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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARFIELD GAYLE, *et. al.*, Petitioners/Plaintiffs v. JANET NAPOLITANO, *et al.*, Respondents/Defendants	No. 3:12-cv-2806-FLW

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY GARFIELD GAYLE

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PRELIMINARY STATEMENT

For more than nine months, Petitioner Garfield Gayle has been subject to mandatory detention under 8 U.S.C. § 1226(c), even though the U.S. Department of Homeland Security ("DHS") did not take custody of him until *more than five years* after his release from jail for the misdemeanor possession offense that purportedly subjects him to the statute. As this Court has held on five separate occasions, § 1226(c) requires DHS to take custody "*when* the alien is released" from criminal custody for the specified offense in order for mandatory detention to apply—and not years afterwards. *See Kerr v. Elwood*, 2012 WL 5465492 (D.N.J. Nov. 8, 2012); *Baguidy v. Elwood*, 2012 WL 5406193 (D.N.J. Nov. 5, 2012); *Nimako v. Shanahan*, 2012 WL 4121102 (D.N.J. Sept. 18, 2012); *Kot v. Elwood*, 2012 WL 1565438 (D.N.J. May 2, 2012); *Christie v. Elwood*, 2012 WL 266454 (D.N.J. Jan. 30, 2012).

In its response to Mr. Gayle's habeas petition,[1] DHS offers no new arguments that this Court has not already considered and rejected.[2] Accordingly, this Court should grant Mr. Gayle's individual habeas petition and order the government to provide Mr. Gayle an immediate bond hearing under 8 U.S.C. § 1226(a).[3]

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[1] On December 4, 2012, DHS responded to Mr. Gayle's individual habeas claims but reserved responding to the class claims alleged in the Amended Petition/Class Action Complaint. Dkt. 20 at 2-3. This reply therefore addresses Mr. Gayle's individual claims alone. Mr. Gayle continues to assert that § 1226(c) does not authorize his mandatory detention for all the reasons set forth in the class complaint.

[2] *See, e.g.*, Answer, at 9-11, 13-35, filed in *Nimako*, 2012 WL 4121102 (D.N.J. Sept. 18, 2012); Answer, at 9-30, filed in *Kerr*, 2012 WL 5465492 (D.N.J. Nov. 8, 2012).

[3] There are at least two appeals pending in the Third Circuit on this issue. *See Sylvain v. Attorney Gen.*, No. 11-3357 (3d Cir. docketed Aug. 31, 2011); *Desrosiers v. Hendricks*, No. 12-1053 (3d Cir. docketed Jan. 11, 2012). This Court has indicated that "absent a directive from the Third Circuit, [it] is not inclined to depart from . . . [its] prior decisions." *Kerr*, 2012 WL 5465492, at *3. Petitioner respectfully requests that the Court take the same approach here.

STATEMENT OF FACTS

Garfield Gayle is a Jamaican national and a lawful permanent resident of the United States. Lauterback Decl., Ex. A (Notice to Appear, dated Mar. 24, 2012). He has lived in the United States for approximately thirty (30) years, most of the time in New York City. Mr. Gayle's family also lives in the New York area and includes two U.S. citizen daughters, two U.S. citizen grandchildren, and his U.S. citizen ex-wife, with whom he maintains a close and supportive relationship. *See* Gayle Decl. ¶ 3.

Mr. Gayle also has a solid employment history. In particular, for nearly the past 13 years, he has been a union carpenter with the American Brotherhood of Carpentry Local 157. *See* Gayle Decl. ¶¶ 5-7; Lauterback Decl., Ex. C (Letter from UBCJA Local Union 157, dated July 16, 2012). He has worked on various construction projects in the New York area, including the Fulton Street Mall in downtown Brooklyn, and is highly respected for his skills. *See id*., Ex. D (Aff. of Martin Allen, dated Oct. 9, 2012, ¶¶ 6-13); Gayle Decl. ¶¶ 5-6.

