13-1994; 13-2509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Leiticia CASTAÑEDA,

Petitioner, Appellee,

v.

Steve SOUZA,
Superintendent, Bristol County House of Correction
in his official capacity and his successors and assigns,

Respondent, Appellant,

Bruce E. CHADBOURNE, Field Office Director, Boston Field Office, Office of Detention and Removal, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; John T. MORTON, Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; Jeh JOHNSON, Secretary, U.S. Department of Homeland Security, in his official capacity and his successors and assigns; Eric H. HOLDER, Jr., Attorney General, U.S. Department of Justice, in his official capacity and his successors and assigns,

Respondents.

Clayton Richard GORDON,
on behalf of himself and others similarly situated,

Petitioner, Appellee,

Preciosa ANTUNES; Gustavo Ribeiro FERRIERA; Valbourn Sahidd LAWES; Nhan Phung VU,

Petitioners,

v.

Eric H. HOLDER, Jr., Attorney General; John SANDWEG, Acting Director; Sean GALLAGHER, Acting Field Office Director; Christopher J. DONELAN; Michael G. BELLOTI, Sheriff; Steven W. THOMPKINS, Sheriff; Thomas M. HODGSON, Sheriff; Joseph D. MCDONALD, Jr., Sheriff; RAND BEERS, Acting Secretary of Homeland Security,

Respondents, Appellants.

CONTINUED ON INSIDE BACK COVER

On Appeal From The United States District Court For The District of Massachusetts

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BRIEF OF *AMICI CURIAE*

IMMIGRATION LAW PROFESSORS
AND
AMERICAN IMMIGRATION LAWYERS ASSOCIATION, BOSTON COLLEGE LAW SCHOOL IMMIGRATION CLINIC, BOSTON UNIVERSITY LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, DETENTION WATCH NETWORK, FAMILIES FOR FREEDOM, GREATER BOSTON LEGAL SERVICES, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRANT RIGHTS CLINIC, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, SUFFOLK UNIVERSITY LAW SCHOOL IMMIGRATION LAW CLINIC, AND UNIVERSITY OF MAINE SCHOOL OF LAW IMMIGRANT AND REFUGEE RIGHTS CLINIC

IN SUPPORT OF PETITIONERS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* state that no publicly held corporation owns 10% or more of the stock of any of the parties listed herein, which are nonprofit organizations and community groups.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored any part of the brief, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT OF INTEREST

Amici curiae are immigration law professors, immigration law practitioners and service providers, and immigrant rights organizations familiar with the Government's application of *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), and its expansive interpretation of the mandatory detention statute. *Amici* include 67 law professors along with 15 prominent national and local organizations with an interest in the proper interpretation of the statute. A detailed list of *amici* and further organizational statements of interest are submitted as Appendix A.

Amici submit this brief in response to this Court's order inviting supplemental briefing on the following question:

> Could Congress lawfully provide that, categorically, all aliens who have committed one of the crimes enumerated in 8 U.S.C. § 1226(c), regardless of when released from prior custody, should be detained without bail while their deportation proceedings proceed, provided that the proceeding moves apace and that there is a right to a prompt *Joseph* hearing challenging the individual's classification as an alien who has committed such a crime?

As *amici* explain below, Congress did not and could not lawfully predicate mandatory detention on the commission of an enumerated offense alone regardless of when a noncitizen is released from prior custody for that offense.

First, contrary to the sweeping and atextual picture of Congressional intent that the Government proffers in its petition for rehearing en banc, Congress has never predicated mandatory detention under 8 U.S.C. § 1226(c) or its predecessor

statutes solely on whether a noncitizen has committed an enumerated crime alone. As explained in Point I, *infra*, the text and legislative history demonstrate that Congress intended mandatory detention to serve a "more limited but focused purpose," *cf. Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). Rather than focusing on all noncitizens with old criminal records, Congress was concerned with incarcerated noncitizens who were being released into the community, evading immigration officials, and reoffending. Congress thus applied mandatory detention to individuals who would otherwise be released from criminal incarceration for the specific purpose of addressing their presumed flight risk and dangerousness at the time of their incarceration. Individuals like Ms. Castañeda and Mr. Gordon—who have peacefully and openly lived in the community for years and are later identified for removal proceedings based on an old criminal record—are thus not the individuals whom Congress had in mind when it enacted mandatory detention. Instead, they remain subject to the ordinary bond procedures that apply under the statute's longstanding discretionary detention scheme.

Second, even if the statute could be interpreted to apply to noncitizens regardless of when they were released from custody, such an interpretation would raise serious constitutional concerns. As the Supreme Court held in *Demore v. Kim*, the constitutionality of mandatory, no-bond, preventative civil detention is predicated upon the reasonableness of the categorical presumption of flight risk

and dangerousness. As explained in Point II, *infra*, the Government's position that it can deny a bond hearing to individuals like Ms. Castañeda and Mr. Gordon "any time after" a release from custody eviscerates the reasonableness of this presumption by ignoring the relevance and evidentiary impact of the time that they have spent peacefully and openly in the community since their enumerated offense. For such individuals, only an individualized bond hearing under a discretionary detention scheme may determine whether they are a flight risk or danger.

ARGUMENT

I. The Text and Legislative History of 8 U.S.C. § 1226(c) Demonstrate that its Purpose is to Ensure Continued Custody for Noncitizens Who Are Incarcerated for Predicate Offenses, Not to Undermine Bond Procedures that Ordinarily Apply When a Noncitizen is Later Identified in the Community and Detained.

The Government's arguments in this case, and the specific concerns it presses on rehearing, are based on a false premise—that the target of Congress's mandatory detention scheme includes all "criminal aliens in general" who have a predicate offense listed in 8 U.S.C. § 1226(c)(1)(A)-(D). *See* Gov't Pet'n Reh'g ¶ 4. This position not only excises the "when . . . released" clause out of the substance of 8 U.S.C. § 1226(c), it also attributes to Congress an expansive and amorphous intent that is not supported in the text or history of the statute.

Amici support, and will not repeat, the arguments submitted in the briefing of Petitioners-Appellees on the proper statutory interpretation of 8 U.S.C. §

1226(c) before the Panel in this case (as well as the statutory interpretation adopted by the majority of federal courts, *see* Appendix B). *Amici* write separately here only to emphasize how the legislative history itself demonstrates that Congress had a "more limited but focused purpose" in mind when it created an exception to its ordinary bond procedures through mandatory detention—to prevent criminally incarcerated noncitizens from being released from custody for their predicate offenses into the community where they may abscond or recidivate.[1] *Cf. Saysana v. Gillen*, 590 F.3d 7, 17 (1st Cir. 2009). Contrary to the Government's arguments, Congress was not focused on any heightened risks posed by noncitizens living peacefully and openly in the community whom immigration officials were able to identify and detain based on an old criminal record. For these individuals, and all others who fall outside the scope of 8 U.S.C. § 1226(c), the ordinary bond procedures of § 1226(a) continue to apply. In attributing a much more sweeping and atextual intent to Congress to deny bond hearings to all "criminal aliens in general," the Government's "generalized statements of legislative intent paint with far too broad a brush." *See Castañeda v. Souza*, 769 F.3d 32, 43 (1st Cir. 2014).

[1] *Amici* do not suggest that they necessarily agree with Congress's choice to deprive bond hearings to noncitizens who are detained at the time of their release from incarceration for an enumerated offense. Regardless of the merits of Congress's choice, however, *amici* submit that *Matter of Rojas* goes much further than Congress intended.

As an initial matter, *amici* note that any assertion by the Government that 8 U.S.C. § 1226(c) applies to all noncitizens who have a predicate offense under § 1226(c)(1)(A)-(D) without any further limitation cannot be correct under the plain terms of the statute and the agency's own longstanding view. At a minimum, the Government would have to concede that the statute applies only to individuals who have been confined for their predicate offenses. *See* 8 U.S.C. § 1226(c) (referring to noncitizens "released" from custody for predicate offenses); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 303(b)(2), Pub. L. No. 104-208, 110 Stat. 3009-586 (specifying that the mandatory detention in 8 U.S.C. § 1226(c) applies to individuals who were "released after" the statute's effective date); *Matter of West*, 22 I&N Dec. 1405, 1409-10 (BIA 2000) (holding that the statute's reference to being "released" requires a release from physical restraint in order for mandatory detention to apply); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (BIA 1999) (holding that mandatory detention only applies to immigrants "released" from criminal custody); *see also Saysana*, 590 F.3d at 17 (holding that mandatory detention does not apply if an individual has not been released from custody for a predicate offense after the effective date of the statute). Thus, a noncitizen with a predicate offense who has never been criminally confined—for example, a noncitizen charged with marijuana possession by summons/ticket and ordered to pay a fine—would not be subject to mandatory

detention even though he or she would have a predicate offense (in this example, under § 1226(c)(1)(A)). Congress's focus on criminal confinement is therefore indisputably key to the operation of the mandatory detention statute. The question is thus not whether past confinement for an enumerated offense is a predicate requirement for mandatory detention to apply (it is), but only whether the timing of immigration detention vis-à-vis release from that past confinement is also a predicate requirement.

