UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

Sassan PARINEJAD and Carlos Andre CALCANO individually and on behalf of all similarly situated persons and the CATHOLIC LEGAL IMMIGRATION NETWORK, Inc. and the POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, **Plaintiffs** **v.** **UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY; BRUCE CHADBOURNE, Field Office Director for Detention and Removal, Boston Field Office, Immigration and Customs Enforcement; MICHAEL CHERTOFF, Secretary, Department of Homeland Security, and ALBERTO GONZALEZ, Attorney General of the United States ["the federal defendants"]; and, in the alternative, ROBERT W. NORRIS in his official capacity as Sheriff of Franklin County Jail (at St. Albans); STUART GLADDING in his official capacity as Superintendent of Vermont Department of Corrections/Northern State; FORBES E. BYRON in his capacity as Superintendent of Franklin County Jail (Massachusetts); LORI H. Ricks in her official capacity as Warden of the Hartford Correctional Center Institution; ANDREA J. CABRAL in her official capacity as Sheriff of Suffolk County House of Correction; ALBERT J. WRIGHT in his official capacity as Superintendent of Rockingham County House of Corrections; JOSEPH D. MCDONALD, Jr. in his official capacity as Sheriff of Plymouth County Correctional Facility; DANIEL W. MARTIN in his official capacity as Warden of York Correctional Institution; THOMAS M. HODGSON in his official capacity as Sheriff of Bristol County Jail and House of Correction; and WAYNE T. SALISBURY, Jr. in his official capacity as Warden of Wyatt Detention Facility ["the jailer defendants"],** **Defendants**	**Civil Action No. 07CA10432RGS** **Leave to File Granted on May 25, 2007**

SECOND AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF AND PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

1. This is an action to declare invalid the federal defendants' misinterpretation of Section 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c) ("mandatory detention" provision), and Section 303(b) ("Transitional Period Custody Rules" or "TPCR") of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Section 236(c) of the INA, in effect since October 9, 1998, requires the mandatory detention without bond of virtually all immigrants who commit a removable offense listed therein upon the immigrant's release from the criminal custody that resulted from the offense. The TPCR provision, in effect until October 9, 1998, also required detention upon release for those who committed removable offenses listed therein—but did not preclude bond. The net result of these two provisions is that § 236(c) does not apply to: 1) anyone released from criminal custody for an offense covered by the statute, if the release occurred prior to October 9, 1998; and 2) anyone released from criminal custody for an offense not covered by the statute, even where the release occurred after 1998. Defendants have misinterpreted both of the above provisions by erroneously applying § 236(c)(1) to immigrants with pre-October 9, 1998 removable offenses upon an immigrant's post-October 9, 1998 "release" from a subsequent, unrelated state or local custodial encounter that does not constitute a removable offense under § 236(c)(1).

2. Plaintiffs and the class they seek to represent are immigrants unlawfully detained by defendant U.S. Immigration and Customs Enforcement's Boston field office ("Boston ICE") as a result of this misinterpretation. In erroneously subjecting plaintiffs and other class members to mandatory detention, defendants have deprived them of statutory and regulatory rights to be considered for release on bond under INA § 236(a), 8 U.S.C. § 1226(a), and under 8 C.F.R. § 1003.19(c)-(f). They have been or will be denied all opportunity to be heard concerning their suitability for release based upon evidence that they are not flight risks or a danger to their communities and that therefore no purpose is served by their detention. As a consequence of defendants' actions, the individual plaintiffs and class members are suffering or will suffer unnecessary imprisonment, prolonged separation from family members, and economic harms, including lost business income, wages and property, as well as reduced ability to access legal services and develop and present their cases against removal. Plaintiffs also include two organizational plaintiffs—a national nonprofit immigration legal services provider and a local nonprofit immigration legal services provider that rely on limited resources and charitable contributions to assist the growing number of detainees, including unrepresented immigrants, held in Boston ICE's New England contract detention facilities pursuant to contracts and/or agreements with the jailer defendants.

3. Plaintiffs seek declaratory relief and/or injunctive and mandamus relief against the defendants' above-described policies and practices, misinterpretations of law and failure to comply with the requirements of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., as amended by IIRIRA (including by the TPCR), as well as with applicable regulations.