According to documents filed by ICE, in May 1995, Mr. Gayle was convicted after a bench trial of criminal possession of a controlled substance with the intent to sell in the third degree under New York State Penal Law § 220.16. Lauterback Decl., Ex. A. Mr. Gayle served approximately two years of jail time and was released on parole in June 1997. He satisfied all conditions of parole and was discharged in May 2001. *See id*. ¶ 2. In March 2007, he pleaded guilty to a misdemeanor controlled substance offense for which he was sentenced to ten days in jail. *See* Dkt. 20 at 8; Dkt. 20-1 ¶ 6

On March 24, 2012, a team of U.S. Immigration and Customs Enforcement ("ICE") officers arrested Mr. Gayle at his home in Brooklyn. Gayle Decl. ¶ 2. Mr. Gayle subsequently learned that ICE was charging him with removal on the ground that his 1995 conviction rendered him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance offense) and 8 U.S.C. § 1227(a)(2)(A)(iii) (drug trafficking aggravated felony). *See* Lauterback Decl., Ex. A.

Since his arrest by ICE—a period of more than nine months—Mr. Gayle has been held in mandatory detention under 8 U.S.C. § 1226(c) at the Monmouth County Correctional Facility in Freehold, New Jersey. DHS asserts that Mr. Gayle is subject to mandatory detention based on his March 2007 misdemeanor offense. *See* Dkt. 20 at 8; Dkt. 20-1 ¶ 6.[4] At no point has DHS alleged that Mr. Gayle is a flight risk or danger, nor has Mr. Gayle ever received a bond hearing or any other individualized determination that would justify his detention.

Indeed, Mr. Gayle poses neither a flight risk nor a danger to the community. If released, Mr. Gayle would live with his ex-wife, Antoinette Vanderveer, and he has a standing offer of employment. Gayle Decl. ¶¶ 22-24; Vanderveer Decl. ¶ 8; Lauterback Decl., Ex. E (Letter from Martin Allen, P.P.E.E. Construction, Inc., dated Aug. 8, 2012). He would comply with all immigration court dates and is also willing to submit to reasonable conditions of supervision to ensure his appearance, including electronic monitoring if deemed necessary. *See* Gayle Decl. ¶ 24. Meanwhile, his ongoing mandatory detention has caused tremendous financial and emotional hardship to himself and his family. *See* Gayle Decl. ¶¶ 9-21; Vanderveer Decl. ¶¶ 4-6; Makanju Decl. ¶¶ 4-9; Isha Gayle Decl. ¶¶ 3-6.

ARGUMENT

Mr. Gayle is not properly subject to mandatory detention under 8 U.S.C. § 1226(c). Section 1226(c) commands the Attorney General to "take into custody any alien who . . . is deportable by reason of having committed any offense committed in section [1227(a)(2)(A)(iii) & § 1227(a)(2)(B)] . . . *when the alien is released*" from custody for that offense, 8 U.S.C. § 1226(c)(1) (emphasis added), and then prohibits the release of any such alien, except in exceptional circumstances not at issue here, 8 U.S.C. § 1226(c)(2). Here, DHS took Mr. Gayle into immigration custody *more than five years* after his release from his 2007 conviction—not

[4] Mr. Gayle's 1995 conviction does not subject him to mandatory detention because he was released from custody before the effective date of § 1226(c), or October 1998. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1103 (BIA 1999).

"when [he was] released" from criminal custody after completing his ten-day sentence. But Congress did not intend for mandatory detention to apply to individuals, such as Mr. Gayle, who are detained by DHS months or years after their reentry into society following their conviction. Instead, those individuals are subject to discretionary detention under § 1226(a)—with the right to a hearing before an immigration judge to determine if they can be released on bond while they litigate their challenges to removal.

