UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CLAYTON RICHARD GORDON and PRECIOSA ANTUNES, on behalf of themselves and others similarly situated,	)	
Plaintiff-Petitioners,	)	
v.	)	Civ. No. 3:13-cv-30146
JANET NAPOLITANO, ET AL.,	)	
Defendant-Respondents.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION

Plaintiff-Petitioners Clayton Richard Gordon and Preciosa Antunes ("Plaintiffs") are being held in mandatory immigration detention, without the opportunity to seek release on bond, based on the government's erroneous interpretation of the mandatory detention provision, 8 U.S.C. § 1226(c). They ask this Court to rule that they are not subject to § 1226(c) and to order that they receive individualized bond hearings at which a neutral decisionmaker can determine whether they pose public safety or flight risks that require their continued detention during the pendency of their immigration proceedings.

Mandatory detention is an exception to the discretion that immigration authorities otherwise possess, under § 1226(a), to decide whether to detain or release a noncitizen in removal proceedings. The mandatory detention provision, § 1226(c), requires the detention of certain noncitizens "when [they are] released" from criminal custody for offenses that render them removable from the United States. Yet the government imposes mandatory detention on

noncitizens, including Plaintiffs, who were not taken into immigration custody "when . . . released" from criminal custody for one of those predicate removable offenses. Relying on the decision of the Board of Immigration Appeals ("BIA" or "Board") in Matter of Rojas, 23 I&N Dec. 117 (BIA 2001), the government applies mandatory detention to noncitizens taken into immigration custody at any time after their release from criminal custody for a predicate offense—even if that release occurred years ago.

Clayton Richard Gordon is a case in point. He is being detained without the possibility of bond based on a 2009 drug conviction, even though the local authorities who prosecuted that offense released him shortly after his arrest in 2008. Gordon came to the United States at age six, has been a lawful permanent resident for more than 30 years, and served in the United States Army. After he was released from his 2008 arrest, he and his fiancée settled down, had a son, and bought a home. In 2013, Gordon was running his own contracting business and serving his community in the Hartford area. But, as he drove to work on June 20, 2013, Gordon was surrounded by armed Immigration and Customs Enforcement ("ICE") agents. Now, under the government's interpretation of § 1226(c), an Immigration Judge cannot even consider whether he poses any danger or flight risk that warrants his detention.

Gordon's case highlights the "drastic[]" difference "between ordering an individual in custody to remain in custody and ordering the detention of an individual who had been free." Castaneda v. Souza, No. 1:13-cv-10874, 2013 WL 3353747, *9 n.10 (D. Mass. July 3, 2013), Notice of Appeal filed August 7, 2013. Section 1226(c) accounts for this difference by requiring detention without bond only when a noncitizen is taken into ICE custody at the time of his release from criminal custody for an offense designated under the mandatory detention provision. See id. at 9-10.

Preliminary injunctive relief is appropriate here. First, Plaintiffs are likely to succeed on the merits of their claim that their detention violates § 1226. Both judges of this Court to have considered the question have rejected the government's interpretation of the mandatory detention provision. Forero-Caicedo v. Tompkins, 1:13-cv-11677 (D. Mass. July 17, 2013) (Young, J.); Castaneda, 2013 WL 3353747 (Young, J.); Oscar v. Gillen, 595 F. Supp. 2d 166, 169 (D. Mass. 2009) (Tauro, J.). And for good reason. Plaintiffs' mandatory detention undermines the plain meaning of § 1226(c), raises serious constitutional questions, and contradicts the First Circuit's analysis of § 1226(c) in Saysana v. Gillen, 590 F.3d 7, 13, 17-18 (1st Cir. 2009). Indeed, even the BIA has noted the inconsistency between Saysana and Matter of Rojas. See Matter of Garcia Arreola, 25 I&N Dec. 267, 270-71 (BIA 2010).

Plaintiffs will also suffer irreparable harm—i.e., continued detention away from their families—if their mandatory detention is not enjoined. The balance of equities and the public interest also favor injunctive relief. Accordingly, this Court should issue a preliminary injunction requiring Plaintiffs be afforded the opportunity to seek release at individualized bond hearings.

II. STATUTORY FRAMEWORK

Section 1226 of Title 8 governs detention during immigration removal proceedings. Section 1226(a) supplies general discretionary authority to detain a noncitizen, or release him on bond or conditional parole, during his removal proceedings. A noncitizen detained under § 1226(a) is entitled to a bond hearing, at which an Immigration Judge decides if detention is justified by determining whether the noncitizen presents public safety or flight risks. See 8 C.F.R. §§1003.19, 1236.1(d); Matter of Guerra, 24 I&N Dec. 37, 37-38 (BIA 2006).

