Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Maria Sandra RIVERA, on behalf of herself as an individual and on behalf of others similarly situated,

Plaintiff-Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General of the United States; Juan P. OSUNA, Director, Executive Office for Immigration Review, United States Department of Justice; Jeh JOHNSON, Secretary of Homeland Security; Thomas S. WINKOWSKI, Principal Deputy Assistant Secretary for United States Immigration and Customs Enforcement; Nathalie R. ASHER, Director, Seattle Field Office of United States Immigration and Customs Enforcement; Lowell CLARK, Warden, Northwest Detention Center; and the UNITED STATES OF AMERICA,

Defendants-Respondents.

Case No. 14-cv-01597-RSL

PLAINTIFF-PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

January 16, 2014

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff-Petitioner Maria Sandra Rivera and the class she proposes to represent ("Plaintiffs") are individuals who have all been placed in immigration detention without the lawful custody determination required by Immigration and Nationality Act ("INA") § 236(a), 8 U.S.C. § 1226(a). Section 1226(a) expressly authorizes the Attorney General to exercise discretion to release a noncitizen in removal proceedings on a "bond of at least $1,500 . . . *or* . . . conditional parole," which includes release on the condition that the noncitizen appear for court hearings and whatever other non-monetary conditions that are necessary in order to ensure her appearance. 8 U.S.C. § 1226(a)(2) (emphasis added). Yet despite this plain language, the Seattle and Tacoma Immigration Courts maintain a policy and practice of uniformly denying requests for "conditional parole"—or, as it has been historically described, release on recognizance. Instead, Immigration Judges have adopted the view that § 1226(a) and its implementing regulations do *not* authorize them to order such release, but rather restrict them to ordering an individual's release on a minimum bond of $1,500. Indeed, Defendants-Respondents ("Defendants") maintain this policy even though in litigation outside this District the government has *conceded* that § 1226(a) authorizes the Immigration Judge to order release on conditional parole as an alternative to bond.

As a result of Defendants' policy, Immigration Judges in this District uniformly refuse to consider requests that individuals be released on recognizance, and instead require individuals such as Ms. Rivera to post bond. Thus, indigent or low-income individuals like Ms. Rivera who are deemed suitable for release, but cannot post bond, routinely suffer continued and unnecessary

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detention. Even where individuals are able to post bond, they are forced to strain personal, family, and community resources in order to gain their release.

Plaintiffs' detention without the opportunity to seek release on conditional parole from the Immigration Judge unquestionably violates the INA. Defendants' policy of precluding such requests violates the plain language of the statute and regulations, published case law, and the history of the statute, regulations, and agency practice, and improperly seeks to restrict the Immigration Court's own jurisdiction over custody determinations. Moreover, Defendants' policy raises serious due process concerns. Thus, this Court should grant summary judgment, declare that § 1226(a) authorizes Immigration Judges to order release on conditional parole, and issue an injunction providing Plaintiffs with individualized bond hearings in which the Immigration Judge must consider requests for such release.

II. PROCEDURAL HISTORY

Plaintiff-Petitioner ("Plaintiff") Rivera filed this proposed class action on October 16, 2014. Dkt. #1. She simultaneously filed a Motion for Class Certification. Dkt. #2. On November 3, 2014, the Parties filed a Joint Stipulation Concerning Scheduling, agreeing that because the case "raises a purely legal issue" and that there are no material facts in dispute, the case is appropriate for resolution under Federal Rule of Civil Procedure 56(a). Dkt. #17 at 2-3. The Parties also established a timeline for filing cross motions for summary judgment. *Id*. The Parties agreed that if the Court decides "the sole legal issue raised by this lawsuit in favor of the Petitioners, class relief would be appropriate . . . as the legal issue in this case is determinative of whether 'final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole' under Federal Rule of Civil Procedure 23(b)(2)." *Id*. at 2.

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Nonetheless, on December 15, 2014, Defendants filed a Motion to Stay Proceedings or Hold Case in Abeyance, and Request for Telephonic Conference Concerning Scheduling on the grounds that the Board of Immigration Appeals ("BIA") might address the issue presented in this case. Dkt. #18. Plaintiffs filed a Response to Defendants' Motion Requesting Telephonic Conference Concerning Scheduling on December 16, 2014, apprising the Court of its intention to oppose Defendants' stay request and urging the Court to proceed with summary judgment briefing on the agreed-upon schedule. Dkt. #21.