DHS disagrees, relying on the decision of the Board of Immigration Appeals ("BIA") in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001). In *Rojas*, the BIA acknowledged that the "when . . . released" clause of § 1226(c) requires the Attorney General "to take custody of aliens *immediately* upon their release from criminal confinement." *Id*. at 122 (emphasis in original). The BIA nonetheless concluded that the statute requires detention even if the noncitizen is taken into custody much later because, according to the BIA, the "when . . . released" clause is merely a "statutory command" rather than a "*description* of an alien who is subject to detention." *Id*. at 121 (emphasis in original). Thus, the BIA concluded, § 1226(c) mandates detention without possibility of bail "regardless of when [the noncitizen] [was] released from criminal confinement and regardless of whether [he has] been living within the community for years after [his] release." *Id*. at 122.

This Court has rejected *Rojas* on five separate occasions, holding that the plain language of the statute requires detention only for those individuals detained at the time of their release from criminal custody for an enumerated offense. *See supra* at 1. Certainly, § 1226(c) cannot reasonably be read to require the detention of individuals like Mr. Gayle who have been living in the community and are detained years after their release from criminal custody. Thus, Mr. Gayle is entitled to an immediate bond hearing under 8 U.S.C. § 1226(a) to determine whether his continued detention is justified.

I. SECTION 1226(C) PLAINLY REQUIRES THAT A NONCITIZEN BE TAKEN INTO DETENTION AT OR ABOUT THE TIME OF RELEASE FROM CRIMINAL CUSTODY.

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court applies a two-step analysis to an agency's interpretation of a statute. First, the Court must determine whether Congress has directly spoken to the precise question at issue using traditional tools of statutory construction. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-49 (1987); *Hanif v. Attorney Gen.*, 694 F.3d 479, 483 (3d Cir. 2012). If the statute is clear, the Court must give effect to Congress's intent. *Chevron*, 467 U.S. at 842-43. If the Court concludes that Congress's intent is ambiguous, the Court must defer to the agency's interpretation, provided that it is reasonable. *Id.* at 843 & n.11.

This case should begin and end with the text of § 1226(c). The plain language of the statute does not permit mandatory detention for someone like Mr. Gayle who was taken into immigration custody years after his release from criminal custody. Section 1226(c) consists of two paragraphs that work together to impose mandatory detention on noncitizens who fall within its terms. The first paragraph, § 1226(c)(1), provides that:

> The Attorney General shall take into custody any alien who . . .
>
> (B) is deportable by reason of having committed any offense covered in section [1227(a)(2)(A)(ii) and 1227(a)(2)(B)], . . .
>
> *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.

8 U.S.C. § 1226(c)(1) (emphasis added). The second paragraph, § 1226(c)(2), provides that the Attorney General may not release "an alien *described in paragraph (1)*" absent certain narrow circumstances that are not relevant here. 8 U.S.C. § 1226(c)(2) (emphasis added).

As this Court has repeatedly held, § 1226(c) "means just what it says, *i.e.*, the Attorney General shall take the alien into custody when the alien is released." *Christie*, 2012 WL 266454

at *7 (internal quotation marks omitted); *accord Kerr*, 2012 WL 5465492, at *3-4; *Baguidy*, 2012 WL 5406193, at *7-9; *Nimako*, 2012 WL 4121102, at *5-8; *Kot*, 2012 WL 1565438, at *5-8. This reading has been confirmed by the overwhelming majority of federal courts, including by several judges in this District.[5]

Nonetheless, DHS asserts that the "when . . . released" clause is ambiguous, and that this Court should abandon its prior decisions and defer to *Rojas*. DHS makes three arguments, all of which the Court has previously rejected and should reject again here.