Section 1226(c), the mandatory detention provision, is a narrow exception to the government's discretion to detain or release under Section 1226(a). See § 1226(a) (discretion

applies "[e]xcept as provided in subsection (c)"). Section 1226(c) requires the Secretary to detain noncitizens who are "deportable" or "inadmissible" based on certain grounds "when" they are "released" from custody for an offense triggering one of these grounds. § 1226(c)(1). The Secretary may release these mandatorily detained noncitizens only in narrow circumstances not present here. § 1226(c)(2). Noncitizens detained under § 1226(c) are not entitled to bond hearings and thus receive no individual determination of whether they pose any danger or flight risk justifying their detention. Section 1226(c), entitled "Detention of criminal aliens," provides:

> (1) Custody
> The Attorney General[1] 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.

[1] The text of § 1226 refers to the Attorney General, but authority over the detention of noncitizens is now shared by the Attorney General and the Secretary of Homeland Security. 8 U.S.C. § 1103(a), (g); 8 C.F.R. §§ 236.1, 1236.1. Section 1226(c) is properly understood to require the Secretary of Homeland Security, rather than the Attorney General, to take custody of certain noncitizens. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402, 441, 116 Stat. 2135; 6 U.S.C. § 557.

In Matter of Rojas, the BIA held that mandatory detention applies to individuals who are removable based on a ground listed in paragraphs (A)-(D) of § 1226(c)(1), without regard to whether they were detained when released from criminal custody. 23 I&N Dec. at 125. The BIA acknowledged that § 1226(c) directs immigration authorities to detain noncitizens "immediately upon their release from criminal confinement." Id. at 122 (emphasis added). But it held that the "when . . . released" clause was a "statutory command," not part of the "description of an alien who is subject to [mandatory] detention," and that mandatory detention could apply to noncitizens days, months, or even years their release from criminal custody. Id. at 121-22.

III. STATEMENT OF FACTS

A. Clayton Richard Gordon

Clayton Richard Gordon is mandatorily detained under the government's erroneous interpretation of § 1226(c), adopted by the BIA in Rojas. He has lived in the United States as a lawful permanent resident since 1982, when he was six years old. See Ex. A at 1. He joined the National Guard in 1994 and then served in active duty in the United States Army between 1996 and 1999, when he was honorably discharged. Exs. B, C.

In 2008, Gordon was arrested after police found cocaine in the home that he shared. Gordon was released from custody within a day, and pleaded guilty in 2009 to possession of narcotics with intent to sell. Ex. D. He received a sentence of seven years' incarceration, suspended over a three-year probationary term. Id. Gordon successfully completed probation and never spent a day in jail. Ex. E.

Gordon owns a contracting business and a home in Bloomfield, Connecticut, where he lives with his fiancée and their three-year-old son. See Ex. F. He is an involved and caring father for both of his sons (he has a 16-year-old son from a prior marriage), and serves as a father figure

for several of his nieces and nephews who do not have active fathers in their lives. Id. Gordon also cares deeply about helping his community. Before being detained, he had begun working to start a halfway house for single mothers coming out of incarceration. Ex. G.

Gordon was detained by immigration authorities on June 20, 2013, and charged with being removable based on his drug offense. Ex. A. On July 17, 2013, Gordon sought release on bond. Exs. H, I. But the Immigration Judge found that Gordon was subject to mandatory detention, and thus ineligible for bond, due to his 2008 offense. Ex. I.

Gordon's detention has harmed his family and community. His fiancée has had difficulty keeping up with mortgage payments, and their son has been constantly asking for his father and has been hitting and acting out. Ex. F. Meanwhile, Gordon's dream of opening a transitional home has been put on hold. Id. ¶ 15; Ex. G.

B. Preciosa Antunes

Preciosa Antunes is also detained under the government's erroneous interpretation of § 1226(c). She has lived in the United States as a lawful permanent resident since 1983, when she was 14. See Ex. J. Antunes has three children and four young grandchildren. She owns a home in Bridgeport, Connecticut. Ex. K. At the time of her detention, Antunes worked at a deli and provided regular care to two of her young grandchildren in order to make it possible for her daughter to work. Id.

