing provisions are at best precatory").

The Supreme Court has explained on numerous occasions that statutes providing "that the Government 'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 161 (2003). The Court first articulated this rule of statutory construction as early as 1871, with *French v. Edwards, supra*. In *French*, the Supreme Court advised that congressional deadlines to government agencies are generally interpreted as hortatory and "do not limit their power or render its exercise in disregard of the requisitions ineffectual." *French*, 80 U.S. at 511. Over time, this rule served as a primary tool of statutory construction for all courts because it reflected the realities affecting government action. As the Supreme Court observed, "It ignores reality to expect that the Government will be able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 433 (1990) (internal quotation omitted). Taking these realities into consideration, the Supreme Court directs that statutory deadlines, when applied to the government,

are generally interpreted as advisory deadlines meant to prod the government to expeditious action. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003); *Dolan*, 571 F.3d at 1027. As the Third Circuit explained, "[b]ureaucratic inaction – whether the result of intertia, oversight, or design – should not rob the public of statutory benefits." *Sylvain*, 714 F.3d at 158.

This default rule of statutory construction applies even when courts are interpreting statutes that contain unambiguous and explicit deadlines. For example, in *Brock v. Pierce Cnty.*, 476 U.S. 253 (1986), the Supreme Court considered the Comprehensive Employment and Training Act, which contained a provision requiring the Secretary of Labor to determine whether an allegation is substantiated within 120 days of receiving a complaint regarding misuse of funds disbursed under the Act. *Id*. at 254-55. Even though the deadline for action was clear, the Supreme Court still found that "[t]he 120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority." *Id*. at 265. Thus, the Court found that the statute permitted the Secretary's actions even after the 120-day deadline had passed. *Id*.; *see also Gottlieb v. Pena*, 41 F.3d 730, 733-34 (D.C. Cir. 1994) (finding statute directing Secretary of Transportation "to ensure that a complete application for correction of military records is

processed expeditiously and that final action on the application is taken within 10 months of its receipt" expressed hortatory deadline).

B. Courts should not interpret a missed deadline as withdrawing executive authority.

The Supreme Court has made clear that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993). The Court has taken this view because it did not want "every failure of an agency to observe a procedural requirement" to "void[] subsequent agency action, especially when important public rights are at stake." *Pierce Cnty.*, 476 U.S. at 260 (citations omitted). Mandatory language in a statute is not enough to overcome this presumption. As the Supreme Court explained, "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart*, 537 U.S. at 161.

The courts of appeals have routinely followed the Supreme Court's guidance in this area. For example, in *Southwestern Pennsylvania Growth Alliance v. Browner*, the Third Circuit followed the Supreme Court's reasoning in *Pierce County*, noting that the absence of a sanction in the Clean Air Act for missing a

deadline suggested "that Congress did not intend for the EPA to lose its power to act after 18 months." *Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 114 (3d Cir. 1997). In *Cyberworld Enterprise Technologies, Inc. v. Napolitano*, the Third Circuit rejected the argument that the Secretary of Labor's failure to make a determination under 8 U.S.C. § 1182(n) within the required thirty-day deadline precluded the Secretary from imposing a fine under that provision. *See* 602 F.3d 189, 196 (3d Cir. 2010). Noting that "a statutory time limit does not divest an agency of jurisdiction unless the statute specifies a consequence for failure to comply with the provision," the court of appeals determined that Congress's mere use of the word "shall' and a thirty-day deadline in 8 U.S.C. § 1182(n) was insufficient to deprive the Secretary of statutory authority to act. *Id*. And the court applied the *Pierce County* principle even though the Government's delay was lengthy. *Id.* at 199-200.

Similarly in *Liesegang*, the Federal Circuit considered several deadlines contained in the Agent Orange Act, codified at 38 U.S.C. § 1116. *Liesegang*, 312 F.3d at 1371. The statute provided that the Secretary of Veterans Affairs "shall issue proposed regulations" "not later than 60 days after making" a determination regarding a service-connected illness, 38 U.S.C. § 1116(c)(1)(A), and then gave the Secretary ninety more days to issue final regulations. 38 U.S.C. § 1116(c)(2).

The Secretary missed both deadlines, the first by three days and the second by thirty days. *Liesegang*, 312 F.3d at 1371. The Federal Circuit rejected the plaintiff's pleas to treat these hortatory deadlines as jurisdictional deadlines as "[t]he price the agency must pay for its errors in timing." *Id.* at 1376. As that court explained, "it is well settled that 'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'" *Id.* (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

The Ninth Circuit also has followed this approach. In *Montana Sulphur*, a statute required that an agency "shall" promulgate an implementation plan within two years. *Id*. (citing 42 U.S.C. § 7410(c)). The Ninth Circuit held that in the absence of any Congressional indication otherwise, the failure of the agency to act within two years does not deprive the agency of the authority to promulgate the implementation plan at a later date. *See Mont. Sulphur & Chem. Co., v. U.S. E.P.A.*, 666 F.3d 1174, 1191 (9th Cir. 2012); *see also Hendrickson v. FDIC*, 113 F.3d 98, 101 (7th Cir. 1997) ("Standing alone, moreover, use of the word 'shall' in connection with a statutory timing requirement has not been sufficient to overcome the presumption that such a deadline implies no sanction for an agency's failure to

heed it."). Accordingly, it is now well-settled that when the Government fails to act by a statutory deadline, it does not lose its authority to act.