A. The "When . . . Released" Clause Describes the Class of Noncitizens Subject to Mandatory Detention.

First, DHS argues that the statute is ambiguous as to whether the phrase in § 1226(c)(2), which prohibits release from custody of those individuals "described in paragraph (1)," refers to paragraph (1) in its entirety or refers only to subparagraphs (A)-(D), without encompassing the "when… released" language. That is, DHS construes the "described in paragraph (1)" language as referring only to those individuals described in subparagraphs (A)-(D) of paragraph (1), rendering the "when … released" language irrelevant and thus subjecting all such individuals to the prohibition of release from ICE custody regardless of how long they were released from

[5] *See, e.g.*, *Kerr*, 2012 WL 5465492, at *3 (citing cases); *Davis v. Hendricks*, 2012 WL 6005713, at *6-11 (D.N.J. Nov. 30, 2012); *Morrison v. Elwood*, 2012 WL 5989456, at *3-4 (D.N.J. Nov. 29, 2012); *Martial v. Elwood*, 2012 WL 3532324, at *3-4 (D.N.J. Aug.14, 2012); *Beckford v. Aviles*, 2011 WL 3515933, at *7-9 (D.N.J. Aug. 5, 2011); *see also*, *e.g.*, *Castillo v. ICE Field Office Dir.*, 2012 WL 5511716, at *4-5 (W.D. Wash. Nov 14, 2012); *Bogarin–Flores v. Napolitano*, 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012); *Ortiz v. Holder*, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); *Scarlett v. DHS*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); *Bromfield v. Clark*, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007); *Zabadi v. Chertoff*, 2005 WL 3157377, at *4-5 (N.D. Cal. Nov. 22, 2005); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004). *But see, e.g.*, *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (finding "when . . . released" ambiguous and deferring to *Rojas*), *cert. petition filed sub nom.*, *Pasicov v. Holder*, 2012 WL 5210007 (Oct. 15, 2012); *Diaz v. Muller*, 2011 WL 3422856 (D.N.J. Aug. 4, 2011) (same); *Cave v. Decker*, 2012 U.S. Dist. LEXIS 120668 (M.D. Pa. Jan. 4, 2012) (same); *Sulayao v. Shanahan*, 2009 WL 3003188 (S.D.N.Y. Sept. 15, 2009) (same).

criminal incarceration before being taken into ICE custody. In other words, in DHS's view, the "when . . . released" clause is not part of the description of who is subject to mandatory detention, but is merely a directive to ICE as to the point at which its duty to detain the noncitizen arises. *See* Dkt. 20 at 34-35; *see also Rojas*, 23 I. & N. Dec. at 121.

DHS's argument requires an unnatural reading of the statute. Paragraph (1) refers, in one continuous sentence, to noncitizens who are inadmissible or deportable on certain grounds and who have been taken into custody at a particular point in time following their release from criminal custody. The "when . . . released" clause is contained in "flush language" that directly follows subparagraphs (A)-(D), reflecting that the clause modifies all of the classes described in those subparagraphs.[6] Subparagraphs (A)-(D) are also separated from the first clause of the paragraph by a dash, and from the last clause of the paragraph by a comma. This punctuation reinforces that the last clause—the "when . . . released" clause—modifies subparagraphs (A)-(D). *See* 8 U.S.C. § 1226(c)(1); *see also, e.g.*, *Davis*, 2012 WL 6005713, at *11 (holding that the "when . . . released" clause "is not a statutory deadline, but limits the class of criminal aliens subject to mandatory detention"); *Bracamontes v. Desanti*, 2010 WL 2942760, at *6 (E.D. Va. June 16, 2010), *abrogated by Hosh*, 680 F.3d 375. However, DHS reads subparagraphs (A)-(D) as if they may be extracted from paragraph (1) and themselves serve as the "paragraph (1)" referenced in § 1226(c)(2). Unsurprisingly, this Court and many others have rejected this strained interpretation. *See, e.g.*, *supra* n.5; *Rojas*, 23 I. & N. Dec. at 135-36, 139 (Rosenberg, dissenting); *Baguidy*, 2012 WL 5406193, at *6-7 (citing dissent in *Rojas*).

Moreover, this plain reading of the statute is confirmed by the First Circuit's decision in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), which this Court has repeatedly found persuasive. *See, e.g.*, *Baguidy*, 2012 WL 5406193, at *8. In *Saysana*, the court held that the plain language

[6] *See, e.g.*, *Sherwin-Williams Co. Emp. Health Plan Trust v. Comm'r*, 330 F.3d 449, 454 n.4 (6th Cir. 2003) ("Provisions appearing in a statute's 'flush language,' or that language that appears flush against the margins in the code, generally apply to 'the entire statutory section or subsection.'" (quoting *Snowa v. Comm'r*, 123 F.3d 190, 196 n.10 (4th Cir.1997))).

of § 1226(c) did not apply to a noncitizen taken into ICE custody when he was released from criminal custody for a non-designated conviction, but only to an individual taken into ICE custody upon release from criminal custody for a conviction that triggered mandatory detention under the statute. 590 F.3d at 9, 13-16. In doing so, *Saysana* treated the "when . . . released" clause as unambiguously part and parcel of the definition of the persons subject to the statute.[7]

B. The "When . . . Released" Clause Requires the Attorney General to Take Custody At or About the Time of Release.

Second, DHS argues that the "when . . . released" clause reasonably can be read to mean *any time* after release. *See* Dkt. 20 at 35-38. This Court has repeatedly rejected this argument, holding that the clause is naturally read as requiring that the Attorney General act at or about the time of release. *See, e.g.*, *Baguidy*, 2012 WL 5406193, at *7-9. Indeed, even *Rojas* rejected DHS's argument in this respect, acknowledging that "[t]he statute does direct the Attorney General to take custody of aliens *immediately* upon their release from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). Notably, DHS's brief ignores this point entirely. Certainly, DHS's litigation position—which is directly contrary to the BIA's construction in *Rojas*—is not entitled to *Chevron* deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

Instead, DHS's argument relies primarily on the Fourth Circuit's decision in *Hosh*, 680 F.3d 375, and the Supreme Court's decision in *United States v. Willings*, 8 U.S. (4 Cranch) 48 (1807), *see* Dkt. 20 at 35-37. Both are unavailing. As an initial matter, *Hosh* fails to address the conflict between the BIA's position in *Rojas* and DHS's litigation position that "when" can mean "at any time"—a position that therefore warrants no deference. Moreover, this Court has already rejected the analysis in *Hosh* as failing to read the "when . . . released" clause in light of §

[7] DHS claims *Saysana* is inapposite because it did not address the specific issue raised in *Rojas*. *See* Dkt. 20 at 43-44. This Court has rejected this argument before, *see Nimako*, 2012 WL 4121102 at *7 (citing Answer at 14), and should do so again here.

1226(c)'s text, context, and purpose. *See Baguidy*, 2012 WL 5406193, at *8-9; *Nimako*, 2012 WL 4121102 at *6-8; *Kerr*, 2012 WL 5465492 at *3-4.[8]

Willings is inapposite for the same reason.[9] The Supreme Court in *Willings* construed the phrase "when . . . sold" in an Act addressing ship registration to designate when a boat owner's duty to register his boat accrues (*i.e.*, at the time of sale), as opposed to the "precise time" registration must be performed. *Willings*, 8 U.S. (4 Cranch) at 55. However, the text and context of the Act in *Willings* is entirely inapplicable to § 1226(c). Indeed, *Willings* itself emphasized that the mere fact that the word "when" may be used in multiple ways does not mean it is ambiguous. Rather, "the context must decide in which sense ['when'] is used in the law under consideration." *Id*.[10]

Here, the text, structure, and purpose of § 1226(c) and the detention scheme as a whole make clear that Congress intended the government to take custody of noncitizens at or around the time of their release from criminal custody for mandatory detention to apply. Indeed, as this Court has held, and as the First Circuit held in *Saysana*, the text of § 1226(c) "clearly envision[s]