Alternatively, the detained plaintiffs and class members seek a writ of habeas corpus ordering the full bond redetermination hearings to which they are entitled, or release.

II. STATUTORY FRAMEWORK

4. In September of 1996, Congress enacted a major overhaul of the immigration laws through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586. Among the new sections added was INA § 236(c), 8 U.S.C. § 1226(c), [hereafter, the "mandatory detention" provision] which reads, in relevant part, as follows:

> (c) Detention of criminal aliens.
>
> (1) Custody. The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2) [8 U.S.C. § 1182(a)(2)],
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) [8 U.S.C. §§1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],
>
> (C) is deportable under section 237(a)(2)(A)(i) [8 U.S.C. §1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) [8 U.S.C. § 2282(a)(3)(B)] or deportable under section 237(a)(4)(B) [8 U.S.C. § 1227(a)(4)(B)],
>
> **when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.**

[Emphasis supplied.]

5. Detention under the above provision is referred to as "mandatory" because an immigrant to whom it is applied may not seek release under *any* set of circumstances or by posting any type

of bond, unless the alien is a witness needed by the Attorney General. 8 U.S.C. § 1226(c)(2). As further interpreted by regulation and Board of Immigration Appeals decisions, the immigrant may not seek review of the Attorney General's custody decision, because the immigration judges are stripped of jurisdiction to reconsider bond in mandatory detention cases. 8 C.F.R. § 1003.19(h)(2)(i); *Matter of Rojas*, 23 I&N Dec. 117, 127 (BIA 2001). Instead, the immigrant must remain in detention for the duration of his or her removal proceedings, however meritorious his or her defenses or claims for relief may be.

6. At the same time that Congress adopted the above-described mandatory detention provision, it enacted a separate provision authorizing the Attorney General to delay implementation of mandatory detention for an additional one or two-year period, after which time "[INA § 236(c)] shall apply to individuals **released after** such periods." IIRIRA § 303(b)(2) [emphasis supplied]. During the delayed implementation period, the TPCR established by IIRIRA were to govern who was subject to mandatory detention. IIRIRA § 303(b)(3). Immigrants such as plaintiffs remained eligible to seek release on bond.

7. In *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999), the Board of Immigration Appeals ("BIA" or "Board") construed IIRIRA § 303(b) to mean that the mandatory detention provisions of INA § 236(c) apply only to individuals who were released from non-DHS custody *after* October 8, 1998—the expiration date of the Transitional Period Custody Rules and the date on which new INA §236(c) took effect.

8. The federal defendants, however, have extended the application of INA § 236(c) to any non-DHS "release" of an immigrant after 1998, even if the "release" does not relate to a removable offense that is a ground for mandatory detention under subparagraphs (A)-(D) of §

236(c)(1). Thus, immigrants in removal proceedings based on pre-1998 offenses—who are clearly exempted from the post-1998 mandatory detention requirement for these offenses due to the TPCR—are now being subjected to mandatory detention by defendants following state or local custodial encounters for offenses not encompassed by § 236(c).

9. This interpretation is expressly authorized by unreported BIA decisions and is widely applied in practice by defendants' DHS/ICE field offices throughout the country. *See In re Manuel Garcia-Ramirez*, 2004 WL 2952340 (BIA 2004), and *In re Younes*, 2006 WL 2183559 (BIA 2006) (Exhibit B); *Cavazos v. Moore* (Exhibit A) [January 2005 U.S. District Court Order in a Texas class action lawsuit that declared the policy and practice invalid in the Harlingen ICE District]; *Cox v. Monica* (Exhibit D) [U.S. District Court Complaint challenging the policy in Pennsylvania]; Declaration of Attorney Mary Holper (Exhibit C) [evidencing same practice in Virginia]; and Declaration of Attorney William E. Graves, Jr. (Exhibit I) [evidencing practice in Boston].

10. The Boston Department of Homeland Security/ICE Office of Chief Counsel admits that this is its practice here as well. *See* Declaration of Attorney Kerry E. Doyle regarding conversation with Boston ICE Assistant District Counsel (Exhibit E). *See also* the facts of the individually named plaintiffs and additional victims of the government's policy as described in this Complaint. (Exhibits F, G, I and Exhibit H [Pierre Jacques Custody Documents].)