C. DHS retains its ability to detain aliens under section 1226(c) even if it does not act by a statutory deadline.

Both the Third and Fourth Circuits held, based on these precedents, that an alien is still subject to mandatory detention under 8 U.S.C. § 1226(c) even if he is not taken into immigration custody immediately following his release from criminal custody. *See Hosh*, 680 F.3d at 382 ("The negligence of officers, agents, or other administrators, or any other natural circumstance or human error that would prevent federal authorities from complying with § 1226(c), cannot be allowed to thwart congressional intent and prejudice the very interests that Congress sought to vindicate."); *Sylvain*, 714 F.3d at 161 (holding that "even if the statute calls for detention 'when the alien is released,' . . . nothing in the statute suggests that officials lose authority if they delay").

As the Third and Fourth Circuits have recognized, the Supreme Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), is particularly instructive with respect to section 1226(c). *See Sylvain,* 714 F.3d at 158; *Hosh*, 680 F.3d at 382. In *Montalvo-Murillo*, the Supreme Court interpreted the Bail Reform Act of 1984, 18 U.S.C. § 3142, which allows the Government to detain

criminal defendants pending trial if they pose a risk of flight or a danger to others. 8 U.S.C. § 3142(a)-(f). The statute provides that before the Government may detain a defendant, a judicial officer "shall" hold a bond hearing "immediately upon the person's first appearance before the [ ] officer" to assess the person's flight risk and danger. *Id.*; *see also* 18 U.S.C. § 3142(f)(2). Montalvo-Murillo did not receive a bond hearing upon his first appearance, and instead received one a few days later. He argued that the delay stripped the Government of authority to detain him under the Act. The Supreme Court rejected his argument, holding that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged." 495 U.S. at 717. The Court explained that "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Id.* Instead, the Court determined that its interpretation of the Act "must conform to the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 717-18 (citations and quotations omitted).

The same principles apply to mandatory detention under section 1226(c). "Like the Bail Reform Act, the mandatory-detention statute allows the government to detain a person in the days leading up to a legal proceeding." *Sylvain,* 714 F.3d at 159. Under the Bail Reform Act, the Government must conduct a hearing "immediately upon the person's first appearance," and the defendant must pose either a flight risk or danger to the public. *Id.*; *see also* 18 U.S.C. § 3142(f)(2). Under section 1226(c), for criminal aliens, the Government must detain the alien "when ... released," and the alien must have committed one of the crimes enumerated in the statute. *Sylvain,* 714 F.3d at 159; *see also* 8 U.S.C. § 1226(c)(1). As the Third Circuit astutely noted, "neither statute explicitly ties the government's authority to the time requirement" and so "the government retains authority under both statutes despite any delay." *Sylvain,* 714 F.3d at 159.

Further, like the Bail Reform Act, "§ 1226(c) does not specify any consequence for the Government's failure to detain a criminal alien immediately upon release." *Hosh*, 680 F.3d at 382. Indeed, it would make no sense to read the provision to eliminate DHS's authority in cases where an alien who committed such a crime was not identified or located by DHS until after release from custody – a reality that is often beyond DHS's control. Therefore, "even if 'the duty is mandatory, the sanction for breach is not loss of all later powers to act.'" *Id.*

(quoting *Montalvo-Murillo*, 495 U.S. at 718). Indeed, the principle that delay does not take away the Government's ability to act is "doubly persuasive in [this] setting" because the portion of the Bail Reform Act at issue in *Montalvo-Murillo* "was unquestionably written for the benefit of the defendant-arrestees," whereas "§ 1226(c) was undeniably *not* written for the benefit of criminal aliens facing deportation." *Hosh*, 680 F.3d at 382-383. And as the Third Circuit recognized, the *Montalvo-Murillo* principle applies with special force because "an important public interest is at stake." *Sylvain*, 714 F.3d at 159. "Congress adopted the mandatory-detention statute against a backdrop of rising crime by deportable aliens," and it had before it studies establishing that "many aliens failed to show up at their deportation proceedings" and also committed crimes while their removal proceedings were pending. *Id.*

Especially because Congress presumably was aware of this rule of statutory construction when it drafted 8 U.S.C. § 1226(c), and nonetheless chose not to specify a sanction for failure to detain an alien "when released," this Court may not judicially create a sanction prohibiting DHS from fulfilling its duty to detain criminal aliens described in 8 U.S.C. § 1226(c)(1)(A) through (D) during the pendency of their removal proceedings. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction

is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Congress's failure to specify any alternate rules to apply if the Government fails to detain an alien immediately after his release from non-immigration custody also "is quite telling." *Shenango Inc. v. Apfel*, 307 F.3d 174, 194 (3d Cir. 2002); *see Sylvain*, 714 F.3d at 160 n.10 (noting that "Congress created mandatory detention in the wake of" Supreme Court decisions setting out the principle that the Government does not lose the authority to act when it fails to meet a statutory deadline).

Moreover, it would be especially odd for courts to release criminal aliens as the sanction for the Government's failure to act when Congress itself declined to allow such aliens released except in the circumstances enumerated in paragraph (2) of the statute. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'"). Congress's failure to impose an alternate scheme indicates its intent to preserve DHS's authority under section 1226(c), even when there are delays in apprehending criminal aliens.

Nothing in section 1226(c) precludes mandatory detention where DHS has missed the statutory deadlines (assuming "when" represents a deadline at all). This

Court should not create such a sanction. Accordingly, even if section 1226(c) requires the Government to act immediately, *Montalvo-Murillo*, teaches that there is "no reason to bestow upon the [detainee] a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous [detainees]" because a timing violation occurs).