In 2006, Antunes was convicted of sixth-degree larceny and paid a $75 fine. Ex. L. In January, 2011, she was arrested following a report that she and another person had taken two garbage bags out of a house that was unoccupied and for sale. Ex. M. The bags apparently contained towels. Id. In connection with these events, Antunes pleaded guilty to second degree burglary in October, 2011, and was sentenced to five years in jail, with the execution suspended

after 90 days. Ex. N. Antunes finished serving this 90-day sentence in approximately January, 2012, and remains on probation. Also in 2011, Antunes was arrested after allegedly stealing a package from the front of a house. Ex. O. She pleaded guilty to sixth-degree larceny and was sentenced to serve 90 days, concurrent with her sentence in the burglary case. Ex. P.

On May 10, 2013, ICE officials detained Antunes at the deli where she worked. She was charged as removable due to her 2006 and 2011 offenses. Ex. J. Antunes asked the Immigration Court to consider her for release on bond on June 5, and July 3, 2013. Ex. Q. The Immigration Judge rejected her requests and found that Antunes was subject to mandatory detention. Id.

Antunes has a history of depression and anxiety, which have worsened during her immigration detention. See Ex. R at 6. She is threatened with the loss of her home. Ex. K. Antunes' detention has also impacted her family members. Her grandson, who she cared for almost daily, is asking for his grandmother, and Antunes' daughter may have to leave her job because Antunes is no longer there to provide her with much-needed childcare. Id.

IV. ARGUMENT

A party seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Plaintiffs readily satisfy those requirements.

A. Plaintiffs are Likely to Succeed on the Merits.

Plaintiffs can readily demonstrate that they are likely to succeed on the claim that their detention violates § 1226(c). As a majority of district courts has held, mandatory detention applies only to noncitizens taken into immigration custody at the time of their release from

criminal custody for an offense designated in the mandatory detention provision. See Baquera v. Longshore, No. 13-CV-00543-RM-MEH, 2013 WL 2423178, *4 & n.3 (D. Colo. June 4, 2013) (collecting cases); Dighero-Castaneda v. Napolitano, 2:12-CV-2367 DAD, 2013 WL 1091230, *6-7 (E.D. Cal. Mar. 15, 2013) (same). Both Judges of this District that have considered the question have agreed. See Castaneda, 2013 WL 3353747 (Young, J.); Oscar, 595 F. Supp. 2d at 169 (Tauro, J.). Although the Third and Fourth Circuits have recently reached a contrary holding, their approach cannot be reconciled with the First Circuit's analysis in Saysana, 590 F.3d at 17-18 & n.6, and has been rightly rejected by Judge Young and others, see Castaneda, 2013 WL 3353747, at *7-8 & n.6, *10-11; Deluis-Morelos v. ICE Field Office Dir., 12CV-1905JLR, 2013 WL 1914390, *4-6 (W.D. Wash. May 8, 2013).

The Board's decision in Matter of Rojas—under which Plaintiffs are detained without bond—is owed no deference because § 1226(c) is not ambiguous. See Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-43 & n.9 (1984). As the First Circuit has repeatedly stated in the immigration context, "[t]he judiciary is the final authority on issues of statutory construction," and "deference . . . is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." Succar v. Ashcroft, 394 F.3d 8, 22 (1st Cir. 2005) (quotation marks and citations omitted); see Saysana, 590 F.3d at 12-13.

Section 1226(c) is not ambiguous because its meaning can be conclusively discerned using ordinary tools of statutory construction. See Saysana, 590 F.3d at 13-14 (construing language in light of statutory context, structure, and history). The language of § 1226(c), understood in light of the statutory purposes and structure, unambiguously provides that only a particular group of noncitizens—those "who have committed a qualifying offense and are

detained immediately upon completing their custodial sentence"—are subject to § 1226(c)'s "limited exception to the general bond hearing requirements found in section 1226(a)." Castaneda, 2013 WL 3353747, at *7. A contrary interpretation would raise serious Due Process concerns and create arbitrary results that Congress could not have intended and that contradict the First Circuit's conclusion that mandatory detention is a limited regime. See Saysana, 590 F.3d at 16-18. Moreover, even if § 1226(c) were ambiguous, the Board's interpretation would not warrant deference because it is unreasonable.

1. The Text and Structure of § 1226 Apply Mandatory Detention Only to Noncitizens Taken Into Immigration Custody at the Time of Their Release from Criminal Custody for a Designated Offense.