As to this question, the answer is yes. Rather than deny bond hearings to all immigrants with a past criminal offense, mandatory detention applies only to incarcerated noncitizens who are detained at the time of their release from criminal custody for their enumerated offense. As this Court has explained in a related context:

> The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply. . . . [F]inding that the "when released" language serves this more limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses, as opposed to the amorphous purpose the Government advances, avoids attributing to Congress the sanctioning of the arbitrary and inconsequential factor of any post-[Oct. 8, 1998] custodial release becoming the controlling factor for mandatory detention.

Saysana, 590 F.3d at 17. In other words, Congress intended for mandatory detention to serve a specific and limited function—to ensure that individuals incarcerated for certain types of removable offenses will remain in a continuous

chain of custody until the timely completion of their removal proceedings. This "focused purpose" is not served when mandatory detention applies to individuals long ago released from criminal custody.

This view of Congress's "more limited but focused" purpose for mandatory detention is reflected throughout the text and legislative history of this statute and its predecessor statutes. In 1988, Congress enacted the first mandatory detention statute for noncitizens pending removal proceedings. *See* Anti-Drug Abuse Act, § 7343(a)(4), Pub. L. No. 100-690, 102 Stat. 4181 (1988).[2] Congress preserved federal immigration officials' prior, longstanding discretionary authority to detain or release most noncitizens in removal proceedings, but carved out a specific category of noncitizens for whom detention was mandated and bond was not available—noncitizens incarcerated for "aggravated felony" convictions. *See* Anti-Drug Abuse Act, § 7343(a)(4) (codified at 8 U.S.C. § 1252(a)(2) (1989)).[3] In

[2] Prior to 1988, the power to detain noncitizens facing deportation was fully discretionary and predicated on an individual's risk of flight and danger to national security. *See, e.g.*, *Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) ("An 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." (citations omitted)). Under this longstanding statutory scheme, federal immigration officials retained broad authority to decide whether to detain noncitizens pending their removal proceedings or release them on bond. *See id*. This discretionary scheme is still the default rule for noncitizens placed in removal proceedings and is currently codified at 8 U.S.C. § 1226(a).

[3] The Anti-Drug Abuse Act initially defined the term "aggravated felony" to include murder, drug trafficking, and firearm trafficking. *See* Anti-Drug Abuse

enacting mandatory detention, Congress intended to prevent these incarcerated "aggravated felons" from being released from their sentences before federal immigration officials had the opportunity to deport them. *See, e.g.*, *Matter of Eden*, 20 I. & N. Dec. 209, 214 (BIA 1990) (discussing legislative history of mandatory detention and its stated purpose to ensure that "illegal aliens convicted of drug or violent crimes are incarcerated until they are returned to their homeland" (quoting 134 Cong. Rec. S14112 (daily ed. Oct. 3, 1988)). To that end, Congress specified that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction ... [and] the Attorney General shall not release such felon from custody." *See* Anti-Drug Abuse Act, § 7343(a)(4) (codified at 8 U.S.C. § 1252(a)(2) (1989)). In so doing, Congress ensured a continuous chain of custody from criminal incarceration to immigration detention to removal for this class of noncitizens.

Since the initial enactment of the first mandatory detention statute, Congress's focus on providing a chain of custody for incarcerated noncitizens who would otherwise be released prior to removal proceedings has not changed. Subsequent amendments to the law focused specifically on clarifying that mandatory detention applied at the time of release from custodial incarceration.

Act, § 7342 (codified at 8 U.S.C. § 1101(a)(43) (1989)). The term "aggravated felony" was subsequently expanded and is currently defined by reference to twenty-one subcategories of offenses, 8 U.S.C. § 1101(a)(43)(A)-(U).

For example, some noncitizens argued that the 1988 version of the statute could not apply to noncitizens who were released from incarceration through parole or other forms of supervised release, because their "sentence" had not yet been completed. *See, e.g., Matter of Eden*, 20 I. & N. Dec. at 212 (discussing the dispute over the meaning of "sentence" in mandatory detention cases). Congress responded by amending the language to clarify that mandatory detention applies to individuals released from criminal custody for their aggravated felony convictions "regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense." Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 4978, 5049 (Nov. 29, 1990) (codified at 8 U.S.C. § 1252(a)(2) (1991)).[4] Congress thus sought to ensure that noncitizens incarcerated for

[4] The Immigration Act of 1990 also briefly restored discretion to release "any lawfully admitted alien" whom the Attorney General otherwise detained upon his or her release from criminal custody for an aggravated felony conviction, provided that the noncitizen established his or her lack of risk of flight or danger to the community. *See* Immigration Act of 1990, § 504, 104 Stat. 4978, 5049; Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 306, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (effective as if included in the 1990 Act) (codified at 8 U.S.C. § 1252(a)(2) (1991)). In *Matter of Rojas*, the BIA suggested that this provision indicated that Congress was not concerned about the timing of release because the specific subsection restoring discretion for lawfully admitted noncitizens did not in and of itself refer to such individuals having been "released." 22 I&N Dec. at 123-24. However, this provision provided an exception to the mandatory detention provision, which did include a reference to the timing of release, and thus incorporates the requirement that an individual be

aggravated felony convictions would remain detained, and not be released to the public by any mechanism, pending their deportation.[5]

In 1996, Congress made further amendments to the mandatory detention statute, expanding the types of enumerated offenses that triggered mandatory detention pending removal proceedings when the person would have otherwise been released from incarceration. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (Apr. 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b), 110 Stat. 3009, 3009-585 (Sept. 30, 1996), codified at 8 U.S.C. § 1226(c). Congress's expanded list of offenses triggering mandatory detention corresponded to the list of offenses for which

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detained "upon release of the alien" before an exception would be necessary. 8 U.S.C. § 1252(a)(2)(A) (1991). As the seven member dissent in *Matter of Rojas* notes, federal courts interpreted the release clause to require mandatory detention at the time of release, history of which Congress was presumably aware in subsequent enactments. *Id.* at 135-37 (Rosenberg, Board Member, dissenting).

[5] Congress explicitly addressed arguments discussed in *Matter of Eden* when adopting this amendment. H.R. Rep. No. 101-681(I), § 1503, at 148 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6554, 1990 WL 188857, 158 ("Current law . . . requires INS to incarcerate alien aggravated felons without bond immediately upon completion of the alien's criminal 'sentence.' At least one immigration judge has ruled that an aggravated felon who has been paroled by the sentencing court continues to serve his 'sentence' while out on parole. Therefore, INS has no authority to incarcerate this alien until his period of parole has ended. Section 1503 amends existing law by requiring INS to incarcerate aggravated felons upon release from confinement, regardless of whether such release involves parole, probation, or other forms of supervision.").

Congress initially eliminated most discretionary relief from removal in AEDPA (to be later partially restored in IIRIRA). *See* AEDPA, 110 Stat. at 1277. In expanding the list of convictions that could trigger mandatory detention, Congress presumably elected to single out certain categories of removable incarcerated immigrants whom it deemed to represent a danger to the community or flight risk upon release from criminal confinement for the removable offense.[6]

While vastly expanding the list of offenses enumerated in the mandatory detention statute, Congress choose to preserve the "when . . . released" clause, thus continuing to predicate mandatory detention on a person's release from criminal custody for the enumerated offenses using substantially the same language as its predecessor statute. *See* 8 U.S.C. § 1226(c) (specifying that people are subject to mandatory detention "when . . . released" from custody for the enumerated offense). Legislative history during this period demonstrates that members of Congress remained concerned with preventing the release of criminally incarcerated immigrants. *See, e.g.*, S. Rep. No.104-48, at 21 (1995) (seeking

[6] Not all removable offenses trigger mandatory detention upon release. For example, in defining the subcategories of immigrants subject to § 236(c) in subparagraphs (1)(A)–(D), Congress applied mandatory detention to incarcerated noncitizens removable for a crime falling within specified categories such as convictions for an aggravated felony or a crime involving moral turpitude with a prison sentence of at least one year but chose to exempt noncitizens removable for a crime involving moral turpitude who had not been sentenced to at least one year of imprisonment. *See* 8 U.S.C. § 1226(c)(1)(A)–(D).

detention without bond for noncitizens who would otherwise be released from their "underlying sentences" before the agency could complete deportation proceedings); House Conf. Rep. 104-828, at 210-11 (1996) (seeking to mandate detention when noncitizens are "released from imprisonment" for a predicate offense). As the Supreme Court noted in *Demore v. Kim*, Congress was concerned with the growing percentage of noncitizens in prisons and jails and sought to avoid circumstances where these noncitizens would be released from incarceration into the community where it would be difficult to "identify . . . much less locate . . . and remove [them] . . . from the country." 538 U.S. 510, 518–20 (2003).