The district court declined to apply the principle urged here on the ground that taking away the Government's ability to detain criminal aliens under section 1226(c) is not a sanction on the Government's failure to act because the Government may still detain a criminal alien (subject to a bond hearing) under section 1226(a). Addendum at A033. But taking away the Government's mandatory detention authority under section 1226(c) is precisely the type of sanction courts are loath to impose. *See Sylvain*, 714 F.3d at 157 (finding that the "text does not explicitly remove that authority" and under well-established law we "are loath to interpret a deadline as a bar on authority after the time has passed"). "[A]lthough 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 U.S. at 518-19. Congress recognized that "[t]he Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society," but it determined that that authority was insufficient to ensure that criminal aliens would be removed and would not commit more crimes in the meantime. *Id.*; *see also id.* at 520 (noting that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings"); *see also Sylvain*, 714 F.3d at 159 (under the prior regime where the "Attorney General could release aliens on bond if they did not 'present an excessive flight risk or threat to society' . . . . 'more than 20% of deportable criminal aliens failed to appear'" so "Congress eliminated all discretion"). Accordingly, Congress already has rejected the view that detention

subject to a bond hearing under section 1226(a) is adequate for specified criminal aliens.[10]

"To be sure, immigration officials should act without delay," because "[the sooner they detain dangerous aliens, the safer the public will be." *Sylvain*, 714 F.3d at 159. But "despite the most diligent efforts of the Government," "some errors in the application of the time requirements . . . will occur," and when they do, courts should not "bestow upon [aliens] a windfall" and "visit upon the Government and the citizens a severe penalty" by taking away the Government's ability to detain aliens under 8 U.S.C. § 1226(c). *See Montalvo-Murillo*, 495 U.S. at 720. "Congress designed the statute to keep dangerous aliens off the streets," yet the district court's interpretation "would lead to an outcome contrary to the statute's design: 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 160. For this reason as well, the district court's decision should be reversed.

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[10] The Government acknowledges that the Bail Reform Act discussed in *Montalvo-Murillo* authorizes a bond hearing, while section1226(c) authorizes mandatory detention without a bond hearing. Despite this difference, the "loss of authority" principle applies to both statutes: the court may not impose the less secure of two detention alternatives simply because the Government missed a detention-related deadline. *See Hosh*, 680 F.3d at 382-83.

CONCLUSION

For the foregoing reasons, 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.

April 14, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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 13,929 words, excluding the parts of the brief exempted by Fed. R. Appx. P. 32(a)(7)(B)(iii); 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: April 14, 2014

Respectfully submitted,

/s/ Sarah B. Fabian
SARAH B. FABIAN
Trial Attorney

TABLE OF CONTENTS OF ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CLAYTON RICHARD GORDON,	)	
Plaintiff/Petitioner	)	
	)	
	)	
v.	)	**C.A. NO. 13-cv-30146-MAP**
	)	
JANET NAPOLITANO, Secretary of Homeland Security; ERIC H. HOLDER, JR., Attorney General of the U.S.; JOHN SANDWEG, Acting Director, Immigration and Customs Enforcement; SEAN GALLAGHER, Acting Director, Immigration and Customs Enforcement; CHRISTOPHER DONELAN, Sheriff of Franklin County; MICHAEL G. BELLOTTI, Sheriff of Norfolk County; STEVEN W. TOMPKINS, Sheriff of Suffolk County; THOMAS M. HODGSON, Sheriff of Bristol County; and, JOSEPH D. MCDONALD, JR., Sheriff of Plymouth County.	)	
Defendants/Respondents	)	

ORDER REGARDING PLAINTIFF'S PETITION FOR WRIT OF HABEAS CORPUS, PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, and DEFENDANTS' MOTION TO DISMISS
(Dkt. Nos. 1, 2 & 13)

October 23, 2013

PONSOR, U.S.D.J.

Plaintiff, a lawful permanent resident being held by the government pursuant to 8 U.S.C. § 1226(c), has brought a petition for writ of habeas corpus seeking an individualized

bond hearing to challenge his immigration detention. Defendants are: Janet Napolitano, Secretary of Homeland Security; Eric Holder, Attorney General; John Sandweg, Acting Director of Immigrations and Customs Enforcement ("ICE"); Sean Gallagher, Acting Field Office Director for the New England Field Office of ICE; Christopher Donelan, Sheriff of Franklin County; Michael Bellotti, Sheriff of Norfolk County; Steven Tompkins, Sheriff of Suffolk County; Thomas Hodgson, Sheriff of Bristol County; and, Joseph McDonald, Jr., Sheriff of Plymouth County. Plaintiff has also filed a Motion for a Preliminary Injunction (Dkt. No. 2), and Defendants have filed a Motion to Dismiss (Dkt. No. 13).

Section 1226(c) requires the government to detain certain non-citizens "when the alien is released." At issue is whether the "when . . . released" language imposes an immediacy requirement and limits the class of aliens subject to mandatory detention, or whether it merely states the time at which the government can first act.

Defendants take the position that "when . . . released" is ambiguous, and thus deference to the Board of Immigration

Appeal's ("BIA") interpretation in Matter of Rojas, 23 I&N Dec. 117 (BIA 2001), is required under Chevron v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Defendants further argue that the statute does not provide a sanction for the government's delay in acting, and it would thus be inappropriate for the court to impose one. See e.g., U.S. v. Montalvo-Murillo, 495 U.S. 711, 713-14 (1990).

Plaintiff disagrees that the language is ambiguous. In his view, "when . . .released" literally means "at the time of release." Moreover, the BIA's view allows the government to act without limitation after a non-citizen is released, thereby defeating the congressional purpose behind the statute. Since the language and purpose of the statute are clear, no deference to the BIA is required. Finally, under Plaintiff's interpretation, the government does not lose any power since it can still detain a non-citizen under § 1226(a).