As many courts have concluded, the plain text of § 1226(c) is naturally read to require detention without the possibility of bond only for noncitizens detained at the time of their release from the relevant criminal custody. The Board has itself acknowledged that § 1226(c) directs DHS to take custody of noncitizens who have committed certain crimes "immediately upon their release from criminal confinement." Rojas, 23 I&N Dec. at 122; see also Castaneda, 2013 WL 3353747, at *5 (holding that the "most natural reading of 'when . . . released' is 'at the time of release' or 'immediately upon release'"). And courts have observed that if § 1226(c) is understood to apply regardless of whether this immediacy requirement is satisfied, or if "when . . . released" is not understood to require immediacy, the "when . . . released" clause would be rendered superfluous. See Castaneda, 2013 WL 3353747, at *5. To avoid this problem, § 1226(c) should be interpreted to apply only to noncitizens detained "when . . . released." The

government's contrary argument—that § 1226(c) applies "'any time after the alien is released'"—"perverts the plain language of the statute." Oscar, 595 F. Supp. 2d at 169.[2]

But the "plain meaning" of a provision is "made clear not only by the words of the statute but by its structure as well." See Saysana, 590 F.3d at 13. Judge Young identified two structural elements demonstrating why § 1226(c) unambiguously applies only to noncitizens detained at the time of their release from predicate criminal custody. Castaneda, 2013 WL 3353747, at *15.

First, § 1226(c) is a limited exception to the discretionary detention authority that immigration officials otherwise have under § 1226 to detain or release noncitizens during their immigration proceedings. See § 1226(a). Section 1226(a) gives immigration authorities discretion to detain or release noncitizens, "[e]xcept as provided in subsection (c)." Section 1226(c), in turn, describes circumstances in which immigration authorities are barred from making this choice. See Demore v. Kim, 538 U.S. 510, 520-21 (2003) (characterizing mandatory detention provision as a limitation on the "Attorney General's discretion over custody determinations"); 8 C.F.R. § 1003.19(h)(2) ("an immigration judge may not redetermine conditions of custody" for noncitizens subject to § 1226(c)(1)). Section 1226(c), therefore, is not a grant of any new detention authority and is not a stand-alone detention statute. It is "a limited exception." Castaneda, 2013 WL 3353747, at *6; see Saysana, 590 F.3d at 17. As such, the

[2] See also Baquera, 2013 WL 2423178, at *4 ("[T]he plain language of the statute requires immigration officials to detain an alien at the time the alien is released from custody in order for mandatory detention to apply."); Dighero-Castaneda, 2013 WL 1091230, at *7 ("[T]he plain language of 8 U.S.C. § 1226(c) is unambiguous with respect to the requirement that the DHS detain individuals under that section 'upon release' from criminal custody."); Louisaire v. Muller, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (finding government's interpretation "wrong as a matter of law and contrary to the plain language of the statute"); Khodr v. Adduci, 697 F. Supp. 2d 774, 774–75 (E.D. Mich. 2010) ("[T]he statute at issue clearly and unambiguously requires the Attorney General to take into custody certain aliens without delay in order to make applicable the mandatory detention provisions of 8 U.S.C. § 1226(c).").

provision should be read to apply only in the circumstances described within its text: that of noncitizens who are detained at the time of their release from a listed offense.

Second, § 1226(c) has two paragraphs that together accomplish this result. Paragraph (1) is entitled "Custody." As the BIA has acknowledged, see Rojas, 23 I&N Dec. at 122, it is phrased as a directive, instructing federal authorities to "take into custody any alien who . . . is deportable by reason of having committed [certain offenses] . . . when the alien is released." § 1226(c)(1). Paragraph (2) is entitled "Release," and permits the Secretary to release "an alien described in paragraph (1)" only in limited circumstances involving the protection of witnesses. Working in tandem, the two paragraphs effectuate mandatory detention for a particular class of noncitizens; the limitations on release from ICE detention described in paragraph (2) apply only to noncitizens whom the Secretary has detained "when . . . released," as described in paragraph (1). By the same token, the limitations on release in paragraph (2) do not apply to noncitizens—like Gordon and Antunes—who were detained months or years after their release from custody. The descriptions of "Custody" and "Release" in paragraphs (1) and (2) are a matched set; they correspond to the same subset of people. A noncitizen who has not been taken into custody "when . . . released" is not "an alien described in paragraph (1)," and the Secretary's release of that noncitizen is not governed by the restrictions of paragraph (2). See § 1226(c).[3]

Indeed, in answering a related question, the First Circuit has already found that the phrase "when . . . released"—and not merely the grounds of removability listed in paragraphs (A)-(D) of § 1226(c)(1)—is part of the description of noncitizens subject to mandatory detention. See

[3] As the seven dissenters in Rojas noted, the Rojas majority's analysis "fail[ed] to provide any reason why characterizing the ["when . . . released"] language as a directive makes it any less a description, particularly when that description is communicated as part of a mandate to the [Secretary of Homeland Security]." See Rojas, 23 I&N Dec. at 135 (Rosenberg, dissenting).