Recognizing the burden that its predicate requirements would cause (a vastly expanded list of enumerated offenses with a continuation of the requirement that individuals be detained at the time of their release from incarceration), Congress also enacted Transition Period Custody Rules ("TPCR") to give the federal government a two-year extension for the effective date of the mandatory detention statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. no. 104-208, § 303(b), 110 Stat. 3009-546, at 3009-586-587 (1996) ("IIRIRA"). Concerned that "the Attorney General did not have sufficient resources" to implement mandatory detention requirements, the TPCR were "designed to give the Attorney General a [one- to two-year] 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) (citing *Criminal and Illegal Aliens, 1996: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of David A. Martin, General Counsel, INS); 142 Cong. Rec. S11,838-01, S11,839 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch)). The Attorney General delayed the effective date by the full two years, and thus 8 U.S.C. § 1226(c) applies only to individuals "released after" October 8, 1998. As noted earlier, the effective date clause and the implementation of the TPCR during the intervening period both underscore the importance of the timing of release to Congress's chosen statutory scheme.[7]

Thus, throughout the history of the mandatory detention statute, Congress had a specific focus on criminally incarcerated noncitizens who might otherwise be released from custody. Its continual retention of a "released" requirement and its amendments to clarify that mandatory detention must occur at the time of custodial release demonstrate that the purpose of the statute is narrower than what the

[7] Indeed, the fact that Congress chose to give the Attorney General additional time to prepare to meet the requirements of 8 U.S.C. § 1226(c) is further evidence that Congress intended for mandatory detention to apply at the time of the noncitizen's release from criminal custody. If Congress had intended to authorize federal immigration officials to detain noncitizens without bond at any time after their release from criminal custody, Congress would have seen no need to delay the statute's effective date.

Government has suggested in its arguments in this case. The "limited but focused purpose" of mandatory detention recognized by this Court in *Saysana* and the Panel in this case is thus not served when mandatory detention applies to individuals long released from criminal custody who are later identified and detained while peacefully and opening living within the community. Adopting the Government's sweeping and severe reading of Congressional intent expands mandatory detention beyond the terms that Congress has continually chosen at great cost to immigrants who fall outside of Congress's core concerns.

II. Even if 8 U.S.C. § 1226(c) Could Be Read to Apply to Noncitizens Who Are Detained While Living Openly and Peacefully in the Community, Such An Interpretation Would Raise Serious Constitutional Concerns.

Assuming *arguendo* that Congress had sought to apply mandatory detention to noncitizens with the offenses enumerated in § 1226(c)(1)(A)-(D) without regard to whether they were detained at the time of their release from criminal custody, such an interpretation would raise serious concerns under the Due Process Clause. Under principles of constitutional avoidance, this Court should therefore conclude that Congress could not lawfully apply mandatory detention to noncitizens with enumerated offenses "any time after" their release from criminal custody.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In the

civil, preventative detention context, due process thus requires "special justification" that "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.*

The two stated justifications for immigration detention are the government's regulatory aims of preventing flight risk and protecting the community from danger. *See id.*; *Demore*, 538 U.S. at 513. Whether detention bears a reasonable relationship to these justifications depends on the operation of the particular statutory scheme at issue. For example, in *Zadvydas*, the Supreme Court examined the provision in the immigration statute governing detention following a final removal order in a case involving individuals who could not be deported and thus faced indefinite detention. It concluded that "the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best," and that the second justification alone—protecting against dangerousness through preventative detention—applies "only when limited to specially dangerous individuals and subject to strong procedural protections" not found in the current administration of the statute. *Zadvydas*, 533 U.S. at 690. The Supreme Court thus construed the statute to avoid these serious constitutional concerns and recognized a six-month cap after which detention would not be presumptively reasonable under the post-final-removal-order scheme. *Id.* at 701.

The detention provision at issue in this case—mandatory detention under 8

U.S.C. § 1226(c)—has likewise come under constitutional scrutiny, although not with respect to individuals detained months or years after their release from criminal custody. In *Demore*, the Supreme Court held that mandatory detention under 8 U.S.C. § 1226(c) of an individual who had conceded he was "subject to mandatory detention under § 1226(c)" and "conceded he is deportable" was constitutional for "limited period of his removal proceedings." 538 U.S. at 513-14, 531. Observing that Congress was concerned about the growing population of noncitizens in the prison system, coupled with immigration officials' inability to identify "criminal aliens" who abscond or recidivate, the Court concluded that Congress "may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." *Id.* at 513, 518 ("Criminal aliens were the fastest growing segment of the federal prison population, already constituting roughly 25% of all federal prisoners, and they formed a rapidly rising share of state prison populations as well. Congress' investigations showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country." (emphasis in original)).

The Government argues that *Demore* somehow forecloses the conclusion reached by the Panel in this case because the Supreme Court upheld the facial constitutionality of mandatory detention without any limiting principles applicable to the *Matter of Rojas* context. *See* Gov't Pet'n Reh'g ¶ 2(b)-(g). This argument

misconstrues the scope of *Demore*. In upholding the constitutionality of mandatory detention as a general matter, the Supreme Court did not address the statutory or constitutional questions presented here—whether the Government has interpreted the mandatory detention more expansively than either Congress intended or the Due Process Clause permits. Rather, the immigrant challenging the constitutionality of his detention in *Demore* did not raise these arguments, conceding that he was subject to the terms of the mandatory detention statute. 538 U.S. at 513–14 ("Respondent . . . did not dispute the INS' conclusion that he is subject to mandatory detention under § 1226(c)."). The Court's holding thus was predicated on the notion that the Mr. Kim's detention was aligned with Congressional intent, and its review was therefore limited to determining whether Congress's manifestation of that intent complied with due process. *See id.* at 531. The Court thus did not have cause to address *Matter of Rojas* (or the myriad other BIA cases involving statutory interpretation of various aspects of § 1226(c)) to determine whether those interpretations were improper or otherwise expand mandatory detention beyond its constitutionally permissible purpose.

Nothing in *Demore* thus forecloses the argument raised by Petitioners-Appellees in this case, that the Government's interpretation of the "when . . . released" clause raises constitutional concerns. Indeed, the Court acknowledged that there could be circumstances in which Congressional intent would not be

served by mandatory detention, because detention without bond was no longer geared towards individuals who were categorical flight risks and dangers to the community. In providing the fifth vote for the holding in *Demore*, Justice Kennedy explained that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." 538 U.S. at 532 (Kennedy, J., concurring) (noting that "[w]ere there to be an unreasonable delay by [ICE] in pursuing . . . deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons"); *Diop v. DHS/ICE*, 656 F.3d. 221, 232 n.10 (2001) (noting that *Demore* left open the possibility that § 1226(c) might be unconstitutional as applied to individuals).

The interpretation at issue in this case raises this very concern about unjustified, unreasonable, and arbitrary detention. Noncitizens who are subject to *Matter of Rojas* are, by definition, individuals who have neither absconded nor committed additional enumerated offenses during the relevant gap between their predicate release and their immigration detention. Rather, they are individuals later identified by immigration officials and placed in removal proceedings through the ordinary course of immigration enforcement, and who have, in the intervening

time, accumulated evidence of their rehabilitation and ties to the community following their past enumerated offense. *See* Brief of *Amici* Detention Watch Network et al., *Castañeda v. Souza*, No. 13-1994 (1st Cir. filed Apr. 8, 2014) (hereinafter "Detention Watch Network *Amici* Br."), at 10-14, 24-28 (describing stories of individuals who have developed strong equities since their past offense and who have been living openly and peacefully in the community). Thus, neither of the two justifications for mandatory detention categorically applies.

The Government suggests that the first justification, relating to flight risk, nonetheless applies to individuals subject to *Matter of Rojas* because "certain criminal aliens face near 'certain' removal" and thus "possess a strong incentive to flee after—but not necessarily before—immigration authorities turn their attention to them." Gov't Pet'n Reh'g ¶ 2(d). However, the noncitizens subject to *Matter of Rojas* are among those with enumerated offenses most likely to be eligible for discretionary relief from removal by virtue of the equities they have built following their past removable offense and the passage of time relevant to certain forms of relief. *See, e.g.*, 8 U.S.C. § 1229b(A) (predicating cancellation of removal in part on years of lawful permanent residency status); *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (describing evidence of rehabilitation following past criminal offense and the recency of the offense as factors in grants of cancellation of removal and relief under former § 212(c) of the INA); Detention Watch Network

Amici Br. at 14-18 (describing prevalence of relief eligibility for individuals subject to *Matter of Rojas* and noting specific stories of individuals).[8]

The Government does not make a clear argument regarding the second justification—dangerousness—for individuals specifically subject to *Matter of Rojas*. This underscores the problem with conflating the circumstances of incarcerated noncitizens—where the Government argues one may reasonably presume a categorical risk of recidivism with no countervailing evidence to rebut any presumption—with noncitizens who have already been released to the community and have had the opportunity to accumulate evidence demonstrating rehabilitation and lack of recidivism since their past offense. As this Court has recognized, "the more remote in time a conviction becomes and the more time after a conviction an individual spends in the community, the lower his bail risk is likely to be." *See Saysana*, 590 F.3d at 17.

Amici thus agree with the growing list of courts, including the Panel in this case, that have recognized these constitutional concerns where noncitizens are detained months or years after any release from criminal custody for an

[8] Indeed, nearly 50% of noncitizens placed in removal proceedings are ultimately permitted to remain in the United States, whether it is due to the grant of relief, the exercise of prosecutorial discretion, or successful arguments challenging the grounds of removal. *See* Transactional Records Access Clearinghouse, *U.S. Deportation Outcomes By Charge*, *at* http://trac.syr.edu/phptools/immigration//court_backlog/deport_outcome_charge.php (last visited Feb. 17, 2015).

enumerated offense. *See, e.g.*, *Castañeda*, 769 F.3d at 46 ("[T]he 'when ... released' clause must be construed as benefitting aliens detained years after release in order to avoid constitutional doubts."); *Rodriguez v. Shanahan*, No. 14-CV-09838 (SN), 2015 WL 405633, at *13 (S.D.N.Y. Jan. 30, 2015) ("Th[e] special justification [necessary for mandatory detention] . . . no longer applies for non-citizens such as Rodriguez who have, by virtue of being in his community for seven years, rebutted Congress's otherwise acceptable presumption of dangerousness, recidivism, and flight risk. Holding him without a bond hearing now raises constitutional concerns that would not have been present had he been apprehended 'when ... released.'"); *Figueroa v. Aviles*, No. 14-cv-9360 (AT), 2015 WL 464168, at *4 (S.D.N.Y. Jan. 29, 2015) (concluding that mandatory detention of an individual not detained "when . . . released" "raises serious due process concerns"); *Martinez Done v. McConnell*, No. 14 Civ. 3071 (SAS), -- F.3d --, 2014 WL 5032438, at *32 (S.D.N.Y. Oct. 8, 2014) ("[T]he government's construction of section 236(c) would confer limitless authority on the Attorney General to pluck immigrants from their families and communities with no hope of release pending removal—even decades after criminal confinement. This construction threatens immigrants' statutory and constitutional rights."); *Araujo-Cortes v. Shanahan*, 35 F.Supp.3d 533, 550 (S.D.N.Y. 2014) (holding that a petitioner who has returned to his family and community is "differently situated from the criminal aliens who are

taken into custody ‘when ... released’ considered by the Supreme Court in *Demore*” and therefore “Congress’ concerns about whether those criminal aliens pose a flight risk or danger to the community, do not justify . . . continued detention”); *Espinoza v. Aitken*, No. 5:13-cv-00512 EJD, 2013 U.S. Dist. LEXIS 34919, *19-20 (N.D. Cal. Mar. 13, 2013) (“[T]he liberty interest implicated by any civil detention statute, especially one which calls for imprisonment without review, makes it unsurprising why Congress would want to limit its application to a particular class of individuals detained at a particular time.”); *Monestime v. Reilly*, 704 F Supp. 2d 453, 458 (S.D.N.Y. 2010) (concluding that, given the length of time that has passed since the immigrant detainee’s last removable offense, “DHS can only determine whether [the petitioner] poses a risk of flight or danger to the community through and individualized bond hearing”).

As a final matter, *amici* note that the two caveats highlighted in this Court’s request for supplemental briefing do not shift the analysis. Neither the “right to a prompt *Joseph* hearing challenging the individual’s classification as an alien who has committed such a crime” nor a finding that “the proceeding moves apace” would cure mandatory detention of the constitutional infirmities in the *Matter of Rojas* context.

First, the availability of a *Joseph* hearing does not resolve the question of whether the interpretation of 8 U.S.C. § 1226(c) in *Matter of Rojas* presents serious

constitutional concerns. A *Joseph* hearing merely provides a noncitizen with the opportunity to argue, pursuant to regulations, that he or she "is not properly included" within "section 236(c)(1) of the Act." 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). While a noncitizen may challenge his or her inclusion in the mandatory detention statute on the basis of whether his or her conviction is an enumerated offense, 22 I&N Dec. at 807-08, noncitizens may also seek a *Joseph* hearing to argue that they are not properly included in the mandatory detention statute for other reasons, including the argument that they were not detained "when . . . released" from their predicate offense (or other issues, such as whether the individual was "released" at all, whether the individual is an "alien," etc.) under § 1226(c)(1).[9] Having the right to an administrative hearing to challenge one's mandatory detention based on a claim that the statute is being misapplied does not dictate whether the legal outcome of that hearing—in this case, the agency's conclusion that one *is* properly included in

[9] Because the BIA has already rejected noncitizens' arguments regarding the "when . . . released" clause in *Matter of Rojas*, the resort to a *Joseph* hearing on this issue is futile. *See, e.g.*, *In re: Verner Alfonso Larios-Garcia*, 2010 WL 2601506 (BIA June 9, 2010) (unpublished) (considering and rejecting "when . . . released" claim in *Joseph* hearing as foreclosed by *Matter of Rojas*); *In re: Chrisanto Ronduen Acosta*, 2010 WL 2224587 (BIA May 12, 2010) (unpublished) (same); *In re: Mtanious Dandouch*, 2009 WL 5443764 (BIA Dec. 16, 2009) (unpublished) (same).

the mandatory detention statute regardless of whether one was detained when released from criminal custody—is constitutionally firm.

In addition, although beyond the scope of the issues posed in this case, the burden of proof in *Joseph* hearings on the predicate offense issue is constitutionally suspect. Under *Matter of Joseph*, a noncitizen who seeks to challenge whether his or her conviction is enumerated in the statute bears the burden of establishing that the Department of Homeland Security "is substantially unlikely to prevail on its charge." 22 I&N Dec. at 807. This standard is virtually impossible to meet, and has been criticized as being unconstitutional. *See Tijani v. Willis*, 430 F.3d 1241, 1243-49 (9th Cir. 2005) (Tashima, J., concurring) ("[T]he *Joseph* standard is not just unconstitutional, it is egregiously so."); Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65 (2011) (describing virtually insurmountable burden in *Joseph* hearings).

Second, the assurance that "the proceeding moves apace" is an assurance only that the detention is not prolonged, and thus does not protect mandatory detention from all constitutional infirmities. In other words, while prolonged detention does raise serious constitution concerns, *see, e.g., Diop*, 656 F.3d. at 231-32; *Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013); it does not follow that it is the only constitutional concern that might arise with mandatory detention.

As noted above, several courts in addition to the Panel in this case have recognized that the categorical denial of bond hearings to noncitizens months or years after their release from criminal custody raises constitutional concerns. Courts have similarly recognized that the detention of noncitizens whose removal is not reasonably foreseeable (for example, because there is no repatriation agreement with the country of removal) raises constitutional concerns. *See, e.g.*, *Owino v. Napolitano*, 575 F.3d 952, 955-56 (9th Cir. 2009); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003). Finally, courts have recognized that the categorical denial of bond hearings to individuals with a substantial challenge to removal may raise constitutional concerns. *See, e.g.*, *Gonzalez v. O'Connell*, 355 F.3d 1010, 1015 (7th Cir. 2004). Thus while it is constitutionally required that "proceedings move apace," it does not follow that prolonged detention is the only circumstance in which mandatory detention may run afoul of constitutional requirements.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the en banc Court to reject the reasoning in *Matter of Rojas* as contrary to both congressional intent and constitutional principles.