This complex question has divided courts around the country. Compare Sylvan v. Att'y Gen. of U.S., 714 F.3d 150 (3d Cir. 2013)(finding that the plaintiff's reading imposed an impermissible sanction for the government's delay in

acting); and Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012) (deferring to the government's interpretation under Chevron); with Castaneda v. Souza, No. 13-10874-WGY, 2013 WL 3353747 (D. Mass. July 3, 2013)(finding the statute unambiguous and granting habeas relief); and Baquera v. Longshore, No. 13-cv-00543, 2013 WL 2423178, at *4, n.3 (D. Colo. June 4, 2013)(compiling cases finding in favor of the plaintiff's reading). This court will shortly issue a memorandum providing its detailed perspective on this issue. Ultimately though, the court is persuaded by District Court Judge William G. Young's opinion in Castaneda adopting Plaintiff's reading of the statute, and granting habeas relief.

Specifically, the plain language of the statute, Congress's intent in enacting the statute, and the structure of the statute unambiguously describe the time at which the government must act to detain a non-citizen under § 1226(c). Even if that language were ambiguous, the BIA's interpretation yields impermissibly absurd results and would not warrant deference. Finally, the loss of authority cases are not applicable to the statute in question here, since

the government may still act under § 1226(a).

In order to avoid needless delay to Plaintiff while this court's more detailed memorandum is prepared, Plaintiff's individual petition for writ of habeas corpus (Dkt. No. 1) is hereby ALLOWED, Plaintiff's Motion for Preliminary Injunction (Dkt. No. 2) is DENIED without prejudice, and Defendants' Motion to Dismiss is DENIED (Dkt. No. 13). Defendants are hereby ordered to grant Plaintiff an individualized bond hearing within thirty days of this order.

Also within thirty days, counsel will file a memoranda on the question of whether it is proper for the court to retain the case to resolve the class-wide allegations.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CLAYTON RICHARD GORDON, on behalf of himself and others similarly situated, Plaintiff/Petitioner	)	
v.	)	C.A. NO. 13-cv-30146-MAP
JEH CHARLES JOHNSON, Secretary of Homeland Security; ERIC H. HOLDER, JR., Attorney General of the U.S.; JOHN SANDWEG, Acting Director, Immigration and Customs Enforcement; SEAN GALLAGHER, Acting Director, Immigration and Customs Enforcement; CHRISTOPHER DONELAN, Sheriff of Franklin County; MICHAEL G. BELLOTTI, Sheriff of Norfolk County; STEVEN W. TOMPKINS, Sheriff of Suffolk County; THOMAS M. HODGSON, Sheriff of Bristol County; and, JOSEPH D. MCDONALD, JR., Sheriff of Plymouth County. Defendants/Respondents	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S PETITION FOR WRIT OF HABEAS CORPUS, PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, and DEFENDANTS' MOTION TO DISMISS
(Dkt. No. 1, 2 & 13)

December 31, 2013

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff, a lawful permanent U.S. resident held by the

government pursuant to 8 U.S.C. § 1226(c), brought a petition for writ of habeas corpus on behalf of himself and those similarly situated. (Dkt. No. 1.) He sought an individualized bond hearing to challenge his ongoing detention by immigration authorities. Defendants are: Jeh Charles Johnson, Secretary of Homeland Security; Eric Holder, Attorney General; John Sandweg, Acting Director of Immigrations and Customs Enforcement (ICE); Sean Gallagher, Acting Field Office Director for the New England Field Office of ICE; Christopher Donelan, Sheriff of Franklin County; Michael Bellotti, Sheriff of Norfolk County; Steven Tompkins, Sheriff of Suffolk County; Thomas Hodgson, Sheriff of Bristol County; and Joseph McDonald, Jr., Sheriff of Plymouth County. In addition to his petition for habeas corpus, Plaintiff filed a Motion for a Preliminary Injunction. (Dkt. No. 2.) Defendants also submitted a Motion to Dismiss. (Dkt. No. 13.)

On October 23, 2013, this court granted Plaintiff's individual habeas petition, denied without prejudice Plaintiff's Motion for a Preliminary Injunction, and denied

Defendants' Motion to Dismiss.[1] This memorandum provides a more detailed explanation of the court's reasoning.

II. BACKGROUND[2]

As the facts of this case can only be understood in the context of the statute, a brief discussion of the law is necessary before laying out the factual background.

A. Statutory Framework

Section 1226 of Title 8 governs the detention of non-citizens during immigration removal proceedings. Sub-section (a) provides discretionary authority to the government to take an alien into custody while a decision on removal is pending. A non-citizen detained under § 1226(a) is entitled to an individualized bond hearing to determine

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[1] Defendants argue that dismissal as to all of the Defendants except Defendant Donelan is required because habeas relief must "be directed to the person having custody of the person detained." 28 U.S.C. § 2243. In cases of physical confinement, the immediate custodian is the proper respondent. Rumsfeld v. Padilla, 542 U.S. 426, 439 (2004). Given the class-wide allegations, however, dismissal at this point is inappropriate. Furthermore, the "immediate custodian rule" might not apply where the relief sought is a bond hearing and not immediate release. See Bourguignon v. MacDonald, 667 F. Supp. 2d 175, 179-180 (D. Mass. 2009).

[2] There is no dispute as to the facts, and the question before the court is one purely of law. The facts are drawn from Plaintiff's complaint. (Dkt. No. 1.)

whether release pending removal is appropriate. 8 C.F.R. §§ 1003.19 & 1236.1(d); Matter of Guerra, 24 I. & N. Dec. 37, 37-38 (BIA 2006). Sub-section (a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on--
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General, or
> (B) conditional parole; but
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a) (emphasis added).