Saysana, 590 F.3d at 11, 14. Saysana involved the mandatory detention of a noncitizen who was released from criminal custody for a removable offense referenced in § 1226(c)(1)(A)-(D) before the 1998 effective date of the provision, but who, after that effective date, was arrested and released for an offense not triggering paragraphs (A)-(D). Id. at 9. The government argued that mandatory detention applied because Saysana had been "released" from some criminal custody after the effective date. Id. at 9, 17. The First Circuit disagreed, holding that phrase "when . . . released" unambiguously refers to a release for an offense referenced in § 1226(c)(1)(A)-(D). Id. at 16. In doing so, the First Circuit necessarily found—contrary to Rojas—that the phrase "when . . . released" is more than a "temporal triggering mechanism," and instead helps to set forth who is subject to mandatory detention. Id. at 14-15.

2. Congress Intended § 1226(c) to Reach Only a Narrow Class of Noncitizens.

Saysana is relevant in another respect as well. Its analysis of the purposes of mandatory detention directly contradicts Rojas and leads to the conclusion that § 1226(c) does not apply to those who—like Antunes and Gordon—were detained by ICE sometime after their release from the relevant criminal custody.

Rojas posited that Congress enacted a sweeping mandatory detention regime geared toward "detaining and removing all criminal aliens." 23 I&N Dec. at 122. This regime, the Board surmised, addressed concerns that deportable criminal noncitizens exhibited high rates of recidivism and, when not detained, failed to appear at their immigration removal proceedings in significant numbers. Id.; see also Demore, 538 U.S. at 518–21. But the First Circuit concluded that Congress addressed those same concerns by enacting a "limited" and "focused" system of mandatory detention. Saysana, 590 F.3d at 17 & n.6. The court explained that "[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." Id.

As the First Circuit explained, § 1226(c) does not impose mandatory detention on all noncitizens with certain criminal convictions. Rather, it removes the discretion of immigration authorities to release a limited class of people whom DHS seeks to remove, and whom Congress regarded as most likely to recidivate, fail to appear for their immigration proceedings, or fail to cooperate with a removal order. See Saysana, 590 F.3d at 16; Demore, 538 U.S. at 518-19. The First Circuit simply found that Congress would not have categorically imputed those risks to noncitizens who have returned to their communities following release from criminal custody:

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

Saysana, 590 F.3d at 17-18; see also id. at 16-17. Although Saysana does not expressly address the issue in this case, its implications for this case are clear. The First Circuit rejected an interpretation of the mandatory detention provision that swept in individuals who—because of the passage of time since their release from custody for their removable offense—do not categorically pose the risks that had concerned Congress. But these are exactly the people whom Rojas subjects to mandatory detention. Indeed, under the Board's view, Plaintiffs would be equally subject to mandatory detention if the government were to detain them and instigate removal proceedings in 2043—when Gordon will be 68 and Antunes will be 75—instead of in 2013. That view unduly severs the statutory link between mandatory detention and bail risk. See Saysana, 590 F.3d at 17-18. Because Congress could not have intended such an absurd result, the phrase "when . . . released" must be understood to be part of the description of the noncitizens who are subject to mandatory detention.

In fact, the Board itself has recognized that its decision in Rojas conflicts with Saysana. While the BIA eventually adopted Saysana's holding—that mandatory detention applies only to noncitizens released after the provision's effective date from custody for an offense referenced in § 1226(c)(1)(A)-(D)—it expressly declined to adopt the First Circuit's reasoning, relying instead on the effective date provision. See Garcia Arreola, 25 I&N Dec. at 270-71. It then expressly stated that because it had "depart[ed] from the First Circuit's analysis," it was not "reced[ing] from Matter of Rojas." Id. at 271 & n.4.

This Court, however, should follow the reasoning of Saysana. See United States v. Fulton, 960 F. Supp. 479, 493 (D. Mass. 1997) ("district courts within the circuit must respect the reasoning as well as the judgment in each First Circuit decision"). Doing so requires recognizing that § 1226(c) has limited purposes that can be achieved only by holding that the "when . . . released" language is part of the description of the noncitizens subject to § 1226(c).

3. Plaintiffs' Significant Liberty Interests Require that this Court Apply the Rule of Lenity and the Canon of Constitutional Avoidance.

Given the significant liberty interests at stake, the Court should also apply "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." INS v. St. Cyr, 533 U.S. 289, 320 (2001) (internal quotation marks and citation omitted). Applying this rule of lenity, even if the meaning of the "when . . . released" clause was not made plain by its text and the other tools of statutory construction, this Court should construe the statute not to apply to individuals, like Plaintiffs, who have returned to their communities after their release from criminal custody. See Castaneda, 2013 WL 3353747, at *11.