III. FACTUAL BACKGROUND

A. Defendants' Policy Restricting Immigration Judges to Release on Monetary Bond Only.

8 U.S.C. § 1226(a) generally governs the detention of individuals whom the government seeks to remove from the United States during the pendency of their removal cases. It provides in pertinent part that, pending a decision on removal,

> 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*;

Id. (emphasis added).

Under current law, both the Secretary of the U.S. Department of Homeland Security ("DHS") and the Attorney General share the Attorney General's authority under § 1226(a) to detain or release noncitizens during removal proceedings. *See Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (AG 2003). Pursuant to the implementing regulations, DHS makes the initial determination, upon the noncitizen's arrest, as to whether a noncitizen will remain in custody. *See* 8 C.F.R. § 1236.1(c)(8) (granting DHS officers discretion to "release an alien . . . under the conditions at [INA §]

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236(a)(2)").[1] The noncitizen may then seek a redetermination of that custody determination from the Immigration Judge. 8 C.F.R. § 1236.1(d); 8 C.F.R. § 1003.19(a).

Notwithstanding the plain language of the statute, beginning in 2004, a series of single-member BIA decisions concluded, without analysis, that § 1226(a) and/or regulations prohibit Immigration Judges from ordering release on conditional parole. *See, e.g.*, *In re Gregg*, 2004 WL 2374493, at *1 (BIA Aug. 3, 2004); *In re Suero-Santana*, 2007 WL 1153879, at *1 (BIA Mar. 26, 2007). This guidance is also reflected in the Executive Office of Immigration Review ("EOIR") Immigration Judge Benchbook. Dkt. #1, Ex. A (EOIR Immigration Judge Benchbook, Bond/Custody (Aug. 2014)). That document, which is an authoritative reference guide for Immigration Judges across the country, including in the Seattle and Tacoma Immigration Courts, instructs that "[f]or non-mandatory custody aliens, Immigration Judges can: (1) continue to detain; or (2) release on bond of not less than $1,500.00. INA § 236(a). Note: Immigration Judges do *not* have authority to consider or review DHS parole decisions." *Id*. at 3 (emphasis added). *See also* Dkt. #1, Ex. B (EOIR, Immigration Judge Benchbook, Ch.3, I.E (Oct. 2001)) (same).

Although the practice regarding conditional parole—or release on recognizance—appears to be inconsistent among Immigration Courts nationwide, *see, e.g*, *infra* n.3, the Seattle and Tacoma Immigration Courts have uniformly implemented a policy of refusing to entertain requests for conditional parole. Thus, government data shows that, between April 1, 2013 to April 1, 2014, *not a*

[1] Prior to 2003, detention authority under § 1226(a) was exercised by the Immigration and Naturalization Service ("INS"), a component of the Department of Justice. The INS ceased to exist in 2003, and most of its law enforcement functions were transferred to DHS and its sub-agency, Immigration and Customs Enforcement ("ICE"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified at 6 U.S.C. §§ 251, 291); *Morales-Izquierdo v*. *Gonzales*, 486 F.3d 484, 489 n.7 (9th Cir. 2007) (en banc).

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single individual detained under § 1226(a) was granted release on recognizance by those two Immigration Courts. *See* Dkt. #3 (Declaration of David Hausman ¶¶ 12-13). Similarly, the Northwest Immigrant Rights Project—the primary legal service provider for detained individuals at the Northwest Detention Center in Tacoma, Washington—is not aware of *a single individual* detained under § 1226(a) who has been granted release on conditional parole. Dkt. #7 (Declaration of Timothy Warden-Hertz ¶ 7).

B. Plaintiff-Petitioner Rivera's Detention Without Opportunity to Seek Release on Conditional Parole.

The experience of Plaintiff Rivera is typical of Defendants' policy. Ms. Rivera is a native of Honduras who fled seeking to escape the persecution and torture inflicted by her partner. She entered the United States on May 29, 2014, and was taken into U.S. Immigration and Customs Enforcement ("ICE") custody that same day. Dkt. #1 ¶ 44. She was then transferred to the Northwest Detention Center in Tacoma, Washington. *Id*. On June 17, 2014, Ms. Rivera passed a credible fear interview with an asylum officer and was referred to the Tacoma Immigration Court to pursue her applications for asylum, withholding of removal, and protection under the Convention Against Torture. *Id*. ¶ 46. She applied for relief based on the years of severe physical, sexual, and verbal abuse she suffered at the hands of her former partner in Honduras. *Id*. ¶¶ 45-47.

On June 23, 2014, ICE set an initial bond for Ms. Rivera of $7,500. *Id*. ¶ 48. Ms. Rivera requested a custody redetermination hearing before an Immigration Judge and sought release on her own recognizance pursuant to the Attorney General's authority under § 1226(a) to grant conditional parole. *Id*. ¶ 49. Ms. Rivera argued that a monetary bond was unnecessary in her case because she posed no significant flight risk and no danger to the community. *Id*. Moreover, she explained that she did not have the resources to pay even a minimum $1,500 bond. *Id*. Ms. Rivera demonstrated

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that she had no criminal record and had a prima facie claim for asylum. *Id*. ¶ 50. She presented letters from friends stating that she would be allowed to stay with them if released and that they would provide transportation to future hearings in Immigration Court. *Id*.

At the custody determination hearing, held on August 26, 2014, Immigration Judge John C. Odell ruled that he did not have jurisdiction under § 1226(a) to entertain Ms. Rivera's request for release on conditional parole . *Id*. ¶ 51; Dkt. #5 (Declaration of Vanessa Arno ¶ 3); Dkt. #6 (Declaration of Leila Kang ¶ 3). The Immigration Judge then found that Ms. Rivera did not present a danger to the community, but did present "somewhat of a flight risk" based on her lack of prior residence and limited ties in the United States. *See* Declaration of Elizabeth Benki ¶ 6. The Immigration Judge reduced Ms. Rivera's bond to $3,500. *Id*. However, Ms. Rivera was unable to post even the reduced bond. *Id*. at ¶ 7. Accordingly, she remained detained until her final immigration hearing on October 28, 2014. *Id*.

At the hearing on October 28, the Immigration Judge granted Mr. Rivera's application for asylum. *Id*. at ¶ 8. DHS waived its right to appeal the decision, and Ms. Rivera was released that afternoon, after having been detained for *five months* simply because she could not afford to pay a bond. *Id*.[2]

[2] Critically, Ms. Rivera's release does *not* moot her as a class representative. As the Ninth Circuit has explained, even where a class representative's claim is mooted prior to the class being certified, her class claim remains live where, as here, it is "'inherently transitory.'" *Pitts v*. *Terrible Herbst*, *Inc*., 653 F.3d 1081, 1090 (9th Cir. 2011) (quoting *Cnty*. *of Riverside v*. *McLaughlin*, 500 U.S. 44, 52 (1991)). In such cases, "the named plaintiff's [class] claim is capable of repetition, yet evading review," and class certification "relates back" to the filing of the complaint. *Id*. (internal quotation marks and citation omitted).

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IV. ARGUMENT

There is no genuine issue of material fact that the plain language of 8 U.S.C. § 1226(a) authorizes Immigration Judges to release eligible noncitizens on conditional parole, and that as a matter of policy and practice, Immigration Judges in the Western District of Washington uniformly deny requests for conditional parole. As a matter of law, Defendants' policy and practice of restricting Immigration Judges to ordering individuals released only upon payment of a minimum $1,500 bond violates the Immigration and Nationality Act ("INA"). Further, Defendants concede that this case presents a purely legal issue for the Court's resolution. Plaintiffs therefore request that this Court enter summary judgment against Defendants.

Indeed, in litigation outside this District, the government has *conceded* that the Immigration Courts are authorized to grant release on conditional parole under § 1226(a).[3] The same conclusion is compelled here. As set forth below, the plain language of the statute and regulation; basic principles of statutory construction; the statutory and regulatory history; authority from the BIA and the federal courts; and longstanding agency practice all confirm that the Immigration Court has the authority to order such release as an alternative to monetary bond.

A. Legal Standard

Summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

[3] *See* Dkt. #1, Ex. E (DHS Br. on Appeal at 1 n.1, In re Pangan, A087 269 297 (BIA Dec. 29, 2011) (noting that "[DHS] is not aware of any authority that precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without bond")); *see also* Dkt. #1, Ex. F (Deposition of Thomas Y.K. Fong 209:16-210:6, Rodriguez v. Robbins, No. CV 07-3239 (C.D. Cal. Feb. 28, 2012)) (Assistant Chief Immigration Judge noting that "all [judges] know" that "[i]f you set a bond dollar amount, it has to be a minimum 1500 or it is released without bond").

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Civ. P. 56(a). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982) (citation omitted). The moving party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Again, it is undisputed that the issue presented is purely a legal issue. Thus, the Parties have stipulated that this lawsuit is amenable for resolution under Rule 56(a), and the Court's holding on this legal issue should be "determinative of whether 'final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" Dkt. #17 at 2 (quoting Fed. R. Civ. P. 23(b)(2)).

B. Defendants' Policy of Refusing to Consider Requests for Conditional Parole Is Inconsistent with the Plain Language of Both § 1226(a) and the Implementing Regulations.

Defendants' policy of refusing to consider requests for conditional parole is inconsistent with the plain language of both § 1226(a) and the implementing regulations. As set forth above, § 1226(a) provides that pending a decision on removal, "the Attorney General . . . may release the alien on bond of at least $1,500 . . . *or conditional parole*." *Id.* (emphasis added). Thus, the plain language of § 1226(a) clearly authorizes the Attorney General to grant release on "conditional parole" as an alternative to release on a minimum $1,500 bond. Yet despite this plain language granting the Attorney General—and, by extension, Immigration Judges as his agents—the authority to grant such release, the Seattle and Tacoma Immigration Courts have adopted a policy of uniformly denying all requests for conditional parole on the grounds that § 1226(a) restricts the Immigration Judge to

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ordering an individual released on a minimum $1,500 bond. In effect, Defendants' policy renders § 1226(a)(2)(B) mere surplusage.[4]

As referred to in § 1226(a), "conditional parole" is the equivalent of "release on recognizance." "Parole" is a form of "release," and "recognizance" is "conditional" because it imposes requirements on the noncitizen; at a minimum, a person released on recognizance must appear when requested by the agency, including appearing at Immigration Court for all future removal proceedings, in addition to obeying whatever other conditions are necessary to ensure her appearance. *See* Black's Law Dictionary 1386 (9th ed. 2009) (defining "recognizance" as "[a] bond or obligation, made in court, by which a person promises to perform some act or observe some *condition*, such as to appear when called, to pay a debt, or to keep the peace" (emphasis added); *id*. at 1227 (defining "parole" as a form of release). Thus, § 1226(a) empowers both DHS and the Immigration Judge to order an individual released on her own recognizance pursuant to their authority to grant "conditional parole."

Indeed, in *Ortega-Cervantes v*. *Gonzales*, 501 F.3d 1111 (9th Cir. 2007), the Ninth Circuit clarified that "conditional parole" pursuant to § 1226(a) is equivalent to release on recognizance. In that case, Mr. Ortega argued that his release pursuant to § 1226(a)(2) should be understood as something more than release on recognizance: namely, "parole into the United States" under 8

[4] *See Reiter v*. *Sonotone Corp*., 442 U.S. 330, 339 (1979) (explaining that courts "are obliged to give effect, if possible, to every word Congress used" (citation omitted)); *Marx v*. *General Revenue Corp*., 133 S.Ct. 1166, 1178 (2013) (noting that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

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U.S.C. § 1182(d)(5)(A).[5] *Id*. at 1115. This was significant, because if release on "conditional parole" under§ 1226(a) was the equivalent of "parole" under § 1182(d)(5)(A), then the petitioner would have been entitled to apply for adjustment of status to lawful permanent residence.[6] In rejecting this proposition, the Ninth Circuit upheld the agency's longstanding recognition that release on "conditional parole" under § 1226(a) is simply "release on recognizance," and is not the equivalent of "parole into the United States." As the court observed, "the INS used the phrase 'release on recognizance' as another name for 'conditional parole' under [§ 1226(a)]." *Ortega-Cervantes*, 501 F.3d at 1115. The court noted that the INS release form itself is entitled "Order of release on Recognizance," and that it specified the person was being released pursuant to § 1226. *Id*.[7]

Other Circuit Courts have also acknowledged that conditional parole under § 1226 is the equivalent of release on personal recognizance. *See Cruz-Miguel v*. *Holder*, 650 F.3d 189, 191 (2d Cir. 2011) ("[Petitioner] was released therefrom on his 'own recognizance' pursuant to 8 U.S.C. § 1226 . . . . All parties appear to agree that petitioners were released on 'conditional parole.'"); *Delgado-Sobalvarro v*. *Attorney General of U.S*., 625 F.3d 782, 784 (3rd Cir. 2010); *see also Matter*

[5] 8 U.S.C. § 1182(d)(5)(A) grants the Attorney General discretion to "parole into the United States temporarily . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States."

[6] Pursuant to 8 U.S.C. § 1255(a), persons who are "inspected and admitted or paroled into the United States" are thereafter eligible to apply for adjustment of status from within the United States instead of returning to their home country to go through the more arduous consular process.

[7] DHS issued guidance shortly after the Ninth Circuit's decision in *Ortega-Cervantes* agreeing with the court's interpretation of "conditional parole" under § 1226(a). Dkt. #1, Ex. C at 2-3 (Gus P. Coldebella, DHS Office of General Counsel, Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act (Sept. 28, 2007)). The guidance confirms that DHS (and INS, its predecessor agency), have consistently defined "parole" under § 1226(a)(2) (and under the former § 1252 (1995)) as nothing more than "the release of a deportable alien without bail." *Id*. at 3 n.3.

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of Aguilar-Aquino, 24 I. & N. Dec. 747, 748 (BIA 2009) (noting that noncitizen released by DHS under § 1226(a) had been "released on his own recognizance").

Similarly, this principle is reflected in § 1226(a)'s implementing regulations. Regulations describing the agency's authority over the initial custody determination construe "conditional parole" to refer to release on recognizance as an alternative to release on monetary bond. *See* 8 C.F.R. § 287.3 (directing DHS to promptly determine whether noncitizens subject to a warrantless arrest "will be continued in custody or released on bond *or recognizance*" (emphasis added)); *id*. § 1236.3(b) (providing for the release of "[j]uveniles for whom bond has been posted, for whom parole has been authorized, *or who have been ordered released on recognizance*" (emphasis added)).[8]

The regulations governing custody redetermination hearings also recognize the Immigration Judge's authority to grant release on conditional parole as an alternative to release on monetary bond. The regulations specify that after DHS has made a custody determination, a detained individual "may, at any time before an order [of removal under 8 U.S.C. § 1229a] becomes final, request amelioration of the conditions under which he or she may be released." 8 C.F.R. § 1236.1(d). The regulation explicitly states that "the immigration judge is authorized to exercise the authority in section 236 of the Act [8 U.S.C. § 1226]." *Id*. There is nothing in the regulation that purports to

[8] Unlike the Immigration Court, DHS continues to acknowledge and routinely exercises its authority to grant "conditional parole" under § 1226(a) by releasing noncitizens on their own recognizance. *See* Dkt. #1, Ex. D (Form I-220A, Order of Release on Recognizance) (stating that "[i]n accordance with Section 236 of the [INA] . . . you are being released on your own recognizance," and requiring, among other things, that the noncitizen "report for any interview or hearing as directed," "surrender for removal from the United States if so ordered," obtain permission before changing her place of residence, and assist in obtaining travel documents). It would be incongruous for the statute to authorize DHS to order release on recognizance but not the Immigration Court, given that the Attorney General is expressly designated in § 1226(a).

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restrict Immigration Judges, as opposed to DHS, from exercising the authority granted by § 1226(a)(2) to release persons on conditional parole. To the contrary, the regulation empowers an Immigration Judge to determine whether to "to detain the alien in custody, release the alien, and determine the amount of bond, *if any*, under which the respondent may be released." *Id*. (emphasis added). Indeed, in amending the regulations for custody redetermination hearings, the agency explicitly reconfirmed that "[t]he immigration judge may . . . reduce the required bond amount, *release the alien on his or her own recognizance*, or make such other custody decision as the immigration judge finds warranted." EOIR, Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,910 (Oct. 31, 2001) (emphasis added) (regulations providing for automatic stay of an Immigration Judge's release orders). And the BIA has previously acknowledged the Immigration Judge's authority to order an individual released on her own recognizance. *See, e.g*., *Matter of Joseph*, 22 I. & N. Dec. 799, 800, 809 (BIA 1999) (upholding the Immigration Judge's order releasing the respondent on his own recognizance after determining that he was not subject to mandatory detention under § 1226(c), but instead detained under § 1226(a)).

In sum, Defendants' policy of refusing to hear requests for release on conditional parole as an alternative to monetary bond violates the plain language of both the statute and its implementing regulations.

C. The Statutory and Regulatory History and Longstanding Agency Practice Confirm the Immigration Court's Authority to Order Release on Conditional Parole.

The plain reading § 1226(a) and its regulations is reinforced by decades of statutory and regulatory history, case law, and agency practice recognizing the Immigration Court's authority to grant release on conditional parole as an alternative to monetary bond. Congress was fully aware of

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this history and, indeed, adopted it when it authorized release on conditional parole in enacting § 1226(a). *See Negusie v. Holder*, 555 U.S. 511, 546 (2009) ("Congress is aware of a judicial interpretation of statutory language and adopts that interpretation when it re-enacts a statute without change" (internal quotation marks and citation omitted)).

For more than sixty years, Congress has continuously provided the Attorney General—and the former INS and Immigration Judges as his agents by delegation—the authority to order release on conditional parole as an alternative to release on monetary bond. Congress first authorized the release of noncitizens in removal proceedings on "conditional parole" in the Internal Security Act of 1950. The Act provided that:

> Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; *or (3) be released on conditional parole*.

Internal Security Act of 1950, Pub. L. No. 831, § 23(a), 64 Stat. 1010, 1011 (emphasis added). Judicial opinions from this period make clear that the statutory provision for "conditional parole" authorized release on recognizance as an alternative to monetary bond. *See, e.g.*, *Carlson v. Landon*, 342 U.S. 524, 538 n.31 (1952) (referring to "bonds *or personal recognizances*" granted under the Act (emphasis added)); *Florentine v. Landon*, 206 F.2d 870, 871 (9th Cir. 1953) (noting that respondent was released on "conditional parole," which did not include the posting of bail but did require that the respondent "to produce himself when required to do so"); *see also* Dkt. #1, Ex. C at 3 n.3 (DHS guidance noting that 1950 Act "provided for the release from INS custody without bond of a deportable alien and termed it 'conditional parole'").

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Congress enacted a sweeping overhaul of the immigration laws in the Immigration and Nationality Act of 1952. However, the agency's authority to grant release on conditional parole remained unchanged. *See* Immigration and Nationality Act of 1952, Pub. L. No. 414, § 242(a), 66 Stat. 208, 209 (1952); *see also* H.R. Rep. No. 82-1365 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1711-12 (noting that "[section 242], in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950"); *Shrode v. Rowoldt*, 213 F.2d 810, 812 (8th Cir. 1954) (noting that "[§ 23 of the 1950 Act was] carried forward with no material change and embodied in the 1952 Act."); Dkt. #1, Ex. C at 3 n.3; *see also Matter of Patel*, 15 I. & N. Dec. 666, 667 (BIA 1976) (ordering, under former INA § 242(a), that the "respondent shall be released from custody on his own recognizance"); *Matter of Andrade*, 19 I. & N. Dec. 488, 489-90 (BIA 1987) (reviewing an Immigration Judge's grant of release on recognizance and reversing based on the individual facts of the case).

Likewise, for five decades, agency regulations have implemented the statute by expressly providing the Attorney General's agents with authority to release individuals without requiring a bond. These included both the former INS District Director—the predecessor to ICE Field Office Director—who previously made the initial custody determination, as the well as the Immigration Judge and its predecessor officials reviewing that determination. *See, e.g.*, Orders to Show Cause and Warrants of Arrest, 28 Fed. Reg. 8279, 8280 (Feb. 28, 1963) (codified at 8 C.F.R. § 242) ("a district director . . . may exercise the authority contained in section 242 of the Act to continue or detain an alien in, or release him from, custody, to determine whether an alien shall be released under bond, and the amount thereof, if any"); 8 C.F.R. § 242.2(b) (1970) (same, for the "[t]he special inquiry officer," the predecessor officer to the Immigration Judge); 8 C.F.R. § 242.2(b) (1983)

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(same, for the Immigration Judge); *compare* 8 C.F.R. § 1236.1(d)(1) (current regulation).[9] And Immigration Judges routinely granted release on recognizance under the 1952 Act and its implementing regulations. *See* Janet A. Gilboy, *Setting Bail in Deportation Cases*, 24 San Diego L. Rev. 347, 370 (1987) (noting that approximately one-sixth of detained immigrants who challenged their custody statuses in Chicago's immigration courts were successful in obtaining release on recognizance).

This unbroken history continued with § 1226(a). Notably, in enacting § 1226(a) in the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA"),[10] Congress adopted the language of former § 242(a) without any relevant changes. In doing so, Congress thus adopted the existing interpretations of the statute, which long understood "conditional parole" to be an alternative form of release on bond. *See Negusie*, 555 U.S. at 546.

Despite this long history, Immigration Judges in the Seattle and Tacoma Immigration Courts do not acknowledge their authority under the Act to grant such release, even though there has been no statute modifying their authority to do so. Defendants' decision to depart from the statute must be rejected.

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[9] Notably, the current regulation also authorizes the Immigration Judge "to exercise the authority in . . . section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings," 8 C.F.R. § 1236.1(d)(1), under which Immigration Judges indisputably had the authority to order release on recognizance. *See supra*. It would be incongruous to interpret the regulation to authorize Immigration Judges to order release on recognizance in deportation proceedings pursuant to former INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (1990), but not in removal proceedings pursuant INA § 236(a), 8 U.S.C. § 1226(a)—particularly in the absence of any evidence of Congress' intent to strip Immigration Judges of their traditional release authority.

[10] IIRIRA was consolidated into, and enacted as Division C of, the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

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D. The Executive Office For Immigration Review Cannot Restrict Its Jurisdiction in Contravention to the Detention Scheme Designed by Congress.

Defendants' policy is additionally unlawful because it improperly restricts its statutory authority to hear requests for release on conditional parole. When Ms. Rivera requested that the Immigration Judge release her on recognizance, the Immigration Judge responded that he did not have jurisdiction to consider such a request. The Immigration Judge's holding conforms to the recent unpublished decisions from the BIA and to the guidelines laid out in the EOIR Immigration Judge Benchbook. *See* Dkt. #1, Ex. A. However, it is clear that an agency does not have the right to restrict its statutory authority to adjudicate requests for release on recognizance. The Supreme Court has held that it is impermissible for an agency to contract its own jurisdiction through regulation or decision. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. Of Adjustment, Cent. Region*, 558 U.S. 67, 83-84 (2009). The Court reasoned that Congress alone controls an agency's jurisdiction and, unless Congress provides an agency authority to "adopt rules of jurisdictional dimension," any attempt to limit its jurisdiction cannot stand. *Id*. at 84.

In *Union Pacific*, the U.S. Supreme Court considered a challenge to the comprehensive review scheme for the National Railway Adjustment Board ("NRAB"), including the agency's delegation of authority to adjudicate "all disputes" between railroad carriers and employees (45 U.S.C. §§ 152-153). In a unanimous opinion, the Court held that the NRAB impermissibly refused "to adjudicate cases on the false premise that it lacked power to hear them." *Id*. at 86. The Court found that "Congress alone controls the Board's jurisdiction," and, thus, the NRAB lacks authority to impermissibly contract its jurisdiction. *Id*. at 71. Accordingly, the Court concluded that NRAB exceeded the scope of its jurisdiction by refusing to adjudicate the unions' claims.

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This case compels the same result. Defendants impermissibly refuse to adjudicate requests for conditional parole "on the false premise that it lacks power to hear them." *Id*. at 86. *See also Reyes-Torres v*. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) (rejecting the government's position that "the Attorney General [had] the power to unilaterally reduce the time in which Reyes-Torres could have filed his motion to reopen from the statutorily mandated ninety days to seven days. . . . such a result would 'completely eviscerate the statutory right to reopen provided by Congress'"). Congress vested the Attorney General—and thus his agents, the Immigration Judges and the BIA—with adjudicatory authority to order that persons detained under § 1226(a) be released on their own recognizance, without requiring a bond. *See* Section IV.B, *supra*. Nothing in the statute even suggests that the Defendants have the authority to limit its jurisdiction to eliminate this power. Consequently, "Congress alone controls the [agency's] jurisdiction." *Id*. Indeed, in this case the agency's action is especially egregious as it does not rely on any regulation or precedent decision that purports to limit its authority.

In sum, Congress vested EOIR with jurisdiction over custody determinations, including requests that persons be released on their own recognizance. Thus, EOIR cannot refuse "to adjudicate cases on the false premise that it lack[s] power to hear them." *Id*. at 86.

E. Defendants' Policy Raises Serious Due Process Concerns.

Finally, even assuming that there were any doubts as to the plain meaning of the statute, the principle of constitutional avoidance would require construing § 1226(a) to authorize Immigration Judges to grant conditional parole. Defendants' policy raises serious due process concerns by requiring the detention of individuals regardless of whether they present a flight risk or a danger to the community, simply because they do not have the resources to pay the minimum bond of $1,500.

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Under the canon of constitutional avoidance, a court must reject any interpretation of a statute that raises serious constitutional problems so long as an alternative construction is "fairly possible." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (internal citation and quotation marks omitted). This canon "is not a method of adjudicating constitutional questions" but rather one of statutory interpretation—"a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). As this Court has explained, the avoidance canon is a means of determining the plain meaning of a statute and "'giving effect to congressional intent.'" *Diouf v. Napolitano*, 634 F.3d 1081, 1090 n.11 (9th Cir. 2011) (quoting *Clark*, 543 U.S. at 382).

As the Supreme Court has explained, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civil detention violates due process when it is not reasonably related to its purpose and accompanied by "strong" procedural protections to guard against unjustified deprivations. *Id.* at 690-91. Where individuals are denied release, not based on a determination that they present a flight risk or danger to the community, their detention ceases to be reasonably related to its purpose. *Id.* at 690; *see also Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1979) (noting that "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk" (citation omitted)); *accord Matter of Andrade*, 19 I. & N. Dec. at 489.

If the statute were somehow read, despite its plain language, to limit Immigration Judges to ordering release on a minimum $1,500 bond, this would raise serious due process concerns, as it

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would deprive individuals of their liberty even when they do not pose a danger or flight risk that warrants their detention, based solely on their lack of financial resources. Immigration Judges must be allowed to exercise their conditional parole authority so as to prevent "poverty [from] be[ing] an absolute obstacle [to] release." *Leslie v. Holder*, 865 F. Supp. 2d 627, 641 (M.D. Pa. 2012); *cf. Shokeh v. Thompson*, 369 F.3d 865, 872 (5th Cir. 2004), *vacated on other grounds*, 375 F.3d 351 (5th Cir. 2004) (holding that "a bond that has the effect of preventing an immigrant's release because of inability to pay and that results in potentially permanent detention is presumptively unreasonable" (internal quotation marks omitted)). Moreover, the Attorney General's longstanding authority to order persons released on recognizance is consistent with both the overall purpose of the detention statute and the "broad discretion" that § 1226(a) vests in the Attorney General to decide whether to detain or release a noncitizen in removal proceedings. *See Matter of Guerra*, 24 I. & N. Dec. 37, 39 (BIA 2006).

The ability of Immigration Judges to order individuals released on recognizance is also critical because of their role, as neutral decision-makers, in reviewing ICE custody determinations and serving as an essential check on ICE's prosecutorial decision-making with respect to individuals' physical liberty. ICE officers have an institutional interest in detaining and removing noncitizens like Plaintiffs. *See St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (noting "political and community pressure" on the "INS, an executive agency," to continue to detain noncitizens). Accordingly, ICE's custody decisions cannot provide the kind of impartiality that due process requires. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (recognizing "the general rule" that "even purportedly fair adjudicators are disqualified by their interest in the controversy to be decided" (internal citations and quotation marks omitted)); *Concrete Pipe & Products of Cal., Inc. v.*

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Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617-18 (1993) ("Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation . . . which might lead him not to hold the balance nice, clear and true" (internal citation and quotation marks omitted)). Barring Immigration Judges from granting conditional parole raises serious due process concerns by compromising the impartial review required to ensure that the deprivation of the detainee's liberty is reasonably related to its purpose. If the Immigration Courts are unable to order release on recognizance, they cannot fully and effectively review ICE's custody decisions, including ICE's own denials of release on recognizance.

Release on recognizance, as an alternative to bond, is essential to effectuating the statutory authority of Immigration Judges and ensuring that immigration detention is serving its purposes in every case. Without this form of release, individuals whom the Attorney General determines to pose no flight risk or danger whatsoever nonetheless remain detained simply because they do not have the resources to post a bond, raising serious due process concerns. Thus, in determining the plain meaning of the statute, this Court should avoid the constitutional concerns that would be presented if § 1226(a) were not read to authorize the Immigration Judge to grant conditional parole as an alternative to monetary bond.

V. CONCLUSION

In sum, Defendants' policy of limiting Immigration Judges to ordering release on a bond of at least $1,500 is contrary to the plain language of the statute and regulations, which expressly contemplate release on conditional parole as an alternative to monetary bond and empower Immigration Judges to order such release as agents of the Attorney General. Defendants' position is

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also contrary to the statutory and regulatory history, published decisions from the BIA and the federal courts, and the history of agency practice, and improperly seeks to restrict the Immigration Court's jurisdiction over custody determinations. Finally, Defendants' policy raises serious constitutional concerns.

For all of these reasons, this Court should grant summary judgment providing declaratory and injunctive relief to the class.

DATED this 19th day of December, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I electronically filed the foregoing motion for summary judgment, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

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