Sub-section (c) of the law eliminates this discretion with respect to certain non-citizens. This provision requires detention pending removal, and, unlike sub-section (a), it does not explicitly provide for individualized bond hearings. Sub-section (c) reads as follows:

> (1) Custody

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

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), A(iii), (B), (C), or (D) of this title,
(C) is deportable under section 1227(a)(2)(A)(I) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

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

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons

> or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c) (emphasis added).

B. Factual Background

Plaintiff Clayton Richard Gordon, a native of Jamaica, arrived in the U.S. in 1982 at age six as a lawful permanent resident. Plaintiff joined the National Guard in 1994 and then served in active duty with the U.S. Army. He was honorably discharged in 1999.

In 2008, Plaintiff was arrested after police found cocaine in his home. Within one day of his arrest, he was released from custody. Plaintiff pled guilty in state court to a charge of possession of narcotics with intent to sell, for which he received a seven-year suspended sentence and three years of probation. He successfully completed his probation without incident.

Since that arrest, Plaintiff has re-established himself as a productive member of society. He met his current fiancee around 2008, and the couple had a son in 2010. They purchased a home together in Bloomfield, Connecticut.

Plaintiff developed a successful business and has worked on a project to open a halfway house for women released from incarceration.

On June 20, 2013, while driving to work, Plaintiff was unexpectedly stopped by ICE agents. He was taken into ICE custody and detained at the Franklin County Jail and House of Correction in Greenfield, Massachusetts. Defendants, relying on the 2008 criminal conviction, invoked the mandatory provisions of § 1226(c) to detain Plaintiff without the opportunity for an individualized bond hearing.

Plaintiff filed this petition for Writ of Habeas Corpus on his own behalf and on behalf of a class of similarly situated individuals, seeking an individualized bond hearing. He also filed a Motion for a Preliminary Injunction.[3] Defendants moved to dismiss the case.

On October 23, 2013, the court granted Plaintiff's individual habeas petition, denied without prejudice Plaintiff's Motion for a Preliminary Injunction, and denied Defendants' Motion to Dismiss.[4]

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[3] Plaintiff also filed a Motion to Certify a Class, (Dkt. No. 16), which is pending before the court.

[4] The history of the case subsequent to the court's rulings is straightforward. On November 1, 2013, Defendants

III. DISCUSSION

In their submissions and at oral argument, both parties urged the court to rule on the underlying merits of the habeas petition. The parties agreed that the case hinged on the interpretation of the phrase "when the alien is released" in § 1226(c)(1).

Defendants contend that the phrase indicates the time at which it can begin to act, rather than setting the time at which it must act. Defendants raise two arguments in support of this interpretation. First, the court must defer to the Board of Immigration Appeal's (BIA) decision in Matter of Rojas, 23 I. & N. Dec. 117 (BIA 2001), because the statute -- specifically, the word "when" -- is ambiguous. The BIA's reading is a permissive construction because it is consistent with the plain language and purpose of the statute. Deference is therefore required under Chevron

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notified the court that Mr. Gordon was being held pursuant to § 1226(a), and a bond hearing had been scheduled. (Dkt. No. 51.) A hearing was held on November 6, 2013, and bond was set at $25,000. (Dkt. No. 59.) On November 18, 2013, Plaintiff posted bond and was released from custody. (Id.) Plaintiff has since amended his complaint to include additional Plaintiffs. (Dkt. No. 72.)

U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

Second, Defendants invoke favorable Third and Fourth Circuit decisions relying on the "loss of authority" line of cases.[5] They suggest that adopting Plaintiff's interpretation impermissibly imposes a sanction on the government for failing to act in a specific, limited period of time.

Defendants' arguments are unpersuasive. The plain language of this statute sets forth an immediacy requirement. Furthermore, the purposes underlying the section and the structure of § 1226 amply support that reading. Thus, no deference to the BIA opinion is appropriate.

Even if there were an ambiguity in the statutory language, the BIA's argument goes too far. Its interpretation fails to recognize any temporal limitation on

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[5] Defense counsel suggested at oral argument that the "loss of authority" principle can be analyzed as part of the Chevron analysis or as an independent justification for the government's interpretation of its authority. (Tr. of Mot. Hr'g, at 27, Dkt. No. 48.) Although each analysis yields the same result, the arguments will be considered independently.

the government's ability to act. It also shifts unintended discretion to the executive branch, yielding arbitrary and capricious results, of which this case provides a prime example.

Finally, the "loss of authority" cases do not apply to this statute. Under Plaintiff's proposed interpretation of 1226(c) the government does not lose any power, since it still has the full authority to detain aliens pending removal under § 1226(a). Indeed, it is crucial to emphasize what is, and what is not, at issue in this case. The question before the court is not whether a convicted alien who is not taken into ICE custody "when released" from his criminal detention should be forever free from any risk of ICE detention. The much narrower question is whether an alien in this position is entitled to a hearing at which an Immigration Judge can consider the possibility of releasing the alien on conditions. Obviously, in many cases the upshot of this hearing will be a prompt denial of conditions, and immediate detention. The pivotal question, however, is whether any hearing will ever take place once a previously convicted alien is taken into custody at any time after his release from criminal detention.

A. Chevron Deference

The court must apply a two-step Chevron analysis to determine whether deference is due to an agency's interpretation of its governing statute. Chevron, 467 U.S. at 842-43. Step one asks "whether Congress has directly spoken to the precise question of law." Id. at 842. A court should use the ordinary tools of statutory interpretation, starting with the text, to elucidate the meaning of any statutory language. Id. at 842-43 n.9. If Congress has spoken clearly, that unambiguous language is given effect, and the analysis ends. However, if the statute is ambiguous, then a court proceeds to step two of Chevron. There, the question is whether the agency's interpretation is a "permissible" one.