Those same liberty interests also trigger the canon of constitutional avoidance. See St. Cyr, 533 U.S. at 299-300; Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 877 (D.Mass. 1997); see also Clark v. Martinez, 543 U.S. 371, 381 (2005). Civil

detention violates due process when it is not reasonably related to its purposes and accompanied by strong procedural protections. Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001). Locking up noncitizens without the possibility of bond, years after their release from criminal custody, implicates those due process concerns because it severs the link between mandatory detention and the purposes of preventing flight and protecting public safety. See Saysana, 590 F.3d at 17-18.[4] The court should construe § 1226(c) to avoid the serious constitutional concerns raised by Matter of Rojas, and find that Gordon and Antunes are not subject to mandatory detention.

4. Even if § 1226(c) Were Ambiguous, the BIA's Interpretation Would Not Warrant Deference Because it is Unreasonable.

Even if the text, structure, and purposes of § 1226(c) did not yield a clear answer to the question presented here—though they do—the BIA's interpretation would still be unreasonable and not entitled to deference. See Chevron, 467 U.S. at 844; Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (deference is not warranted if "an agency interpretation is arbitrary or capricious in substance" (internal quotation marks omitted)). For the reasons discussed above, the government's interpretation is unreasonable because it is unsupported by the statute's plain meaning and leads to results that are "unmoored from the purposes and concerns" of the statute. Judulang, 132 S.Ct. at 490.

5. Hosh and Sylvain Are Wrongly Decided and Do Not Control.

Most district courts have rejected the government's interpretation of § 1226 as being contrary to the statute's plain meaning. See Baquera, 2013 WL 2423178, at *4 & n.3. Nonetheless, the Third and Fourth Circuits have upheld Rojas. Sylvain, 714 F.3d 150; Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012). Many courts, however, have recognized that these

[4] See also Aguasvivas v. Elwood, CIV.A. 13-1161 PGS, 2013 WL 1811910, *8 (D.N.J. Apr. 29, 2013), abrogated by Sylvain v. Attorney General, 714 F.3d 150 (3d Cir. 2013).

decisions rest on flawed legal arguments and unfounded premises. See, e.g., Castaneda, 2013 WL 3353747, at *7-8 & n.6, *10-11.[5] Like Rojas itself, the Third and Fourth Circuit decisions overlook that § 1226(c) is a narrow exception to the government's discretionary release authority, rather than an effort to enact a broad regime of mandatory detention. See Sylvain, 714 F.3d at 159; Hosh, 680 F.3d 375 at 380-81. Their reasoning runs directly counter to Saysana, which the Fourth Circuit does not address and the Third Circuit mentions only in a footnote. See Sylvain, 714 F.3d at 156 n.7 ("[Saysana], however, does not address the question at hand.").

Moreover, the decisions rely on case law that is "completely inapposite." Gomez-Ramirez v. Asher, C13-196-RAJ, 2013 WL 2458756, *6 (W.D. Wash. June 5, 2013). This inapposite line of cases holds that, absent contrary evidence, statutory provisions that impose deadlines on the government generally do not restrict its authority to act when it misses those deadlines. Sylvain, 714 F.3d at 157-59 (citing, e.g., United States v. Montalvo-Murillo, 495 U.S. 711 (1990)); Hosh, 680 F.3d at 381-83 (same).[6] Citing those cases, the Third and Fourth Circuits held that limiting the scope of mandatory detention to noncitizens detained "when . . . released" would impermissibly impose a "'severe penalty'" upon the government for failing to take people into custody at the time of their release from criminal confinement. Sylvain, 714 F.3d at 159 (quoting Montalvo-Murillo, 495 U.S. at 720).

[5] See also Baquera, 2013 WL 2423178, at *5-6; Deluis-Morelos, 2013 WL 1914390, at *4-6; Espinoza v. Aitken, 5:13-CV-00512 EJD, 2013 WL 1087492, *5-7 (N.D. Cal. Mar. 13, 2013); Castillo v. ICE Field Office Dir., 907 F. Supp. 2d 1235, 1239 (W.D. Wash. 2012); Bogarin-Flores v. Napolitano, 12CV0399 JAH WMC, 2012 WL 3283287, *3 (S.D. Cal. Aug. 10, 2012).

[6] The Fourth Circuit also held that the word "when" is ambiguous. Hosh, 680 F.3d at 379-80. The Third Circuit correctly rejected the Fourth Circuit's Chevron analysis as "flaw[ed]" because the Board in Rojas did not purport to be interpreting the word, "when," and in fact understood that "when" connoted immediacy. See Sylvain, 714 F.3d at 157 & n.9 (citing Rojas, 23 I&N Dec. at 122); see also Castaneda, 2013 WL 3353747, at *7-8 & n.6 (criticizing Hosh).

Reliance on these cases is misplaced for a simple reason: section 1226(c) is not a grant of authority to the government. It curtails the authority of immigration officials to decide, under § 1226(a), whether a noncitizen will be detained or released.

When § 1226(c) does not apply, the government retains the authority under § 1226(a) to decide whether a noncitizen will be detained during removal proceedings. When § 1226(c) does apply, the government loses that authority and is prohibited from releasing those noncitizens except in certain circumstances. The Supreme Court recognized this dynamic in describing how mandatory detention "limited the Attorney General's discretion over custody determinations." Demore, 538 U.S. at 520-21; see also Saysana, 590 F.3d at 17; 8 C.F.R. § 1003.19(h)(2) (implementing mandatory detention by describing circumstances in which immigration judges lack authority to review custody determinations).

Judge Young recognized the frailty of the Third and Fourth Circuit's position, observing that "[i]f anything," the government "gains power" when § 1226(c) does not apply. Castaneda, 2013 WL 3353747, at *10 n.12 (emphasis added). Thus, "[t]he mistake both [the Third and Fourth Circuits] make is to treat section 1226(c)(1) as a grant of authority or power. . . . [T]he power to hold is not what is at stake. Rather, what is at stake is the power to exercise discretion." Id. at *10 (internal citations omitted). Because they mischaracterized the way that § 1226(c) operates, the decisions of the Third and Fourth Circuits should be rejected, and this Court should find that Plaintiffs are not subject to mandatory detention.

B. Plaintiffs are Likely to Suffer Irreparable Harm.

In addition to being likely to succeed on the merits, Plaintiffs can readily show irreparable harm. Gordon and Antunes are unlawfully detained without the possibility of bond

and are suffering irreparable harm "each day" that their detention continues without intervention of this Court. See McGuinness v. Pepe, 150 F. Supp. 2d 227, 230 n.8 (D. Mass. 2001).

If afforded bond hearings, Gordon and Antunes would present compelling arguments that they are neither public safety threats nor likely to flee. Both have been lawful permanent residents for decades, are homeowners, and were employed before being detained. They have deep family ties to the United States, including children or grandchildren that they help care for. Their removal offenses were nonviolent, and Gordon has served in the United States military and has a record of community service.

But without relief from this Court, Plaintiffs will continue to be unlawfully detained, perhaps for months or years, without a chance to seek release on bond or conditional parole. This unlawful, continued detention is itself a clear, irreparable harm. See United States v. Bogle, 855 F.2d 707, 710-11 (11th Cir. 1988); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 463 (D. Mass. 2010); see also Hilton v. Braunskill, 481 U.S. 770, 777 (1987) ("[t]he interest of the habeas petitioner in release pending appeal [is] always substantial"); Rodriguez v. Robbins, 715 F.3d 1127, 1144-45 (9th Cir. 2013) (finding clear irreparable harm where noncitizens were likely to prevail on the merits of their claim that their detention violated § 1226(c)). In addition to curtailing freedom, detention can have a "dramatic" and adverse effect on a detainee's chances of prevailing in removal proceedings. Castaneda, 2013 WL 3353747, at *11.[7]

Detention can also have a severe physical, psychological, and financial impact on detainees and their families. For Antunes, detention and separation from her family exacerbate her depression and anxiety. See Ex. R at 4-5. She reported that she was hardly sleeping, and a

[7] See New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, at 3, 19 (2011) (finding that noncitizens prevailed in 74% of removal proceedings when represented and not detained, 18% when represented and detained, and only 3% when unrepresented and detained).

psychologist found that she appeared to be suffering from "incapacitating anxiety." Id. at 3, 5. Meanwhile, Antunes is facing the imminent loss of her home, Ex. K, and Gordon's fiancée is having difficulty making mortgage payments without him, Ex. F. The detention of Gordon and Antunes has also deprived their children and grandchildren of important caretakers, Exs. F, K, and of the love and support that Gordon's young son needs from his father, Ex. F.

C. The Balance of the Equities Favors Plaintiffs.

The balance of the equities strongly favors injunctive relief. Whereas detention without the possibility of bond has severely harmed Plaintiffs and their families, the government has no clear interest in denying them the opportunity to be considered for release on bond.

Recent events prove this point. In recent months the government was ordered to provide bond hearings in two "when . . . released" cases: Castaneda and Forero-Caicedo. In response, the government released Castaneda on electronic monitoring without holding a bond hearing, see Notice of Release, ECF No. 25 (attached as Ex. S), and did not oppose bond for Forero-Caicedo, see Ex. T. Forero-Caicedo was released on a bond of $1,500, the statutory minimum. Id. Thus, although government argues that the detention of these noncitizens is mandated by § 1226(c), its actions confirm that their detention was unnecessary to protect the public safety or prevent flight.

Here, too, Plaintiffs merely request the opportunity to be considered for release on bond or conditional parole. As Judge Young has recognized, granting this request would "not prevent ICE from detaining even a single criminal alien." Castaneda, 2013 WL 3353747, at *11. Instead, it would "merely make[] that detention subject to an individualized bond hearing." Id. If an Immigration Judge finds that Plaintiffs present a danger to others or a flight risk, they will be denied bond. See Matter of Guerra, 24 I&N Dec. 37.

What is more, bond hearings can save public resources by ensuring that noncitizens are not unnecessarily detained. Although Gordon and Antunes were both employed when initially detained, they are now locked up at a cost of $122 per day (not including payroll costs), many times the estimated $0.17-$17.78 daily cost of supervised release.[8] Of course, even if "the government faced severe logistical difficulties in implementing the order," these costs "would merely represent the burdens of complying with the applicable statutes." Rodriguez, 715 F.3d at 1146 (holding that conducting hundreds of bond hearings for detainees held in the Central District of California would not be prohibitively burdensome). The government "cannot suffer harm from an injunction that merely ends an unlawful practice." Id. at 1145.

D. An Injunction is in the Public Interest.

No harm to the public interest arises from giving Gordon and Antunes the opportunity to be considered for release, because they will be denied release on bond if they present public safety or flight risks. To the contrary, such individual consideration serves the public interest by allowing for a determination of whether their detention is, in fact, necessary.

V. CONCLUSION

For these reasons, Plaintiffs respectfully request that Defendant-Respondents be preliminarily enjoined from continuing to detain them unless they receive timely individualized bond hearings under § 1226(a).

Plaintiffs request oral argument on this motion.

[8] See DHS, ICE Enforcement Salaries and Expenses, FY2013 Congressional Budget Justification, at 1067, 1085, available at http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf (last visited August 6, 2013).

August 8, 2013

Respectfully submitted,

/s/ Adriana Lafaille
Matthew R. Segal (BBO # 654489)
Adriana Lafaille (BBO # 680210)
Jessie J. Rossman (BBO # 670685)
American Civil Liberties Union
of Massachusetts
211 Congress Street
Boston, Massachusetts 02110
(617) 482-3170 x 308

/s/ Judy Rabinovitz
Judy Rabinovitz*
American Civil Liberties Union
Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660

*Motion for admission pro hac vice forthcoming.

/s/ Elizabeth Badger
Elizabeth Badger (BBO # 663107)
Political Asylum / Immigration Representation
Project
98 N. Washington Street, Suite 106
Boston, MA 02114
(617) 603-1524

Certificate of Service

I, Adriana Lafaille, hereby certify that a true copy of the foregoing Memorandum of Law in Support of Motion for Preliminary Injunctive Relief, with attached exhibits, was served on August 8, 2013, by certified U.S. mail, upon the following:

Janet Napolitano, Secretary
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

John Sandweg, Acting Director
U.S. Immigration and Customs Enforcement
500 12th St., SW
Washington, D.C. 20536

Sean Gallagher
Acting Field Office Director
Immigration and Customs Enforcement, Boston Field Office
10 New England Executive Park
Burlington, MA 01803

Carmen M. Ortiz
U.S. Attorney for the District of Massachusetts
John Joseph Moakley U.S. Federal Courthouse
One Courthouse Way, Suite 9200
Boston, MA 02210

Christopher Donelan, Sheriff
Franklin County Sheriff's Office
160 Elm Street
Greenfield, MA 01301

Michael G. Bellotti, Sheriff
Norfolk County Sheriff's Office and Correctional Center
200 West Street
Dedham, MA 02027

Steven W. Tompkins, Sheriff
Executive Office
20 Bradston Street
Boston, MA 02118

Thomas M. Hodgson, Sheriff
Bristol County House of Correction & Jail
400 Faunce Corner Road
North Dartmouth, MA 02747

Joseph D. McDonald, Jr., Sheriff
Plymouth County Sheriff's Department
24 Long Pond Road
Plymouth, MA 02360

Respectfully submitted,
/s/ Adriana Lafaille
Adriana Lafaille (BBO # 680210)
American Civil Liberties Union
of Massachusetts