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[8] The overwhelming majority of courts outside the Fourth Circuit have found *Hosh* unpersuasive, including most judges in this District. *See, e.g.*, *Davis*, 2012 WL 6005713, at *8 (citing cases); *Morrison*, 2012 WL 5989456, at *3-4; *Charles v. Shanahan*, 2012 WL 4794313, at *7 (D.N.J. Oct. 9, 2012); *Kporlor v. Hendricks*, 2012 WL 4900918, at *6-7 (D.N.J. Oct. 9, 2012); *Campbell v. Elwood*, 2012 WL 4508160, at *4 (D.N.J. Sept. 27, 2012); *Martinez v. Muller*, 2012 WL 4505895, at *3-4 (D.N.J. Sept. 25, 2012); *Castillo*, 2012 WL 5511716, at *4. One only court outside the Fourth Circuit has found *Hosh* persuasive. *See Silent v. Holder*, 2012 WL 4735574, *2 (N.D. Ala. Sept. 27, 2012). Although two judges in this District have deferred to *Rojas* post-*Hosh*, neither relied upon *Hosh*'s reasoning to reach their results. *See Castillo v. Aviles*, 2012 WL 5818144, at *4 (D.N.J. Nov 15, 2012); *Espinoza–Loor v. Holder*, 2012 WL 2951642, at *4 (D.N.J. July 2, 2012).

[9] Notably, DHS has previously cited *Willings* in its briefs to this Court, and this Court has rejected its arguments. *See* Answer at 22, filed in *Nimako*, 2012 WL 4121102 (D.N.J. Sept. 18, 2012); Answer at 15-16, filed in *Kerr*, 2012 WL 5465492 (D.N.J. Nov. 8, 2012).

[10] Thus, the Court in *Willings* held that "when" designated "the occurrence [i.e. the sale] which shall render [registration] necessary" because the statutory text otherwise made clear that "forfeiture . . . depend[ed] on the failure to register," and not "the failure to register at the precise time" of sale, and that, as a practical matter, registration could not take place at the time of sale, but only after a "reasonable interval." *Id*. at 55-56.

a continuous chain of custody of dangerous aliens." *Baguidy*, 2012 WL 5406193, at *8; *accord Nimako,* 2012 WL 4121102, at *7. Thus, as the First Circuit explained, the language of § 1226(c) "embodies the judgment of Congress" that individuals in criminal custody for an offense listed in the statute "should not be returned to the community pending disposition of [their] removal proceedings." *Saysana*, 590 F.3d at 13.

The structure of the INA's detention scheme further confirms that § 1226(c) applies only to noncitizens detained at or about the time of release.[11] First, Congress established mandatory detention as an exception to the usual discretionary detention. *See* 8 U.S.C. § 1226(a) (permitting discretion "[e]xcept as provided in subsection (c)"). Thus, as the First Circuit explained in *Saysana*, "[t]he 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." *Saysana*, 590 F.3d at 17. As this Court has held, "by definition, aliens who have lived in the community for years after release from criminal incarceration are those who are among the least likely to pose a flight risk or danger to the community, the presumed reasons for mandatory detention." *Baguidy*, 2012 WL 5406193, at *8; *see also Saysana*, 590 F.3d at 17-18 ("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.").[12]

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[11] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent . . . primarily is discerned from the language of the . . . statute and the statutory framework surrounding it. . . . Also relevant, however, is the structure and purpose of the statute as a whole . . . ." (internal quotation marks omitted)).

[12] Congress's deliberate choice of a prospective effective date for § 1226(c), *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 303(b), Pub. L. No. 208, 110 Stat. 309, supports this position as well. DHS asserts that it would make no sense for Congress to limit mandatory detention to only some, and not all, individuals convicted of the offenses specified in the statute. *See* Dkt. 20 at 30, 31, 35. But if that were the case, Congress would have applied the statute retroactively to *all* individuals convicted for these offenses and released prior to its effective date.

Second, Congress's enactment of the Transition Period Custody Rules ("TPCR") makes sense only if § 1226(c) requires immediate detention upon release. The TPCR permitted the Attorney General to delay the effective date of § 1226(c) for one or two years. *See* IIRIRA § 303(b). Concerned that "the Attorney General did not have sufficient resources" to implement a regime of mandatory detention, the TPCR were "designed to give the Attorney General a . . . grace period . . . during which mandatory detention of criminal aliens would not be the general rule." *Matter of Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). If the concurrently enacted version of § 1226(c) did not require detention immediately upon release from criminal custody, the TPCR would have been gratuitous; indeed, ICE could wait as long as it wanted before detaining an otherwise qualified noncitizen. *See Davis*, 2012 WL 6005713, at *9-10.

C. Section 1226(c) Does Not Apply When DHS Fails to Act At or About the Time of Release.

Finally, DHS asserts that, even if § 1226(c) requires DHS to take custody immediately, DHS does not have to follow this mandate. DHS cites several Supreme Court cases holding that where a statutory timing requirement imposed upon the government does not specify the consequences of noncompliance, courts should not ordinarily construe the government's failure to meet the time limit as a loss of its authority to act. *See* Dkt. 20 at 38-40 (citing cases). As an initial matter, since *Rojas* "did not rely on the statutory deadline rationale, deference to this argument is not appropriate." *Davis*, 2012 WL 6005713, at *11 (citing *Bowen*, 488 U.S. at 212). But more importantly, as this Court has already held, "[t]his argument misses the mark." *Kot*, 2012 WL 1565438 at *8.

First, the problem that the cases cited by DHS sought to avoid is not present here. Unlike in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), the petitioner here is not arguing that DHS loses all authority to detain due to its failure to detain him five years ago. Rather, DHS maintains authority to detain anyone facing removal proceedings no matter when that person is detained, but under the discretionary rather than the mandatory detention statute, 8 U.S.C. §

1226(a). Thus, under § 1226(a), DHS retains the authority to deny bond where an individual is flight risk or danger to society. *See Kot*, 2012 WL 1565438 at *8 (holding that *Montalvo-Murillo* is inapposite); *accord Baguidy*, 2012 WL 5406193, at *9; *Nimako*, 2012 WL 4121102 at *8 n.5; *Davis*, 2012 WL 6005713, at *11 n.6. For this reason, holding the government to the "when . . . released" requirement hardly engenders a "coercive sanction" that strips the government of all power to act. *See* Dkt. 20 at 4.

In addition, the statutory schemes at issue in the cases cited by DHS are materially different. Here, the requirement that the noncitizen be taken into custody at a certain time is part of the substantive description, in "paragraph (1)," of *who* is subject to mandatory detention. In contrast, the cases that DHS cites involve procedural requirements alone. Thus, in *Montalvo-Murillo*, the duty to provide a detention hearing by the time of the detainee's "first appearance" was a procedural requirement of 18 U.S.C. § 3142(f) that was separate and distinct from the substantive provisions defining the categories of individuals subject to pretrial detention and conferring authority on the judicial officer to order that detention. *Id*. § 3142(e). *See Montalvo-Murillo*, 495 U.S. at 717 (explaining that subsection (e) authorizes detention while subsection (f) "sets forth the applicable procedures"). The other cases that DHS cites are distinguishable for the same reasons. *See* Dkt. 20 at 38-40 (citing cases). In each of these cases, the Court rejected the argument that the government lost all authority to act by failing to comply with separate procedural guidelines. However, here the "when the alien is released" clause is part and parcel of § 1226(c)'s substantive provision. *See supra* Point I.A. Failing to detain someone when she is released from criminal custody is, then, no mere procedural violation, but substantively defines the class of people to whom mandatory detention applies.

II. EVEN IF SECTION 1226(C) WERE AMBIGUOUS, *ROJAS* DOES NOT MERIT DEFERENCE BECAUSE IT IS UNREASONABLE TO READ "WHEN . . . RELEASED" TO MEAN "ANY TIME AFTER RELEASE."

Even if this Court were to conclude that the "when . . . released" clause of § 1226(c) is ambiguous, it should nonetheless reject *Rojas* as unreasonable. *See Chevron*, 467 U.S. at 844;

Judulang v. Holder, 132 S.Ct. 476, 483 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance." (internal quotation marks omitted)). This is so for at least two reasons.

First, *Rojas* draws an arbitrary line between statutory language that is "descriptive" as opposed to "directive." *See Rojas*, 23 I. & N. Dec. at 121. As noted above, the BIA held that the timing of release is irrelevant to § 1226(c) because the "when . . . released" clause is a "statutory command" not a "description" of noncitizens subject to mandatory detention. *See id*. at 121. However, as the dissent in *Rojas* noted, this is a distinction without a difference. *See id*. at 135 (Rosenberg, dissenting) ("[T]he majority fails to provide any reason why characterizing the language as a directive makes it any less a description.").

Second, the BIA's interpretation leads to arbitrary and capricious results that are "unmoored from the purposes and concerns" of the statute. *Judulang*, 132 S.Ct. at 490. Under the BIA's view, anyone who has been in jail for a removable offense at any time since October 1998 when the statute took effect—a period of now more than fourteen years—is subject to mandatory detention at whatever point in the future DHS chooses to detain them. Such a reading unreasonably severs the explicit statutory link between mandatory detention and bail risk, as measured by the recency of a conviction. *See Saysana*, 590 F.3d at 17-18.

DHS makes two arguments urging deference to *Rojas*, both of which lack merit. First, DHS argues that *Rojas* is consistent with Congress's intent that removal proceedings not cut short criminal sentences. *See* Dkt. 20 at 41-42. But requiring DHS to take custody at or about the time the alien is *released* from his criminal sentence obviously does not undermine that goal.

Second, DHS argues that it may not be feasible for it to take custody immediately upon a noncitizen's release from custody because it may not receive timely notice of the criminal arrest or may need to wait for a criminal appeal to be resolved. *See* Dkt. 20 at 42-43. As an initial matter, DHS's concerns about timely notice are increasingly less relevant in light of the continuing expansion of enforcement programs such as Secure Communities and the Criminal Alien Program, which seek to ensure that DHS is promptly informed of removable noncitizens in

the criminal justice system *before* they are released.[13] In addition, DHS's argument regarding appeals makes no sense, as individuals who lose their appeals are usually still in criminal custody or, if released pending appeal, will be taken back into criminal custody for the specified offense and eventually released, at which point DHS could place them in detention. And in the rare case where an individual satisfies his criminal sentence while his appeal is pending, DHS may still detain him after his appeal is decided, but must do so under § 1226(a), and not under § 1226(c).

Moreover, even assuming it is reasonable to interpret "when . . . released" to include days or even a few weeks after release, it is unreasonable to interpret that clause to sweep up individuals, like Mr. Gayle, who were detained *years* after their release to the community. *Compare Zabadi*, 2005 WL 3157377, at *4 (invalidating mandatory detention two years after noncitizen's release), *and Scarlett*, 632 F. Supp. 2d at 219-20 (18 months), *with Rojas*, 23 I. & N. Dec. at 118 (upholding mandatory detention of person detained by ICE two days after release).

Indeed, the unreasonable real world effects of DHS's position are amply illustrated by this case. For more than five years after his conviction for misdemeanor possession, Mr. Gayle has lived a productive life in the community, maintaining close family relationships and stable employment. *See supra* Statement of Facts. If an Immigration Judge deems his conduct over the last five years to be insufficient to justify his release on bond, the judge has ample authority to deny bond. But it is unreasonable under these circumstances to construe § 1226(c) to impose a categorical presumption that Mr. Gayle is a danger to the community or a flight risk, especially based upon a misdemeanor offense from 2007 for which he was sentenced to only ten days in jail.

CONCLUSION

For these reasons, the Court should grant Mr. Gayle's individual habeas petition and order the government to provide him an immediate bond hearing under 8 U.S.C. § 1226(a).

[13] *See generally* ICE, Secure Communities, http://www.ice.gov/secure_communities/; ICE, Criminal Alien Program, http://www.ice.gov/criminal-alien-program/.

Respectfully submitted,

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