1. Chevron Step One

It is impossible to read "when . . . released" as ambiguous without rendering it meaningless. This conclusion is unavoidable in light of both the plain language of the statute and the broader purpose and structure of the law.

a. Plain Language

The core of any statutory analysis is the language itself. "When the plain wording of the statute is clear,

that is the end of the matter." Saysana v. Gillen, 590 F.3d 7, 13 (1st Cir. 2009), citing BedRoc Ltd., LLC v. U.S., 541 U.S. 176, 183 (2004). A court "must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992)(citations omitted).

The most natural construction of the phrase "when the alien is released" is "at the time of release." A majority of district courts, including Judge William G. Young in this district, have agreed. See e.g., Castaneda v. Souza, -- F. Supp. 2d --, 2013 WL 3353747 (D. Mass. July 13, 2013); Baquera v. Longshore, -- F. Supp. 2d --, 2013 WL 2423178, *4 n.3 (D. Colo. June 4, 2013)(compiling cases). This interpretation of the five words "at the time of release" requires no manipulation; it simply flows from the phrase's usual meaning. Conversely, Defendants' proposed interpretation, "at any point after release," requires wrenching the phrase out of its normal context. The obvious manhandling of language proposed by Defendants is highlighted by looking at other language Congress could easily have used, assuming its intent followed Defendant's

proposed construction, and by examining the effect of removing the phrase from the statute.

If Congress intended the open-ended grant of power Defendants claim, it had far more precise language available. In fact, Congress has never been shy about utilizing broad language to set the time at which a party can begin to act. But, when Congress desires such an outcome, it uses explicit language.

For example, if Congress wanted the executive to detain an individual "any time after" release from custody, it could simply have used the phrase "any time after," as it has in numerous other statutes. See e.g., 8 U.S.C. § 1227(a)(2)(A)(ii); 10 U.S.C. § 12687; 10 U.S.C. § 14112; 14 U.S.C. § 323(c); 16 U.S.C. § 19jj-4; 42 U.S.C. 17385(d); 43 U.S.C. § 542; 46 U.S.C. § 40701(b). Alternatively, Congress could have said "at any point after." See e.g., 42 U.S.C. § 1395cc-4(c)(1)(B). An even simpler "thereafter" would have sufficed to convey the open-ended authority Defendants claim. See e.g., 12 U.S.C. § 3020; 16 U.S.C. § 18f-1. In sum, had Congress actually intended the result Defendants advocate, a plethora of words and phrases easily available to Congress would have been more appropriate.

Perhaps more importantly, Defendants' meaning renders the phrase "when the alien is released" superfluous. One elementary canon of statutory interpretation dictates that "a statute should be construed so that effect is given to all its provisions, so no part will be inoperative or superfluous, void or insignificant." Corley v. U.S., 556 U.S. 303, 314 (2009) quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)(further citations omitted).

Here, if one removes the phrase "when the alien is released" from § 1226(c), the only limits that remain are the enumerated categories. In that hypothetical case, the statute would allow the government to detain, without limit, any individual who falls into one of those categories. That, however, is identical to Defendants' current reading of the statute.

Defendants argue that the phrase does serve a purpose; it states the time at which the government can begin to act. Without the phrase, the executive is directed to detain specified individuals, but not told when it can begin to do so.

Silence, however, yields the same result. Put differently, if Defendants' construction of the phrase "when

the alien is released" prevailed, the phrase simply would not be needed at all. It is physically impossible for ICE to detain an individual before he is released from criminal custody. ICE can only begin to act once the alien is released. Thus, under Defendants' interpretation, whether the phrase "when the alien is released" is inserted into § 1226(c) is irrelevant, making the phrase "inoperative or superfluous." This is contrary to a basic rule of statutory construction. See Corley, 556 U.S. at 314.

In short, strictly based on the words of the statute themselves, it is flatly implausible to read "when . . . released" as suggesting anything but "at the time of release." This plain-language interpretation is powerfully supported by the purpose and structure of § 1226(c).[6]

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[6] It is possible, of course, to reduce this court's reading of the phrase "at the time of release" to absurdity by contracting the permissible time frame. Is the court suggesting that an alien must be detained within an hour of release? Within thirty seconds? The time frame at issue in this case -- five years of law-abiding life between a one-day criminal detention and apprehension by ICE -- renders any such quibbling irrelevant. See Castaneda, 2013 WL 3353747 at *12 ("While it has no occasion in this case to determine what constitutes a reasonable period of time, this Court would suggest that any alien who has reintegrated back into his community has not been detained within such a reasonable period of time").

b. Congressional Purpose

To illuminate the meaning of a statute, it may be necessary to examine Congress's purpose in enacting the law. See e.g., Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1333 (2011). With respect to § 1226(c), there are two relevant cases that illustrate Congress's intent. Together, they confirm that Congress undoubtedly intended to grant extensive power to the executive to detain certain aliens pending removal proceedings. Equally clearly, however, these cases describe only limited circumstances where detention is permitted without a bond hearing.

In Demore v. Kim, 538 U.S. 510 (2003), the Supreme Court upheld the constitutionality of § 1226(c) and outlined its view of Congress's intent. Congress was concerned with an increase in criminal convictions among non-citizens, paired with a decrease in the ability to deport those same individuals. Id. at 518 ("Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens."). Specifically, Congress was concerned with the threat of recidivism, flight risk, and the inability to identify and

locate the individuals once released. See id. at 518-22. The Congressional record supported that analysis. Id. citing Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S. Rep. No. 104-48 (1995); S. Rep. No. 104-249 (1996).