11. Plaintiffs maintain that immigrants removable for offenses for which they were never subject to custody prior to the expiration of the Transitional Period Custody Rules on October 8, 1998, or for which they were released prior to the TPCR expiration date, and who have not been convicted or otherwise rendered removable since that date for any offense included in INA §

236(c)(1)(A)-(D), are not subject to mandatory detention under § 236(c). This is the only proper interpretation of the mandatory detention provision.

12. Immigrants not subject to mandatory detention have a statutory right to request release on bond under INA § 236(a), 8 U.S.C. § 1236(a), and by regulation, a right to make such application to an Immigration Judge who must consider any information the immigrant presents regarding suitability for release on bond. 8 C.F.R. § 1003.19 (c)-(f). *See Matter of Adeniji*, 22 I&N Dec. 1102, 1111-1112 (BIA 1999) [applying long-standing BIA standards regarding flight risk and danger to community] and *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) ["In general, an immigration judge **must** consider whether an alien who seeks a change in custody status is a threat to the national security, a danger to the community, likely to abscond or otherwise a poor bail risk." (Emphasis supplied.)].

13. By contrast, immigrants subject to mandatory detention are denied all opportunity to present or have an Immigration Judge consider evidence of suitability for release on bond because the Immigration Judge has no jurisdiction to consider such evidence. 8 C.F.R. § 1003.19(h)(2)(i); *Matter of Rojas*, 23 I&N Dec. 117, 127 (BIA 2001).

III. JURISDICTION AND VENUE

14. This action arises under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, as amended by IIRIRA as well as under the Constitution of the United States. Accordingly, this Court has jurisdiction over this matter under 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. § 2241 (habeas corpus) and pursuant to art. I, section 9, cl. 2 of the United States Constitution ("Suspension Clause"), as the named plaintiffs and other class members are presently in custody under the authority of the United States. This Court may grant relief under 28 U.S.C. §

1361 (Mandamus Act), 28 U.S.C. §1651 (All Writs Act), 28 U.S.C. § 2201 *et seq*. (Declaratory Judgment Act), 5 U.S.C. § 701 *et seq*. (Administrative Procedures Act), and 28 U.S.C. § 2242 (Habeas Corpus).

15. This action challenges only the federal defendants' misinterpretation of law and their detention policies and practices pursuant thereto. Therefore, the jurisdictional limitations in INA § 236(e) or elsewhere in the INA are not applicable.

16. Venue is proper in this court because the government defendants Boston ICE and its director Bruce Chadbourne are located in this judicial district and because decisions made regarding both named plaintiffs' custody were made here. 28 U.S.C. § 1391(e). Thus a substantial part of the events giving rise to all claims occurred in this district.

IV. THE PARTIES

The Plaintiffs

17. Plaintiff Carlos Calcano ("Mr. Calcano") is a Lawful Permanent Resident of the United States since 1979 and is a native and citizen of the Dominican Republic. He resides in Lawrence, Massachusetts, where he lived until defendant Boston ICE took him into custody. On information and belief, he is currently detained by defendant Boston ICE at a detention facility in Massachusetts.

18. Plaintiff Sassan Parinejad ("Mr. Parinejad") is a native and citizen of Iran who was lawfully admitted to the U.S. as an "F-1" student, most recently in 1979. He resided in Quincy, Massachusetts until defendant ICE, through the Providence ICE sub-office, took him into custody. On information and belief, he is currently detained by defendant Boston ICE at the Bristol County House of Corrections in North Dartmouth, Massachusetts.

19. **Organizational Plaintiffs**

A) Plaintiff CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC) is a national not-for-profit organization that enhances and expands delivery of legal services to indigent and low-income immigrants principally through diocesan immigration programs to meet the immigration needs identified by the Catholic Church in the United States. Through its Boston Detention Program, CLINIC, in conjunction with a Boston-area law school, assists immigration detainees, most of them unrepresented, who are held by defendant Boston ICE in its contract detention facilities throughout the New England region. This CLINIC program's goal is to identify those unjustly detained and, as resources permit, represent them, help them obtain private or *pro bono* counsel, and explain law and policy in written materials, at rights presentations, and otherwise.

B) Plaintiff POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT (PAIR) is a not-for-profit organization that is the core provider of pro bono legal services to indigent asylum-seekers and immigration detainees in Massachusetts. Through its Detention Center Program, PAIR assists immigration detainees held by defendant Boston ICE in contract facilities throughout the New England region, with the goal of identifying immigrants unjustly detained and, as resources permit, representing them or helping them obtain private counsel. PAIR is one of only two organizations in the New England region that provides group presentations on legal rights to immigration detainees, as well as individual legal counseling, services that are explicitly authorized by the U.S. Department of Homeland Security in its Detention Operations Manual. *See* INS Detention Standard: Group Presentation on Legal Rights (revised February 11, 2002). PAIR also provides written materials explaining to detainees their

legal rights. Since September 1996, PAIR has put on approximately 125 group presentations and counseled approximately 1,750 individuals in detention facilities throughout New England.

The Federal Defendants

20. Defendant Bruce Chadbourne is the Field Office Director for Detention and Removal in the Boston Office of the Department of Homeland Security's U.S. Immigration and Customs Enforcement division. He has custody of the named plaintiffs. He is sued in his official capacity.

21. Defendant Boston ICE is the Office for Detention and Removal, headquartered in Boston, within the Department of Homeland Security's U.S. Immigration and Customs Enforcement division, with responsibility over aliens detained and/or placed in removal proceedings by its agents in Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island and Vermont.

22. Defendant Secretary Michael Chertoff heads the Department of Homeland Security and is charged with the administration and enforcement of the immigration laws under 8 U.S.C. § 1103(a) and is therefore ultimately responsible for setting policy for the Department of Homeland Security's U.S. Immigration and Customs Enforcement nationally, including for Boston ICE. He is sued in his official capacity.

23. Defendant Alberto Gonzalez is the Attorney General of the United States and is responsible for the interpretation, administration and enforcement of the immigration laws. 8 U.S.C. § 1103(a) and (g). He is the head of the Department of Justice, which includes the Executive Office for Immigration Review that houses both the Board of Immigration Appeals and the Office of the Immigration Judge. He is sued in his official capacity.

The Jailer Defendants

24. Defendants Robert W. Norris, Stuart Gladding, Forbes E. Byron, Daniel W. Martin, Andrea J. Cabral, Joseph D. McDonald, Jr., Albert J. Wright, Lori H. Ricks, Thomas M. Hodgson, and Wayne T. Salisbury, Jr. ["the jailer defendants"] are the wardens, superintendents and sheriffs with day-to-day responsibility over the New England detention facilities with which defendant Boston ICE, on information and belief, has contracts and/or agreements to detain immigrants and is authorized to do so and in which named plaintiffs are detained and unnamed class members are likely to be detained. The jailer defendants are sued in their official capacities.

V. CLASS ALLEGATIONS

25. The individually named plaintiffs bring this action on their own behalf and also on behalf of all other similarly situated persons, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is defined as:

> all aliens who have been or will be subjected to mandatory detention without bond under 8 U.S.C. § 1226(c) by Boston ICE upon release from non-DHS custody on or after the October 8, 1998 expiration of the Transitional Period Custody Rules and who have not been convicted or otherwise rendered removable for an offense described in 8 U.S.C. § 1226(c)(1) since that date.

26. A class action is proper because the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the individually named plaintiffs are typical of those of the class, and the representatives of the individually named plaintiffs will fairly and adequately protect the interests of the class.

27. The class includes numerous members who have yet to be detained, making joinder impracticable. Joinder is also impracticable because of difficulties in accessing class members due to Boston ICE's unpredictable detention and transfer decisions among ten detention facilities with which on information or belief it has contracts and/or agreements in the five New England states,

as well as among remote detention facilities throughout the country. Further, the unique susceptibility of these detention-related claims being rendered moot on an individual basis, as found by the federal district court judge in the *Cavazos* class action order (Exhibit A), increases the impracticability of joinder.

28. This case turns on one central question of law that is common to plaintiffs' claims and those of all class members: whether the "when released" clause of INA § 236(c)(1) must relate to an "offense" listed in § 236(c)(1)(A)-(D)—with the result that defendants' contrary interpretation, as reflected in the BIA's unreported *Garcia-Ramirez* and *Younes* decisions (Exhibit B) and applied in practice by defendants—violates this statute. Individual factual differences about the circumstances of plaintiffs' and class members' detention are irrelevant to the proper interpretation of these governing statutory provisions.

29. The claims of the named plaintiffs are typical of those of the class claims as both the individual and class claims derive from a single set of misinterpretations of law regarding the scope of the mandatory detention provision.

30. The named plaintiffs will fairly and adequately represent the interests of the class because their interests are identical. Plaintiffs know of no conflict between their interests and those of the class.

31. Plaintiffs and class members are represented by competent legal counsel with substantial experience in immigration law and class action matters.

32. This action should be maintained as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure because defendants have acted on grounds generally applicable to the class as a whole by interpreting the INA and IIRIRA in a manner that subjects all class members

to mandatory detention and deprives all class members of their statutory and regulatory rights to seek and be considered for release on bond based on their evidence of their suitability for release.

VI. STATEMENT OF FACTS

33. Plaintiff Carlos Calcano is a 38-year-old Lawful Permanent Resident of the United States who emigrated with his family from the Dominican Republic in 1979, over twenty-six years ago, at the age of nine. His lives with his U.S. citizen wife, Solange Acevedo, and their two U.S. citizen children: Ashlenie Calcano, who is a 17-year-old junior at Lawrence High School, and Giancarlos Calcano, a 13-year-old eighth-grader at Bruce Middle School in Lawrence. The Calcano family owns their home at 103 May Street in Lawrence, Massachusetts.

34. Mr. Calcano has been employed for the last four years continuously by Aramark Corporation as a Food Production Manager at Phillips Academy in Andover, Massachusetts. His job involves managing a dining hall and supervising more than a dozen employees. His parents, Andres and Hilda Calcano, are United States citizens as are his only two other siblings.

35. On January 30, 2007, Mr. Calcano appeared at the Boston Office of the Department of Homeland Security's Citizenship and Immigration Services, as requested, to follow up on a pending application for citizenship he had previously filed. At that time he was detained by defendant Boston ICE, placed into removal proceedings and held without bond. *See* Notice of Custody Determination (Exhibit G). He was issued a Notice to Appear charging him with removability under INA § 237(a) (2) (A) (iii) based on a 1989 conviction for transporting firearms. (Exhibit G). Mr. Calcano had been released from criminal custody following his arrest

for this offense on May 10, 1988, prior to his conviction; he was never sentenced to any imprisonment.

36. Mr. Calcano requested a custody redetermination hearing before an Immigration Judge. Exhibit G. The government at that time argued that the Immigration Judge lacked jurisdiction pursuant to INA §236(c) because Mr. Calcano had been arrested in Lawrence, Massachusetts on June 5, 2002, although the 2002 arrest did not result in any convictions or form a basis for removal under INA § 236(c)(1)(A)-(D). *See* Exhibit G (Declaration of Attorney Michael Martel). Mr. Calcano remains in immigration custody.

37. Plaintiff Sassan Parinejad last entered the United States on September 24, 1979 on an F-1 student visa. He attended Shaw Prep in Boston, Massachusetts and then Northeastern University, also in Boston, before having to leave school when the Islamic Revolution in Iran eliminated his family's ability to finance his schooling. Mr. Parinejad is married to a U.S. citizen, Joanna Hunt, and has a U.S. citizen son, Daniel Murphy. He is a successful businessman, having founded Boston Business Technologies, a software company, in Norwood, Massachusetts. Prior to his incarceration, he employed four full-time and five part-time persons at Boston Business Technologies.

38. Mr. Parinejad was charged on a Notice to Appear issued December 22, 2006 with being removable on the basis of having remained in the United States longer than permitted, 8 U.S.C. § 1227(a)(1)(B), and of having been convicted of a violation of any law or regulation relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)(i), on account of a 1996 conviction. The 1996 conviction was for possession of cocaine, for which Mr. Parinejad was sentenced to probation and completion of a thirty-day in-patient treatment program in 1997 that he successfully completed.

39. In 2001 and 2006, Mr. Parinejad was arrested by non-DHS officials on matters unrelated to his 1996 conviction. One of these matters was continued without a finding and dismissed and the other is currently pending. Following the 2006 arrest, on December 22, 2006, Mr. Parinejad was taken into custody by defendant Boston ICE through the Providence, Rhode Island office, a sub-office of Boston ICE. On December 22, 2006, defendant ICE determined that it would not release Mr. Parinejad on bond or on his own recognizance. *See* Exhibit F.

40. On January 5, 2007, Mr. Parinejad submitted a written request to defendants for a custody redetermination hearing before an Immigration Judge. (Exhibit F).

41. On January 8, 2007, Mr. Parinejad was initially scheduled for a hearing with an Immigration Judge in Boston, Massachusetts. Although the hearing did not go forward due to technical difficulties with the video conferencing connection to the Immigration Court, the DHS/ICE attorney stated to the Immigration Judge at that time that he would seek a finding that Mr. Parinejad was subject to mandatory detention pursuant to INA § 236(c) based on Mr. Parinejad's 1996 conviction, due to his subsequent arrests following the 1998 expiration of the TPCR. Exhibit E (Declaration of Attorney Kerry E. Doyle) and Exhibit F (Order of Immigration Judge and BIA Decision).

42. On January 22, 2007, the Immigration Judge held a hearing in Mr. Parinejad's case. A different DHS/ICE attorney made the same argument that Mr. Parinejad was subject to mandatory detention because of his "release" from post-TPCR arrests for offenses that were unrelated to the charged removable ground or to any removal ground in INA § 236(c)(1)(A)-(D). (Exhibit E.)

43. Once the DHS/ICE attorney provided proof to the Immigration Judge of Mr. Parinejad's 2001 post-TPCR arrest, the Immigration Judge ruled orally that Mr. Parinejad was subject to mandatory detention and issued an order that she therefore lacked jurisdiction to consider bond under INA §236(c). (Exhibits E & F). Thus, consistent with the interpretation the BIA applied in *Garcia-Ramirez* and *Younes* (Exhibit B), the Immigration Judge applied the mandatory detention provision to Mr. Parinejad for his 2001 release following arrest, even though that release was unrelated to his charged pre-1998 ground of removal and did not result in a conviction rendering him removable on a ground listed in INA § 236(c)(1).

44. But for DHS/ICE's position that Mr. Parinejad was subject to mandatory detention and the Immigration Judge's decision adopting the same position, a full bond redetermination hearing would have been held on January 22, 2007. Mr. Parinejad had available and would have offered to provide testimony and documentary evidence that he is neither a danger to the community nor a flight risk. Such testimony and documents would have shown that Mr. Parinejad has only one conviction—the 1996 possession offense; that he has been in the United States for almost thirty years; that he has a long-term marriage to a United States citizen; that he has run a successful business that employed several full-time and several part-time employees; and that he was financially capable of paying a substantial bond. Such a showing would have likely have resulted in the grant of a bond.

45. Parinejad appealed the Immigration Judge's ruling on February 21, 2007. (Exhibit F.) On April 10, 2007, the BIA held that Mr. Parinejad was subject to mandatory detention under INA Section 236(c). (Exhibit F). Consistent with its prior *Garcia-Ramirez* and *Younes* decisions (Exhibit B), the Board ruled that "the relevant inquiry … is the date of release from physical

custody and not whether his 2001 offense resulted in a conviction that would support a removability charge." *Id.*

46. Parinejad remains in DHS/ICE custody four months after defendants detained him.

VII. CAUSES OF ACTION

47. Plaintiffs seek declaratory relief. Plaintiffs claim that persons removable for offenses for which they were never subject to custody prior to the expiration of the Transitional Period Custody Rules on October 8, 1998, or for which they were released prior to the TPCR expiration date, and who have not been convicted or otherwise rendered removable since that date for any offense included in INA § 236(c)(1)(A)-(D), are not subject to mandatory detention under § 236(c). Defendants' contrary interpretation violates INA § 236(c) and Section 303(b)(3) of IIRIRA, as well as §§ 702 and 706 of the Administrative Procedures Act, inasmuch as it constitutes agency action not in accordance with law and/or in excess of statutory authority, and violates the plaintiffs' rights to due process under the Fifth Amendment of the Constitution. Plaintiffs seek declaratory relief to that effect.

48. Plaintiffs seek corresponding injunctive relief, should the requested declaratory relief set forth above fail to provide an adequate remedy for the violations of law described in this Complaint.

49. Plaintiffs claim that as a result of the federal defendants' misinterpretation of law as set forth above, defendants have unlawfully withheld a duty they owe plaintiffs and class members under INA § 236(a) and 8 C.F.R. § 1003.19(c)-(f) to provide bond hearings at which evidence regarding their suitability for release on bond must be considered. This constitutes agency action unlawfully withheld in violation of §§ 702 and 706(a) of the Administrative Procedures Act and

denies them due process under the Fifth Amendment of the Constitution. Accordingly, should declaratory relief provide an inadequate remedy for these violations, plaintiffs seek mandamus relief to compel the federal defendants to perform the duty they owe.

50. As a result of federal defendants' misinterpretation of law as set forth above, plaintiffs and class members are in custody contrary to the laws and the Constitution of the United States. Therefore, to the extent that the requested declaratory and/or injunctive or mandamus relief may be inadequate to remedy their unlawful detention, plaintiffs alternatively seek a writ of habeas corpus ordering the federal defendants to provide the bond hearings to which detained plaintiffs and class members are entitled—or their release.

VIII. IRREPARABLE HARM

51. Plaintiffs and class members have suffered, are suffering and will continue to suffer irreparable harm because of the defendants' misinterpretation of law and policies and practices pursuant thereto. These harms include the harms alleged throughout this Complaint and include:

a) Plaintiff Calcano has suffered irreparable harm in that he has been separated from his wife and two teenage children and has lost his job.

b) Plaintiff Parinejad has suffered irreparable harm in that he has been separated from his US citizen wife and his company has been decimated. His company lost contracts and has been reduced to one full-time employee after having been built up over many years. Mr. Parinejad and his wife have also suffered emotional distress as she is disabled and previously relied on her husband as the sole financial support for the family.

52. Given that CLINIC, in conjunction with a Boston-area law school, and PAIR are the only two organizations providing group and individualized legal counseling to immigration detainees in

the New England region, there is a substantial probability that defendants' application of INA § 236(c) has caused and will continue to cause CLINIC and PAIR to suffer the following irreparable harm: time-consuming and costly assistance—including for phone calls and travel to defendants' detention facilities, legal rights presentations, materials, and staff time in providing individual legal counseling and referrals for detainees who should be eligible for release on bond—as well as impaired ability to effectively represent detainees whose access to important witnesses and ability to obtain important documentary evidence is compromised by their detention.

IX. CONCLUSION

Plaintiffs respectfully request that this court grant the relief sought. In particular, plaintiffs request that this court make the following orders:

A. Certify this as a class action as and when requested by plaintiffs;

B. Declare that defendants' actions and failures to act as complained of herein violate 8 INA § 236 and IIRIRA §303(b), the defendants' regulations, the Administrative Procedures Act, and the Fifth Amendment's Due Process Clause, and that defendants have subjected plaintiffs to mandatory detention in violation of such laws and regulations;

C. Declare that in so acting and failing to act the federal defendants have unlawfully withheld their duty to provide to plaintiffs the evidentiary bond hearings required by INA § 236(a) and 8 C.F.R. § 1003.19;

D. Preliminarily and permanently enjoin defendants as and when requested by plaintiffs;

E. Alternatively, issue a writ of habeas corpus ordering defendants to provide the evidentiary bond hearings required by law or release them and additionally, if deemed necessary by this court, transfer individual habeas petitions to applicable federal district courts to effectuate any release from custody as may be required;

F. Award plaintiffs reasonable attorneys fees and costs;

G. Award any other and further relief that this court deems just, equitable and proper.

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By his attorney,

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*/s/ Iris Gomez*_____
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VERIFICATION OF COUNSEL

I, Kerry E. Doyle, hereby certify that I am familiar with the cases of the above-named plaintiffs herein, and that the facts as stated above are true and correct to the best of my knowledge and belief.

*/s/ Kerry E. Doyle*_____
Kerry E. Doyle

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Second Amended Class Action Complaint For Declaratory, Injunctive And Mandamus Relief And Petition For Writ Of Habeas Corpus filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 29, 2007.

*/s/ Justin Saif*_____
Justin Saif