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New York, NY

Respectfully submitted,

/s/ Alina Das

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APPENDIX A:
LIST OF LAW PROFESSOR AND ORGANIZATIONAL *AMICI CURIAE*

I. List of Law Professor *Amici Curiae*

The following 67 law professors have expertise in immigration law and share an interest in the proper interpretation of the mandatory detention statute in this case. *Institutional affiliations are listed for identification purposes only.*

Farrin R. Anello
Visiting Assistant Clinical Professor
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Center for Social Justice
Seton Hall University School of Law

David C. Baluarte
Assistant Clinical Professor of Law
Director, Immigrant Rights Clinic
Washington and Lee University School of Law

Eleanor Brown
Associate Professor
George Washington University Law School

Jason A. Cade
Assistant Professor of Law
Director, Community Health Law Partnership
University of Georgia Law School

Janet M. Calvo
Professor of Law
City University of New York School of Law

Kristina M. Campbell
Associate Professor of Law
Director, Immigration and Human Rights Clinic

University of the District of Columbia David A. Clarke School of Law

Linus Chan
Visiting Associate Professor of Clinical Law
University of Minnesota Law School

Violeta Chapin
Associate Clinical Professor of Law
University of Colorado, Boulder

Michael J Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas at Austin

Marisa S. Cianciarulo
Professor of Law
Chapman University
Fowler School of Law

Dree K. Collopy
Lecturer and Co-Director, Immigration Litigation Clinic
The Catholic University of America Columbus School of Law

Erin B. Corcoran
Professor of Law
University of New Hampshire School of Law

Alina Das
Associate Professor of Clinical Law
New York University School of Law

Charles Shane Ellison
Adjunct Professor of Immigration Law
Creighton University School of Law

César Cuauhtémoc García Hernández
Visiting Professor
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Denise Gilman
Clinical Professor
Director, Immigration Clinic
University of Texas School of Law

Jennifer Gordon
Professor of Law
Fordham Law School

Jonathan Hafetz
Associate Professor Law
Seton Hall University School of Law

Susan Hazeldean
Assistant Clinical Professor of Law
Director, LGBT Clinic
Cornell Law School

Mary Holper
Associate Clinical Professor
Boston College Law School

Michael Kagan
Associate Professor
Co-Director, Immigration Clinic
William S. Boyd School of Law
University of Nevada, Las Vegas

Anil Kalhan
Associate Professor of Law
Thomas R. Kline School of Law
Drexel University

Daniel Kanstroom
Professor of Law
Thomas F. Carney Distinguished Scholar, and
Director, International Human Rights Program
Boston College Law School

Harvey Kaplan
Emeritus
Northeastern School of Law

Elizabeth Keyes
Assistant Professor
Director of the Immigrant Rights Clinic
University of Baltimore School of Law

Jennifer Lee Koh
Associate Professor of Law and
Director, Immigration Clinic
Western State College of Law

Hiroko Kusuda
Associate Clinic Professor
Loyola New Orleans College of Law

Kevin Lapp
Associate Professor of Law
Loyola Law School, Los Angeles

Christopher N. Lasch
Associate Professor of Law
University of Denver Sturm College of Law

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Lewis & Clark Law School

Lynn Marcus
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University of Arizona Rogers College of Law

Peter L. Markowitz
Associate Clinical Professor of Law
Director, Kathryn O. Greenberg Immigration Justice Clinic
Benjamin N. Cardozo School of Law

Miriam H. Marton
Assistant Clinical Professor of Law
University of Tulsa College of Law

M. Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University New Orleans College of Law

Vanessa Merton
Professor of Law
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Kathleen A. Moccio
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Nancy Morawetz
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New York University School of Law

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Howard University School of Law

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Director, Institute for Higher Education Law and Governance
University of Houston Law Center

Sunita Patel
Practitioner-in-Residence
Civil Advocacy Clinic
American University
Washington College of Law

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Sarah Rogerson
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Albany Law School

Victor C. Romero
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Penn State Law

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Marty Rosenbluth
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Elon University School of Law

Kevin Ruser
M.S. Hevelone Professor of Law
Director of Clinical Programs
University of Nebraska College of Law

Irene Scharf
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University of Massachusetts School of Law - Dartmouth

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Clinical Professor of Law
Suffolk University Law School

Rebecca Sharpless
Clinical Professor

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Michael J. Wishnie
William O. Douglas Clinical Professor of Law and
Deputy Dean for Experiential Education
Yale Law School

Lauris Wren
Clinical Professor
Director, Asylum Clinic
Hofstra University
Maurice A. Deane School of Law

Stephen Yale-Loehr
Adjunct Professor of Immigration Law
Cornell University Law School

II. List of Organizational *Amici Curiae*

The following national and local organizations provide legal, advocacy, and/or other community services to individuals who are directly affected by mandatory detention. These organizations share an interest in the proper interpretation of the mandatory detention provision in this case.

American Immigration Lawyers Association

The American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Boston College Law School Immigration Clinic

The Boston College Law School Immigration Clinic (BCIC), formerly known as the Boston College Immigration and Asylum Project, is a clinical program within the Boston College Law School Legal Services LAB, which houses many of the law school's clinical programs. The BC Immigration Clinic represents low-income noncitizens in removal proceedings before the Immigration Court in Boston, in their applications for legal status before the local U.S. Citizenship and Immigration Services offices, and in appeals before the Board of Immigration Appeals and First Circuit Court of Appeals. The BCIC represents clients in a variety of matters, such as asylum and other relief based on fear of persecution in the country of removal, waivers of deportation for long-term residents of the U.S., adjustment of status for noncitizens with U.S. citizen or permanent resident family members, visas for victims of violent crimes who have assisted in the prosecution of such crime, relief for noncitizen victims of domestic violence and visas for juveniles who have been abused, abandoned or neglected. Some of the Clinic's clients are detained by the Immigration and Customs Enforcement (ICE); in these cases, students represent clients both in their removal proceedings and bond hearings. Additionally, BCIC students regularly conduct "Know Your Rights" presentations ICE detainees at the Bristol County House of Corrections in North Dartmouth, MA. As such, the BCIC has an interest in ensuring that mandatory detention is not expanded.

Boston University Law School International Human Rights Clinic

The International Human Rights Clinic at Boston University Law School is a full-year clinical program giving students the opportunity to learn the substantive law of human rights through working in the international and regional human rights mechanisms as well as use international human rights norms in domestic practice and advocacy. Students engage in projects in the US and around the world to represent international NGO's in advocacy in the UN Human Rights Council, treaty bodies, and regional human rights organs (in the American, African, and European human rights systems); file briefs and amicus briefs on international human rights law issues in U.S. domestic courts; participate in universal jurisdiction claims in the U.S. and other courts; AND handle appeals in refugee and international human rights cases. The International Human Rights Clinic is part of BU Law's expanded practicum of offerings in international human rights that includes the Semester-in-Practice Program in Geneva and international pro bono project trips. The International Human Rights Clinic has an interest in in ensuring detention schemes, including the mandatory detention provision at issue in this case, are not arbitrarily interpreted or applied.

Detention Watch Network

As a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network (DWN) has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for more than two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. Mandatory detention is primarily responsible for the exponential increase in the numbers of people detained annually since 1996, and it is the primary obstacle before DWN members in their work for meaningful reform of the system. Together, through the "Dignity Not Detention" campaign, DWN is working for the elimination of all laws mandating the detention of immigrants.

Families for Freedom

Families for Freedom (FFF) is a multi-ethnic network for immigrants and their families facing deportation. FFF is increasingly concerned with the expansion of mandatory detention. This expansion has led to the separation of our families without the opportunity for a meaningful hearing before an immigration judge and has resulted in U.S. citizen mothers becoming single parents; breadwinners becoming dependents; bright citizen children having problems in school, undergoing therapy, or being placed into the foster care system; and working American families forced to seek public assistance.

Greater Boston Legal Services

Greater Boston Legal Services (GBLS), is the second oldest legal services program in the country and the largest in New England. The Immigration Unit of GBLS provides advice, referrals and direct representation to low-income individuals throughout Commonwealth of Massachusetts who are seeking lawful immigration status in the United States or seeking protection against removal from the United States. In this capacity, the Immigration Unit has provided representation and other services to thousands of individuals seeking protection against removal from the United States. Since January, 2011 GBLS has provided services to individuals from over seventy countries. In addition, the staff of the Immigration Unit

provides training to students, attorneys and government officials regarding matters of asylum immigration law; and they have submitted *amicus curiae* briefs to the Board of Immigration Appeals and Circuit Courts of Appeal. GBLS, through its work on behalf of immigrants, has an interest in the proper application of the immigration laws and ensuring access of low-income individuals to protection under the law.

Harvard Immigration and Refugee Clinical Program

The Harvard Immigration and Refugee Clinical Program at Harvard Law School (Clinic) has been a leader in the field of immigration law for nearly 30 years. The Harvard Immigration Project (HIP) is a student organization supervised by the Clinic's staff and faculty. Both the Clinic and HIP represent immigration detainees in the Boston Immigration Court. Specifically, HIP operates a bond hearing project where students, under supervision from the Clinic, represent ICE detainees seeking release from detention on bond. The Clinic and HIP have an interest in the appropriate application and development of immigration law and the proper interpretation of the mandatory detention statute so that claims for release on bond and claims for immigration relief receive full and fair consideration. *Amicus curiae* regard the issues in this case as especially important to ensure the fair and consistent application of the mandatory detention statute. *Amicus curiae* can aid

the U.S. Court of Appeals for the First Circuit in its consideration of the issues in this case through its extensive experience and expertise in the area of immigration law.

Immigrant Defense Project

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seek to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens convicted of criminal offenses the full benefit of their constitutional and statutory rights.

Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a national back-up center that is committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. The ILRC has special expertise in immigration consequences of crimes and since 1990 has

consulted on thousands of cases in criminal and immigration proceedings, and has provided training to criminal court defense counsel, prosecutors and judges, as well as immigration practitioners. The ILRC has filed briefs as amicus curiae in key decisions in this area, including Supreme Court cases such as *Padilla v. Kentucky*, 559 U.S. 336 (2010).

Immigrant Rights Clinic

Immigrant Rights Clinic (IRC) of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases involving federal courts' interpretation of the government's mandatory detention authority under 8 U.S.C. § 1226(c). *See, e.g.*, *Lora v. Shanahan*, No. 14-2343 (2d Cir., appellee brief filed Jan. 7, 2015) (counsel of record); *Khoury v. Asher*, No. 14-35482 (9th Cir., *amici* brief filed Nov. 3, 2014) (counsel for *amici curiae*); *Castañeda v. Souza*, 769 F.3d 32 (1st Cir. 2014) (counsel for *amici curiae*), *pet'n for reh'g granted*, No. 13-1994 (Jan. 23, 2015)*; Olmos v. Holder*, No. 14-1085 (10th Cir., *amici* brief filed July 17, 2014) (counsel for *amici curiae*); *Desrosiers v. Hendricks*, 532 Fed. Appx. 283 (3d Cir. 2013) (counsel for *amici curiae*); *Sylvain v. Atty. Gen. of the United States*, 714 F.3d 150 (3d Cir. 2013) (counsel for *amici curiae*); *Hosh v. Lucero*, 80 F.3d 375 (4th Cir. 2012) (counsel for *amici curiae*);

Rodriguez v. Shanahan, No. 13-09838 (SN), 2015 WL 405633 (S.D.N.Y. Jan. 30, 2015) (counsel of record); *Straker v. Jones*, No. 986 F. Supp. 2d 345 (S.D.N.Y. 2013) (counsel of record); *Beckford v. Aviles*, No. 10-2035 (JLL), 2011 WL 3444125 (D.N.J. Aug. 5, 2011) (counsel for *amicus curiae*); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (counsel for *amicus curiae*); *Louisaire v. Muller*, 758 F.Supp.2d 229 (S.D.N.Y. 2010) (counsel of record); *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010) (counsel of record); *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009) (counsel of record); *Matter of Garcia-Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (counsel for *amici curiae*).

National Immigrant Justice Center

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based organization working to ensure that the laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 10,000 noncitizens per year, including 2000 per year who are detained. NIJC represents hundreds of noncitizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences.

National Immigration Project of the National Lawyers Guild

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a nonprofit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides technical assistance to the bench and bar, litigates on behalf of noncitizens as amicus curiae in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories as well as Immigration Law and Defense and three other treatises published by Thompson-West. Through its membership network and its litigation, the National Immigration Project is acutely aware of the problems faced by noncitizens subject to mandatory detention under § 1226(c).

Political Asylum/Immigration Representation (PAIR) Project

The Political Asylum/Immigration Representation Project (PAIR) is a non-profit organization in Boston and the leading provider of *pro bono* legal services to indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts. At any given time, PAIR is representing or advising *pro bono* several hundred low-income asylum-seekers and immigration detainees with active

removal cases. PAIR regularly conducts legal rights presentations and individual intakes for immigration detainees at the Suffolk County House of Corrections, the Plymouth County Correctional Facility, and the Bristol County House of Corrections. PAIR typically visits one of these facilities every week. PAIR staff and *pro bono* attorneys have frequently met and represented immigration detainees whom ICE considers to be subject to mandatory detention under 8 U.S.C. § 1226(c), many of whom were not detained upon release from criminal custody. Thus, the matters at issue in this case, such as detainees' opportunity to seek release from immigration detention and return to their community and family while proceedings are pending in Immigration Court, are central to countless detained immigrants whom PAIR represents or advises.

Suffolk University Law School Immigration Law Clinic

Suffolk University Law School Immigration Law Clinic is a clinical program of Suffolk University Law School. Since 2006, Suffolk University Law School Immigration Law Clinic has almost exclusively represented immigrant detainees in both bond and removal proceedings in the Boston Immigration Court including a number who were categorized as being subject to mandatory detention by the U.S. Immigration Customs and Enforcement. In addition to providing full representation, the Clinic conducts monthly Know Your Rights presentations and

intake sessions at Suffolk County House of Corrections. Through these activities, the Clinic advises close to 200 detainees and represents 10-20 of these a year. It is clear from the 1500+ cases that the Clinic has examined that an increasing number of immigrant detainees are being categorized as being subject to mandatory detention by US ICE. As one of the few legal resources for this population, the Clinic has an interest in ensuring that the mandatory detention statute is properly interpreted and applied in immigration proceedings.

University of Maine School of Law Refugee and Human Rights Clinic

The Refugee and Human Rights Clinic (RHRC) is a clinical program of the University of Maine School of Law. The program aims to help address an acute need in Maine for legal representation (and broader advocacy) on behalf of low-income immigrants, in a broad range of cases and projects. Clients include, for example, asylum applicants who have fled human rights abuses in their home countries and are seeking refuge in the U.S.; immigrant survivors of domestic violence; immigrant victims of certain crimes; and abandoned, abused or neglected children seeking status in the U.S. Students also participate in a range of advocacy projects, including, e.g., conducting Know-Your-Rights presentations and intakes of immigrant detainees at the Cumberland County Jail in Portland and creating educational materials to assist mmigrants appearing *pro se*. As such, the clinic has

an interest in ensuring that the mandatory detention statute is not improperly expanded.

Appendix B:
Courts That Have Considered Challenges To *Matter of Rojas*:

I. The following courts (89) have rejected *Matter of Rojas*

Cruz v. Shanahan, No. 14-CV-9736(VEC), 2015 WL 409225, at *6 (S.D.N.Y. Jan. 30, 2015)

Rodriguez v. Shanahan, No. 13-CV-09838(SN), 2015 WL 405633, at *14 (S.D.N.Y. Jan. 30, 2015)

Figueroa v. Aviles, No. 14 Civ. 9360(AT)(HBP), 2015 WL 464168, at *3–4 (S.D.N.Y. Jan. 29, 2015)

Castañeda v. Souza, 769 F.3d 32, 42–49 (1st Cir. Oct. 6, 2014), *pet'n for reh'g granted*, No. 13-1994 (Jan. 23, 2015)

Martinez-Done v. McConnell, -- F. Supp. 3d --, No. 14 Civ. 3071 (SAS), 2014 WL 5032438, at *6–8 (S.D.N.Y. Oct. 8, 2014)

Araujo-Cortes v. Shanahan, No. 14 Civ. 4231(AKH), -- F.Supp. 2d --, 2014 WL 3843862, at *5-9 (S.D.N.Y. Aug. 5, 2014)

Lora v. Shanahan, 15 F. Supp.3d 478, 486–90 (S.D.N.Y. 2014)

Preap v. Johnson, -- F.R.D. --, No. 13-CV-5754 YGR, 2014 WL 1995064 at *9 (N.D. Cal. May 15, 2014)

Gordon v. Johnson, 300 F.R.D. 31, 39 (D. Mass. 2014) (certifying class and granting summary judgment to plaintiffs held subject to mandatory detention under *Rojas*)

Khoury v. Asher, 3 F. Supp. 3d 877, 883–91 (W.D. Wash. 2014) (certifying class and granting declaratory judgment in favor of those held subject to mandatory detention under *Rojas*)

Olmos v. Holder, No. 13–cv–3158–RM–KMT, 2014 WL 222343, at *6 (D. Colo. Jan. 17, 2014)

Gordon v. Johnson, 991 F. Supp. 2d 258, 263–70 (D. Mass. 2013)

Sanchez-Penunuri v. Longshore, 7 F. Supp. 3d 1136, 1155–62 (D. Colo. 2013)

Castillo-Hernandez v. Longshore, 6 F. Supp. 3d 1198, 1218–24 (D. Colo. 2013)

Sanchez-Gamino v. Holder, 6 F. Supp. 3d 1028, 1033–35 (N.D. Cal. 2013)

Rosciszewski v. Adducci, 983 F. Supp. 2d 910, 915–916 (E.D. Mich. 2013)

Castañeda v. Souza, 952 F. Supp. 2d 307, 313–21 (D. Mass. 2013), *aff'd*, 769 F.3d 32, 42–49 (1st Cir. Oct. 6, 2014), *pet'n for reh'g granted*, No. 13-1994 (Jan. 23, 2015)

Gomez-Ramirez v. Asher, No. C13–196–RAJ, 2013 WL 2458756, at *3 (W.D. Wash. June 5, 2013)

Bacquera v. Longshore, 948 F. Supp. 2d 1258, 1262–65 (D. Colo. 2013)

Deluis-Morelos v. ICE Field Office Dir., No. 12CV–1905JLR, 2013 WL 1914390, at *5 (W.D. Wash. May 8, 2013)

Aguasvivas v. Ellwood, No. 13–1161 (PGS), 2013 WL 1811910, at *8 (D.N.J. Apr. 29, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Contreras v. Terry, No. 12-746 (LH/ACT) (D.N.M. Apr. 24, 2013)

Pellington v. Nadrowski, No. 13–706 (FLW), 2013 WL 1338182, at *5 (D.N.J. Apr. 1, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martinez-Cardenas v. Napolitano, No. C13–0020–RSM–MAT, 2013 WL 1990848, at *9 (W.D. Wash. Mar. 25, 2013)

Pujalt-Leon v. Holder, 934 F. Supp. 2d 759, 766 (M.D. Pa. 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Marin-Salazar v. Asher, No. C13–96–MJP–BAT, 2013 WL 1499047, at *5

(W.D. Wash. Mar. 21, 2013)

Santos-Sanchez v. Elwood, No. 12-6639 (FLW), 2013 WL 1165010, at *6 (D.N.J. Mar. 20, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Dighero-Castaneda v. Napolitano, No. 2:12–cv–2367 DAD, 2013 WL 1091230, at *7 (E.D. Cal. Mar. 15, 2013)

Burmanlag v. Durfor, No. 2:12–cv–2824 DAD P, 2013 WL 1091635, at *7 (E.D. Cal. Mar. 15, 2013)

Gayle v. Napolitano, No. 12–2806 (FLW), 2013 WL 1090993, at *5 (D.N.J. Mar. 15, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Espinosa v. Aitkin, No. 5:13–cv–00512 EJD, 2013 WL 1087492, at *6 (N.D. Cal. Mar. 13, 2013)

Snegirev v. Asher, No. C12–1606MJP, 2013 WL 942607, at *1 (W.D. Wash. Mar. 11, 2013)

Thai Hong v. Decker, No. 3:CV–13–0317, 2013 WL 790010, at *2 (M.D. Pa. Mar. 4, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Vicencio v. Shanahan, No. 12-7560 (JAP), 2013 WL 705446, at *5 (D.N.J. Feb. 26, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Almonte v. Shanahan, No. 12-05937 (CCC) (D.N.J. Feb. 25, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Arellano v. Terry, No. 12-0112 (MCA/LAM) (D.N.M. Feb. 27, 2013)

Ferguson v. Elwood, No. 12-5981 (AET), 2013 WL 663719, at *4 (D.N.J. Feb 22, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Popo v. Aviles, No. 13-0331 (JLL) (D.N.J. Feb. 21, 2013), *abrogated by*

Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 161 (3d Cir. 2013)

Nikolashin v. Holder, No. 13-0189 (JLL), 2013 WL 504609, at *5 (D.N.J. Feb. 7, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Foster v. Holder, No. 12-2579 (CCC), 2013 U.S. Dist. LEXIS 20320 (M.D. Pa. Feb. 4, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Balfour v. Shanahan, No. 12-06193 (JAP), 2013 WL 396256, at *6 (D.N.J. Jan. 31, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rodriguez v. Shanahan, No. 12-6767 (FLW), 2013 WL 396269, at *4 (D.N.J. Jan. 30, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Dussard v. Elwood, No. 12-5369 (FLW), 2013 WL 353384, at *4 (D.N.J. Jan. 29, 2013), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Davis v. Hendricks, No. 12–6478 (WJM), 2012 WL 6005713, at *10 (D.N.J. Nov. 30, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Morrison v. Elwood, No. 12–4649 (PGS), 2012 WL 5989456, at *4 (D.N.J. Nov. 29, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Castillo v. ICE Field Office Dir., 907 F. Supp. 2d 1235, 1238 (W.D. Wash. 2012)

Kerr v. Elwood, No. 12–6330 (FLW), 2012 WL 5465492, at *3 (D.N.J. Nov. 8, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Baguidy v. Elwood, No. 12–4635 (FLW), 2012 WL 5406193, at *9 (D.N.J. Nov. 5, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Nabi v. Terry, 934 F. Supp. 2d 1245, 1248 (D.N.M. 2012)

Charles v. Shanahan, No. 3:12–cv–4160 (JAP), 2012 WL 4794313, at *8 (D.N.J. Oct. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Kporlor v. Hendricks, No. 12–2744 (DMC), 2012 WL 4900918, at *7 (D.N.J. Oct. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Campbell v. Elwood, No. 12–4726 (PGS), 2012 WL 4508160, at *4 (D.N.J. Sept. 27, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martinez v. Muller, No. 12–1731 (JLL), 2012 WL 4505895, at *4 (D.N.J. Sept. 25, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Nimako v. Shanahan, No. 12–4909 (FLW), 2012 WL 4121102, at *8 (D.N.J. Sept. 18, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Heras-Quezada v. Terry, No. 12-0615 (JP/WPL) (D.N.M. Sept. 10, 2012)

Cox v. Elwood, No. 12–4403 (PGS), 2012 WL 3757171, at *4 (D.N.J. Aug. 28, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Martial v. Elwood, No. 12–4090 (PGS), 2012 WL 3532324, at *3 (D.N.J. Aug. 14, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Bogarin-Flores v. Napolitano, No. 12cv0399 JAH(WMc), 2012 WL 3283287, at *3 (S.D. Cal. Aug. 10, 2012)

Dimanche v. Tay-Taylor, No. 12–3831, 2012 WL 3278922, at *2 (D.N.J. Aug. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Munoz v. Tay-Taylor, No. 12–3764 (PGS), 2012 WL 3229153, at *3-4 (D.N.J. Aug. 2, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Gonzalez-Ramirez v. Napolitano, No. 12–2978 (JLL), 2012 WL 3133873, at *5 (D.N.J. July 30, 2012), *rev'd sub nom. Gonzalez-Ramirez v. Sec'y of United States Dep't of Homeland Sec.*, 529 Fed. Appx. 177, 179 (3d Cir. 2013)

Kot v. Elwood, No. 12–1720 (FLW), 2012 WL 1565438, at *8 (D.N.J. May 2, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Valdez v. Terry, 874 F. Supp. 2d 1262, 1265 (D.N.M. 2012)

Nunez v. Elwood, No. 12–1488 (PGS), 2012 WL 1183701, at *3 (D.N.J. Apr. 9, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Ortiz v. Holder, No. 2:11CV1146 DAK, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012)

Harris v. Lucero, No. 1:11–cv–692, 2012 WL 603949, at *3 (E.D. Va. Feb 23, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Zamarial v. Lucero, No. 1:11–cv–1341, 2012 WL 604025, at *2 (E.D. Va. Feb. 23, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Jaghoori v. Lucero, No. 1:11–cv–1076, 2012 WL 604019 (E.D. Va. Feb. 22, 2012), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Christie v. Elwood, No.11–7070 (FLW), 2012 WL 266454, at *9 (D.N.J. Jan. 30, 2012), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rosario v. Prindle, No. 11–217, 2011 WL 6942560, at *3 (E.D. Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D. Ky. Jan. 4, 2012)

Parfait v. Holder, No. 11–4877 (DMC), 2011 WL 4829391, at *9 (D.N.J. Oct. 11, 2011), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Rianto v. Holder, No. CV–11–0137–PHX–FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011)

Beckford v. Aviles, No. 10-2035 (JLL), 2011 WL 3515933, at *9 (D.N.J. Aug. 5, 2011), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Keo v. Lucero, No. 11-614 (JCC), 2011 WL 2746182 (E.D. Va. July 13, 2011), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Jean v. Orsino, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011)

Sylvain v. Holder, No. 11-3006 (JAP), 2011 WL 2580506, at *7 (D.N.J. June 28, 2011), *rev'd sub nom., Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Aparicio v. Muller, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011)

Louisaire v. Muller, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010)

Gonzalez v. Dep't of Homeland Sec., No. 1:CV-10-0901, 2010 WL 2991396, at *1 (M.D. Pa. July 27, 2010), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Bracamontes v. Desanti, No. 2:09cv480, 2010 WL 2942760 (E.D. Va. June 16, 2010), *adopted by* 2010 WL 2942757 (E.D. Va. July 26, 2010), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Dang v. Lowe, No. 1:CV-10-0446, 2010 WL 2044634, at *2 (M.D. Pa. May 20, 2010), *abrogated by Sylvain v. Att'y Gen. of the United States*, 714 F.3d 150, 161 (3d Cir. 2013)

Monestime v. Reilly, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010)

Khodr v. Adduci, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010)

Scarlett v. U.S. Dep't of Homeland Sec., 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009)

Waffi v. Loiselle, 527 F. Supp. 2d 480 (E.D. Va. 2007), *abrogated by Hosh v. Lucero*, 680 F.3d 375, 380 (4th Cir. 2012)

Bromfield v. Clark, No. C06-0757-JCC2006, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007)

Roque v. Chertoff, No. C06 0156 TSZ, 2006 WL 1663620, at *4-5 (W.D. Wash. June 12, 2006)

Zabadi v. Chertoff, No. C05-03335, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005)

Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004)

II. The following courts (27) have deferred to *Matter of Rojas* either as a holding or in dicta

Hosh v. Lucero, 680 F.3d 375, 380 (4th Cir. 2012)

Romero v. Shanahan, No. 14 Civ. 6631(KBF), 2014 WL 6982937, at *4–5 (S.D.N.Y. Dec. 10, 2014)

Nunez Pena v. Tryon, No. 14-CV-282-JTC, 2014 WL 4093567, at *4–6 (W.D.N.Y. Aug. 18, 2014)

Charles v. Aviles, No. 14 Cv. 3483 (MHD), 2014 WL 3765797, at *4–8 (S.D.N.Y. Jul. 23, 2014)

Debel v. Dubois, No. 13 Civ 6028 (LTS)(JLC), 2014 WL 1689042, at *4 (S.D.N.Y. Apr. 24, 2014)

Clarke v. Phillips, 17 F. Supp. 3d 254, 258–60 (W.D.N.Y. 2014)

Thompson v. Napolitano, No. 13 Civ. 9126 (LTS)(JLC), 2014 WL 2609701 at *1 (S.D.N.Y. June 2, 2014)

Mora-Mendoza v. Godfrey, No. 3:13–cv–01747–HU, 2014 WL 326047, at *3 (D. Or. Jan. 29, 2014)

Straker v. Jones, 986 F. Supp. 2d 345, 353–56 (S.D.N.Y. 2013) (deferring to *Matter of Rojas* in dicta but finding that petitioner was not subject to mandatory detention because he had not been "released" for the purposes of § 1226(c))

Johnson v. Orsino, 942 F. Supp. 2d 396, 407 (S.D.N.Y. 2013)

Cisneros v. Napolitano, No. 13–700 (JNE/JJK), 2013 WL 3353939, at *9 (D. Minn. July 3, 2013)

Khetani v. Petty, 859 F. Supp. 2d 1036, 1038 (W.D. Mo. 2012)

Castillo v. Aviles, No. 12–2388 (SRC), 2012 WL 5818144, at *4 (D.N.J. Nov. 15, 2012)

Silent v. Holder, No. 4:12–cv–00075–IPJ–HGD, 2012 WL 4735574, at *2 (N.D. Ala. Sept. 27, 2012)

Espinoza-Loor v. Holder, No. 11–6993 (FSH), 2012 WL 2951642, at *4 (D.N.J. July 2, 2012)

Santana v. Muller, No. 12 Civ. 430(PAC), 2012 WL 951768, at *4 (S.D.N.Y. Mar. 21, 2012)

Guillaume v. Muller, No. 11 Civ 8819, 2012 WL 383939 (S.D.N.Y. Feb. 7, 2012)

Mendoza v. Muller, No. 11 Civ. 7857(RJS), 2012 WL 252188 (S.D.N.Y. Jan. 25, 2012)

Hernandez v. Sabol, 823 F. Supp. 2d 266, 270 (M.D. Pa. 2011)

Desrosiers v. Hendricks, No. 11–4643 (FSH) (D.N.J. Dec. 30, 2011), *aff'd*, 532 Fed. Appx. 283, 284 (3d Cir. 2013)

Garcia Valles v. Rawson, No. 11-C-0811, 2011 WL 4729833 (E.D. Wis. Oct. 7, 2011)

Diaz v. Muller, No. 11-4029 (SRC), 2011 WL 3422856, at *3 (D.N.J. Aug. 4, 2011)

Gomez v. Napolitano, No. 11-cv-1350, 2011 WL 2224768 (S.D.N.Y. May 31, 2011)

Garcia-Valles v. Rawson, No. 11–C–0811, 2011 WL 4729833, at *3 (E.D. Wis. Oct. 7, 2011)

Sidorov v. Sabol, No. 09–cv–1868 (M.D. Pa. Dec. 18, 2009)

Sulayao v. Shanahan, No. 09-Civ.-7347, 2009 WL 3003188 (S.D.N.Y. Sept. 15, 2009)

Serrano v. Estrada, No. 3–01–CV–1916–M, 2002 WL 485699, at *3 (N.D. Tex. Mar. 6, 2002) (deferring to *Matter of Rojas* in dicta but granting the habeas petition based on due process concerns)

III. The following courts (5) have refused to decide the issue of deference to *Matter of Rojas* but instead found mandatory detention to apply to those not detained "when . . . released" based on the theory that officials do not lose authority to impose mandatory detention if they delay

Desrosiers v. Hendricks, 532 Fed. Appx. 283, 285 (3d Cir. 2013) (following *Sylvain*)

Gonzalez-Ramirez v. Sec'y of United States Dep't of Homeland Sec., 529 Fed. Appx. 177, 179 (3d Cir. 2013) (same)

Sylvain v. Att'y Gen. of the United States, 714 F.3d 150, 161 (3d Cir. 2013)

Marlon v. Holder, No. 13 Civ 2375, 2014 WL 1321105, at *6 (M.D. Penn. Apr. 1, 2014) (following *Sylvain*)

Guttierez v. Holder, 6 F. Supp. 3d 1035, 1040–44 (N.D. Cal. 2014)

IV. The following courts in the Fourth Circuit (5) have not specifically examined *Matter of Rojas* but have found the *Hosh* opinion controlling

Pasicov v. Holder, 488 Fed. Appx. 693, 694 (4th Cir. 2012) (following *Hosh*)

Thakur v. Morton, No. ELH–13–2050, 2013 WL 5964484, at *3 (D. Md. Nov. 7, 2013) (same)

Ozah v. Holder, No. 3:12–CV–337, 2013 WL 709192, at *4 (E.D. Va. Feb. 26, 2013) (same)

Velasquez-Velasquez v. McCormic, No. CCB–12–1423, 2012 WL 3775881, at *2 (D. Md. Aug. 28, 2012) (same)

Obaid v. Lucero, No. 1:12cv415 (JCC/JFA), 2012 WL 3257827, at *2 (E.D. Va. Aug. 8, 2012) (same)

V. <u>The following (1) court has held that detention less than six months after release from criminal custody does not necessarily implicate constitutional limits on *Matter of Rojas*'s holding</u>

Reynoso v. Aviles, No. 14 Civ. 9482 (PAE), 2015 WL 500182 (S.D.N.Y. Feb. 5, 2015)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's supplemental briefing order because the brief is limited to 25 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: February 23, 2015
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2015, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All counsel for Petitioners and Respondents in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

Dated: February 23, 2015
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