To deal with these problems, Congress authorized immediate immigration detention for certain individuals. The obvious goal was to ensure the direct transfer of potentially dangerous and elusive individuals from criminal custody to immigration authorities. Therefore, an extraordinary and limited power was provided to the executive to hold individuals without giving these individuals any opportunity for release. The intent animating this Congressional authorization is hardly vindicated by a distorted interpretation of the statute that would allow immigration authorities to take someone into custody without a right to a bond hearing, such as Plaintiff, who has been in the community living a law-abiding life for five years.

Following Demore's recognition of the executive's

broad power to effectuate the true purpose underlying § 1226(c), Saysana v. Gillen, 590 F.3d 7, 13 (1st Cir. 2009), focused on the associated limits to that authority. In Saysana, the court was asked whether § 1226(c) justified the mandatory detention of a non-citizen released from criminal custody for an offense enumerated in § 1226(c) before the 1998 effective date of the provision but who, after that 1998 date, was released for a separate, non-categorized offense. Saysana, 590 F.3d at 9-10. The First Circuit concluded, quite reasonably, that an individual could only be detained under § 1226(c) after release for one of the enumerated crimes. Id. at 18.

The court, noting Demore, explained, "[W]e do not dispute that Congress has determined that the specified offenses in the mandatory detention provision are of a particularly serious nature warranting greater restrictions on liberty pending removal proceedings." Id. Nevertheless, the court said, "The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." Id. at 17. In

essence, while Congress intended to grant broad authority to the executive to detain aliens pending their removal, § 1226(a) was intended to be the norm, with § 1226(c) a limited exception.

The confluence of these two cases clearly outlines a limited regime of mandatory detention, one where Congress envisioned the immediate (or, at a minimum, reasonably prompt) transfer from criminal custody to immigration detention. Congress's concern was with individuals whose criminal propensity or risk of flight, or both, rendered quick and mandatory detention critical. Under this rationale a five-year gap between criminal release and ICE mandatory detention makes no sense whatsoever. Both the Supreme Court's Demore decision and the subsequent First Circuit decision in Saysana support this common-sense conclusion.

Congress's goal in enacting 1226(c) simply does not apply when a person has re-integrated into society. The Saysana court said it best with respect to the threat of bail risks:

> [I]t is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks. The affected aliens are

> individuals who committed an offense, and were released . . . . They have continued to live in the United States. By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.

Id. at 17-18.

Plaintiff's life, as noted, is a case in point. In the time since his release from custody for the original offense, Plaintiff has had a son, purchased a home, and developed a successful business. He has worked for the good of the community to open a halfway house. While he may have fit the category of individuals Congress was concerned with when he was first released, at this point he falls far outside it. Under these circumstances, the only clear inference to draw from the statute as a whole is that Plaintiff should, at least, have an opportunity to present arguments supporting release to an Immigration Judge -- which, as of the date of this memorandum, he has done successfully.

c. Structure

The structure of a statute often assists a court in construing the meaning of its words. Id. at 13-14. As Judge Young pointed out in Castaneda, two aspects of the

structure of § 1226(c) support Plaintiff's view of the plain language.

First, as Saysana emphasized, § 1226(c) is a limited exception in the broader detention scheme. Castaneda, 2013 WL 3353747 at *6. Normally, a strong presumption exists in favor of discretionary detention and individualized bond hearings. Section 1226(a) is the default route if the government wishes to detain a non-citizen; § 1226(c) offers no more than a narrow exception.

The structure within § 1226(c) itself also favors Plaintiff's reading. Id. at 7. Section 1226(c) is broken up into two sub-sections: 1226(c)(1) provides a definition, and 1226(c)(2) offers a limited exception to mandatory detention. Each, respectively, should be read on its own.

The phrase, "when the alien is released" is included in the definitional section. The placement of the phrase in that section suggests that the five words are intended to serve as a limit. They help to define the group of non-citizens subjected to § 1226(c) as those who commit a crime in an enumerated category and are detained upon release.

However, giving the phrase "when the alien is released" Defendants' meaning disjoints that clause from the remainder

of § 1226(c)(1). Under Defendants' interpretation, an alien can be subjected to § 1226(c) regardless of when he or she is released. That reading entirely uproots the phrase from its context. See id.

In sum, the plain language of the statute indicates that "when . . . released" simply means "at the time of release." The congressional intent behind the law and the structure of the Act powerfully support that reading. Since Congress has spoken clearly on this issue, the Chevron analysis ends at step one.

2. Chevron Step Two

Even if the statute were ambiguous, which it is not, Defendants' interpretation would still falter under step two of the Chevron framework.

At Chevron step two, a court must ask whether the executive's interpretation of the statute is a "permissible" one. Chevron, 467 U.S. at 843. An agency's interpretation will be binding "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." U.S. v. Mead Corp., 533 U.S. 218, 227 (2001)(citations omitted). Specifically, deference to an agency's construction of statutory language will "depend

upon the thoroughness evident in its consideration, the validity of its reasoning, [and] the consistency with earlier and later pronouncements." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Defendants' interpretation would stumble at this second level of analysis (assuming that level were reached) because it is flatly unreasonable as a matter of ordinary usage and exhibits arbitrariness and caprice in its application. The most glaring problem with Defendants' reading is the complete absence of any temporal limitation on the executive's ability to act. Defendants insist that the statute mandates detention at any point after the Attorney General has decided to remove an individual for a reason enumerated in § 1226(c). Immigration authorities could wait ten, twenty, or thirty years, if they wished, before detaining an alien without any right to a bail hearing, even where the alien had lived an exemplary life for all those decades.

This outcome is not only patently unreasonable, but is inconsistent with a fundamental principle underlying our system of justice: except in the rarest of circumstances, the state may not postpone action to deprive an individual

of his or her liberty indefinitely. Time limits "promote repose by giving security and stability to human affairs," thus allowing a defendant to move on with his life. Wood v. Carpenter, 101 U.S. 135, 139 (1879).

That principle weighs heavily against Defendants in this case. A non-citizen, convicted of a crime, released from criminal custody, and resuming his life without any further offense for years, should not spend his days in indefinite peril of detention without any opportunity even to seek provisional release. Since Defendants' interpretation has this grossly arbitrary result, it is impermissible under step two of Chevron.

The second problem with Defendants' interpretation is that it has the potential to yield utterly capricious results. Defendants vigorously argue that Section 1226(c) affords them no discretion; they must, they say, detain Plaintiff without any bail hearing. In their view, Congress has required them to detain, without hearing, all individuals who fall into a § 1226(c) category, no matter how large the gap between a person's release from criminal custody and immigration detention. However, Defendants' interpretation creates precisely the discretion Congress

sought to avoid and capriciously subjects similarly situated non-citizens to grossly disparate treatment.

Consider the following. Two non-citizens have committed a crime enumerated in § 1226(c), have served the same sentence, and are both released from custody the same day. Under Plaintiff's interpretation, if ICE wished to detain the individuals without bail, it must take them both into custody at the time of their release from criminal custody. The two would be treated, under the statute, identically.

Under Defendants' reading, the statute gives the executive branch the power to treat these two individuals differently. One person may be held without bail on the day he is released from criminal custody. The other, for whatever reason, may be allowed to return to his family and community for years before the executive moves to detain him or her. This scenario gives the executive discretion to select who will be detained immediately upon release and who will be allowed to return to the community indefinitely. Given that Congress desired to eliminate, not broaden, discretion through this statute, that outcome makes zero sense. Plaintiff's reading creates far more consistency in

the statute itself, especially since ICE always retains the ability to seek detention of an alien at any time after his apprehension through a hearing before an Immigration Judge.

For all these reasons, even if Plaintiff's interpretation had not been clear from the plain words and clear import of the statute, the court would still be obliged to adopt it given the grave flaws in Defendants' proposed construction.[7]

B. The Loss of Authority Cases

Both the Third and Fourth Circuit, to different degrees, rely on the "loss of authority" line of cases to uphold Defendants' interpretation of 1226(c). Sylvain v. Att'y Gen. of U.S., 714 F.3d 150 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012). In U.S. v. Montalvo-Murillo, the Supreme Court stated the general principal that "construction of the [Bail Reform Act] must conform to the 'great principle of public policy,' applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or

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[7] Plaintiff also argues that the Rule of Lenity and Canon of Constitutional Avoidance require the court to adopt his interpretation. It is not necessary to reach these contentions given the simpler line of logic adopted here.

agents to whose care they are confided." 495 U.S. 711, 718 (1990). In additional cases, the Court made clear that "If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." U.S. v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)(citations omitted). In other words, absent a clear Congressional directive, a court should not strip power from the executive branch simply because the executive fails to act in a timely manner.

Drawing on this principle, the Third and Fourth Circuits concluded that it would be impermissible to read § 1226(c) as intending the phrase "at the moment of release" to signify "at the moment of release and not later." Hosh, 680 F.3d at 380. To do so, these courts suggested, would be to enact a penalty where none was intended.

In making this argument, the Sylvain court analogized § 1226(c) to the Speedy Trial Act ("STA"). 714 F.3d at 160. The Third Circuit offered that statute to illustrate the clarity with which Congress speaks when it wants a deadline to have bite. The STA explicitly precludes prosecution if a trial is not held within a certain period of time after a

plea is tendered. 18 U.S.C. § 3161(c)(1). The loss of the right to detain without a bail hearing, the argument runs, has no equivalent statutory mandate.

Like other courts, this court is not persuaded that this analogy holds up. See e.g., Castaneda, 2013 WL 3353747 at *10; Castillo v. ICE Field Office Dir., 907 F. Supp. 2d 1235, 1239 (W.D. Wash. 2012).

The essence of the "Loss of Authority" cases, as noted, is that a court should not intervene to strip power from the executive branch unless Congress explicitly directs it to. The principle thus applies in cases where judicial action would remove power from the executive. For instance, in Montalvo-Murillo, the executive would have been precluded from detaining certain individuals. Montalvo-Murillo, 495 U.S. at 717-18. In another case Defendants rely on, Brock v. Pierce Cnty., the executive would have been prohibited from recovering misused government funds had the Court ruled against the Secretary of Labor. 476 U.S. 253, 284 (1986).

That critical component, elimination of authority, is missing here. The relevant grant of authority in § 1226 is the power to detain an individual pending removal proceedings. That authority has its genesis in § 1226(a).

Section (c) is merely an exception that, in limited cases, alters the method by which that authority is carried out. Giving § 1226(c) its plain meaning here does not limit or prevent the government from detaining individuals pending removal. The fair construction of the statute only has the effect of circumscribing the executive's power to detain a person without a hearing. The extraordinarily powerful sanction set forth in the STA -- the prohibition of a prosecution of a criminal, with or without prejudice -- offers no supportive analogy for Defendants' proposed construction of 1226(c).

IV. CONCLUSION

For the foregoing reasons, the court ALLOWED Plaintiff's Writ of Habeas Corpus (Dkt. No. 1), DENIED Plaintiff's Motion for a Preliminary Injunction (Dkt. No. 2) without prejudice, and DENIED Defendant's Motion to Dismiss(Dkt. No. 13).

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge